

<b>Rollins v Green Apple Tr. Inc.</b>
2020 NY Slip Op 33778(U)
November 6, 2020
Supreme Court, Kings County
Docket Number: 524859/2018
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
STEVEN A. ROLLINS,

Plaintiff,

-against-

GREEN APPLE TRANSIT INC., MOHAMMAD N.  
AKHTAR, GRAND LIMO & CAR SERVICE INC.,  
SHARIF A. LASKAR, TAXILAND BROKERAGE  
INC., JAMIL RAHMAN, THANVIR LASKAR AND  
JOHN DOE,

Defendants.  
-----X

Decision and Order

Index No. 524859/2018

Cal. No.

Mot. Seq. 1, 2, & 3

Date: NOV 6 2020

After oral argument by remote means, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

Plaintiff's Notice of Motion dated January 23, 2020 for an order pursuant to CPLR 3215 granting a default judgment to the plaintiff against defendants GREEN APPLE TRANSIT INCO, MOHAMMAD N. AKHTAR, GRAND LIMO & CAR SERVICE INC., SHARIF A LASKAR, TAXILAND BROKERAGE INC., JAMIL RAHMAN, THANVIR LASKAR and JOHN DOE.; Attorney Affirmation of John A. Ardito, Esq., affirmed on January 23, 2020; Affidavit of Steven A. Rollins, sworn to on January 22, 2020;		
Exhibits		
A	Summons and verified complaint; dated December 10, 2018	
B	Supplemental Summons dated January 21, 2019 and verified complaint;	
C	Affidavits of Service;	
D	Affidavits of Service;	1
Plaintiff's Notice of Motion dated April 22, 2020 pursuant to CPLR 203 and 3025(b) to file and serve a second supplemental summons and second amended verified complaint; pursuant to CPLR 3025(b) to amend the caption to correctly name the Defendant "JOHN DOE" as "LO TSEPAK s/h/a JOHN DOE"; pursuant to CPLR 203(b) that all claims against LO TSEPAK s/h/a JOHN DOE be deemed timely served nunc pro tunc to the time of filing of plaintiff's summons and verified complaint and supplement Summons and Amended Verified Complaint; Attorney Affirmation of John A. Ardito, Esq., affirmed on April 22, 2020;		
Exhibits		

A	Affidavit of Steven A. Rollins, sworn to on April 14, 2020;	
B	Uncertified Accident Report;	
C	Affidavit from Lo Tsepak, sworn to on April 11, 2016;	
D	Summons and Verified Complaint; verified December 10, 2018;	
E	Supplemental Summons and Amended Verified Complaint, verified January 21, 2019;	
F	Affidavits of service;	
G	Affidavit of service;	
H	Limited Stipulation dated February 21, 2020;	
I	Amended verified answer, bill of particulars and combined demands, dated February 27, 2020;	
J	Letter dated March 24, 2020 from Ardito, Esq. to Supreme Court;	2
K	Second Supplemental Summons, dated April 1, 2020;	
Defendant Green Apple Transit Inc.'s Attorney affirmation of John P. McEvoy, affirmed on June 5, 2020, in opposition to the plaintiff's motion to amend the caption to reflect Lo Tsepak as a party defendant on the basis that the statute of limitations has run.		3
Plaintiff's Attorney affirmation of John A. Ardito, Esq., affirmed on June 8, 2020, in Reply.		4
Defendants' Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, Thanvir Laskar (all the alleged drivers) Cross-Motion to dismiss under CPLR 3211(a)(7) and 3211(a)(10)		
Exhibits		
A	Letter from American Transit Insurance Company dated February 21, 2020 to Mohammad Akhtar, Sharif A. Laskar, Thanvir Laskar and Jamil Rahman;	
B	Affidavit of Mohamad N. Akhtar, sworn to on March 4, 2020;	
C	Certificate of Liability Insurance effective March 1, 2015 through March 1, 2016;	
D	Police Accident Report dated January 23, 2016 (uncertified);	
E	Affidavit of Lo Tsepak, sworn to on April 11, 2016;	5
Plaintiff's Attorney Affirmation of John A. Ardito, Esq., in opposition to Defendants' cross-motion (Defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, Thanvir Laskar) to dismiss and in further support of plaintiff's motion for default judgment;		
Exhibits		
A	Affidavit of Steven A. Rollins, sworn to on April 14, 2020;	
B	Page from NYS Department of State, Division of Corporations re: Green Apple Transit Inc, registered agent: Mohammad N. Akhtar;	
C	Plaintiff's Notice of Motion dated April 22, 2020; Affirmation in Support of John A. Ardito, Esq., affirmed on April 22, 2020	6
Defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, Thanvir Laskar Attorney affirmation in Reply of Jacob Marks, Esq., affirmed on July 28, 2020.		7

MONTELIONE, RICHARD J., J.

This action involves a vehicle accident where plaintiff claims he was injured. The plaintiff was in a for hire motor vehicle at the time. Plaintiff's initial

motion was for default judgment against defendants Green Apple Transit Inc., Mohammad N. Akhtar, Grand Limo & Car Service Inc., Sharif A Laskar, Taxiland Brokerage Inc., Jamil Rahman, Thanvir Laskar and “John Doe.” Plaintiff alleges that defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, and Thanvir Laskar were all drivers of the vehicle involved in his accident. Plaintiff’s subsequent motion was to amend the caption to correctly name the Defendant “John Doe” as “Lo Tsepak s/h/a John Doe,” pursuant to CPLR 203(b) and that all claims against Lo Tsepak s/h/a John Doe be deemed timely served *nunc pro tunc* to the time of filing of plaintiff’s summons and verified complaint and supplemental Summons and Amended Verified Complaint. It appears that all parties concede that Defendant Lo Tsepak s/h/a John Doe was in fact the driver of the vehicle with plaintiff as his passenger. Defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, Thanvir Laskar (all the alleged drivers) cross-move to dismiss under CPLR 3211(a)(7) and 3211(a)(10). Defendant Green Apple Transit Inc. opposes plaintiff’s motion to substitute Lo Tsepak for “John Doe” as time barred and essentially argues that to allow the amendment would constitute a prohibited extension of the three-year statute of limitations.

The standard for obtaining a default judgment is stated in *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 (2d Dept 2013), “(o)n a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant’s default (see CPLR 3215[f]).

Generally, as determined by the Court in *Archer v Motor Veh. Acc. Indem. Corp.*, 118 AD3d 5, 7-8 [2d Dept 2014], “[i]n the absence of a formal request to vacate its default, defendant may not seek affirmative relief” (2012 NY Slip Op 32568[U], [2012]).”

The Appellate Court in *Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d Dept 1990]), regarding the discretion of the court to order the amendment of a caption, stated:

CPLR 305 (c) authorizes the court, in its discretion, to ‘allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced’. This provision, and its predecessors, has been consistently interpreted as allowing a misnomer in the description of a party defendant to be cured by amendment, even after

the Statute of Limitations has run. Generally, such an amendment should be granted where (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought (*see, Stuyvesant v Weil*, 167 NY 421; *Simpson v Kenston Warehousing Corp.*, 154 AD2d 526; *Creative Cabinet Corp. v Future Visions Computer Store*, 140 AD2d 483; *Gajdos v Haughton Elevator*, 131 AD2d 428; *Yanni v Chopp*, 130 AD2d 489, 490-491; *Connor v Fish*, 91 AD2d 744; *Luce v Pierce Muffler Shops*, 51 Misc 2d 256, *affd* 28 AD2d 826; McLaughlin, 1988 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:4, 1990 Supp Pamph, at 193; Siegel, NY Practice § 65, at 66-67; 3 Carmody-Wait 2d, NY Prac §§ 19:11, 19:19).

