

Hamilton v Blowback Prods.

2013 NY Slip Op 30846(U)

April 19, 2013

Supreme Court, New York County

Docket Number: 401690/12

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN
Justice

PART 36

Index Number : 401690/2012
HAMILTON, ASA M.
vs.
BLOWBACK PRODUCTIONS
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~, seq. no. 001, is consolidated for joint disposition with motion seq. no. 003. This motion, seq. no. 001, ~~is~~ to dismiss the action is granted in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/23/13

[Signature], J.S.C.
DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

AVA M. HAMILTON,

Plaintiff,

-against-

INDEX NO. 401690/12

MOTION SEQ. NO. 001 & 003

BLOWBACK PRODUCTIONS,

Defendant.

Upon the foregoing papers, it is ordered that motion sequence 001 and 003 are consolidated for joint disposition and are decided as indicated below.

FILED

APR 23 2013
BAKER & GUNZ

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff *pro se* commenced this action against defendant film company seeking monetary damages in the amount of \$850,000. Plaintiff's complaint alleges the: (1) inappropriate and unauthorized use of her former apartment (Subject Apartment) by defendant; (2) unlawful and hazardous occupancy of the Subject Apartment, a 350 sq. ft. studio apartment, by actors, a film crew and equipment; (3) illegal obstruction of fire egress and common spaces at 142 Ludlow Street (Building) during filming; (4) disturbance of residential tenants in the Building; (5) failure to respond to an order to cease and desist by the New York Police Department (NYPD); (6) violation of tenancy on the plaintiff's New York City Housing Court record; (7) loss of plaintiff's permanent New York City address of 15 years; (8) inability of plaintiff to find architectural design work due to loss of Manhattan address; (9) loss of plaintiff's community network; (10) loss of plaintiff's 212 number; (11) loss of plaintiff's voting registration district; (12) loss of plaintiff's Manhattan lifestyle; (13) damages to the floors, walls and furnishings of the apartment; (14) moving costs; (15) housing relocation costs; and (16) inability of plaintiff to find housing equal to the Subject Apartment in the Building.

Defendant moves, under motion sequence no. 001, to dismiss the complaint in its entirety for failure to state a cause of action, and for sanctions pursuant to 22 NYCRR 130-1.1 on the grounds that

[* 3]
this action is frivolous. Plaintiff moves, under motion sequence no. 003, for a default judgment against defendant.

DISCUSSION

Plaintiff does not oppose defendant's motion to dismiss. Rather, plaintiff moves for a default judgment against defendant. CPLR 3215 provides that "[w]hen a defendant has failed to appear, . . . the plaintiff may seek a default judgment against him. . . . The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305." Generally, New York courts favor resolution of actions on their merits rather than on default. See *Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1st Dep't 1986). However, similar to the standard for vacating a default judgment, a party attempting to prevent a default judgment from being entered must demonstrate a reasonable excuse for the default and a meritorious defense to the action. *Wehringer v Brannigan*, 232 AD2d 206, 206 (1st Dep't 1996).

In support of her motion, plaintiff argues that a default judgment should be granted as defendant served plaintiff with a Notice of Motion which defendant allegedly failed to file. Plaintiff further argues that defendant failed to appear at the Motion Support Office on October 11, 2012, the return date for such motion. Defendant opposes plaintiff's motion for a default judgment arguing that its motion was properly filed, and noticed a return date of October 11, 2012 in the Submissions Part of 60 Centre Street, New York, NY. According to defendant, the clerk of the court inadvertently failed to enter its motion to dismiss in the system and a return date was rescheduled for October 25, 2012. Defendant asserts, and it is undisputed, that defendant, through its attorney, conferred with plaintiff by telephone, on October 11, 2012, and that defendant advised plaintiff of the clerical error by the court.

