

Perez v Jackson

2021 NY Slip Op 31463(U)

April 28, 2021

Supreme Court, New York County

Docket Number: 158814/2020

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

BENEDICTO PEREZ,

Plaintiff,

- v -

CURTIS JACKSON, CURTIS JACKSON, also known as
TIMCO DAVILLE, and JOHN DOES 1- 4, SAID NAMES
BEING FICTITIOUS PARTIES INTENDED AS BEING
AGENTS OR EMPLOYEES OF CURTIS JACKSON

Defendants.

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INDEX NO. 158814/2020
MOTION DATE 01/15/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover damages, inter alia, for assault, battery, negligent hiring, negligent and intentional infliction of emotional distress, and negligence, the plaintiff moves pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendants Curtis Jackson, also known as Timco Daville, and John Does 1-4. Jackson opposes the motion. The motion nonetheless is granted to the extent that the plaintiff may enter a default judgment against Jackson on the issue of liability on the causes of action to recover for assault and battery, the motion is otherwise denied, and the matter is set down for an inquest on the issue of damages on those causes of action. The action is dismissed as against the fictitious defendants, John Does 1-4.

The plaintiff commenced this action on October 20, 2020 by filing a summons and complaint, pursuant to which he sought money damages, as well as an award of attorney's fees, to recover for assault (first and fifth causes of action), battery (first and sixth causes of action),

negligent hiring (second cause of action), negligent infliction of emotional distress (third cause of action), intentional infliction of emotional distress (fourth cause of action), punitive damages (seventh cause of action), and negligence (eighth cause of action). On December 1, 2020, the plaintiff purportedly served copies of the summons and complaint upon Jackson by delivering them to a male of suitable age and discretion at Jackson's dwelling place and usual place of abode, and thereafter mailing an additional copy to that address on December 2, 2020 in an envelope marked "personal and confidential" and not indicating that it was from an attorney or related to a lawsuit (see CPLR 308[2]). On December 3, 2020, the plaintiff filed proof of service in connection with the service of the summons and complaint.

On January 15, 2021, the plaintiff made the instant motion for leave to enter a default judgment, returnable on January 29, 2021. On that same date, the plaintiff caused a copy of the notice for default judgment and the motion papers to be served upon Jackson by regular mail. On February 18, 2021, in a separate proceeding in the Criminal Court, New York County, Jackson pleaded guilty to assault in the third degree in connection with the subject assault upon the plaintiff. On February 23, 2021, Jackson, by his attorney, served a notice of appearance, and uploaded papers in opposition to the plaintiff's motion to the New York State Court Electronic Filing (NYSCEF) system. In reply, the plaintiff contended that the opposition papers were not timely filed and, thus, should not be considered.

The plaintiff correctly argues that Jackson's opposition papers were not timely filed.

CPLR 2214(b) provides that:

"A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time."

In connection with the pending motion, the plaintiff provided Jackson with 14 days notice.

Hence, to be timely, Jackson was obligated to serve opposition papers 2 days before the

January 29, 2021 return date, or by January 27, 2021. Instead, Jackson served his opposition papers on February 23, 2021, or 27 days after the expiration of the statutory deadline.

Although a de minimis delay in the service of opposition papers might be excused (see *Dinnocenzo v Jordache Enters.*, 213 AD2d 219 [1st Dept 1995] [one or two-day delay]), for the court properly to consider opposition papers that are significantly late, the delinquent party must provide a valid excuse as to why the papers were late (see *Nakollofski v Kingsway Props., LLC*, 157 AD3d 960, 961 [2d Dept 2018]; *Bush v Hayward*, 156 AD2d 899, 901 [3d Dept 1989]; *Risucci v Zeal Mgt. Corp.*, 258 AD2d 512, 512 [2d Dept 1999] [motion court providently exercised its discretion in declining to consider late papers where delinquent party provided no excuse for delay, even where there was no showing of prejudice to movant]). In this case, the opposition papers that Jackson submitted did not provide any excuse whatsoever as to why his opposition to the plaintiff's motion was late, providing only a purported explanation as to why he did not timely answer the complaint in the first instance. Furthermore, in his February 18, 2021 affidavit, Jackson conceded to having received a copy of the plaintiff's motion papers in the mail in a timely fashion, and acknowledged the return date of the motion, although he incorrectly denoted it as January 29, 2020 instead of January 29, 2021. Notwithstanding that acknowledgment, Jackson "never applied for an extension" of time to submit papers (*Rivers v Butterhill Realty*, 145 AD2d 709, 710 [3d Dept 1988]), did not ask the plaintiff to stipulate to adjournment of the return date, and unilaterally filed his opposition papers on February 23, 2021 without court approval.

