

Ulysse v Ulysse
2018 NY Slip Op 33103(U)
December 6, 2018
Supreme Court, New York County
Docket Number: 154715/2016
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22-----X
JOSITA ULYSSE,

Plaintiff,

- v -

MARIE ULYSSE, SHEN EVA

Defendant.

INDEX NO. 154715/2016MOTION DATE 10/29/2018MOTION SEQ. NO. 001

DECISION AND ORDER

-----X
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is ORDERED that defendant, Marie Ulysse's motion for an Order, pursuant to CPLR 3215, to dismiss plaintiff, Josita Ulysse's Complaint, against defendant, Marie Ulysse, only, for failure to move for a default judgment within one year of service of the Summons and Complaint on said defendant is granted. Plaintiff, Josita Ulysse opposes the motion and cross-moves for a default judgment in favor of plaintiff and against defendant, Marie Ulysse.

This action stems from a motor vehicle accident which occurred on July 19, 2015, at the intersection of the Horace Harding Expressway and Parsons Boulevard in the County of Queens, City and State of New York, when a motor vehicle operated by defendant, Marie Ulysse came into contact with a motor vehicle operated by defendant, Shen Mei Sufu Eva and led to the alleged serious injury of plaintiff, Josita Ulysse.

The lawsuit was commenced on May 19, 2016, issue was joined by defendant Shen Mei Sufu by service of answer on September 6, 2016. Defendant Marie Ulysse was served on August 22, 2016 by "nail and mail" service and to date, has never joined issue. Two years have passed since the Summons and Complaint. Defendant, Marie Ulysse now moves to dismiss the Complaint pursuant to CPLR 3215 for failure to move for default judgment.

Pursuant to CPLR 3215 (c):

Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

In order to prevail on a motion to dismiss under CPLR 3215 (c), movant must establish a meritorious claim and justifiable excuse for failure to timely move for a default judgment (*Pack v Saldana*, 178 AD2d 123, 124 [1st Dept 1991] [finding that plaintiff who did not move for default against defendant after a period of two and one-half years, and did not provide an affidavit of merit or reasonable excuse for not entering a default judgment within one year, should have her complaint dismissed as abandoned pursuant to CPLR 3215 (c)]).

Here, plaintiff has litigated the claim against defendant, Shen Mei Sufu Eva and proceeded with discovery conferences absent the appearance of defendant, Marie Ulysse. In that time, plaintiff has not moved for a default judgment against defendant, Marie Ulysse within the year prescribed by the CPLR. In opposition to defendant's motion, plaintiff claims that it can

demonstrate sufficient cause as to why the complaint should not be dismissed. Plaintiff notes that it changed attorneys from Harmon Linder & Rogowsky to Helen F. Dalton & Associates, P.C. on March 26, 2018. Plaintiff's counsel claims that once it received the file from prior counsel, he noticed that there was no Answer from defendant, Marie Ulysse, and attempted to contact State Farm to resolve the issue but was not successful in receiving an answer. While plaintiff's counsel may have made such an effort to obtain said Answer, the Court notes that counsel was retained over six months before it cross-moved for a default judgment. Thus, the court finds that plaintiff has failed to provide affidavit of merit or reasonable excuse for not entering a default judgment within one year, should have her complaint dismissed as abandoned against defendant, Marie Ulysse pursuant to CPLR 3215 (c).

Accordingly, it is

ORDERED that defendant, Marie Ulysse's motion for an Order, pursuant to CPLR 3215, to dismiss plaintiff, Josita Ulysse's Complaint, against defendant, Marie Ulysse, only, for failure to move for a default judgment within one year of service of the Summons and Complaint on said defendant is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that plaintiff, Josita Ulysse's cross-motion for an Order, pursuant to CPLR 3215 to grant Default Judgment in favor of plaintiff and against defendant, Marie Ulysse is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Shen Mei Sufu Eva; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in caption herein.

This constitutes the Decision/Order of the Court.



12/6/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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☐

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐

DENIED

☒
☐
☐
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE