

Gongora v Tri-State Empl. Serv. Inc.
2018 NY Slip Op 31522(U)
February 6, 2018
Supreme Court, New York County
Docket Number: 158768/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. KATHRYN E. FREEDPART 2*Justice*-----X
GEGUEL GONGORA,INDEX NO. 158768/2016

Plaintiff,

- v -

TRI-STATE EMPLOYMENT SERVICE INC., L&R
DISTRIBUTORS, INC., ALLIED SUPPLY COMPANY, and
SEGUE SEARCH OF NORWALK, INC.MOTION SEQ. NO. 002Defendants.
-----X

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 23, 24, 25, 26, 27, 28, 29, 30
were read on this motion to/for DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **denied with leave to renew upon proper papers.**

In this personal injury action, plaintiff Geugel Gongora moves, pursuant to CPLR 3215, for a default judgment against defendants Tri-State Employment Inc.¹ and Segue Search of Norwalk, Inc. After a review of the moving papers, as well as the relevant statutes and case law, the motion, which is unopposed, is denied with leave to renew upon proper papers.

FACTUAL AND LEGAL BACKGROUND:

Plaintiff alleges that, on October 7, 2015, he was working as an employee of defendant Allied Supply Company (Allied) at 120 East Industry Court, Deer Park, New York, when he was

¹ Although the caption of the notice of motion refers to this entity as TS Employment, Inc. (TS Employment), the caption of the complaint refers to it as Tri-State Employment, Inc. Doc. 1. As discussed herein, there has been no motion by plaintiff to amend the caption or the complaint.

injured. Doc. 1.² Plaintiff was hired to work for Allied by defendant Tri-State Employment Service Inc. (Tri-State) or defendant Segue Search of Norwalk, Inc. f/k/a Segue Search, Inc. (Segue), both of which were employment agencies.

This action was commenced by the filing a summons and verified complaint, verified by plaintiff's attorney, on October 19, 2016. Doc. 1. The action was commenced against Tri-State, Allied, and Segue. Doc. 1. Plaintiff purported to serve Tri-State with process on November 9, 2016. Doc. 2. The affidavit of service reflects that Tri-State, a corporation, was served when the summons and verified complaint were delivered to "Johnathan Guzman as Hispanic for Tri State" at 160 Broadway, 3rd Floor, New York, NY. Doc. 2.

Plaintiff purported to serve Segue, a corporation, on November 10, 2016 by delivering the summons and verified complaint to "Willette Doe as Receptionist" at 295 Madison Avenue, New York, NY. Doc. 4.

On February 28, 2017, plaintiff amended the verified complaint to add L&R Distributors (L&R) as an additional defendant. Doc. 7. The amended complaint also named as a defendant TS Employment instead of Tri-State. On March 23, 2017, plaintiff purported to serve the amended verified complaint on Segue by delivering it to "Paulette (Smtih) [sic] (who refused full name), receptionist and general agent." Doc. 8. On March 29, 2017, plaintiff purported to serve the amended summons and complaint on TS Employment via the Secretary of State as it agent. Doc. 12.

Allied and L & R joined issue by service of their verified answer filed May 4, 2017. Doc. 13.

² All references are to the documents filed with NYSCEF in this matter.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against Tri-State and Segue. Doc. 23. In support of the motion, plaintiff submits the summons and verified complaint with affidavits of service (Doc. 25); letters written to said defendants warning them that they were in default (Doc. 26); the supplemental summons and amended complaint with affidavits of service thereof (Docs. 27-28); and an affidavit by plaintiff attesting to the fact that she was injured on October 7, 2015 “while employed by TS EMPLOYMENT, INC. and/or SEGUE SEARCH OF NORWALK, INC. to perform work for L&R DISTRIBUTORS, INC. and/or ALLIED SUPPLY CO.” Doc. 29.

LEGAL CONCLUSIONS:

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 A.D.3d 978 (2d Dept 2008); *Allstate Ins. Co. v Austin*, 48 A.D.3d 720 (2d Dept 2008); *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 A.D.3d 783 (2d Dept 2015).

Plaintiff failed to establish proper service of the summons and complaint. A corporation must be served on one of the individuals listed in CPLR 311(a)(1) or through the Secretary of State pursuant to Business Corporation Law section 306. Here, plaintiff attempted to serve “Johnathan Guzman as Hispanic for Tri State” at 160 Broadway, 3rd Floor, New York, NY. Doc. 2. However, plaintiff does not list Guzman’s position or whether he was entitled to accept

service on behalf of Tri-State. Further, although plaintiff purported to serve Willette Doe, a receptionist, on behalf of Segue, the process server does not specify whether Doe was authorized to accept service on behalf of that entity. *See Martinez v Church of St. Gregory*, 261 AD2d 179, 180 (1st Dept 1999). Since service of the complaint was improper, the representation by plaintiff's counsel that Tri-State and Segue failed to answer or otherwise appear in this matter is thus without merit. Doc. 24, at par. 3.

Nor is plaintiff entitled to a default judgment based on his amended complaint. Plaintiff did not serve his amended complaint within any of the time frames set forth in CPLR 3025(a). Rather, on February 28, 2017, a little over two months after the expiration of what would have been Tri-State and Segue's period for responding to the complaint (had they been served properly), plaintiff simply uploaded the amended complaint as document number 7 to NYSCEF without court leave. As noted above, the proposed amended complaint named L&R as an additional defendant and named TS Employment, Inc., instead of Tri-State, as a defendant. Since plaintiff failed to seek leave for this amendment in accordance with CPLR 3025(b), the amended complaint is a nullity and this Court may not consider it. *See Khedouri v Equinox*, 73 AD3d 532 (1st Dept 2010). Thus, the issues of whether Tri-State and Segue were properly served with the amended complaint, or whether they failed to answer the same, are academic, and plaintiff's motion for a default judgment as against Tri-State and Segue is denied with leave to renew upon proper papers.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers; and it is further

ORDERED that this constitutes the decision and order of the court.

2/6/2018
DATE


KATHRYN E. FREED, J.S.C.

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CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

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DENIED

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NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: