

**Chance v Higgins**

2017 NY Slip Op 30870(U)

March 8, 2017

Supreme Court, Suffolk County

Docket Number: 10126/2015

Judge: William G. Ford

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Motion Submit Date: 12/08/16  
Motion Seq #: 001 MG

**HON. WILLIAM G. FORD**  
**JUSTICE SUPREME COURT**

**COPY**

\_\_\_\_\_x

**JESSAMYN CHANCE,**  
  
**Plaintiff,**

**PLAINTIFF'S ATTORNEY:**  
**Beth A. Rosenthal, Esq.**  
1476 Deer Park Avenue, Suite 3  
North Babylon, NY 11703

**-against-**

**DEFENDANT'S ATTORNEY:**  
**Law Offices of Karen L. Lawrence**  
1225 Franklin Avenue  
Garden City, NY 11550

**DAMION HIGGINS, ALL NATION LIMOUSINE, INC., JOSE UMANZOR & "JOHN DOE", the name "JOHN DOE" being fictitious, the real name of the defendant unknown to plaintiff, with the fictitious name being intended to designate the driver of the 1997 Nissan automobile with NY Registration number FR17496, as more fully set forth in the complaint, whose name is presently unknown,**

**Defendant.**

\_\_\_\_\_x

The Court has considered the following in reaching a determination on the pending unopposed motion by plaintiff seeking default judgment pursuant CPLR 3215:

- 1. Plaintiff's unopposed Notice of Motion for default judgment pursuant to CPLR 3215 dated August 19, 2016; Affirmation in Support of Scott Lockwood, Esq. dated August 16, 2016; Exhibits A - D; it is

**ORDERED** that plaintiff's motion default judgment as against the non-appearing and non-answering defendants Damion Higgins and All Nation Limousine, Inc. is granted as discussed below.

The matter presently pending before the Court is a personal injury motor vehicle accident action. Plaintiff Jessamyn Chance ("plaintiff") brought suit against defendants Damion Higgins, All Nation Limousine, Inc. and Jose Umanzor, as well as against a "John Doe" operator of the offending vehicle, a 1997 Nissan automobile with NY Registration number FR17496.

The action was commenced with plaintiff's filing of her summons and complaint on June 9, 2015. Umanzor joined issue with service of his answer. Plaintiff now seeks default judgment as against Higgins and All Nation Limousine on the grounds that neither has answered or appeared in this action, nor responded to or opposed the instant application.

“ ‘On 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’ ” (CPLR 3215[f]; *Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 692, 965 NYS2d 511, 512 [2d Dept 2013]).

Having reviewed the moving papers, this Court finds that plaintiffs have included in their submissions proof of service of process on defendants, thus apprising them of the necessary, proper and appropriate notice of the pendency of this action with submission of Affidavits of Service dated June 25, 2015 and September 30, 2015 respectively.

More specifically, plaintiff's affidavit of service reflects that defendant Higgins was served with process on September 25, 2015 at 9:38 a.m. at his residential address, 1712 Straight Path, Wheatley Heights, New York 11798, copies of the pleadings being left with a person of suitable age and discretion pursuant to CPLR 308(2), with follow up first class mailing to that address on the same date. Proof of service was filed with the Suffolk County Clerk on October 6, 2015. As regards defendant All Nation Limousine, defendant was served with process via service on the New York Secretary of State, copies of the pleadings being left with a designated agent for service of process, Nancy Dougherty on June 24, 2015 at 11:46 a.m.

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, *Cleary v East Syracuse-Minoa Cent. School Dist.*, 248 AD2d 1005; *Lichtman v Sears, Roebuck & Co.*, 236 AD2d 373).

A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215 (see *Reynolds Sec. v. Underwriters Bank & Trust Co.*, 44 NY2d 568, 572), which requires that the plaintiff state a viable cause of action (see CPLR 3215[f]; *Fappiano v. City of New York*, 5 AD3d 627, 774 NYS2d 773, *lv. denied* 4 N.Y.3d 702 [2004]; *Green v. Dolphy Constr. Co.*, 187 AD2d 635, 636, 590 NYS2d 238). In determining whether a party has a viable cause of action, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff (see *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 71; *Feffer v. Malpeso*, 210 AD2d 60, 619 NYS2d 46); *Beaton v. Transit Facility Corp.*, 14 AD3d 637, 637, 789 NYS2d 314, 315 (2005). Judgment by default further requires "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due", or at least a verified complaint. *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228, 662 NYS2d 19, 19 (1997).

To date defendant has failed to answer or appear within thirty days of completion of service. The process server's affidavit of service constitutes *prima facie* evidence of proper service upon defendants pursuant to CPLR 308(2), and any presumed unsubstantiated denial of receipt of the summons and complaint by defendants is insufficient to rebut that showing (see

*Irwin Mortg. Corp. v Devis*, 72 AD3d 743, 898 NYS2d 854 [2d Dept. 2010]; see also *Sime v Ludhar*, 37 AD3d 817, 830 NYS2d 775 [2d Dept. 2007]). Moreover, there is no evidence that defendant has a meritorious defense to the action (see *Argent Mortg. Co., LLC v Vlahos*, 66 AD3d 721, 887 NYS2d 225 [2d Dept. 2009]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (*Ennis v. Lema*, 305 AD2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*Gambardella v. Ortov Lighting, Inc.*, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Pursuant to CPLR 308(2), since proof of service concerning Higgins was filed on October 6, 2015, service became complete as of October 16, 2015, ten days thereafter. Concerning All Nation Limousine, pursuant to Bus. Corp. L. § 306, service became complete on the date of service on the Secretary of State, June 24, 2015. As per CPLR 320(a), defendants had until July 24, 2015 and November 16, 2016 respectively, thirty days after service was complete to answer the complaint. Since that date has come and gone with no answer, response or appearance from defendants, plaintiffs' proof of default is adequate.

