

Schalman v Aquatic Recreational Mgt., Inc.
2018 NY Slip Op 31252(U)
June 18, 2018
Supreme Court, New York County
Docket Number: 160482/2016
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

**LYNNE SCHALMAN, As Executrix of the Estate of
STEPHEN BERGEN, Deceased, and LYNNE
SCHALMAN, individually,**

INDEX NO. 160482/2016

MOTION DATE 6/5/18

Plaintiffs,

MOTION SEQ. NO. 002

- v -

**AQUATIC RECREATIONAL MANAGEMENT, INC.
NEW YORK AQUATICS, LLC, JORDI LOPEZ, ROSE
ASSOCIATES, INC., 300 EAST 85TH STREET
HOUSING CORP., MARTIN WEISS, and 300 E. 85TH
HOUSING CORP.,**

Defendants.

NYSCEF Doc Nos. 30-39 were read on this motion for an order directing the entry of a default judgment.

Motion by defendants Rose Associates, Inc., Martin Weiss, and 300 East 85th Housing Corp. s/h/a 300 East 85th Street Housing Corp. (collectively, "Movants") pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Movants and against defendant Jordi Lopez ("Lopez") on Movants' cross-claims is denied, and the complaint and all cross-claims are dismissed as against Lopez.

BACKGROUND

Plaintiffs commenced the instant action on December 13, 2016, by e-filing a summons and complaint ("Complaint"). The Complaint alleges, in sum and substance, that plaintiff-decedent Stephen Bergen was at a pool at 300 East 85th Street, New York, New York on April 26, 2016, when he was caused to suffer severe injuries and eventually died due to the negligence of Defendants. The Complaint further alleges negligent hiring, training, retention, and/or supervision, loss of services, and wrongful death.

On March 1, 2017, Movants e-filed amended verified answers in response to the Complaint with cross-claims against Lopez for, among other things, indemnity and contribution, including contractual and common-law indemnity.

This Court conferenced this case and issued orders governing discovery on July 11, 2017, November 28, 2017, February 6, 2018, and May 23, 2018. On May 24, 2018, Plaintiffs filed a note of issue.

On April 27, 2018, Movants filed their motion pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Movants and against Lopez. The motion was returnable June 5, 2018. Movants argue, in sum and substance, that Lopez has failed to answer or appear in the instant action and that his time to do so has expired.

Movants state that “[w]hether the summons and complaint were served on defendant Jordi Lopez by counsel for plaintiff is unknown.” (Affirmation of Roher ¶ 3.) Movants attach affidavits of service, dated January 31, 2018, indicating that Lopez was served with a copy of the summons and complaint and the amended answers of defendants Rose Associates, Inc. and 300 E. 85th Street pursuant to CPLR 308 (2) on January 31, 2018. (Roher affirmation, exhibit C.) Movants attach further affidavits of service, dated April 27, 2018, indicating that Lopez was personally served with a copy of the notice of motion for the instant motion and that an additional mailing of said notice was sent to Lopez’s residence. (NYSCEF Doc Nos. 33–34, 38–39.)

On June 4, 2018, Lopez appeared in the instant action and e-filed opposition to the instant motion. As the motion was returnable June 5, 2018, and as the notice of motion provided that, pursuant to CPLR 2214, answering affidavits, if any, were to be served upon Movants at least seven days prior to the return date, the Court will disregard Lopez’s opposition papers.

Plaintiffs have not submitted any papers on the instant motion.

DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant’s default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Based upon the submitted papers, the Court finds that Movants have failed to show prima facie that Lopez was served with process in the instant action. Plaintiffs have never filed an affidavit of service of process for Lopez in this action. Further, Movants have indicated in their papers that “[w]hether the summons and complaint were served on defendant Jordi Lopez by counsel for plaintiff is unknown.” (Affirmation of Roher ¶ 3.) Movants’ January 31, 2018 attempt at service of process occurred over a year from when the action was commenced. (*See* CPLR 306-b.) As such, the Court finds that, as Movants have failed to show prima facie that Lopez was served with process, Lopez’s time to answer or appear has not begun to run in this action, Lopez is not in default, and this Court has no jurisdiction over Lopez.

Rather, Plaintiffs have failed to serve Lopez with process within 120 days after the commencement of the action. Pursuant to CPLR 306-b, “[i]f service is not made upon a defendant within [120 days after commencement of the action], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.” In *Diaz v Perez*, the Appellate Division, First Department upheld a motion court’s decision to dismiss a complaint sua sponte against a defendant on a plaintiff’s motion pursuant to CPLR 3215 for entry of a default judgment where the motion court found that the defendant had not been served with the summons and complaint as required by CPLR 306-b. (113 AD3d 421, 421 [1st Dept 2014].) The court stated that “there exist[ed] no reason to disturb the dismissal of the complaint as against” the individual defendant in a case where, similarly to the instant action, the movant had sought a default judgment against both an individual and a corporate entity and the movant had failed to take proceedings for a default judgment within a year of a supposed default by a defendant. (*Id.*)

There appears to be a split of authority between the Appellate Division, First Department and the Appellate Division, Second Department regarding whether a court shall dismiss an action pursuant to CPLR 306-b without a motion to dismiss made by a defendant. In *Daniels v King Chicken & Stuff, Inc.*, the motion court denied the plaintiff’s motion for leave to enter a default judgment because the plaintiff had failed to present proof of valid service of process on the defendant. (35 AD3d 345 [2d Dept 2006].) The motion court then dismissed the complaint for lack of personal jurisdiction. The Appellate Division, Second Department held that, pursuant to CPLR 306-b, it was error for the motion court to dismiss the complaint not “upon motion” of the defendant but sua sponte, upon its own initiative. (*Id.*; see also *Rotering v Satz*, 71 AD3d 861 [2d Dept 2010].)

This Court is bound by the Appellate Division, First Department’s decision in *Diaz*. The *Diaz* Court explicitly endorsed the “sua sponte” dismissal of a complaint pursuant to CPLR 306-b. This Court infers that the “upon motion” requirement of CPLR 306-b means that a motion must be made by either party and considered by a court. (See, e.g., *Auto-Chlor System of New York City, Inc. v Better Living Food Corp.*, 2018 NY Slip Op. 31058 [U] [Sup Ct, NY County, May 31, 2018, Kalish, J.].) The motion need not seek the specific remedy of dismissal of an action nor raise a CPLR 306-b issue explicitly. Rather, the motion court need only determine that CPLR 306-b has not been complied with.

In the instant action, the Court finds that there is not sufficient good cause, and it is not in the interest of justice, to extend the time to serve Lopez with process, where over a year has passed since the action was commenced, there is no indication that Lopez was aware that the action was commenced, there were not timely, diligent efforts made to serve Lopez, and the statute of limitations has run on the wrongful death cause of action. (See *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]; see also *Goldstein Group Holding, Inc. v 310 East 4th Street Hous. Dev. Fund Corp.*, 154 AD3d 458 [1st Dept 2017].)

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Rose Associates, Inc., Martin Weiss, and 300 East 85th Housing Corp. s/h/a 300 East 85th Street Housing Corp. (collectively, "Movants") pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Movants and against defendant Jordi Lopez on Movants' cross-claims is denied, and it is further

ORDERED that the complaint and all cross-claims are dismissed as against Lopez; and it is further

ORDERED that counsel for Lopez is directed to serve a copy of this order with notice of entry, within 10 days of entry, upon all parties and upon the Clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: June 18, 2018
New York, New York

 J.S.C.

HON. ROBERT D. KALISH

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE