| **Caronia v Peluso** |
| --- |
| 2016 NY Slip Op 30311(U) |
| February 9, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 22098/14 |
| Judge: Thomas F. Whelan |
|  |
|  |

[* 1]

SHORT FORM ORDER

INDEX No. 22098-14

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/15/15
SUBMIT DATE 01/29/16
Mot. Seq. # 002 - MOTD
Mot. Seq. # 003 - MD
CDISP Y____ N x

| | |
|---|---|
| DARLENE CARONIA,<br><br>Plaintiff,<br><br>-against-<br><br>MATTHEW PELUSO, ANA PELUSO and FACULTY-STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT STONY BROOK, INC.,<br><br>Defendants. | DEVITT, SPELLMAN, BARRETT<br>Attys. For Plaintiff<br>50 Rte. 111 - Ste. 314<br>Smithtown, NY 11787<br><br>WHITE, FLEISCHNER & FINO<br>Attys. For Def. Faculty-Student Assn<br>61 Broadway<br>New York, NY 10006<br><br>MATTHEW & ANA PELUSO<br>Defendants<br>573 Jayne Blvd.<br>Pt. Jefferson Sta., NY 11776 |

Upon the following papers numbered 1 to 11 read on this motion by the plaintiff for default judgments against the Peluso defendants and cross motion by the corporate defendant to dismiss the plaintiff's complaint or for default judgments against the Peluso defendants on the cross claims of the corporate defendant ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers 5-7 ; Opposition papers 8-9 ; Reply papers 10-11 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#002) by the plaintiff for default judgments against the Peluso defendants on the plaintiff's complaint for recovery of damages attributable to the personal injuries sustained in a two car motor vehicle accident and for the scheduling of an inquest is granted to the extent that the defaults in answering on the part of the Peluso defendants are fixed and determined, as are all of the rights that accrue to the plaintiff by reason of such but the inquest on the amount of the plaintiff's damages shall abide the resolution of the claims against the corporate defendant; and it is further

***ORDERED*** that those portions of the cross motion (#003) by the defendant, Faculty-Student Association of the State University of New York at Stony Brook, Inc., for summary judgment dismissing the plaintiff's complaint are denied; and it is further

***ORDERED*** that the remaining portions of the cross motion (#003) by defendant, Faculty-Student Association of the State University of New York at Stony Brook, Inc., for a default judgment in its favor on its cross claims against the Peluso defendants is considered under CPLR 3215 and is denied.

The plaintiff commenced this action on November 10, 2014 to recover damages for the personal injuries she sustained in a two car motor vehicle accident that occurred on September 11, 2013. On that date, at approximately 5:30 p.m., the plaintiff was stopped behind a vehicle owned by defendant Ana Peluso and operated by defendant Mathew Peluso, which was stopped at an exit gate of a parking lot located on the campus of the State University of New York at Stony Brook, New York. During or after exiting her car to see why the Peluso vehicle was not moving, defendant Mathew Peluso put his car into reverse and backed it into the plaintiff's vehicle causing her to sustain injuries. At the time of the accident, defendant, Mathew Peluso, was at work as an employee of defendant, Faculty-Student Association of the State University of New York at Stony Brook, Inc., [hereinafter FSA]).

In the complaint served, the plaintiff seeks recovery of damages from Mathew Peluso under theories of negligence and statutory violations and from Ana Peluso under the vicarious liability provisions of VTL § 388. The plaintiff further seeks the recovery of damages from defendant, FSA, under theories of *respondeat superior*. The Peluso defendants defaulted in answering the summons and complaint served upon them on November 25, 2015. By correspondence dated January 14, 2015, the plaintiff's counsel notified them of their default in answering and advised that a default judgment proceeding to obtain a default judgment would be taken against them absent a response within ten days

In response to the plaintiff's service of the summon and complaint upon defendant, FSA, it appeared herein by a notice of appearance by its counsel and by a verified answer dated January 23, 2015 that was served by mail on January 26, 2015 upon the plaintiff's counsel and the Peluso defendants. On July 22, 2015, defendant FSA served an amended verified answer containing two cross claims against the Peluso defendants sounding in common law indemnification and contractual indemnification. This amended verified answer was served on July 22, 2015 by regular mail upon plaintiff's counsel and upon the Peluso defendants, who had long ago defaulted in appearing herein by answer or otherwise in response to the plaintiff's service of its summons and complaint.

First considered is the plaintiff's motion-in-chief (#002) for default judgments in her favor on her complaint against the Peluso defendants and an order scheduling an inquest on the amount of the damages recoverable. It is well settled law that an entitlement to a default judgment rests upon the proof of due service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215[f]; ***Todd v Green***,

122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***Oak Hollow Nursing Ctr. v Stumbo,*** 117 AD3d 698, 985 NY2d 269 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Dela Cruz v Keter Residence, LLC***, 115 AD3d 700, 981 NYS2d 607 [2d Dept 2014]). It is also well settled that entry of a default judgment containing an award of damages is proper only if such damages are capable of being reduced to a sum certain by simple calculation discernable from the papers before the court and without resort to extrinsic proof (*see* CPLR 3215[f]; ***Reynolds Sec. v Underwriters Bank & Trust Co.***, 44 NY2d 568, 572, 406 NYS2d 743 [1978]; ***Vinny Petulla Contr. Corp. v Ranieri***, 94 AD3d 751, 941 NY2d 659 [2d Dept 2012]). Where the amount due is not so established, the motion should be granted only as to liability with a directive scheduling an inquest scheduled to take proof of the amounts due the plaintiff on its claim (*see* CPLR 3215[b]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Kouho v Trump Vil. Section 4, Inc.***, 93 AD3d 761, 941 NYS2d 186 [2d Dept 2012]; ***Suburban Graphics Supply Corp. v Nagle***, 5 AD3d 663, 774 NYS2d 160 [2d Dept 2004]). In cases of multiple defendants, where default judgments are sought on claims with uncertain damages against some, but not all of the defendants served with process, the court may stay the inquest pending the resolution of the claims against the other non-defaulting defendants (*see* CPLR 3215[d]).

Here, the plaintiff is entitled to an order fixing the defaults of the Peluso defendants, as her moving papers included due proof of the summons and complaint upon the Peluso defendants, their default in answering in response thereto and the existence of facts constituting the material elements of cognizable claims for recovery of damages against the Peluso defendants under theories of negligence and vicarious liability. The court thus fixes the defaults in answering of the Peluso defendants as well as the rights which accrue to the plaintiff by virtue of such defaults (*see* ***Reynolds SEC v Underwriters Bank & Trust Co.***, 44 NY2d 568, *supra*; ***Rudra v Friedman***, 123 AD3d 1104, 1 NYS3d 187 [2d Dept 2014]; ***Montgomery v City of New York***, 307 AD2d 957, 763 NYS2d 477 [2d Dept 2003]; ***Santiago v Siega***, 255 AD2d 307, 679 NYS2d 341 [2d Dept 1998]).

The court declines, however, to schedule an immediate inquest on the issue of the damages recoverable by the plaintiff from the Peluso defendants pending resolution of the plaintiff's claims against the corporate defendant FSA (*see* CPLR 3215[d]). Accordingly, the court hereby directs that the scheduling of such inquest shall abide the resolution of those claims and the interposition of an application which includes a copy of this order, to the Justice then assigned to this action for a day certain on which the inquest shall be heard. The plaintiff's motion (#002) for default judgments against the Peluso defendants is thus granted to this extent.

