

Turcios v Elevations Holdings, LLC

2020 NY Slip Op 33078(U)

September 10, 2020

Supreme Court, Kings County

Docket Number: 507468/2016

Judge: Richard J. Montelione

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 KINGS: PART DJMP

-----X
ROSBIN A. HERRERA TURCIOS,

Plaintiff,

-against-

ELEVATIONS HOLDINGS, LLC, O.A.R. COLUMBIA
CONSTRUCTION CORP., and FRANCISCO B.
BORGES,

Defendants.
-----X

Decision and Order

Index No. 507468/2016

Cal. No.

Mot. Seq. 02

Date: SEP 10 2020

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers Numbered

Plaintiff's Notice of Motion dated February 10, 2020 for consolidation and other relief; Attorney Affirmation of David S. Dender, Esq., affirmed on February 10, 2020; Exhibit A-Summons and Complaint, Index No. 507468/2016; Exhibit B-Verified Answer; Exhibit C-Order relieving counsel entered on 6/5/2018; Exhibit D-Final Pre-Note Order entered 8/9/2018 (indicates defendants did not appear); Exhibit E-Note of Issue (filed 8/15/2018); Exhibit F-Summons and Verified Complaint, Index No. 507468/2016; Exhibit G-Default Judgment entered 2/18/2020; Exhibit H-Note of Issue filed 2/18/2020; Exhibit I-Judgment After Inquest of \$1,526,850.00 entered 1/31/2018; Exhibit J-Summons and Complaint, Index No. 508635/2018; Exhibit K-Verified Answer, Index No. 508635/2018; Exhibit L-Default Judgment Order, entered on 1/25/2019, Index No. 508635/2018; Exhibit M-Order entered on 4/23/2019 relieving counsel from representing Boaz Gilad; Exhibit N-Order entered on 5/21/2019 consolidating Index No. 509797/2015 and Index No. 507468/2016 under Index No. 509797/2015; Exhibit O-Order entered 2/18/2020 referring matter to Inquest before a Referee, Index No. 509797/15.	1
---	---

MONTELIONE, RICHARD J., J.

Plaintiff's motion papers contained an incorrect double caption reflecting the disposed matter of *Rosbin A. Herrera Turcios v Elevations Holdings, LLC, O.A.R.*

Columbia Construction Corp., and Francisco B. Borges, under Kings County Index No. 507468/2016, the first caption, with the matter *Rosbin A. Herrera Turcios v 2142 Fulton LLC, Jrs Construction & Expediting Services, Inc., Arcol Contractor Corp., Elevation Holdings, LLC, O.A.R. Columbia Construction Corp., Francisco E. Borges, So Plumbing and Heating Inc., United Baptist Church, and Boaz Gilad*, under Kings County Index No. 509797/2015, the second caption. The second caption in plaintiff's motion papers involves two prior actions, respectively under index numbers 509797/2015 and 507468/2016 which were consolidated under 509797/2015. The second captioned matter is scheduled for an inquest sine die. All the actions under all the respective index numbers involve a work site accident that occurred on May 13, 2015 at 2142 Fulton Street located in Brooklyn, New York.

Plaintiff seeks to consolidate both actions under Index No. 507468/2016, to default defendants 2142 Fulton LLC and Boaz Gilad, and after consolidation to enter judgment against defendants 2142 Fulton LLC and Boaz Gilad for the amount of the judgment already entered under Index No. 507468/2016 because of common issues of law and fact.

CPLR 602(a) reflects the following:

(a) Generally. When actions involving a common question of law or fact *are pending before a court*, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (*Emphasis Added*).

Here, consolidation is no longer available because plaintiff is seeking to join a matter currently on the inquest calendar sine die with a matter already disposed of through the entry of a monetary judgment (Index No. 507468/2016). "Trial court did not abuse its discretion in denying defendant's motion to consolidate three different actions, where defendant did not move for consolidation until after plaintiff's action was scheduled for trial." *D. M. I. Painting, Inc. v. Eastern Long Island Hospital*, 74 A.D.2d 838, 425 N.Y.S.2d 633 (2d Dep't 1980). *See also* 73 A.L.R.2d 739, 5.

Regarding 2142 Fulton LLC and Boaz Gilad, plaintiff asserts in ¶ 27,

...numerous court appearances and activity has been conducted, and to date, said defendants...have neither retained new counsel nor appeared in any respect after the Orders relieving their respective Counsel. As a result, any doubt as to their status in this matter, must be clarified and an Order holding them in default is clearly warranted.

The plaintiff has not specified the default or indicated whether either of these defendants were given any notice of any court appearances *after their counsel was discharged* or the nature of the default. The court takes judicial notice that an Order dated April 18, 2019 relieving defendant Boaz Gilad's attorney (Index No. 508635/2018 which was consolidated under Index No. 509797/2015) scheduled a Preliminary Conference on July 9, 2019, but there is no indication as to what happened on July 9, 2019. It is not the court that must "clarify" the default but the plaintiff that must inform the court of the specific default. *See CPLR 3215, "(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."*

The court notes that its Order dated September 26, 2019 (Index No. 509797/2015) directs that the plaintiff serve a copy of the Order within seven days:

Plaintiff's motion to restore is granted on default. The matter is restored to the active trial calendar.

All parties to appear in JCP on 11/8/19 at 10AM.

Plaintiff to serve a copy of this Order on all parties within seven (7) days and to provide an affidavit of service to the court.

There is no affidavit of proof of service on all parties or any evidence that the defendants were notified of the JCP appearance scheduled for November 8, 2019 as required by the court's Order. Notwithstanding, on November 8, 2019, the court issued an Order directing that an Inquest be heard before a Judicial Hearing Officer.

Subsequently, the following Notice was issued by the Clerk of the Court:

PER JHO/REFERRAL ORDER DTD 11/8/19 AND SIGNED BY HON. KNIPEL, THIS MATTER IS SET DOWN FOR AN INQUEST ON JANUARY 15, 2020 @9:45AM ROOM 482, SPECIAL REFEREE PART82. IF YOU NEED AN INTERPRETER, YOU MUST CALL THE CLERK IN PART 82 BEFORE THE SCHEDULED DATE. FAILURE TO APPEAR MAY RESULT IN A DEFAULT. NO ADJOURNMENTS ARE GIVEN BY PHONE OR STIPULATION. PARTIES MUST APPEAR ON THE ABOVE DATE. DATED 12/09/2019 FILED

There appears to be no affidavits of service regarding the court's Order of November 8, 2019 or the Clerk's Notice of December 9, 2019. There is no evidence that these orders/notices were ever mailed or electronically sent to the defendants. The court takes judicial notice that neither of defendants' email addresses is within the court's NYCEF system under Index No. 509797/2015.

Based on the foregoing, regarding the plaintiff's request for relief, it is

ORDERED, that plaintiff's application to consolidate is denied as untimely; and it is further

ORDERED, that plaintiff's application to default defendants 2142 Fulton and Boaz Gilad is denied as moot given that this matter is scheduled for an inquest; and it is further

ORDERED, that plaintiff's application to apply collateral estoppel/res judicata effect to the "Judgment After Inquest" of the Honorable Devin P. Cohen dated July 5, 2017 under Index number 507468/2016 is granted if both defendants 2142 Fulton LLC and Boaz Gilad fails to appear by counsel or defendant Boaz Gilad fails to personally appear to contest damages and is denied in the event defendant 2142 Fulton LLC appears by counsel or defendant Boaz Gilad appears by counsel or personally appears; and it is further

ORDERED, that plaintiff's request to transfer this application or the pending Inquest in Part 82 to another Justice is denied; and it is further

ORDERED, that a copy of this decision and order be served by plaintiff upon the defendants 2142 Fulton LLC and defendant Boaz Gilad by certified mail,

return receipt requested, and first class mail, with notice of entry, within 15 days from the entry of this order, and plaintiff is to thereafter file the affidavits of service within 10 days.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY



Hon. Richard J. Montelione

SEP 10 2020

KINGS COUNTY CLERK
FILED
2020 SEP 16 AM 10:40