

Williams v Ortiz

2020 NY Slip Op 32257(U)

May 26, 2020

Supreme Court, Queens County

Docket Number: 718052/18

Judge: Janice A. Taylor

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This opinion is uncorrected and not selected for official publication.

Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

5/27/2020

3:49 PM

Present: HONORABLE JANICE A. TAYLOR
Justice

IAS Part 15

COUNTY CLERK
QUEENS COUNTY

-----x
VICTORIA WILLIAMS,

Plaintiff(s),

Index No.:718052/18

Motion Date:2/11/20

- and -

Motion Cal. No.:
54, 55

Motion Seq. No:1, 2

RICHARD ORTIZ,

Defendant(s).

-----x

The following papers numbered 1 - 14 read on this motion by plaintiff for an order granting a default judgment against defendant and setting this matter down for an inquest hearing. Defendant submits a separate motion for an order dismissing the plaintiff's complaint as against him.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Notice of Motion-Affirmation-Exhibits-Service.....	8 - 11
Affirmation in Opposition-Exhibits-Service.....	12 - 14

This court *sua sponte* modifies its order dated May 14,2020. Upon the foregoing papers it is ordered that these motions are consolidated for purposes of disposition and are determined as follows:

The instant action is the second of two actions commenced by plaintiff to recover for personal injuries allegedly sustained as a result of a motor vehicle accident on December 24, 2015. Plaintiff previously filed an action against defendant based on the same motor vehicle accident and injuries on March 18, 2016 in Supreme Court, Queens County, under index no. 3321/2016 (Action 1). Issue was joined by defendant by service of an answer on May 25, 2016. Action 1 was transferred to Civil Court, Queens County in August 2017 and assigned Civil index no. 300584/2017.

In Action 1, plaintiff failed to appear for a court date on June 11, 2018, and the matter was marked off the trial calendar. On June 26, 2018, plaintiff moved by order to show cause to restore the matter to the trial calendar, but such application was denied for failure to demonstrate good cause. On September 6, 2018, plaintiff moved by a second order to show cause to renew the prior motion to restore, but was again denied. Plaintiff's appeal of that order is pending.

Plaintiff commenced the instant action (Action 2) on November 26, 2018, and served the summons and complaint herein upon defendant on or about January 5, 2019.

CPLR 205(a) provides:

"If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

Insofar as Action 1 was marked off the trial calendar due to plaintiff's failure to appear in court, it was not a dismissal on the merits, and a new action arising from the same set of facts and based on the same claims is not barred by the doctrine of res judicata (see *Matter of Lindenwood Cut Rate Liqs., Ltd. v New York State Liq. Auth.*, 161 AD3d 1077 [2018]; *Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 891, 892 [2013]; *Morales v New York City Hous. Auth.*, 302 AD2d 571 [2003]). Moreover, insofar as plaintiff served the summons and complaint in this action upon defendant on January 5, 2019, and the time for answering or otherwise appearing in this action has long since expired, defendant's motion to dismiss is untimely (CPLR 320; CPLR 3211[e]; see *Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d

at 892). Thus, contrary to defendant's contention that the instant action must be dismissed pursuant to CPLR 3211(a)(4) because there are two pending actions involving the same parties for the same cause of action, defendant's motion warrants denial.

Turning to plaintiff's motion for a default judgment, a plaintiff is entitled to seek a default judgment in any action where the defendant has failed to appear, plead or proceed to trial (CPLR 3215). As stated previously, defendant's time to answer or otherwise appear in this action has expired and his motion to dismiss is untimely (CPLR 320; CPLR 3211[e]), and defendant has not sought an extension of time.

Here, plaintiff timely moved for default judgment and submits proof of proper service of the summons and complaint upon defendant, an affidavit from plaintiff constituting the facts of the claim, and proof of defendant's default (CPLR 3215[f]; see *Curra v Brunswick Hosp. Ctr., Inc.*, 161 AD3d 1042, 1043 [2018]; *Jing Shan Chen v R & K 51 Realty, Inc.*, 148 AD3d 689, 690 [2017]). To successfully oppose a motion for leave to enter a default judgment based on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for its delay and the existence of a potentially meritorious defense (see *id.*; *Vidal v 452 Wycoff Corp.*, 131 AD3d 600, 600 [2015]). Here, plaintiff claims did not realize he had been served with another lawsuit, and therefore did not notify his attorney, who avers that it did not become aware of Action 2 until plaintiff moved for a default judgment, and submits an affidavit to that effect. Such explanation does not constitute a reasonable excuse for the delay and is insufficient for purposes of defeating plaintiff's motion (see e.g. *Nationstar Mortgage, LLC v Ramnarine*, 172 AD3d 886, 886-887 [2019]; *Matter of Lawhorne v City of New York*, 133 AD3d 856, 857 [2015]; *General Motors Acceptance Corp. v Grade A Auto Body, Inc.*, 21 AD3d 447 [2005]).

Accordingly, plaintiff's motion for a default judgment against defendant is granted. Defendant's motion to dismiss is denied. It is hereby:

ORDERED, that plaintiff is to file a Note of Issue, proof of service of the Note of Issue, and proof of service of this order with notice of entry within sixty (60) days of the date herein, and it is further,

ORDERED, that plaintiff is to appear for an inquest hearing against defendant in the Trial Scheduling Part in Courtroom 25 on Friday, November 20, 2020 at 9:30 a.m.


FILED

5/27/2020

3:49 PM

Dated: May 26, 2020

**COUNTY CLERK
QUEENS COUNTY**



JANICE A. TAYLOR, J.S.C.

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