Here, there is an affidavit of service reflecting “deponent served the within Summons and Verified Complaint/mandatory electronic filing notice upon ‘John Doe’ c/o Green Apple Transit, Inc.” on January 8, 2019. The affidavit of service also indicates a mailing of these documents on January 15, 2019. The complaint sufficiently describes “John Doe” as the driver of the vehicle owned by Green Apple Transit, the vehicle involved in an accident that occurred on January 23, 2016 at approximately 3am. The affidavit of Lo Tsepak, sworn to on April 11, 2016 indicates that he was the cab driver of the vehicle owned by Green Apple Transit on that date and at that time. The plaintiff has shown proper service upon defendant “John Doe” because an adequate description of “John Doe” was made in the complaint: “John Doe” is the person driving the vehicle owned by Green Apple Transit on the date and at the time of the accident. An amendment of the caption does no more than reflect a party who has already been properly served albeit incorrectly named as “John Doe” in the caption. *See Thas v Dayrich Trading Inc.*, 78 AD3d 1163, 1165 [2d Dept 2010]), where the court set the standard for proper service upon a “John Doe,” “ ‘While CPLR 1024 allows a party who is ignorant of the name or identity of one who may properly be made a party to proceed by designating so much of his identity as is known, a summons served in a ‘John Doe’ form is jurisdictionally sufficient only if the actual defendants are adequately described and would have known, from the description in the complaint, that they were the intended defendants’ ” (*Lebowitz v Fieldston Travel Bur.*, 181 AD2d 481, 482, 581 NYS2d 302 [1992] [citation and internal quotation marks omitted]).

Defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, and Thanvir Laskar's motion to dismiss their default is denied because these defendants never requested that their default be vacated as part of their application (*see Archer v Motor Veh. Acc. Indem. Corp.*, 118 AD3d 5, 7-8 [2d Dept 2014]; unless the court lacks jurisdiction, a party in default may not ask for affirmative relief unless it moves to vacate the default (*see U.S. Bank N.A. v. Gonzalez*, 99 A.D.3d 694, 952 N.Y.S.2d 59 [2d Dept 2012]; *Holubar v. Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; *McGee v. Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2011]). The court is confident that the parties will stipulate to the discontinuance regarding these defendants to avoid further motion practice and its consequences where before the court is a complaint that is now known to contain materially false allegations regarding other alleged drivers of the vehicle owned by Green Apple Transit Inc. ("allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Maas v Cornell Univ.*, 94 NY2d 87, 91, 721 N.E.2d 966, 699 N.Y.S.2d 716 [internal quotation marks omitted]; *see Myers v Schneiderman*, 30 NY3d 1, 11, 62 N.Y.S.3d 838, 85 N.E.3d 57). (*Izmirligil v Steven J. Baum, P.C.*, 180 AD3d 767, 770 [2d Dept 2020]).

Based on the foregoing,

IT IS,

ORDERED that defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, and Thanvir Laskar's cross-motion, sequence #2 to dismiss, is denied; and it is further

ORDERED that plaintiff's motion for default judgment against defendants Mohammad N. Akhtar, Sharif A. Laskar, Jamil Rahman, and Thanvir Laskar's motion, sequence #1, is denied; and it is further

ORDERED that plaintiff's motion for default judgment, sequence #1, against defendant Green Apple Transit is withdrawn through stipulation; and it is further

ORDERED that plaintiff's motion for default judgment, sequence #1, against defendant Taxiland Brokerage Inc. is granted and the inquest regarding this defendant shall be held at time of trial; and it is further

ORDERED that plaintiff's motion to file and serve a second Supplemental Summons and Second Amended Verified Complaint, and to amend the caption to correctly name the defendant "John Doe" as "Lo Tsepak s/h/a John Doe," motion sequence #3, is granted and plaintiff may file and serve a second Supplemental Summons and Second Amended Verified Complaint and the clerk is directed to substitute the following for the above caption:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
STEVEN A. ROLLINS,

Plaintiff,

Index No. 524859/2018

-against-

GREEN APPLE TRANSIT INC., MOHAMMAD N. AKHTAR, GRAND LIMO & CAR SERVICE INC., SHARIF A. LASKAR, TAXILAND BROKERAGE INC., JAMIL RAHMAN, THANVIR LASKAR AND LO TSEPAK s/h/a JOHN DOE,

Defendants.

-----X

A copy of this order must be served by plaintiff on all sides within fifteen (15) days of the entry of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY

  
RICHARD J. MONTELINE, A.J.S.C.

NOV 6 2020

KINGS COUNTY CLERK  
FILED  
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