

Davis v ALC of N.Y. LLC
2016 NY Slip Op 30839(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 162467/14
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
ERICA MARIE DAVIS,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 162467/14
Mot. Seq. No. 001

ALC OF NEW YORK LLC, CLA OF NEW YORK LLC,
CLA HOLD LLC d/b/a AMERICAN LASER SKINCARE
and AMERICAN LASER SKINCARE,

Defendants.

-----X
KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs. A-M)
SUPPLEMENTAL AFFIRMATION IN SUPPORT	3 (Ex. A)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff Erica Marie Davis alleges that, on April 2, 2011, she sustained burns to her right leg as a result of the negligence of defendants during a laser hair removal procedure at the American Laser Center, located at 871 Fifth Avenue in New York City. Plaintiff alleges that American Laser Center, which did business as American Laser Skincare, was owned by defendant ALC of New York LLC, also known as CLA of New York LLC and was affiliated with CLA Hold LLC. Plaintiff moves 1) pursuant to CPLR 3215(a) and (b), for a default judgment against defendants ALC of New York LLC, CLA of New York LLC, CLA Hold LLC d/b/a American Laser Skincare and American Laser Skincare, and setting this matter down for an inquest, and 2) pursuant to CPLR 2004 and CPLR 306-b, for good cause shown and in the interests of justice, to extend plaintiff's time to serve defendant CLA Hold LLC, and 3) for such other relief as this Court deems just and proper. Upon

a review of the papers submitted and the relevant statutes and case law, the motion, which is unopposed, is **granted** to the extent indicated below.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from personal injuries allegedly sustained by plaintiff on April 2, 2011 at a hair removal clinic known as American Laser Center located at 871 Fifth Avenue in New York, New York. Ex. A.¹ In an affidavit of merit submitted in support of the instant application, plaintiff claims that American Laser Center did business as American Laser Skincare and was owned by ALC of New York LLC, which was also known as CLA of New York LLC, and was affiliated with CLA Hold LLC. Id.

On or about April 14, 2011, plaintiff's attorney sent a claim letter to American Laser Center at 871 Fifth Avenue in New York, New York. Ex. E. American Laser Skincare responded to the letter and counsel forwarded documentation to that entity at its address at 24555 Hallwood Court, Farmington Hills, Michigan regarding plaintiff's injuries. Ex. E.

On December 8, 2011, CLA of New York LLC, d/b/a American Laser Centers, d/b/a American Laser Skincare a/k/a ALC of New York LLC filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware. Ex. B. A proof of claim was filed against defendant CLA Hold LLC in connection with the bankruptcy. Tisi Aff. In Supp., at par. 7. On or about March 27, 2013, the bankruptcy case against ALC of New York LLC/CLA of New York LLC was closed. Ex. F. On or about June 5, 2013, defendant CLA

¹Unless otherwise noted, all references are to the affirmation of Arthur Tisi, Esq. in support of the motion.

Hold LLC's bankruptcy case was closed. Ex. F. Thus, the stays of the prosecution of the claims against these defendants were lifted. Since the bankruptcy stay lasted from December 8, 2011 through at least March 27, 2013, the applicable statute of limitations in negligence for the April 2, 2011 incident was tolled against the defendants until at least July 22, 2015.

The records of the Secretary of State of the State of Delaware reflect that, on or about February 6, 2012, the first article of the certificate of formation of ALC of New York LLC was amended to state that "[t]he name of the limited liability company is CLA of New York LLC." Ex. B. It does not appear that the New York State Department of State was notified of this name change. Ex. C. ALC of New York LLC is a foreign limited liability company registered in New York. Ex. C.

This action was commenced by plaintiff's filing of a summons and verified complaint against defendants ALC of New York, LLC, CLA of New York LLC, CLA Hold LLC d/b/a American Laser Skincare and American Laser Skincare on December 17, 2014. Ex. I. On April 13, 2015, ALC of New York LLC, a/k/a CLA of New York York (Ex. B) was served with two copies of the summons and complaint via the Secretary of State pursuant to Limited Liability Company Law section 303. Ex. K. CLA Hold LLC has not been served despite plaintiff's purported attempt to do so personally at 24555 Hallwood Court, Farmington Hills, Michigan on January 6, 2015. Ex. A to Pltf.'s Supp. Aff. In Supp. In the complaint, plaintiff alleged that defendants were foreign limited liability corporations doing business in New York. Ex. I at pars. 1-4.

POSITIONS OF THE PARTIES:

Plaintiff argues that it is entitled to a default judgment against ALC of New York LLC since

that entity was properly served via the Secretary of State on April 13, 2015, plaintiff's affidavit of merit establishes a meritorious claim against that entity, and counsel's affirmation establishes that that entity failed to answer the complaint. Plaintiff further asserts that she is entitled to a default against CLA of New York LLC because it is the same entity as ALC of New York LLC. Further, she maintains that she is entitled to a default judgment against American Laser Skincare since CLA of New York LLC does business in that name.

Although plaintiff also seeks a default judgment against CLA Hold LLC, she concedes that that entity was not served and, in the alternative, requests additional time to serve it, asserting that she made a diligent attempt to serve it and that said defendant was not prejudiced by any delay in service since it knew about the claim and had exchanged discovery with plaintiff's counsel regarding plaintiff's injuries.

LEGAL CONCLUSIONS:

Plaintiff's Motion For Default

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of 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." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be provided by plaintiff's affidavit. *See* CPLR 3215(f). Where, as here, a verified complaint has been served, it may be used as the affidavit of facts constituting the claim and, in such case, the affidavit

of default may be made by the party or the party's attorney. *Id.* A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, plaintiff is entitled to a default judgment against ALC of New York LLC and CLA of New York LLC. The records of the New York State Department of State reflect that ALC of New York LLC was an authorized foreign limited liability corporation as recently as August 28, 2015. Ex. C. ALC of New York LLC was timely and properly served pursuant to Limited Liability Company Law § 303 on April 13, 2015. Ex. K. That section allows personal service of process to be made on an authorized foreign limited liability company by personally delivering duplicate copies of the summons and complaint to the Secretary of State or a person authorized to accept service on his or her behalf.

As noted previously, the records of the Secretary of State of the State of Delaware reflect that the first article of the certificate of formation of ALC of New York LLC was amended in 2012 to read "[t]he name of the limited liability company is CLA of New York LLC." Ex. B. Since the documentation submitted by plaintiff reflects that ALC of New York LLC and CLA of New York LLC are the same entity, this Court finds that they were both served with process on April 13, 2015.

Although plaintiff seeks a default against American Laser Skincare, she has not established that this is a distinct business entity against which a default may be taken. In the caption, it is named as a "d/b/a" for CLA Hold LLC, which has not been served. Additionally, plaintiff's papers reflect that it is merely a "d/b/a" for CLA of New York LLC. Ex. B. Thus, plaintiff is not entitled to a default against it.

Finally, plaintiff's motion for a default judgment against CLA Hold LLC must be denied, as

plaintiff concedes that that entity was not served. Ex. M. A letter from plaintiff's process server dated March 6, 2015 reflects that the process server could neither locate nor serve CLA Hold LLC in Farmington Hills, Michigan. Ex. M.

Plaintiff's Motion to Extend Time To Serve CLA Hold LLC

Pursuant to CPLR 306-b, the summons and complaint must be served within 120 days after the action is commenced (here December 17, 2014). If service is not completed within such time, the court may, upon motion, dismiss the action without prejudice or, in its discretion, grant an extension of time to effectuate service "upon good cause shown or in the interest of justice." CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 (2001).

To obtain a "good cause" extension, a plaintiff must demonstrate reasonable diligence in attempting to serve a defendant. *Id.*, at 104. Here, in an attempt to establish good cause, plaintiff submits an affidavit of attempted service by his process server reflecting that the process server attempted to timely serve CLA Hold LLC at 24555 Hallwood Court, Farmington Hills, Michigan on January 6, 2015. Ex. M; Ex. A to Pltf.'s Supp. Aff. In Supp. Thus, plaintiff established good cause by attempting to effectuate proper service pursuant to Business Corporation Law § 307 (c) (1) and Limited Liability Company Law § 304 (d).

Even assuming, arguendo, that plaintiff had not established good cause, an extension of time to serve CLA Hold LLC is hereby granted in the interest of justice given that CLA Hold LLC appears to have had timely notice of the claim. Specifically, as noted above, on or about April 14, 2011, plaintiff's attorney sent a claim letter to American Laser Center at 871 Fifth Avenue in New York, New York. Ex. E. American Laser Skincare responded to the letter and counsel then forwarded

American Laser Skincare documentation regarding plaintiff's injuries to that entity at 24555 Hallwood Court, Farmington Hills, Michigan. Ex. E. See *Pennington v Da Nico Restaurant*, 123 AD3d 627 (1st Dept 2014).

A certificate of amendment to the certificate of formation of ALC Holdings LLC filed with the Secretary of State of the State of Delaware on February 6, 2012 reflects that "the first article of the certificate of formation of ALC Holdings LLC is hereby amended and restated to read as follows: 'The name of the limited liability company is CLA Hold LLC.'" Ex. D. An amended notice of commencement of the Chapter 11 proceeding in the Delaware bankruptcy court reflects that ALC Holdings LLC did business as American Laser Centers and as American Laser Skincare. Ex. D. Thus, CLA Hold LLC or, at the very least, entities related to it, was on notice of the claim and was not prejudiced by any delay in service. *Pennington*, 123 AD3d at 627-628. Further, CLA Hold LLC was on notice of the claim as the result of a proof of claim filed against it in connection with the bankruptcy proceeding. Tisi Aff. In Supp., at par. 7.

Further, plaintiff is entitled to an extension of time to serve the summons and complaint in the interest of justice given that the statute of limitations has expired. *Pennington*, 123 AD3d at 628.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion seeking a default judgment against defendant ALC of New York LLC and defendant CLA of New York LLC is granted; and it is further,

ORDERED that an inquest against defendants ALC of New York LLC and CLA of New York LLC is directed at the time of trial; and it is further,

ORDERED that the branch of plaintiff's motion seeking a default judgment against defendant CLA Hold LLC d/b/a American Laser Skincare and defendant American Laser Skincare is denied; and it is further,

ORDERED that that branch of plaintiff's motion seeking an extension of time to serve defendant CLA Hold LLC is granted upon good cause shown and in the interest of justice and the time to serve CLA Hold LLC is extended to and including August 17, 2016; and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: May 5, 2015

ENTER:



KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**