

Mesaldi v RXR Constr. & Dev. LLC
2021 NY Slip Op 31306(U)
April 20, 2021
Supreme Court, New York County
Docket Number: 150038/2017
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY

PART IAS MOTION 23EFM

Justice

-----X

GERARDO MESALDI,
Plaintiff,

INDEX NO. 150038/2017

MOTION DATE February 16, 2021

- v -

MOTION SEQ. NO. 003 004

RXR CONSTRUCTION & DEVELOPMENT LLC, 75 PLAZA
LLC,
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

RXR CONSTRUCTION & DEVELOPMENT LLC, 75 PLAZA
LLC
Plaintiff,

Third-Party
Index No. 595758/2019

-against-

ALL STATE INTERIOR DEMOLITION INC.
Defendant.

-----X

RXR CONSTRUCTION & DEVELOPMENT LLC, 75 PLAZA
LLC
Plaintiff,

Second Third-Party
Index No. 595676/2020

-against-

UNITED INTERIOR RENOVATIONS, LLC
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for JUDGMENT - DEFAULT

In this action, Plaintiff Gerardo Mesaldi (“Plaintiff”) alleges that he suffered personal injury due to the negligence of Defendants RXR Construction & Development LLC and 75 Plaza LLC (“Defendants”). In motion sequence 003, the Defendants move to strike the complaint for Plaintiff’s failure to provide discovery or for an order compelling Plaintiff to serve duly executed HIPPA authorizations in response to defendants’ discovery demands. In motion sequence 004, the Defendants move for a default judgment against second third-party Defendant United Interior Renovations, LLC (“United”), or, in the alternative, for an inquest of damages at the time of trial. The motions are hereby consolidated for disposition.

Motion sequence 003

Motion sequence 003 is resolved as moot, as the outstanding authorizations have now been provided to Defendants. (NYSCEF Doc Nos. 84, 85.) Plaintiff’s time to file the Note of Issue is extended to September 30, 2021 and the parties are directed to cooperate to schedule additional discovery, including depositions at a time and place convenient to the parties, considering the continued health crisis. Accordingly, motion sequence 003 is denied.

Motion sequence 004

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant’s default in answering or appearing. (*SMROF II 2012-1 Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) “Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists.” (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, New York County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Here, Defendants submit proof that United was properly served pursuant to § 303 of the Limited Liability Company Law on August 25, 2020, when a process server delivered two true copies of the second third-party summons and complaint to the New York Secretary of State. (NYSCEF Doc No. 93.) Defendants also submit a September 24, 2020 letter stating that they mailed a second copy of the second third-party summons and complaint to United and a January 29, 2021 affidavit of service demonstrating service of the motion papers for this motion for default judgment. (NYSCEF Doc Nos. 94, 95.) To date, United has failed to appear in this action.

Additionally, Defendants submit an affirmation in support of LaWanda Geter, Defendants' attorney. (NYSCEF Doc No. 88.) However, despite United's failure to appear, the court finds that the affirmation in support is insufficient to support entry of default judgment on Defendants' claims against United.

While a defendant in default is deemed to have admitted all traversable allegations in the complaint (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Browny Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), "CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has 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" (*Feffer v Malpeso*, 210 AD2d 60, [1st Dept 1994]. As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exist (*Woodson*, supra at 70-72).

(*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].)

Here, Defendants merely provide a procedural history of the case without providing proof of the merits of the alleged claims. Accordingly, the motion for default judgment is granted only to the extent that United's default to appear in this action is noted. All issues regarding United's liability and damages are to be decided at an inquest held at the time of trial. Thus, it is hereby

ORDERED that motion sequence 003 is denied as moot; and it is further

ORDERED that motion sequence 004 for default judgment against third party Defendant United Interior Renovations, LLC is hereby granted to the extent that United's failure to appear is noted; and it is further

ORDERED that the degree of liability of United and the damages attributable to United are to be decided at an inquest which will be held at the time of trial; and it is further

ORDERED that counsel for the parties are directed to confer with one another by telephonic or electronic means and promptly thereafter send a joint e-mail message to the clerk of Part 23 advising whether a status conference is necessary to schedule additional discovery.

04/20/21
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: