

Davidson v Sollazzo
2019 NY Slip Op 32681(U)
September 6, 2019
Supreme Court, New York County
Docket Number: 157267/2018
Judge: Shlomo S. Hagler
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
COUNTY OF NEW YORK: IAS PART 17**

-----X
**EILEEN DAVIDSON, as Administratrix of the
Estate of MICHAEL DAVIDSON, deceased, and
EILEEN DAVIDSON, Individually,**

Plaintiff,

Index No.: 157267/2018

- against -

VINCENT SOLLAZZO and CLASS 5, INC.,

DECISION/ORDER

Defendants.

-----X

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action for wrongful death by the estate of decedent New York City firefighter Michael Davidson (“Davidson”) arising out of a March 22, 2018 fire. Plaintiff moves for a default judgment pursuant to CPLR 3215 against defendant Class 5, Inc. (“Class 5”). Class 5 opposes the motion.

BACKGROUND AND FACTUAL ALLEGATIONS

Decedent Michael Davidson was employed as a firefighter with the Fire Department of the City of New York (“FDNY”). On March 22, 2018, Davidson responded to a fire at 773 St. Nicholas Ave., New York, New York (the “Premises”). During the course of performing firefighting duties, Davidson became trapped in the Premises causing serious injuries and death.

Defendant Vincent Sollazzo (“Sollazzo”) is the owner of the Premises, and Class 5 is a corporation which develops and produces feature films. Class 5 entered into an agreement with Sollazzo to use the Premises to film several scenes for a movie entitled “Motherless Brooklyn” (Notice of Motion, Cannavo Affidavit, Exhibit “E” [Verified Answer] at Thirtieth; *Id.*, Exhibit “F” [Cross-Claim Against Class 5] at ¶ 13).

Plaintiff alleges that Class 5 converted the Premises to a movie set without establishing the structural, electrical, and mechanical capacity to conduct the foregoing operations (*Id.*, Exhibit “A” [Verified Complaint] at ¶ 41). Plaintiff also alleges, among other things, that Class 5 failed to determine the safety of the Premises to conduct the subject movie production and failed to preserve the integrity of the Premises (*Id.* at ¶¶ 42-57). Plaintiff further contends that Class 5 used and stored combustible materials at the Premises, and removed the fire safety and prevention measures that had been in place (*Id.* at ¶¶ 58-59).

Based on the foregoing allegations, plaintiff commenced this wrongful death action on August 3, 2018, with the filing of a Verified Complaint. Class 5 responded on March 25, 2019, with an Answer verified by William C. Migliore (“Migliore”), an employee of Class 5 (*Id.*, Exhibit “C” [Verified Answer]).¹ Plaintiff moves herein for a default judgment pursuant to CPLR 3215 against Class 5 on grounds that Class 5 failed to properly verify its Answer.

Plaintiff argues that the verification of the Answer by Migliore as an employee was improper on the basis that CPLR 3020 (d) (1) requires that a verification of a pleading of a domestic corporation be made by an officer thereof. In opposition, Class 5 contends CPLR 3020 (d) (3) permits verification of a pleading of a corporation by a corporate agent, with knowledge.

DISCUSSION

In this matter, it is uncontroverted that plaintiff filed and served a Verified Complaint.² “[W]here a pleading is verified, each subsequent pleading shall also be verified” [CPLR 3020 (a)]. Plaintiff moves herein for a default judgment against Class 5 based on the alleged failure of Class 5 to properly verify its Answer. Plaintiff argues that, as such, the Answer interposed by Class 5 is a

¹ On or about October 10, 2018, Class 5 moved to dismiss the Verified Complaint pursuant to CPLR 3211(a)(7) which was denied by Order, dated March 14, 2019 [Hon. Alan C. Marin, J.S.C.].

² Plaintiff’s Verified Complaint is verified by her attorney.

nullity.

Here, Class 5's Answer is verified by its employee, Migliore (*Id.*, Exhibit "C" [Verified Answer]). Plaintiff maintains that the verification by Migliore, as an employee of Class 5, is an insufficient verification under CPLR 3020 (d) (1). Class 5 asserts that if the material allegations of a pleading are within the personal knowledge of an agent of a corporation, the pleading may properly be verified by said agent pursuant to CPLR 3020 (d) (3).

CPLR 3020(d) provides in pertinent part:

(d) By whom verification made. The verification of a pleading shall be made by the affidavit of the party, or, if two or more parties united in interest are pleading together, by at least one of them who is acquainted with the facts, except:

(1) if the party is a domestic corporation, the verification shall be made by an officer thereof and shall be deemed a verification by the party; [. . .]

(3) if the party is a foreign corporation, or is not in the county where the attorney has his office, or if there are two or more parties united in interest and pleading together and none of them acquainted with the facts is within that county [. . .] or if all the material allegations of the pleading are within the personal knowledge of an agent or the attorney, the verification may be made by such agent or attorney.

In opposition to the instant motion, Class 5 argues that plaintiff has failed to cite any case law to support her assertion that CPLR 3020 requires that domestic corporations verify its pleadings solely through an officer of the corporation and by no other means, including by an employee or agent with personal knowledge. Here, the sworn to Verification Statement by Migliore attached to the Answer interposed by Class 5 provides that:

"I am an employee for Defendant CLASS 5, INC., and I am authorized to sign this verification on its behalf. I have read the foregoing Answer and know the contents thereof, and the contents are true to my own knowledge. The sources of my information and the grounds for my belief as to all matters alleged herein are my personal knowledge based upon my position with Defendant CLASS 5, INC." (Notice of Motion, Cannavo Affidavit, Exhibit "C" [Verified Answer]).

The limited relevant case law provides that a pleading may be verified by any agent of a corporation provided said agent is authorized to sign the verification on the corporation's behalf and has personal knowledge of the pleading based on said agent's position at the corporation (*See Matter of Owega Props. v. Campfield*, 182 AD2d 1058, 1060 [3d Dept 1992] [petition was properly verified by agent of domestic corporation who had personal knowledge of the material allegations of the pleading]; *Ft. Holding Corp. v. Otero*, 157 Misc2d 834, 837 [NY Civ Ct, NY County 1993] [agent or attorney of domestic corporation is permitted to verify its pleadings pursuant to CPLR 3020 (d) (3)]; *Teachers Coll. v. Wolterding*, 75 Misc2d 465, 467 [NY Civ Ct, NY County 1973]; *rev'd on other grounds*, 77 Misc2d 81 (Sup Ct App T, 1st Dept. 1974) (agent of a domestic corporation can verify its pleadings if the material allegations are within the personal knowledge of such agent); Siegel, *New York Practice* § 233 [under CPLR §3020 (d) (3) an attorney or agent can verify a pleading for "a party of any kind, (individual, corporate, etc.)"]; *cf S.P.S.G., Inc. v. S.P. Collado*, 113 Misc2d 167, 170 [NY Civ Ct, NY County 1982] [verification by attorney of the corporate landlord permitted only if the attorney sets forth in an affidavit why the verification is not made by the party]; *Zisser v. Bronx Cigar Corp.*, 91 Misc2d 1025, 1027 [NY Civ Ct, Bronx County 1977] [attorney's verification of the petition of a domestic corporation was insufficient, even when corporate officers were "out of town"]).

On the basis of the foregoing, Migliore's verification is proper under CPLR 3020 (d) (3) which provides that where "all the material allegations of the pleading are within the personal knowledge of an agent ..., the verification may be made by such agent."

Class 5 argues further that plaintiff has waived her right to challenge the verification by Class 5 pursuant to CPLR 3022. CPLR 3022 provides "[w]here a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may

treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.” “[T]he Court of Appeals ‘has never specified a uniform time period by which to measure due diligence’ in interpreting CPLR §3022” (*Rodriguez v. Westchester County Bd. of Elections*, 47 Misc3d 956, 961 [Sup Ct, Westchester County 2015] quoting *Lepkowski v State of New York*, 1 NY3d 201, 210 [2003]).

In *Matter of O’Neil v. Kasler* 53 AD2d 310, 315 [4th Dept 1976], the Fourth Department relied on Professor David Siegel’s interpretation of “due diligence” to mean that an objection must be raised within twenty-four hours (*see also 1346 Park Place HDFC v Wright*, 52 Misc3d 18, 22 [Sup Ct App T, 2d Dept 2016] [“‘due diligence’ has been construed to mean raising an immediate objection or, at least, within 24 hours of the receipt of a defective pleading”]; *Matter of Ireland v Town of Queensbury Zoning Bd. of Appeals*, 169 AD2d 73, 76 [3d Dept 1991] [challenge to unverified complaint/petition by a zoning board waived when not raised within 24 hours]; *Matter of Jacobi v Murray*, 58 Misc3d 319, 325 [Sup Ct, Albany County 2017] [“due diligence [under CPLR 3022] has been held to mean ‘within twenty-four hours’” citing *Matter of O’Neil v. Kasler*]).

Moreover, whether or not the 24 hour rule is strictly adhered to, due diligence as provided in CPLR 3022 “by its very nature, requires that the court examine the facts and circumstances surrounding the service and rejection of the pleading” (*Rodriguez v. Westchester County Bd. of Elections* 47 Misc3d at 962); compare *Able Breaking Corp. v Consolidated Edison Company of New York* (88 AD2d 649, 649 [2d Dept 1982]) [plaintiff’s objection that defendant’s answer was unverified made eight days after receipt of defendant’s answer was deemed unreasonable under the circumstances]; *Theodoridis v American Tr. Ins. Co.*, 210 AD2d 397, 397 [2d Dept 1994] [“under the particular circumstances of this case, the failure to reject the unverified answer within 24 hours of its receipt constituted a waiver of the defect”].

Here, plaintiff waited nine days to object to Class 5's Answer. Based on the foregoing authority, such a delay is "unreasonable" and as such, does not satisfy CPLR 3022's "due diligence" requirement.³

Finally, assuming arguendo that Migliore's verification is defective and the nine day delay constituted due diligence, plaintiff has failed to demonstrate prejudice to a substantial right (CPLR 3026 [[p]leadings shall be liberally construed" and "[d]efects shall be ignored if a substantial right of a party is not prejudiced"]; *Duerr v 1435 Tenants Corp.*, 309 AD2d 607, 607 [1st Dept 2003] ["since plaintiff does not claim that she was prejudiced by the submission of the defective verification, the defect should be ignored"]; *Theodoridis v American Tr. Ins. Co.*, 210 AD2d at 397 ["no evidence that a substantial right has been prejudiced and the complained of defect should therefore be ignored"]; *Matter of Jacobi v Murray*, 58 Misc3d at 327 ["respondents [h]ave failed to allege that they have suffered any prejudice if the alleged defect here were also ignored pursuant to CPLR 3026"]).

CONCLUSION

Accordingly, it is hereby,

ORDERED that plaintiff's motion for a default judgment pursuant to CPLR 3215 is denied.

Dated: September 6, 2019

ENTER:


Hon. **SHLOMO S. HAGLER, J.S.C.**

³ Class 5 filed its Answer on March 25, 2019 and plaintiff waited nine days until April 3, 2019 to raise an objection to said Answer. After the last correspondence between the parties on this issue, plaintiff waited another approximately one month (June 6, 2019) to make the subject motion seeking a default judgment against Class 5.