Long Is. Home v Pipergias
2017 NY Slip Op 32696(U)
November 9, 2017
Supreme Court, Suffolk County
Docket Number: 24849/2014
Judge: William G. Ford

[* 1]

SHORT FORM ORDER **INDEX NO.: 24849/2014**

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

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Date: 06/08/17
Motion Seq. #: 002 MG; RTH

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THE LONG ISLAND HOME d/b/a/ BROADLAWN MANOR NURSING HOME & REHABILITATION CENTER,

Plaintiff,

-against-

ADELIA PIPERGIAS & CHRISTOS PIPERGIAS,

Defendants.

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PLAINTIFF'S COUNSEL:
Abrams Fensterman Festerman Eisman Formato Ferrar & Wolf, LLP.
By: Svetlana Minevich, Esq.
3 Dakota Drive, Suite 300
Lake Success, NY 11042

DEFENDANT - *PRO SE*:
CHRISTOS PIPERGIAS
60 Kellum Street
Lindenhurst, NY 11757

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

1. Plaintiff's Notice of Motion & Affirmation in Support dated May 11, 2017 and supporting papers;
2. Defendant *pro se*'s Affirmation in Opposition dated March 22, 2017; it is

ORDERED that plaintiffs' motion seeking default judgment pursuant to CPLR 3215 as against defendant *pro se* Christos Pipergias, having been fully considered on its merits, is hereby **granted** as discussed below.

Factual Background

Plaintiff The Long Island Home d/b/a Broadlawn Manor Nursing & Rehabilitation Center ("plaintiff") has commenced this action against defendants Christos Pipergias and Adelia Pipergias. Adelia Pipergias was a resident at plaintiff's skilled nursing facility receiving room, board, shelter and medical care and attention from April 12, 2014 through May 2, 2014, when

she was discharged. In their original summons and complaint dated December 8, 2014 and served on defendants on January 2, 2015, plaintiff asserted causes of action for breach of contract, account stated, and unjust enrichment for services rendered for which plaintiff has not been paid totaling $ 20,131.00.

Procedural History

Plaintiff commenced this action having filed a summons and complaint on December 24, 2014. Defendants interposed their answer on January 23, 2015. The parties entered into a Preliminary Conference Order setting forth a discovery schedule on November 2, 2015. Since then this matter has appeared on the Court's discovery compliance conference calendar several times and is presently scheduled to appear for a continued compliance conference on November 27, 2017. Pretrial discovery between the parties is ongoing.

In a short-form order dated September 16, 2016, this Court granted plaintiff leave to amend the pleadings to seek recovery for a supplement cause of action of promissory estoppel. In accord with that decision, plaintiff served a supplemental summons and complaint on October 3, 2016. Based upon the representation that defendants failed to join issue and serve a supplemental answer to the supplemental pleadings, plaintiff now moves to hold defendants in default.

Standard of Review

" 'A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215' " (***U.S. Bank, N.A. v. Razon***, 115 AD3d 739, 740, 981 NYS2d 571, *quoting* ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314; *see* ***Todd v. Green***, 122 AD3d 831, 831–832, 997 NYS2d 155). "Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer" (*see* CPLR 3215[f]; ***Triangle Props. # 2, LLC v. Narang***, 73 AD3d 1030, 1032, 903 NYS2d 424; ***DLJ Mortg. Capital, Inc. v United Gen. Tit. Ins. Co.***, 128 AD3d 760, 761, 9 NYS3d 335, 336 [2d Dept 2015]).

Generally, where a defendant has defaulted in appearing or answering a complaint, he or she will be "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Mortgage Elec. Registration Sys., Inc. v. Smith***, 111 AD3d 804, 806, 975 NYS2d 121 [citations and internal quotation marks omitted]; ***Boudine v Goldmaker, Inc.***, 130 AD3d 553, 554, 14 NYS3d 405, 407 [2d Dept 2015]).

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).

Analysis & Application

Having reviewed the moving papers, this Court finds that plaintiff has included in its submission proof of service of process on the defendant. Plaintiff has done so with submission of its Affidavit of Service dated January 5, 2015.

The affidavit provides that plaintiff pursuant to CPLR 308(2) provided service of the pleadings on defendants having personally served a person of suitable age and discretion at defendants' actual residence located at 60 Kellum Place, Lindenhurst, Suffolk County, New York on January 2, 2015. Follow up service by mail was made on January 5, 2015. The affidavit was subsequently filed with the Suffolk County Clerk on January 6, 2015.

A process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; *see* ***NYCTL 2009–A Trust v. Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571; ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984, 912 NYS2d 96). Bare and unsubstantiated denials are insufficient to rebut the presumption of proper service (*see* ***Wachovia Bank N.A. v. Greenberg***, 138 AD3d 984, 985, 31 NYS3d 110; ***Wells Fargo Bank, N.A. v. Christie***, 83 AD3d 824, 825, 921 NYS2d 127; *Wachovia Mtge. Corp. v Toussaint*, 144 AD3d 1132, 1133, 43 NYS3d 373, 374 [2d Dept 2016]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*see* ***Edwards, Angell, Palmer & Dodge, LLP v. Gerschman***, 116 AD3d 824, 825, 984 NYS2d 392; ***Simonds v. Grobman***, 277 AD2d 369, 370, 716 NYS2d 692; ***Mtge. Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 733, 5 NYS3d 112, 113 [2d Dept 2015]).

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 (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Furthermore, as applicable here, it is settled that the mere denial of receipt of the summons and the complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (*see* Business Corporation Law § 306 [b] [1]; ***Commissioners of State Ins. Fund v. Nobre, Inc.***, 29 AD3d 511, 816 NYS2d 493; ***Truscello v. Olympia Constr.***, 294 AD2d 350, 741 NYS2d 709; ***De La Barrera v. Handler***, 290 AD2d 476, 736 NYS2d 249; ***Trini Realty Corp. v Fulton Ctr. LLC***, 53 AD3d 479, 480, 861 NYS2d 743, 744–45 [2d Dept 2008]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012][" mere denial by corporate defendant of service of the summons and the complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service"]).

Moreover, 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]).

As per CPLR 320(a), defendant had 30 days after service was complete to answer the complaint, or until February 5, 2016. Since that date has come and gone with no answer, response or appearance from defendants, plaintiffs' proof of default is adequate.

Moreover, 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 defendants have been served with the supplemental pleadings and notice of the instant application, at the least evidenced by the moving papers and defendants' opposition thereto.

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.

Pursuant to CPLR 3215(f), plaintiff is required to submit for judicial review the viability of the facts underlying movant's claims, either by affidavit or verification of the pleadings (*see e.g.* 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]; ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 70 [2003][CPLR 3215(f) requires that an applicant for a default judgment file "proof by affidavit made by the party of the facts constituting the claim." A verified complaint may be submitted instead of the affidavit when the complaint has been properly served]). Here, plaintiff has complied with this requirement submitting an affidavit of merit sworn to by Sharon Canady, the Manager of Admissions of plaintiff, a skilled nursing home facility, who by her sworn affidavit testifies and attests to the facts and circumstances underlying plaintiff's claims plead in its complaint against the defendants.

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 N.Y.S.2d 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).

In opposition to plaintiff's motion for default, defendants merely repeat and reiterate in boilerplate fashion a denial of any allegations of fraud. Otherwise, neither defendant makes any argument resembling a sworn denial of receipt of service of process or a reasonable excuse for having failed to timely or properly join issue on the supplemental pleadings. More importantly, defendants' boilerplate and general denial does not constitute the requisite statement of a meritorious defense to plaintiff's allegations as plead.

Conclusion

Having reviewed the unopposed application, this Court finds that movants have complied with the requirements set forth in CPLR 3215(f), as plaintiff has submitted her affidavit providing sworn attestation to the facts alleged and plead in the amended complaint.

Based upon all of the foregoing, this Court is satisfied with movant's submission and finds proof of defendant's default adequate.

Where, as here, plaintiff has satisfied the requirements for granting a default judgment, and requested such within one year of defendants' default, plaintiff's unopposed motion for the entry of a default judgment against defendants is **GRANTED.**

Therefore, it is

ORDERED that movant shall serve a copy of this order with notice of entry upon the defendants herein by personal service by December 1, 2017; 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 **16th day of January, 2018 at 10:30 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.

The foregoing constitutes the decision and order of this Court.

Dated: November 9, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**