

Annunziato v 56th St. Rest., LLC
2018 NY Slip Op 32731(U)
October 22, 2018
Supreme Court, New York County
Docket Number: 159774/2017
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

Justice

-----X

INDEX NO. 159774/2017

JEANNIE ANNUNZIATO,

MOTION SEQ. NO. 001

Plaintiff,

- v -

56TH STREET RESTAURANT, LLC t/a LIPS and 227 EAST 56TH
COMPANY, LLC,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15

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 action based on a slip and fall injury, plaintiff Jeannie Annunziato ("Annunziato") moves, pursuant to CPLR 3215, for a default judgment against defendant 227 East 56th Company, LLC ("the Company"). After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is **denied with leave to renew upon proper papers.**

FACTUAL AND PROCEDURAL BACKGROUND:

On November 2, 2017, plaintiff Annunziato commenced the instant action by filing a summons and verified complaint against defendants 56th Street Restaurant, LLC t/a LIPS ("the Restaurant") and the Company. (Doc. 11.) The complaint alleged that, on November 8, 2014,

plaintiff sustained injuries when she slipped and fell on wet flooring at a restaurant located at 227 East 56th Street in Manhattan. (*Id.* at 5–6.) The complaint set forth a first cause of action based on negligence against the Restaurant (*id.* at 3–8) and a second cause of action for negligence against the Company (*id.* at 8–13). On November 7, 2017, plaintiff served process on the Company by leaving a copy of the summons and verified complaint on its manager, who is authorized to accept service of process on its behalf. (Doc. 12.) The Company has not appeared in this action. (Doc. 10 at 1.)

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the Company. (Doc. 9.)

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.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” (*Atl. Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011].) Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. (*See Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003].)

In slip and fall cases, “[t]o establish a prima facie case, the plaintiff must show that the defendant either created a dangerous condition or had actual or constructive knowledge of the condition.” (*Segretti v Shorenstein Co., E., L.P.*, 256 AD3d 234, 235 [1st Dept 1998].) Thus,

courts have held that the mere existence of a foreign substance is insufficient to establish a claim for negligence. (*Id.* at 234.) Moreover, when a plaintiff states only that “she ‘was caused to fall,’ without stating what caused her to fall” (*Jacobsen v S & F Serv. Ctr. Co., Inc.*, 131 AD3d 450, 452 [2d Dept 2015]), courts have likewise held that such an allegation is factually insufficient to support a negligence claim.

Here, plaintiff has furnished proof of service of process by submitting an affidavit of service, which reflects that the summons and complaint were delivered to a person authorized to accept service on the Company’s behalf, i.e., the Company’s manager. (Doc. 12.) And, in an affirmation supporting its motion for a default judgment, plaintiff has also shown that the Company has failed to appear. (Doc. 10.)

Nevertheless, this Court denies plaintiff’s motion for a default judgment because she failed to submit proof of the facts constituting her negligence claim. Although the complaint alleges that plaintiff fell at the premises due to a wet and slippery floor (Doc. 11 at 10–11), plaintiff has not specifically identified what caused her to fall. Indeed, even in her own affidavit, plaintiff merely states that she was “caused to sustain severe and serious permanent personal injuries” because “defendants were negligent in failing to keep the premises safe by leaving or permitting the premises to remain in an unsafe condition” (Doc. 13 at 1.) Furthermore, plaintiff does not even attempt to prove that the Company and its agents had notice of the defective condition, but rather merely states that “upon information and belief, the [Company] had knowledge of the unsafe, defective and dangerous conditions . . . for such a long time” (Doc. 11 at 11.) Such conclusory assertions are insufficient to establish entitlement to a default judgment. (*See Acunia ex rel. Salgado v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009] (dismissing a slip and fall action where plaintiff did not provide any specific

allegations as to what precipitated his fall).) However, plaintiff may renew her motion upon proper papers.

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff Jeannie Annunziato's motion for a default judgment against defendant 227 East 56th Company, LLC is denied with leave to renew upon proper papers within 30 days upon penalty of dismissal; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, plaintiff is to serve a copy of this order with notice of entry on defendant 227 East 56th Company, LLC's attorney and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

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

10/22/2018
DATE

CHECK ONE:

☐

CASE DISPOSED

☒

NON-FINAL DISPOSITION

GRANTED

☒

DENIED

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

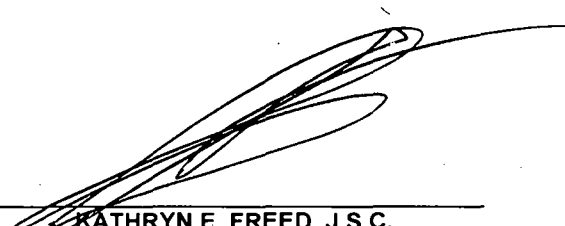
INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE



KATHRYN E. FREED, J.S.C.