

Sodikzoda v Hernandez
2020 NY Slip Op 32024(U)
May 4, 2020
Supreme Court, Bronx County
Docket Number: 27715/2019E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART 15

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BAHODUR SODIKZODA,

Plaintiff,

-against-

Index No.: 27715/2019E

ERIK HERNANDEZ, LIBERTY COLA COLA BEVERAGES,
ADRIAN ZEQRIRI, and BESARTA ZEQRIRI,
Defendants.

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HON. MARY ANN BRIGANTTI:

Plaintiff moves for a default judgment as against one Defendant ERIK HERNANDEZ, and moves to amend pleadings to add TIMOTHY BURNS as a party Defendant, and related relief, and both motions are decided in this same decision and order.

This is an action to recover damages for alleged personal injuries sustained by the Plaintiff in a motor vehicle accident involving Defendants' vehicles. It is alleged that the vehicle owned by Defendant, LIBERTY COCA-COLA BEVERAGES, LLC, i/s/h/a LIBERTY COLA COLA BEVERAGES, and operated by Defendant ERIK HERNANDEZ, struck the vehicle owned and operated by Defendants ZEQRIRI, which struck Plaintiff's vehicle. It was also alleged, during the course of discovery, that HERNANDEZ stole LIBERTY's vehicle, which LIBERTY's employee, TIMOTHY BURNS, had presumably left unlocked and with the keys in the ignition, while BURNS was unloading the vehicle during the course of his employment. (See Police Report;

Affirmation by Plaintiff's Counsel Jonathan Van Dina, dated November 18, 2019; and pleadings).

In support of his motions, Plaintiff's submissions include the verified pleadings, the Affidavit of service thereof on HERNANDEZ, the proposed amended pleadings, and the Police Accident Report. There was no opposition submitted to these motions.

Plaintiff's Motion for a Default

Plaintiff's motion for a default judgment as against Defendant, ERIK HERNANDEZ, is denied, without prejudice, because the moving papers are deficient.

Pursuant to CPLR 3215(f) "Default Judgment - Proof":

"On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party, ... Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney."

In addition, VTL § 253 "Service of summons on non-residents" provides, in relevant part, as follows:

"1. The use or operation by a non-resident of a vehicle in this state... shall be deemed equivalent to an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident

or collision in which such non-resident may be involved while using or operating such vehicle in this state ...

2. A summons in an action described in this section may issue in any court in the state having jurisdiction of the subject matter and be served as hereinafter provided. Service of such summons shall be made by mailing a copy thereof to the secretary of state at his office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of ten dollars, and such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested. **The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, an affidavit of compliance herewith, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail, in accordance with the rules and customs of the post-office department; or, if acceptance was refused by the defendant or his agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by or on behalf of the plaintiff that notice of such mailing and refusal was forthwith sent to the defendant by ordinary mail; or, if the registered or certified letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail ...** The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete when such papers are filed. The return receipt or other official proof of delivery shall constitute presumptive evidence that the summons mailed was received by the defendant or a person qualified to receive his certified mail or registered mail; and the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or his agent ... The court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action.” [emphasis added]

Plaintiff alleges that Defendant HERNANDEZ resides in Massachusetts. The moving papers are deficient, because Plaintiff failed to show that the pleadings were properly served upon HERNANDEZ in compliance with the provisions of the foregoing Vehicle and Traffic Law. For instance, it appears that Plaintiff did not file a copy of either a signed return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, or unclaimed. Plaintiff's process server alleges that the envelope is annexed as an exhibit, but it is not annexed. (See "Affidavit of Service" dated August 21, 2019, by Maiouchkina). Accordingly, the motion is denied, "as there is no indication that the mailing was actually delivered or refused" (*Matos v Jacques*, 2015 WL 13720271 [Sup Ct, Bronx County, Brigantti, J]; See *Braderman v Keitz*, 13 AD3d 205 [1st Dept 2004]).

Plaintiff's Motion to Amend

Plaintiff's motion for leave to supplement the Summons and amend the Complaint to add TIMOTHY BURNS as a party Defendant is granted, without opposition. (See CPLR R 305 "Summons; Supplemental Summons, amendment" and CPLR 3025[b]).

CPLR 3025(b) "Amendments and supplemental pleadings by leave" provides that:

"A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party (see CPLR 3025 [b])" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]).

This shall be effectuated by Plaintiff's filing, and serving upon all parties, the Supplemental Summons, and Amended Verified Complaint, within sixty (60) days from the date of the entry of this Order, with the corrected caption. (See CPLR 3012(e) "Service of pleadings"). The new caption in this case shall read as follows:

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

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BAHODUR SODIKZODA,

Plaintiff,

-against-

Index No.: 27715/2019E

**ERIK HERNANDEZ, LIBERTY COCA-COLA BEVERAGES,
LLC, ADRIAN ZEQRIRI, BESARTA ZEQRIRI, and TIMOTHY
BURNS,**

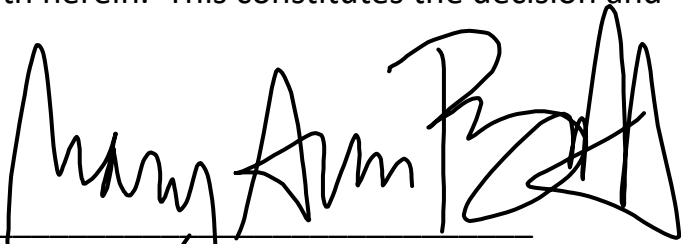
Defendants.

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Accordingly, the Plaintiff's motion for a default judgment as against Defendant ERIK HERNANDEZ is denied, without prejudice; and the Plaintiff's

motion to amend the pleadings to add TIMOTHY BURNS as a party Defendant is granted, without opposition, as set forth herein. This constitutes the decision and order of this Court.

Dated: 5/4 2020



HON. MARY ANN BRIGANTTI, JSC