Moreira v Fofo's Toys, Inc.
2018 NY Slip Op 30262(U)
February 6, 2018
Supreme Court, Suffolk County
Docket Number: 14850/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 14850/2015**

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

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 05/25/17
Motion Seq 001 Mot D

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OSCAR A. MOREIRA,

Plaintiff,

-against-

FOFO'S TOYS, INC. d/b/a "THE EMPORIUM", GREAT MACEDONIAN, LLC., & DAVID FIGUEROA,

Defendants.

---x

PLAINTIFF'S COUNSEL:
Palermo Tuohy Bruno, PLLC
1300 Veterans Memorial Highway, Suite 320
Hauppauge, NY 11788

DEFENDANTS' COUNSEL:
Gallo Vitucci Klar, LLP.
90 Broad Street, 3rd Fl.
New York, NY 10004

DEFENDANTS *PRO SE*:
GREAT MACEDONIAN, LLC.
16 Cedar Oak Avenue
Farmingdale, NY 11738

DAVID A. FIGUEROA
75 Matsunaye Drive
Medford, NY 11763

On plaintiff's unopposed motion seeking to amend pleadings pursuant to CPLR 3025 and for entry of default judgment pursuant to CPLR 3215, the Court has considered the following papers:

1. Plaintiff' Notice of Motion & Affirmation in Support dated April 17, 2017 and supporting papers; it is

ORDERED that plaintiff's motion for leave to amend its pleadings to serve and file an amended complaint joining an additional party defendant, having been fully considered as discussed below is **granted** for the following; and it is further

ORDERED that plaintiff's motion for entry of default judgment against defendants Great Macedonian, LLC. and David Figueroa, on full consideration as provided herein, is also **granted**; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties by certified first class mail, return receipt requested on or before March 12, 2018.

Factual Background

Plaintiff Oscar A. Moreira ("plaintiff" or "movant") has brought the instant action, a premises liability personal injury action against defendants Fofo's Toys, Inc. d/b/a The Emporium, the Great Macedonian, LLC. and individual defendant David A. Figueroa ("defendants"). By his

complaint, plaintiff alleges that on September 7, 2014 at approximately 2:00 a.m., at the Emporium nightclub located at 9 Railroad Avenue, Patchogue, New York, he was the victim of an assault and battery and suffered serious physical injury.

Procedural History

Plaintiff commenced the action filing a summons and complaint on August 24, 2015 against the defendants. Defendant Fofo's Toys, Inc. joined issue serving its answer dated October 20, 2015. Thereafter, on or about March 10, 2010, plaintiff and Fofo's Toys, Inc. sought to agree with execution of a stipulation to consent to plaintiff's proposed amendment of its pleadings to join as an additional defendant Ward Security, Inc., the Emporium's security vendor/contractor on duty at the date, time and location of plaintiff's alleged incident, premised upon an agreement dated April 23, 2013, which was in full force and effect on the date of the alleged occurrence.

Since the service of its pleadings on all defendants, plaintiff contends that neither the Great Macedonian, LLC. nor David Figueroa have appeared in the action or answered the pleadings. Thus, plaintiff now seeks entry of default against them for their failure to answer.

Plaintiff additionally seeks leave of this Court to amend the complaint to add as an additional proposed party defendant Ward Security, Inc.

I. Default Judgment

" '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).

Having reviewed the moving papers, this Court finds that movant has included in his submission proof of service of process on the defendants.

Concerning the Great Macedonian, LLC., plaintiff has submitted an Affidavit of Service dated August 12, 2015, filed with the Suffolk County Clerk on September 2, 2015. As regards service of process, that affidavit reflects that plaintiff served defendant with a copy of the pleadings via a designated agent of the New York Secretary of State pursuant to Business Corporation Law § 306(b) on August 26, 2015.

As regards, the individual defendant David Figueroa, plaintiff submitted an Affidavit of Service dated October 9, 2015, filed with the Suffolk County Clerk on October 13, 2015, which reflects that on October 8, 2015, plaintiff served defendant with a copy of the pleadings via a person of suitable age and discretion pursuant to CPLR 308(2), with follow up mailing on October 9, 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 N.Y.S.2d 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 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 (*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 A.D.2d 494, 495, 717 N.Y.S.2d 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 A.D.2d

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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 A.D.2d 494, 495, 717 N.Y.S.2d 923 [2d Dept. 2000]).

With regard to defendant the Great Macedonian, LLC., under Bus. Corp. L. § 306, service is complete upon service on the Secretary of State, which occurred here on September 2, 2015. As per CPLR 320(a), defendant had 30 days after service was complete to answer the complaint, or until October 2, 2015. Since that date has come and gone with no answer, response or appearance from third-party, plaintiffs' proof of default is adequate.

Concerning individual defendant David Figueroa, under CPLR 320(a), defendant Figueroa had 30 days after service was complete to answer the complaint, or until November 12, 2015. Since that date has come and gone with no answer, response or appearance from third-party, 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.

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.

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 N.Y.2d 568, 572, 406 N.Y.S.2d 743, 378 N.E.2d 106), which requires that the plaintiff state a viable cause of action (*see* CPLR 3215[f]; ***Fappiano v. City of New York***, 5 A.D.3d 627, 774 N.Y.S.2d 773, *lv. denied* 4 N.Y.3d 702, 790 N.Y.S.2d 648, 824 N.E.2d 49 [2004]; ***Green v. Dolphy Constr. Co.***, 187 A.D.2d 635, 636, 590 N.Y.S.2d 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 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156; ***Feffer v. Malpeso***, 210 A.D.2d 60, 619 N.Y.S.2d 46), ***Beaton v. Transit Facility Corp.***, 14 A.D.3d 637, 637, 789 N.Y.S.2d 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 A.D.2d 227, 228, 662 N.Y.S.2d 19, 19 (1997).

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 A.D.3d 616, 804 N.Y.S.2d 817; ***599 Ralph Ave. Dev.,***

LLC v. 799 Sterling Inc., 34 A.D.3d 726, 726, 825 N.Y.S.2d 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 merits swearing or attesting to the facts and circumstances underlying their claims against the defendant consistent with the pleadings.

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 the claims against defendants the Great Macedonian, LLC. and David Figueroa are hereby severed from the claims brought by plaintiff Oscar A. Moreira against the Emporium, to the extent that pretrial disclosure has already commenced in the action as between the parties; and it is further

ORDERED that a determination of plaintiff's damages against defendants Figueroa and the Great Macedonian shall be held in abeyance pending the trial or other disposition of the action; and it is further

II. Leave to Amend Pleadings

CPLR 3025(b) provides that courts may grant leave to parties to amend or supplement their pleadings, and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***Tirpack v 125 N. 10, LLC***, 130 AD3d 917, 919, 14 NYS3d 110, 113 [2d Dept 2015]).

Our courts have generally held that leave to grant or deny an amendment is committed to the court's sound discretion, the exercise of which should not be lightly disturbed (*see* ***Edenwald Contr. Co. v City of New York,*** 60 NY2d 957, 959, 471 NYS2d 55; ***Castagne v Barouh***, 249 AD2d 257, 671 NYS2d 283). Leave to amend pleadings shall be freely given in the absence of prejudice or surprise to the opposing parties (*see* CPLR 3025 [b]; ***Public Adm'r of Kings County v. Hossain Constr. Corp.***, 27 AD3d 714, 716, 815 NYS2d 621;***Anderson St. Realty Corp. v New Rochelle Revitalization, LLC***, 78 AD3d 972, 974, 913 NYS2d 114, 116 [2d Dept 2010]). The application should also be granted, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see* ***Aurora Loan Services v Dimura***, 104 AD3d 796 [2d Dept. 2013]; ***Gitlin v Chirinkin***, 60 AD3d 901 [2d Dept.

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2009]; ***Sheila Props. Inc. v A Real Good Plumbers Inc.***, 59 AD3d 424 [2d Dept. 2009]); ***U.S. Fidelity and Guaranty Company v. Delmar Development Partners, LLC***., 22 AD3d 1017, 803 NYS2d 254 [3d Dept. 2005]).

Here, having reviewed the motion record, and having received no opposition to plaintiff's application, this Court finds and determines that plaintiff's proposed amendment is not palpably devoid of merit. Further, this Court further finds that the none of the defendant presently appearing and represented in this action will suffer substantial or unfair prejudice by allowing plaintiff leave to join as an additional party defendant Ward Security, Inc., particularly where pretrial discovery revealed the nature of the security contractor status and relationship between the Emporium and Ward Security.

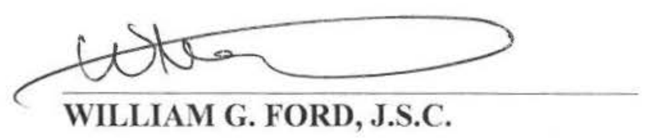
Therefore, that branch of plaintiff's motion for leave to amend the complaint to join an additional party defendant pursuant to CPLR 3025 is hereby **granted**.

Therefore, it is

ORDERED that plaintiff serve and file an amended complaint joining the proposed additional party defendant Ward Security, Inc. within 30 days'.

The foregoing constitutes the decision and order of this Court.

Dated: February 6, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**