Those portions of the cross motion (#003) by defendant FSA wherein it seeks summary judgment dismissing the plaintiff's complaint is denied. The court agrees with the plaintiff that the moving papers failed to establish, by due proof in admissible form, that the corporate defendant is without liability to the plaintiff under the doctrine of *respondeat superior*. This doctrine renders a an employer vicariously liable for a tort committed by an employee acting within the scope of the employment (*see* ***Riviello v Waldron***, 47 NY2d 297, 302, 418 NYS2d 300 [1979]). An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his or her employer, or if the act may be reasonably necessary or

incidental to such employment (*see* ***Ammirita v Arias***, 11 AD3d 771, 976 NYS2d 102 [2d Dept 2013]). While vicarious liability does not arise from acts that are committed for the employee's personal motives unrelated to the furtherance of the employer's business (*see* ***Harry v Gary Goldberg, & Co. Inc.***, 40 AD3d 1033, 838 NYS2d 105 [2d Dept 2007]), those acts which the employer could reasonably have foreseen are within the scope of the employment and thus give rise to liability under the doctrine of respondeat superior (*see* ***Riviello v Waldron***, 47 NY2d 297, *supra*). The issue of whether an act was within the scope of the employment is ordinarily one of fact for the jury to determine (*see id*).

Here, the cross motion is premised upon the affidavit of Michael West, an employee of defendant FSA, who does not claim any personal knowledge of the facts asserted therein. Instead, Mr. West avers that based upon his review of business records allegedly maintained by FSA in the ordinary course of business, defendant Mathew Peluso, clocked into work as a cafeteria aid at 2:30 p.m. on the date of the accident and clocked out at 9:11 p.m. Mr. West goes on to aver that Peluso was given a thirty minute break during the course of every shift but such breaks were not recorded. While counsel for defendant FSA suggests that defendant Peluso may have been on his thirty minute break when the accident occurred and that Peluso, was likely engaged in personal business rather than the business of defendant, FSA, these claims are bald, conclusory and unsupported by any admissible proof. The moving papers are thus insufficient to eliminate all questions of fact regarding an absence of liability on the part of cross moving defendant FSA.

Also denied are the remaining portions of the cross motion by defendant, FSA, for default judgments on its cross claims against the Peluso defendants. The moving papers failed to include due proof of the elements necessary to obtain a default judgment, namely, the jurisdictional joinder of the Peluso defendants to the cross claims, proof of their defaults in answering or appearing in response thereto and proof of the facts constituting the claim (*see* CPLR 3215[f]). Relevant here, are the provisions of CPLR 3012(a), entitled, "Service of pleadings and demand for complaint", which state that "a subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons". That the provisions of CPLR 3012(a) apply to cross claims added in an amended answer which targets party defendants who defaulted in answering the plaintiff's service of its summons and complaint is clear from the language of the statute, since an amended answer is a "subsequent pleading" (*see* CPLR 3012[a]; *see also* Patrick M. Connors, Commentaries, McKinney's Consolidated Laws of New York, CPLR 3012:7).

The record here reveals that the Pelusos were parties in default at the time of service of the amended verified answer in July of 2015 which added new claims against them in the form of two cross claims on which a default judgment is demanded. The record further reveals that the amended verified answer containing the two new cross claims was not served upon the Peluso defendants in a jurisdictionally proficient manner as required by CPLR 3012(a), but instead was mailed to them by regular mail. Entry of a default judgment in favor of defendant FSA on its cross claims against the Peluso defendants is thus precluded since a party not jurisdictionally joined by due service of

process may not be adjudicated to be in default of answering a claim interposed against such a party (*see* ***Cordero v Barreiro-Cordero***, 129 D3d 899, 10 NYS3d 454 [2d Dept 2015]; ***George v Yoma Dev. Group, Inc.***, 83 AD3d 776, 920 NYS2d 696 [2d Dept 2011]; ***Zareef v Lin Wong***, 61 AD3d 749, 877 NYS2d 182 [2d Dept 2009]). Moreover, the cross moving papers failed to satisfy the "facts constituting the claim" element of CPLR 3215(f) from which the court may discern the possession of cognizable clams on the part of defendant FSA against its employee, defendant Mathew Peluso.

In view of the foregoing, the plaintiff's motion (#002) for default judgments against the Peluso defendants is granted to the extent set forth above while the cross motion (#003) by defendant FSA is denied.

DATED: February 9, 2016

THOMAS. F. WHELAN, J.S.C.