Despite plaintiff's contention, defendant is not in default. Aside from plaintiff's conclusory statements, plaintiff has failed to demonstrate that defendant, in fact, defaulted in this action. Based

upon the submissions, it is clear that defendant appeared in this action by filing a pre-answer motion to dismiss. Defendant provided proof that it paid a filing fee for its motion to dismiss on October 5, 2012, with a return date of October 11, 2012. Further, the Supreme Court Records On-Line Library shows several return dates for defendant's motion to dismiss, which were scheduled and adjourned in the Motion Support Office. Significantly, two such dates were October 11, 2012 and October 25, 2012. As such, defendant has not defaulted in this action and plaintiff's motion for a default judgment must therefore be denied.

Turning to defendant's motion, it is well settled that, pursuant to CPLR 3211(a)(7), on a motion to dismiss for failure to state a cause of action, the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss the complaint for failure to state a cause of action "will generally depend upon whether or not there was substantial compliance with CPLR 3013." *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep't 1972). If the allegations are not "sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material element of each cause of action", the cause of action will be dismissed. *See Catli*, 40 AD2d at 715. CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Here, plaintiff seeks to hold defendant liable for monetary damages totaling \$850,000, resulting from defendant's alleged use of the Subject Apartment. According to plaintiff's complaint, in May 2009, tenants of the Building made a complaint to the NYPD, of an ongoing disturbance and unlawful occupancy of the Subject Apartment in the Building. A cease and desist order was issued by the NYPD,

but not complied with. Due to family emergencies, plaintiff was temporarily staying at a family home in Queens, New York during this time, and thus, not occupying the Subject Apartment. Upon plaintiff's return to the Subject Apartment in April 2009, the entry door, floors and walls were dented and scraped, and furniture damaged. In May 2009, plaintiff received a Residential Holdover Petition, which she defended in New York Civil Court, Housing Part from June through September 2009. Plaintiff was put on "tenant" probation as a result of this Housing Court proceeding. The complaint further alleges that plaintiff vacated the Subject Apartment in April 2010 as a result of her inability to pay attorneys' fees, and alleged fear of her superintendent of the Building and an adjacent neighbor in the Building. Thereafter, plaintiff discovered that defendant allegedly gained access to the Subject Apartment through Ronald Mastrion (Mr. Mastrion), the father of plaintiff's child, to film a scene in the movie Dirty Old Town.

Defendant contends that its use of the Subject Apartment was authorized by Mr. Mastrion, whom undisputedly had authority to use the Subject Apartment. In fact, plaintiff admits that Mr. Mastrion had keys to the Subject Apartment, but claims that he was not a tenant or her roommate. *See* Complaint, ¶ 10. Moreover, defendant argues that it used the Subject Apartment in August and September of 2009, several months after the alleged damage occurred. Even taking the allegations in the complaint as true, plaintiff has failed to state any viable cause of action against defendant. Significantly, the complaint is devoid of any allegations of when defendant allegedly used the Subject Apartment, or that such use resulted in the damages complained of. Thus, defendant's motion to dismiss must be granted.

Defendant also seeks sanctions against plaintiff for filing a frivolous action. 22 NYCRR § 130-1.1 (c) states that:

conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

Here, defendants have failed to establish that plaintiff's conduct was frivolous or intended to harass.

While plaintiff has failed to state a cause of action, "courts are mindful of allowing *pro se* litigants some leeway to prosecute their actions." *Mihalakis, D.O. v Cabrini Medical Center*, 176 AD2d 589, 590 (1st Dep't 1991). As such, defendant's motion, to the extent that it seeks sanctions against plaintiff, is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted to the extent that this action is dismissed with prejudice; and it is further

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the decision/order of the Court.

Dated: _____

4/19/13


DORIS LING-COHAN, J.S.C.

J:\Dismiss\Hamilton v Blowback Productions - failure to state a cause of action, default judgment.wpd

FILED

APR 23 2013

**COUNTY CLERK'S OFFICE
NEW YORK**