

Richiez v Rite Aid of N.Y., Inc.
2020 NY Slip Op 33843(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 160083/2019
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **IAS MOTION 56EFM**

Justice

-----X

EDITH RICHIEZ,

Plaintiff,

- v -

RITE AID OF NEW YORK, INC., LONG ISLAND BUILDING
MAINTENANCE PLUS, INC., ALL SEASON CLEANING
SERVICE OF LONG ISLAND, INC., JOSE BUSTILLO, doing
business as ALL SEASON CLEANING SERVICE,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26

were read on this motion to/for

JUDGMENT - DEFAULT

**DECISION + ORDER ON
MOTION**

In this action to recover damages for personal injuries, arising from a slip-and-fall accident inside a Rite Aid drug store, the plaintiff moves pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendants All Season Cleaning Service of Long Island, Inc. (ASCSLI), and Jose Bustillo, doing business as All Season Cleaning Service (together the ASCS defendants). The motion is granted, without opposition, the plaintiff may enter a default judgment against the ASCS defendants on the issue of liability, and the matter is set down for an inquest on the issue of damages against them, to be conducted at the same time as the trial against the remaining defendants.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of service of the summons and complaint upon the defaulting defendants, proof of the defendants' defaults, and proof of the facts constituting the claim (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas.*

Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

The affidavits of service that were filed by the plaintiff on January 28, 2020 (as to Bustillo) and July 7, 2020 (as to ASCSLI) establish that the ASCS defendants were served with process, as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]).

The plaintiff also established, through her attorney's affirmation, that the ASCS defendants have defaulted. ASCSLI, which was served by personal delivery of two copies of the summons and complaint to the Secretary of State (CPLR 311[a]; Business Corporation Law § 306) was obligated to answer or otherwise appear in the action within 30 days of service of the summons upon it (*see* CPLR 320[a], 3012[c]; *Jing Shan Chen v R&K 51 Realty, Inc.*, 148 AD3d 689, 690 [2d Dept 2017]; *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 173 [1st Dept 2005]), or by November 29, 2019, the first business day after the lapse of that period (*see* General Construction Law § 25-a). Bustillo was served with process by delivery of a copy of the summons and complaint to a person of suitable age and discretion at his usual place of abode, followed by the mailing of an additional copy of the summons and complaint to that address (CPLR 308[2]). Where this form of substituted service is employed, service is deemed to be completed when proof of service is filed, and the defendant has 40 days after service is completed to answer or otherwise appear (*see* CPLR 308[2]; 320[a]). Bustillo thus was obligated to answer or otherwise appear in the action on or before March 9, 2020, or the first business day (*see* General Construction Law § 25-a) following the expiration of that period. The affirmation of the plaintiff's attorney demonstrates that those defendants did not serve an answer to the complaint by those deadlines, or otherwise appear in the action, and establishes that they did not seek an extension of time to do so in accordance with CPLR 320(a).

With respect to the proof of the facts constituting the claim,

“CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts”

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; see *Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the “quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered” (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (see *id.*; *Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [2d Dept 1983]).

“Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default” (*Green v. Dolphy Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]; see *Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must “state a viable cause of action” (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating whether the plaintiff has fulfilled this obligation, the ASCS defendants, as the defaulting parties, are “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (see *Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]). Proof that the plaintiff has submitted “enough facts to enable [the] court to determine that a viable” cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; see *Gray v Doyle*, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant’s liability (see CPLR

105[u]; *Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc.*, 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; see also *Michael v Atlas Restoration Corp.*, 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522 [2d Dept 2005]; see generally *Mitrani Plasterers Co., Inc. v SCG Contr. Corp.*, 97 AD3d 552, 553 [2d Dept 2012]).

The plaintiff submits a detailed affidavit describing how the floor surface on which she slipped and fell at a Rite Aid drug store was over-waxed and dangerous, and that the ASCS defendants were the parties responsible for the waxing. “Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (see *id.* at 140). Nonetheless,

“[a] contractor may be said to have assumed a duty of care and, thus, be potentially liable in tort, to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm”

(*Bruce v Edgewater Indus. Park, LLC*, 169 AD3d 753, 754 [2d Dept 2019]; see *Union v Excel Commercial Maintenance*, 185 AD3d 869, 869 [2d Dept 2020]). “A defendant may not be held liable for the application of wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge that the product could render the floor dangerously slippery” (*Faiella v Oradell Constr. Co., Inc.*, 171 AD3d 1013, 1014 [2d Dept 2019]; see *Union v Excel Commercial Maintenance*, 185 AD3d at 869-870; *Walsh v Super Value, Inc.*, 76 AD3d 371, 372 [2d Dept 2010]). Here, the plaintiff provided proof of the facts underlying her allegations that the ASCS defendants were negligent in their application of wax by permitting the wax to be overapplied in a manner that created an overly slippery and dangerous condition, and leaving a residue of waxy buildup that was visible and apparent (see *Panagakos v Greek Archdiocese of N. & S. Am.*, 213 AD2d 336, 336-337 [1st Dept 1995]).

The defendants Rite Aid of New York, Inc. (Rite Aid), and Long Island Building Maintenance Plus, Inc. (LIBMP), separately submit attorneys' affirmations, in which they purport to join in the plaintiff's request for leave to enter a default judgment against the ASCS defendants, albeit only in connection with their own cross claims for contribution and indemnification against the ASCS defendants. Inasmuch as neither Rite Aid nor LIBMP formally made a separate motion for that relief, the court declines to exercise its discretion to entertain their informal applications (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-65 [2d Dept 2013]).

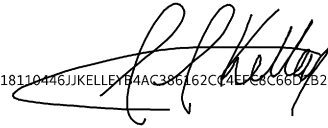
In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted, without opposition, and she is granted leave to enter a default judgment on the issue of liability against the defendants All Season Cleaning Service of Long Island, Inc., and Jose Bustillo, doing business as All Season Cleaning Service, on the cause of action to recover for negligence; and it is further,

ORDERED that the matter is set down for an inquest to assess damages, and the hearing shall be conducted at the same time as the trial against the remaining defendants; and it is further,

ORDERED that the plaintiff shall serve a copy of this order, with notice of entry, upon the defendants All Season Cleaning Service of Long Island, Inc., and Jose Bustillo, doing business as All Season Cleaning Service, by regular first-class mail within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.



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11/18/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE