

**Petracca v Hudson Towner Owners LLC**

2014 NY Slip Op 31533(U)

June 17, 2014

Sup Ct, New York County

Docket Number: 152353/13

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ANTHONY PETRACCA,

Plaintiffs,

-against-

HUDSON TOWNER OWNERS LLC, HUDSON TOWERS CONDOMINIUM, R.Y. MANAGMENT CO., INC. and NIALL LAWLOR,

Defendants.

INDEX NO. 152353/13
MOTION DATE 04-30-14
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for a Default Judgment :

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is ordered that the plaintiffs' motion, pursuant to CPLR §3215, for a default judgment against Hudson Tower Owners LLC and Niall Lawlor is granted on default only as to Hudson Tower Owners LLC. The remainder of the motion as against Niall Lawlor is held in abeyance pending the hearing and determination of the Special Referee to whom a traverse hearing is assigned. Niall Lawlor's cross-motion filed under Motion Sequence 002, to dismiss this action pursuant to CPLR §3211[a][8], is held in abeyance pending the hearing and determination of the Special Referee. Hudson Tower Condominiums's motion filed under Motion Sequence 002, seeking to compel plaintiff to serve a Bill of Particulars and provide responses to its Combined Demands is granted.

Plaintiff commenced this personal injury action alleging that on May 30, 2012, he was viciously assaulted and battered by Niall Lawlor in a restaurant located at 21 South End Avenue, New York, New York. Plaintiff claims Niall Lawlor was President and acting within the scope of his employment, or as an agent of Hudson Tower Condominium, RY Management or Hudson Tower Owners, LLC at the time of the incident.

Pursuant to CPLR §3215, plaintiff seeks a default judgment against Hudson Tower Owners, LLC and Niall Lawlor for failure to timely appear and answer in this action.

Hudson Tower Owners, LLC, did not appear or oppose this motion and is in default.

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

Plaintiff claims that he was unable to personally serve Niall Lawlor and instead on April 22, 2013, pursuant to CPLR §308, a person of suitable age and discretion was served, specifically “Chris” the doorman at Mr. Lawlor’s place of residence, 50 Battery Park Place, New York, New York (Mot. Exh. C). The process server’s affidavits each state that a letter marked personal and confidential was mailed to Niall Lawlor and that they were not returned for an improper address (Aff. in Supp. and Opp., Exhs. A & B). The Affidavit of Eric Goldklank, process server, states that on April 1, 2013, he was advised that Niall Lawlor did not reside at 350 Albany Avenue, Apt. 4G, New York, New York (Aff. in Supp. and Opp., Exh. A). A letter dated July 8, 2013 sent to Mr. Lawlor, by plaintiff’s attorneys advising him of the default, was addressed to 350 Albany Avenue, Apt. 4G, New York, New York (Mot. Exh. F). On April 22, 2013, Mr. Goldshank attempted service on Mr. Lawlor at 50 Battery Park Place, New York, New York, at the direction of plaintiff’s attorneys. According to Mr. Goldshank, the doorman “Chris” confirmed that Niall Lawlor resided at the address (Aff. in Supp. and Opp., Exh. A) .

Niall Lawlor cross-moves under Motion Sequence 002, pursuant to CPLR §3211[a][8], seeking to dismiss the plaintiffs claims asserted against him for lack of jurisdiction. Mr. Lawlor opposes plaintiff’s motion for a default judgment and contends that he does not, and never has, resided or worked at 50 Battery Park Place, New York, New York. He argues that although he resided at 350 Albany Avenue, Apt. 4G, New York New York, Mr. Lawlor left the building at the latest in 2007 and does not reside there. Mr. Lawlor also contends that he is not employed at 350 Albany Avenue, New York, New York. Niall Lawlor argues that this action should be dismissed because plaintiff failed to obtain any personal jurisdiction.

It is within the Court’s discretion to determine whether a motion for a default judgment pursuant to CPLR §3215, should be granted (Nason v. Fisher, 309 A.D. 2d 526, 765 N.Y.S. 2d 32 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]) A motion for default judgment can be denied based on the defendants demonstration of a reasonable excuse for failure to serve a timely answer (CPLR §3012[d] and (Higgins v. Bellet Constr. Co., 287 A.D. 2d 277, 731 N.Y.S. 446 [N.Y.A.D. 1<sup>st</sup> Dept.1990]).

An affidavit of service by a process server is prima facie evidence of sufficient service negating the need for a traverse hearing absent a non-conclusory sworn denial of service (NYCTL 1998-1 Trust v. Rabinowitz, 7 A.D. 3d 459, 777 N.Y.S. 2d 483 [App. Term, 1<sup>st</sup> Dept., 2004] and Ananda Capital Parnters, Inc. v. Stav Electrical Systems (1994) Ltd., 301 A.D. 2d 430, 753 N.Y.S. 2d 488 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]). In those circumstances where there is a non-conclusory denial of service and the parties are in total disagreement about whether service has been accomplished in an action, there should be a traverse hearing (Hinds v. 2461 Realty Corp., 169 A.D. 2d 629, 564 N.Y.S. 2d 763 [N.Y.A.D. 1<sup>st</sup> Dept., 1991]).

There are contradictory statements by each of the parties related to service of process that require a traverse hearing to determine whether service of the summons and complaint was properly made on Niall Lawlor and jurisdiction obtained. The determination of whether jurisdiction was obtained or whether the action should be dismissed as to Niall Lawlor pursuant to CPLR §3211[a],[8], requires a determination at a traverse hearing.

Hudson Tower Condominium and R.Y. Management Co., Inc.'s (hereinafter referred to as "defendants") motion filed under Motion Sequence 002, seeks an Order pursuant to CPLR §3042 compelling plaintiff to serve a Bill of Particulars and pursuant to CPLR §3124 and CPLR §3126, to provide responses to their April 30, 2013, combined demands.

Plaintiff has failed to comply with the discovery demands and has not submitted any opposition to this motion.

Pursuant to CPLR §3042[c], a party may make a motion to compel responses to its demand for a bill of particulars, and seek sanctions if the failure to provide responses is willful. Sanctions for failing to comply with a demand for a Bill of Particulars requires a showing of "willful or contumacious conduct." (*Kouvacs v. Castle Restoration and Const., Inc.*, 262 A.D. 2d 165, 692 N.Y.S. 2d 63 [N.Y.A.D. 1<sup>st</sup> Dept., 1999]).

Pursuant to CPLR §3126, there must be a showing of a willful violation of a prior Order for discovery and that the failure to provide discovery was willful, contumacious or due to bad faith. This would include predicate failure to provide the discovery sought (*Siegman v. Rosen*, 270 A.D. 2d 14, 704 N.Y.S. 2d 40 [N.Y.A.D. 1<sup>st</sup> Dept. 2000]).

Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [N.Y.A.D. 1<sup>st</sup> Dept. 1994]; *148 Magnolia, LLC v. Merrimack Mutual Fire Insurance Company*, 62 A.D. 2d 486, 878 N.Y.S. 2d 727 [N.Y.A.D. 1<sup>st</sup> Dept., 2009]).

This Court finds that the defendants are entitled to the discovery sought but have not stated a basis to find that plaintiff's delay in serving a Bill of Particulars and a Response the Combined Demands is willful and contumacious behavior.

Accordingly, it is ORDERED that the plaintiffs' motion pursuant to CPLR §3215, for a default judgment against the defendants, HUDSON TOWER OWNERS LLC and NIAL LAWLOR, is granted on default as to HUDSON TOWER OWNERS LLC; and it is further,

ORDERED, that an assessment of damages as to defendant HUDSON TOWER OWNERS LLC, shall be conducted at the time of trial; and it is further,

ORDERED, that the remainder of plaintiff's motion pursuant to CPLR §3215 seeking a default judgment against NIAL LAWLOR, is held in abeyance pending a traverse hearing and determination of the Special Referee to whom this traverse hearing is assigned; and it is further,

ORDERED that, this matter is referred to a Special Referee for a Traverse Hearing as to NIAL LAWLOR, and it is further,

ORDERED that, NIALL LAWLOR's cross-motion to Motion Sequence 002 seeking to dismiss this action pursuant to CPLR §3211[a][8], is held in abeyance pending the hearing and determination of the Special Referee; and it is further,

ORDERED that, plaintiff shall serve a copy of this Order with Notice of Entry upon the General Clerk's Office (Room 119) and upon the Special Referee Clerk (Room 119M) who is directed to place this matter on the Calendar of the Special Referee's Part at the earliest convenient date, for a traverse hearing to determine if service upon NIALL LAWLOR was proper; and it is further,

ORDERED that, the Special Referee is to hear and report pursuant to the accompanying Order of Reference, a final determination on this Motion and Cross-Motion to Motion Sequence 002, shall be rendered upon receipt of a report from the special referee; and it is further.

ORDERED, that HUDSON TOWNER CONDOMINIUM and R.Y. MANAGEMENT CO., INC.'s motion pursuant to CPLR §3042, CPLR §3124 and CPLR §3126 to compel plaintiff to provide a Bill of Particulars and responses to the Combined Demands dated April 30, 2014, is granted, and it is further,

ORDERED, that plaintiff shall serve a Bill of Particulars and responses to HUDSON TOWNER CONDOMINIUM and R.Y. MANAGEMENT CO., INC.'s Combined Demands within 30 days of service of a copy of this Order with Notice of Entry.

ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: June 17, 2014

Check one:  FINAL DISPOSITION      X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST       REFERENCE