

Cruz v New York City Tr. Auth.
2019 NY Slip Op 30599(U)
January 14, 2019
Supreme Court, New York County
Docket Number: 151366/2016
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRANSIT PART 21

X

RUTH CRUZ,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, d/b/a/
MTA NEW YORK CITY TRANSIT (NYCTA) and
DERRICK THOMPSON,

Defendant.

X

Index # 151366/2016

Mot. Seq. 1

DECISION AND ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Plaintiff's Motion/ Affirmations/Memo of Law	<u>1</u>	2-8
Defendant 's Memo of Law in Opposition	<u>2</u>	10-15
Plaintiff 's Affirmation in Reply/Memo of Law	<u>3</u>	18-20
Defendant 's Sur-Reply	<u>2</u>	10-15

LISA A. SOKOLOFF, J.

In this personal injury action in which Plaintiff Ruth Cruz alleges injury from a fall on a bus owned by New York City Transit Authority (Transit) and operated by Defendant Derrick Thompson (Thompson), Plaintiff moves for a default judgment against Defendants pursuant to CPLR § 3215(a)(b), or in the alternative, setting down the matter for an inquest.

Plaintiff alleges that Defendants Transit and bus driver Thompson were served with the Summons and Verified Complaint on March 14, 2016 and March 21, 2016, respectively, more than 30 days have elapsed since the date Defendants were served, and no answer or reply has been forthcoming from Defendants.

Transit opposes claiming that Plaintiff's motion is untimely in that Plaintiff did not enter a judgment within one year of the default in answering as required by CPLR § 3215(c). Additionally, the court lacks personal jurisdiction over Defendants because according to an affidavit of service submitted with Plaintiff's motion, the summons and complaint was served on Transit ("Transit Affidavit") at 100 Church Street, Messenger Center, in Manhattan, although service on Transit is properly made at 130 Livingston Street, Brooklyn.

According to a second affidavit of service ("Thompson Affidavit"), Plaintiff alleges to have served Defendant Thompson at 130 Livingston Street, room 1077, Brooklyn, by leaving the summons and complaint with Human Resources Administrator, Michelle Rios. According to Transit, however, a process server would not be able pass through security personnel to reach the 10th floor where room 1077 is located and no employee by the name of Michelle Rios was employed by Transit on March 21, 2016. Per the affidavit of Ronald Roberts, a Principal Administrative Associate at New York City Transit Authority, a search was conducted of the Transit computer database and ledger book for March 14, 2016 and March 21, 2016 and there was no record of receipt of a summons and complaint on those dates for this matter.

Turning to the timeliness of Plaintiff's motion, CPLR § 3215(c) states, in relevant part:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall... dismiss the complaint as abandoned, ... unless sufficient cause is shown why the complaint should not be dismissed.

Here, Transit was purportedly served on March 14, 2016, while Thompson was purportedly served on March 21, 2016. Pursuant to CPLR § 320, Defendants had 20 days from the date of service to answer or otherwise appear in this action which period expired on April 4, 2016 and April 11, 2016, respectively. Thus, Plaintiff had one year from the date of default (April 4, 2017 and April 11, 2017) to move for a default judgment. However, Plaintiff's motion was not filed until February 10, 2018, 312 days and 305 days, respectively, after her time to do so had expired.

Because Plaintiff's motion is untimely, it is her burden under CPLR § 3215(c) to show a lack of intent to abandon the action, and to demonstrate both a reasonable excuse for the period of non-prosecution and merit to the action (*Sports Legends, Inc v Carberry*, 38 AD3d 470 [1st Dept 2007]). Yet Plaintiff has failed to offer any excuse for the delay. Rather, Plaintiff only contests the claimed deficiencies in service and suggests that the disputed differences be resolved at a traverse hearing. The court need not reach this jurisdictional question.

Nor does a recent affidavit of service, prepared more than two years after the date of purported service, setting forth the proper address of service, serve as a legitimate excuse for the failure to prosecute the action. [*cf. Bazac v Odelia Enters. Corp.*, 272 AD2d 226 [1st Dept 2000] [law office failure is excusable, particularly where no prejudice suffered as a result of the delay]].

Since no reasonable excuse has been established for the delay in moving for the default, the complaint must be dismissed as abandoned (CPLR § 3215(c); *Perricone v City of New York*, 62 NY2d 661, 663 (1984); *LaValle v Astoria Const. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]).

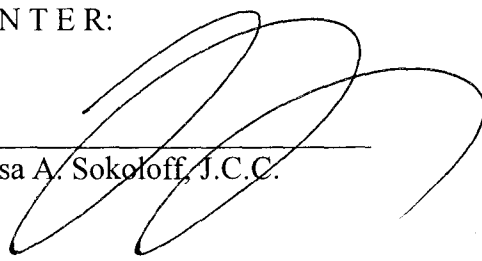
Accordingly, it is:

ORDERED that Plaintiff's motion is denied in all respects, and

ORDERED that the Clerk of the Court shall mark this matter dismissed pursuant to CPLR 3215(c).

Dated: January 14, 2019
New York, New York

ENTER:



Lisa A. Sokoloff, J.C.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: