

Hammond v Equinox Holdings LLC

2020 NY Slip Op 35590(U)

October 21, 2020

Supreme Court, New York County

Docket Number: Index No. 155061/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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STEVEN HAMMOND,

Plaintiff,

- v -

EQUINOX HOLDINGS LLC D/B/A EQUINOX FITNESS CLUB D/B/A EQUINOX, EQUINOX WALL STREET INC., AND MICHAEL ALEXANDER,

Defendants.

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INDEX NO. 155061/2019
MOTION DATE
MOTION SEQ. NO. 004, 005, 006

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 99-118, 164, 167; (Motion 005) 121-153, 161-163, 166; (Motion 006) 154-157, 169-172

were read on this motion to/for REARGUMENT/DISMISS

By order dated October 5, 2020, this court issued a decision on these motions. By letter dated October 9, 2020, plaintiff Hammond informed that in the October 5, 2020 decision, the court accidentally transposed the name of the plaintiff Steven Hammond and the individual defendant Michael Alexander. Accordingly, the October 5, 2020 decision is amended to correct this error and replace the term "defendant Hammond" with "defendant Alexander" as follows:

Plaintiff Steven Hammond commenced this action after his fitness club membership was terminated in May 2018, when defendant Michael Alexander reported that plaintiff had allegedly engaged in lewd behavior in the gym's steam room. In his complaint, plaintiff asserts causes of action for defamation, negligence, breach of contract, negligent hiring and supervision, and negligent infliction of emotional distress. By order dated April 24, 2020, this court granted defendants Equinox Holdings LLC d/b/a Equinox Fitness Club d/b/a Equinox, and Equinox Wall Street Inc. (together "Equinox Defendants") motion to dismiss the complaint. In the same order, the court denied plaintiff's motion for a default judgment against defendant Alexander and

denied defendant Alexander's motion to dismiss based on plaintiff's failure to timely serve defendant with the summons and complaint. In motion #004, plaintiff moves pursuant to CPLR 2221 to reargue the Equinox Defendants' motion to dismiss, which was granted pursuant to the April 24, 2020 order. In motion #005, plaintiff moves pursuant to CPLR 2221 to reargue his motion for a default judgment against defendant Alexander, which was denied pursuant to the April 24, 2020 order. In motion #006, defendant Alexander moves pursuant to CPLR 3211 to dismiss the complaint asserted against him based on the rulings in the April 24, 2020 order concerning the Equinox Defendants. The motions are consolidated for purposes of this decision.

With respect to plaintiff's motion to reargue the Equinox Defendants' motion to dismiss, this motion must be denied. As articulated by the Equinox Defendants in their opposition to the motion to reargue, plaintiff has failed to show that the court overlooked or misapprehended any law or facts in its prior decision, as required under CPLR 2221. Rather, plaintiff seeks merely to relitigate arguments that were already considered and rejected by the court or to raise new arguments, which is improper. *Setters v. AI Prop. and Dev. Corp.*, 139 A.D.3d 492 (1st Dep't 2016) ("Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted"). Accordingly, the motion must be denied.

However, with respect to the motion to reargue plaintiff's motion for a default judgment against defendant Alexander, this motion must be granted and a default judgment entered against him. Although plaintiff admittedly never personally served defendant Alexander with the summons and complaint pursuant to CPLR 308, personal service was effectuated pursuant to CPLR 320(b) as a result of the notice of appearance filed by defendant Alexander's attorney on May 23, 2019. *See Divito v. Fiandach*, 160 A.D.3d 1404, 1405 (4th Dep't 2018). Defendant

Alexander had twenty days from that date to serve an answer or to move to dismiss. *Id.*; *see also Deutsche Bank Nat'l Trust Co. v. Hall*, 185 A.D.3d 1006, 1009-1010 (an appearance by defendant, whether formal or informal, does not relieve defendant of its obligation to thereafter timely file an answer or a motion to dismiss); *U.S. Bank N.A. v. Slavinski*, 78 A.D.3d 1167, 1167 (2d Dep't 2010); *but see Tsionis v. Eriora Corp.*, 123 A.D.3d 694, 696 (2d Dep't 2014) (defendant was not required to serve an answer after filing its notice of appearance where the complaint did not set forth any allegations that the defendant was required to defend against). Defendant Alexander failed to do so and failed to provide any explanation for his default. Thus, the motion for a default judgment against defendant Alexander should have been granted. In light of this ruling, defendant Alexander's motion to dismiss must be denied as moot.

Accordingly, it is

ORDERED that plaintiff's motion to reargue the Equinox Defendants' motion to dismiss is denied (motion #004); and it is further

ORDERED that plaintiff's motion to reargue its motion for a default judgment against defendant Alexander is granted (motion #005), and upon reargument, the motion for a default judgment against defendant Alexander is granted on liability; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk*

Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that defendant Alexander’s motion to dismiss is denied (motion #006).

10-21-20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE