

Corse v Flashdancers
2020 NY Slip Op 30980(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 152944/2019
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 152944/2019

TAIJUAN CORSE,

MOTION SEQ. NO. 001

Plaintiff,

- v -

FLASHDANCERS, JAY JAY CABARET INC, 810 7TH AVENUE GP LLC, METROPOLITAN 810 7TH AVE, LLC, BARRY LIPSITZ, PATRICK NGUNZA and PATRICK NGUNZA,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for JUDGMENT - DEFAULT.

In this action sounding in negligence, plaintiff Taijuan Corse (“Corse”) moves, pursuant to CPLR 3215, for a default judgment against defendants Jay Jay Cabaret Inc. (“Jay Jay”), 810 7th Avenue GP LLC (“810 7th Avenue”), Metropolitan 810 7th Ave., LLC (“Metropolitan 810”) (collectively “the defaulting employer defendants”) and Patrick Ngunza, also known as Bokombo Ngunza (“Ngunza”) (collectively “the defaulting defendants”), and setting this matter down for an inquest and assessment of damages (Doc. 15-16).¹ After a review of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

¹ Although Corse’s notice of motion includes defendant Barry Lipsitz (“Lipsitz”), his counsel’s attorney affirmation and the proof submitted in support of the motion omit Lipsitz entirely, leaving this Court to conclude that a default judgment is not being pursued as against this defendant.

FACTUAL AND PROCEDURAL HISTORY:

This action stems from allegations that, on April 16, 2018, while lawfully in the premises of defendant Flashdancers, located at 1674 Broadway Avenue, Corse was assaulted by Ngunza, a bouncer employed by Flashdancers (Doc. 23). Moreover, he claimed that his injuries resulted, in part, due to the defaulting employer defendants' ownership, operation, management, maintenance, and control of the subject premises (Doc. 8). Corse commenced this action by filing a summons and verified complaint on March 20, 2019 (Doc. 1). A day later, he filed an amended summons and complaint (Docs. 2-3). Three affidavits of service were filed on April 9, 2019 reflecting that the defaulting employer defendants were all served with process via the Secretary of State on April 4, 2018 (Doc. 4-6).

On May 23, 2019, Corse filed a second amended summons and complaint and, on June 3, 2019, the defaulting employer defendants were again served with process via the Secretary of State (Doc. 7-11).² On June 26, 2019, Corse filed an affidavit of service reflecting that, on May 28, 2019, Ngunza was served by affix and mail pursuant to CPLR 308(4) after several attempts to serve him at his residence in New Jersey on May 18, 2019 at 3:31 p.m., May 22, 2019 at 7:55 a.m., May 24, 2019 at 5:15 p.m. and May 28, 2019 at 6:34 p.m. (Doc. 13). According to an affidavit of service filed August 16, 2019, service of the second amended summons and complaint was again attempted at Ngunza's residence on June 7, 2019 at 7:55 a.m., June 8, 2019 at 2:21 p.m. and June 10, 2019 at 7:10 p.m. (Doc. 14) and, after failing to personally serve him, the documents were affixed to the door of his residence (Doc. 14).

² Corse filed an affidavit of service reflecting that Flashdancers was served with process at its place of business on May 20, 2019; however, he is not seeking a default judgment against this defendant (Doc. 12).

A letter dated October 18, 2019 was mailed to Ngunza at his residence, advising him that a default judgment would be pursued against him upon his failure to respond to the second amended complaint within 7 days (Doc. 20). The letter included the second amended summons and complaint (Doc. 20). Moreover, on that same day, a default letter, along with the second amended summons and complaint, were mailed to the defaulting employer defendants via First Class mail (Doc. 22). Corse filed the instant motion on January 16, 2020 seeking a default judgment on his first cause of action (Doc. 15).

LEGAL CONCLUSIONS:

Pursuant to CPLR 3215(a), “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him [or her].” It is well settled that, to prevail on a motion for default judgment, the movant must proffer “proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant’s failure to answer or appear” (*U.S. Bank N.A. v Wolnerman*, 135 AD3d 850, 850-851 [2d Dept 2016] [internal quotation marks and citations omitted]; *see* CPLR 3215 (f); *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 839-840 [2d Dept 2015]).

Corse’s motion seeking a default judgment against the defaulting defendants is denied. Although Corse filed proof of service of the second amended complaint, service of this pleading was invalid. Pursuant to CPLR 3025, “[a] party may amend his [or her] pleading once without leave of court within 20 days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it” (*see Dowell v City of*

New York, 2014 NY Slip Op 31186[U], 2014 NY Misc LEXIS 2104, *7-8 [Sup Ct, NY County 2014]). Since the second amended complaint was not served within any of the time periods set forth in the statute, Corse was required to seek leave from the Court, pursuant to CPLR 3025(b), in order to serve the same. Given that the second amended complaint was a nullity (*see Khedouri v Equinox*, 73 AD3d 532, 533 [1st Dept 2010]; *Nikolic v Fed'n Empl. & Guidance Serv.*, 18 AD3d 522, 524 [2d Dept 2005]), the affidavits of service relating to said pleadings fail to establish proper proof of service on the defaulting employer defendants (*see Pearson v 1296 Pac. St. Assoc., Inc.*, 67 AD3d 659, 660 [2d Dept 2009]; *Dowell v City of New York*, 2014 NY Misc LEXIS 2104 at *7-8).

Moreover, that branch of Corse's motion seeking a default judgment against Ngunza is denied based on improper service. The "'affix and mail' service pursuant to CPLR 308(4) requires that the summons be affixed to the door of defendant's actual dwelling place or usual place of abode within New York State [and, thus,] service on [Ngunza] in New Jersey in this fashion was a nullity" (*Vladeck, Raskin & Clark, P.C. v Camme*, 2016 Slip Op 31042[U], 2016 NY Misc LEXIS 2096, *6 [Sup Ct, NY County 2016]).

Based on the findings above, this Court need not address whether Corse has satisfied the remaining requirements for a default judgment.

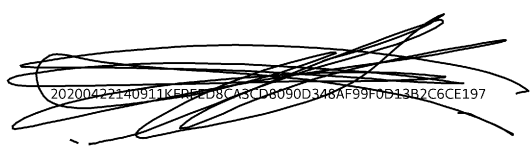
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for a default judgment against defendants Jay Jay Cabaret Inc., 810 7th Avenue GP LLC, Metropolitan 810 7th Ave., LLC and Patrick Ngunza, also known as Bokombo Ngunza, is denied, with leave to renew as to Patrick Ngunza upon proper papers within 30 days of service of this order with notice of entry; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, on all defendants within 20 days hereof; and it is further

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

4/21/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE