

<b>Trujillo v Papito Grocery</b>
2017 NY Slip Op 32012(U)
September 22, 2017
Supreme Court, New York County
Docket Number: 157667/2015
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 47

LISANDRA TRUJILLO,

Index No: 157667/2015

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequences: 002, 003

PAPITO GROCERY and E.S. VENETIS  
PROPERTIES, INC.,

Defendants,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Exhibits Annexed	1, 2
Answering Affidavits/Affirmations/Exhibits Annexed	3, 4
Reply Affidavits/Affirmations/Exhibits	5, 6

**ERIKA M. EDWARDS, J.:**

There are two motions pending before the court. Under motion sequence 002, Plaintiff Lisandra Trujillo ("Plaintiff") moves for a default judgment in her favor, pursuant to CPLR § 3215, against Defendant E. S. Venetis Properties, Inc. ("Venetis"). Under motion sequence 003, Venetis moves, pursuant to CPLR § 3215, to dismiss Plaintiff's complaint and the cross-claims asserted by co-Defendant Papito Grocery ("Papito"), for failure to prosecute their claims. These motions are hereby consolidated for disposition as set forth herein. The court DENIES Plaintiff's motion for a default judgment and partially GRANTS Venetis' motion to dismiss.

On July 24, 2015, Plaintiff commenced this personal injury action against defendants for injuries sustained on the sidewalk of defendants' property. Plaintiff served both defendants with the Summons and Complaint pursuant to BCL §§ 306 and 307 on September 16, 2015 and on

September 17, 2015. Papito served and filed its Answer with cross-claims asserted against Venetis on December 8, 2015, however, Venetis never answered the complaint or replied to the cross-claims. Plaintiff now moves for a default judgment against Venetis. Plaintiff argues that the court, in its discretion, should grant their untimely motion because there is a reasonable excuse for the delay in moving for the default judgment and since Plaintiff can demonstrate the merits of the complaint against Venetis. Papito supports Plaintiff's motion for a default judgment against co-defendant Venetis. Venetis opposes Plaintiff's motion and moves under motion sequence 002 to dismiss the complaint and cross-claims as abandoned since more than one year has elapsed since its default. Plaintiff opposes the motion to dismiss and argues that Venetis chose to neglect, ignore and abandon its defenses to all claims. Papito opposes Venetis' motion to dismiss and argues that the court should deny the motion since Venetis conceded receipt of service but willfully chose not to appear or answer as strategy to avoid litigation. Furthermore, Papito argues that if the court grants Venetis' motion to dismiss the complaint, the court should deny the motion as it pertains to Papito's cross-claims since the asserted cross-claims for indemnification and contribution are specifically contingent upon a finding of liability in the main action.

If plaintiff fails to move for default judgment within one year of defendant's default, the court is mandated to dismiss the complaint as abandoned unless sufficient cause is shown why the complaint should not be dismissed (CPLR 3215 [c]); *see Perricone v City of New York*, 62 NY2d 661, 663 [1984]). Sufficient cause excusing the delay in bringing a default judgment will be found if Plaintiff demonstrates a reasonable excuse for the delay and that a cause of action is potentially meritorious (*see Utak v Commerce Bank Inc.*, 88 AD3d 522 [1st Dept 2011]; *Diaz v Perez*, 113 AD3d 421 [1st Dept 2014]). The requirement that a party must move for a default

judgment within one year of default does not necessarily apply to cross-claims. CPLR 3011 provides that “[t]here shall be ... an answer to a cross-claim that contains a demand for an answer [and that] [i]f no demand is made, the cross-claim shall be deemed denied or avoided” (*see Giglio v NTIMP, Inc.*, 86 AD3d 301, 310 [2d Dept 2011]). Where an answer is not demanded in response to a cross claim, the denial that is “deemed” to have been made under CPLR 3011 will foreclose any motion for a default judgment on the cross-claim and foreclose dismissal of such a cross-claim even where no default motion is made within one year (*id.*). Furthermore, CPLR 3215(c)'s one-year mandate does not apply to indemnification and contribution claims until liability is established in the main action (*IMP Plumbing and Heating Corp. v 317 E. 34th St., LLC*, 89 AD3d 593, 594 [1st Dept 2011] citing *Multari v. Glalin Arms Corp.*, 28 AD2d 122, 124 [1967]).

Here, Plaintiff moves for a default judgment against Venetis almost two years after Venetis defaulted in answering Plaintiff's complaint. Plaintiff argues that this court should excuse the delay for good cause because Plaintiff has continuously litigated this matter against the co-defendant Papito. Plaintiff further argues that her intent to prosecute this matter is evidenced by her appearances at two conferences with Papito, discovery exchanges with Papito, and settlement negotiations with Papito's insurance carrier. Lastly, Plaintiff argues that she demonstrated a meritorious claim against Venetis through the verified complaint, verified bill of particulars and safety expert's report and that Venetis has not been prejudiced by the delay. Venetis argues the record reflects that Plaintiff has been prosecuting this case against Papito as if Venetis was no longer a party. Venetis further argues that this is evidenced by that fact that no adjournment was requested due to Venetis not appearing at the preliminary conference or subsequent compliance conference and that both Plaintiff and Papito proceeded with extensive

discovery. Lastly, Venetis argues that Plaintiff fails to establish a meritorious claim against it and it will suffer prejudice if the complaint and cross-claims are not dismissed.

This court finds that although Plaintiff demonstrated that she has a meritorious claim against Venetis, Plaintiff failed to demonstrate sufficient cause to excuse her untimely motion for a default judgment against Venetis. Plaintiff's appearance at multiple conferences without noting Venetis' absence and engagement in discovery and settlement negotiations with Papito does not demonstrate her intent to prosecute this action against Venetis. Plaintiff took no action to prosecute this action against Venetis beyond serving the summons and complaint. As such, Plaintiff's motion for a default judgment is denied, the complaint against Venetis is dismissed as abandoned, and Venetis' motion to dismiss Plaintiff's complaint is granted. However, since Papito did not demand an answer to its cross-claims asserted against Venetis and since the cross-claims for indemnification and contribution are contingent upon a finding of liability that has yet to be determined in the main action, the court denies Venetis' motion to dismiss Papito's cross-claims.

Accordingly, it is hereby

**ORDERED** that Plaintiff Lisandra Trujillo's motion for a default judgment in its favor, against Defendant E. S. Venetis Properties, Inc. under motion sequence 002 is denied and the complaint against Defendant E. S. Venetis Properties, Inc. is dismissed as abandoned. The Clerk shall enter judgment in favor of Defendant E. S. Venetis Properties, Inc. accordingly; and it is further

**ORDERED** that the court grants that part of Defendant E. S. Venetis Properties, Inc.'s motion to dismiss Plaintiff's complaint for failure to prosecute under motion sequence 003 and denies that part of Defendant E. S. Venetis Properties, Inc.'s motion to dismiss the cross-claims

asserted by co-Defendant Papito Grocery. Defendant Papito Grocery's cross-claims against Defendant E. S. Venetis Properties, Inc. remain active; and it is further

**ORDERED** that all parties are directed to appear for a status conference on September 28, 2017, at 9:30 a.m. in Part 47, Room 320, 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Date: September 22, 2017



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HON. ERIKA M. EDWARDS, J.S.C.