Pursuant to CPLR § 3215(c), a plaintiff must take proceedings for the entry of a default within one year of the default. Plaintiff's motion for a default judgment was filed within one year of defendant's failure to answer the Verified Complaint. It appears that defendant has been served with the Summons, Verified Complaint and Notice of this application.

With Plaintiffs proof of service of process and sums due and owing is proper and sufficient, plaintiff's motion for default judgment against defendant is accordingly **GRANTED**.

When a defendant has failed to appear...the plaintiff may seek a default judgment against him." CPLR § 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557.

Further, pursuant to CPLR § 3215(d), when one or more defendants have defaulted, the Court, upon timely application, may enter an order directing that the proceedings for the assessment of damages or entry of a judgment be conducted at the time of or following the trial or other disposition of the action.

Plaintiff's proof of service of process and sums due and owing is proper and sufficient. Accordingly, plaintiffs' petition for default judgment against defendant is **GRANTED**.

Pursuant to CPLR 3215(f), the viability of the facts underlying movant's claims in this action is established by the pleadings verified not by counsel, but by plaintiff, an individual familiar with facts and circumstances underlying the action as set forth in her complaint (see CPLR 3215[f]; *Giovanelli v. Rivera*, 23 AD3d 616, 804 NYS2d 817; *599 Ralph Ave. Dev., LLC v. 799 Sterling Inc.*, 34 AD3d 726, 726, 825 NYS2d 129, 129-30 [2d Dept. 2006]) [Supreme Court properly granted the plaintiff's motion for leave to enter judgment against the defendant

upon the plaintiff's submissions of proof of service of the summons and complaint, a factually-detailed verified complaint, and an affirmation from its attorney regarding the defendant's default in appearing and answering).

A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215 (see *Reynolds Sec. v. Underwriters Bank & Trust Co.*, 44 NY2d 568, 572, 406 NYS2d 743, 378 NE2d 106), which requires that the plaintiff state a viable cause of action (see CPLR 3215[f]; *Fappiano v. City of New York*, 5 AD3d 627, 774 NYS2d 773, lv. denied 4 NY3d 702, 790 NYS2d 648, 824 NE2d 49 [2004]; *Green v. Dolphy Constr. Co.*, 187 AD2d 635, 636, 590 NYS2d 238). In determining whether a party has a viable cause of action, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff (see *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727, 790 NE2d 1156; *Feffer v. Malpeso*, 210 AD2d 60, 619 NYS2d 46), *Beaton v. Transit Facility Corp.*, 14 AD3d 637, 637, 789 NYS2d 314, 315 (2005). Judgment by default further requires "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due", or at least a verified complaint (*Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228, 662 NYS2d 19, 19 (1997)).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (*Ennis v. Lema*, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*Gambardella v. Ortov Lighting, Inc.*, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Lastly, plaintiff properly gave additional notice to defendant of the default with the appropriate mailing of an envelope marked "Personal and Confidential" more than twenty (20) days prior to entry of the default judgment on February 25, 2016.

Therefore, it is

**ORDERED** that plaintiff shall serve a copy of this order with notice of entry upon the defendants herein by certified mail, return receipt requested by March 10, 2016; and it is further

**ORDERED** that this action be set down for inquest and the Calendar Clerk is directed, upon delivery to him of a copy of this order, to place this cause for inquest on the appropriate calendar of this Court for the **2<sup>nd</sup> day of May, 2017 at 10:00 a.m.**, at which time movant may submit proof of damages pursuant to 22 NYCRR § 202.46; and it is further

**ORDERED** that plaintiff is to serve a Notice of Inquest, stating the date and location of same, together with a copy of this order and the Note of Issue upon defendants at their last known address by certified mail, return receipt requested no later than ten (10) days prior to the date of inquest; and it is further

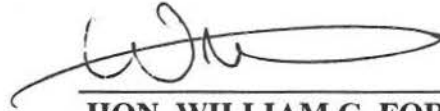
**ORDERED** that movant is directed to file a Note of Issue and pay the appropriate fee therefor, as well as serve by ordinary mail a copy of this order upon the Calendar Clerk of this Court and upon the defendant at [its] last known address at least ten (10) days prior to the hearing date; and it is further

**ORDERED** that the claims against defendant Jose Umanzor are hereby severed from those against defendants Higgins and All Nation Limousine to continue with pretrial discovery already underway as between the parties; and it is further.

**ORDERED** that a determination of plaintiff's damages shall be held in abeyance pending the trial or other disposition of the action as to the remaining defendant.

The foregoing constitutes the decision and order of this Court.

Dated: March 8, 2017  
Riverhead, New York



**HON. WILLIAM G. FORD, J.S.C.**

       FINAL DISPOSITION

  X   NON-FINAL DISPOSITION