Hence, the court declines to consider Jackson's late papers filed in opposition to the plaintiff's motion for leave to enter a default judgment.

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 defendant, proof of the facts constituting the claim, and proof of the defendant's default (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 affidavit of service that was filed by the plaintiff establishes that Jackson was served with process in accordance with CPLR 308(2), as a process server's affidavit of service constitutes prima facie evidence of proper service (see *Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]).

The plaintiff also established through his attorney's affirmation that Jackson has defaulted. Jackson was obligated to appear, answer, or move with respect to the complaint by January 13, 2021, or within 30 days after proof of service upon him was completed, a date defined by the CPLR as 10 days after the proof service referable to him was filed (see CPLR 308[2]; 320[a]). The affirmation of the plaintiff's attorney demonstrates that Jackson did not serve a notice of appearance, an answer, or motion papers directed to the complaint (see CPLR 320[a]) by that deadline, nor did Jackson seek an extension of time to do so in accordance with CPLR 3012(d).

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 defendant, as the defaulting party, is “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 his own affidavit describing the alleged assault and battery upon him. As he explained it, on October 20, 2019, Jackson “punched me in the face without my consent and without any justification.” The plaintiff further alleged that, as a result of the event

that transpired, he has suffered “grievously serious injuries and was hospitalized” for several days.

To avoid a default judgment, Jackson must show both a reasonable excuse for his default in answering or appearing and a potentially meritorious defense (*see PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646-647 [1st Dept 2020]; CPLR 3012[d]), and support his assertions through the submission of an affidavit (*see Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]). In fact, a reasonable excuse is required in order for the court even to consider whether a potentially meritorious defense exists (*see Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 790 [2d Dept 2011]). The determination of what constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court (*see Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]).

In connection with the instant motion, Jackson explains that he has a reasonable excuse for failing timely to answer or appear because was never properly served with the summons and complaint. Specifically, Jackson asserts that it would have been impossible for a process server to deliver process to a male of suitable age and discretion at his apartment because only he and his girlfriend occupy the unit. Jackson asserts that the court consequently does not have personal jurisdiction over him, and that he actually did not default in answering the complaint. Inasmuch as the court declines to consider this explanation because it was set forth only in Jackson’s late opposition papers, Jackson may not rely on it either as his “reasonable excuse” for failing timely to answer the complaint or appear in this action, or as his potentially meritorious defense to the action.

In any event, contrary to Jackson’s affidavit, in the course of a February 18, 2021 proceeding in the Criminal Court, New York County, at which he pleaded guilty to assault in the third degree in connection with his attack upon the plaintiff, Jackson’s criminal defense counsel admitted that Jackson was a party to this litigation:

“Mr. Corozzo: Your Honor, may I request a small addendum to that? Mr. Perez is suing Mr. Jackson in the New York County court system. *I have a summons, Index Number 158814 of 2020.* And, obviously, there might be some contact, whether it's through virtual appearances or court appearances or depositions, so I'd request that that contact be allowed, as long as it's pursuant to *Benedicto Perez against Curtis Jackson, pending in New York County Court*”

(emphasis added). When asked by the Criminal Court if he understood that the order of protection entered against him permitted incidental contact with the plaintiff in connection with this litigation, Jackson answered in the affirmative. Hence, even if the court considered Jackson's opposition papers, Jackson's alleged excuse for defaulting in answering or appearing contradicts his prior sworn testimony, and he will not be relieved of his default since he cannot show a reasonable excuse as to why he defaulted in appearing in this action.

Although it is thus unnecessary for this court to consider whether Jackson can demonstrate a potentially meritorious defense to the substance of the complaint (see *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d at 790), the court agrees with the plaintiff that Jackson would be unable to demonstrate a potentially meritorious defense to several of the causes of action asserted here. As the plaintiff points out, Jackson pleaded guilty to assaulting him. Thus, even were the court to consider his affidavit, Jackson's additional contention that he could assert defenses to assault and battery on the grounds of provocation and self-defense also cannot be considered potentially meritorious.

Although Jackson is deemed to have admitted all factual allegations against him and the reasonable inferences that flow therefrom (see *Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]; *HSBC Bank USA, N.A. v Simms*, 163 AD3d 930, 932-933 [1st Dept 2018]; *Nationstar Mtge., LLC v Hilpertshouser*, 156 AD3d 1052, 1053 [3d Dept 2017]), he has filed a notice of appearance, and he thus is entitled to notice of the inquest, “to appear and cross-examine the plaintiff's witnesses, and to offer testimony upon the question of damages” (*Yeboah v Gains Serv. Leasing*, 250 AD2d 453, 453 [1st Dept 1998]; see *Reynolds Secur., Inc. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572

[1978]; *Santiago v Siega*, 255 AD2d 307 [2d Dept 1998]). In the court's discretion, it directs the plaintiff to serve a copy of this order with notice of entry upon Jackson by regular, first-class mail, as well as by electronically uploading the notice of entry.

The court concludes that the plaintiff is entitled to enter a default judgment against Jackson on the issue of liability on the causes of action to recover for assault and battery, but not on any of the other causes of action.

In order to sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact (see *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 829 [2d Dept 2015]; *Gabriel v Scheriff*, 115 AD3d 791, 792 [2d Dept 2014]). The elements of a cause of action to recover damages for battery are intentional bodily contact that is offensive in nature (see *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d at 829; *Cerilli v Kezis*, 16 AD3d 363, 364 [2d Dept 2005]). The intent required to establish a battery is "intent to cause a bodily contact that a reasonable person would find offensive" (*Jeffreys v Griffin*, 1 NY3d 34, 41, n 2 [2003] [internal quotation marks omitted]). In this action, the plaintiff has made a prima facie showing that Jackson committed both an assault and a battery upon him. Moreover, where, as here, "a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from relitigating the issue of his liability" (*Maiello v Kirchner*, 98 AD3d 481, 482 [2d Dept 2012] [internal quotation marks omitted]). Jackson is thus collaterally estopped from relitigating the issue of whether he committed an assault and battery upon the plaintiff (see *Launders v Steinberg*, 39 AD3d 57, 64-65 [1st Dept 2007]). Hence, the plaintiff is entitled to enter a default judgment against Jackson on the first, fifth, and sixth causes of action.

The tort of intentional infliction of emotional distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv)

severe emotional distress” (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]; see *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Nonetheless, the plaintiff’s cause of action alleging intentional infliction of emotional distress is duplicative of the causes of action alleging assault and battery (see *Leonard v Reinhardt*, 20 AD3d 510, 510 [2d Dept 2005]), as the doctrine of liability for intentional infliction of extreme emotional distress generally is inapplicable where the conduct complained of falls well within the ambit of other traditional tort liability (see *Fischer v Maloney*, 43 NY2d 553, 558 [1978]). Hence, the plaintiff is not entitled to a default judgment on the issue of liability as against Jackson on the fourth cause of action.

Where, as here, an employee is alleged to be acting within the scope of his or her employment, an employer can be held liable under the theory of respondeat superior and, under those circumstances, a claim cannot be asserted to recover for negligent hiring (see *Coville v Ryder Truck Rental*, 30 AD3d 744, 745 [3d Dept 2006]). An exception is recognized where the plaintiff can make a showing of gross negligence in the hiring of the employee (see *id.*). In this case, the plaintiff has failed to make such a showing. In any event, the plaintiff has submitted no proof that Jackson knew or should have known of his employees’ alleged violent propensities, a showing that is necessary to sustain a cause of action to recover for negligent hiring (see *Judith M. v Sisters of Charity Hosp.*, 93 NY2d at 933; *N. X. v Cabrini Med. Ctr.*, 280 AD2d 34, 40 [1st Dept 2001]; *Rodriguez v United Transp. Co.*, 246 AD2d 178, 181 [1st Dept 1998]). Consequently, the plaintiff is not entitled to enter a default judgment against Jackson on the issue of liability on the second cause of action, which seeks to recover for negligent hiring.

To establish common-law negligence, a plaintiff must prove that the defendant owed him a duty of care and breached that duty, and that the breach proximately caused his injuries (see *Solomon v City of New York*, 66 NY2d 1026 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [1st Dept 2001]). The complaint alleges that Jackson owed the plaintiff a duty of care and breached said duty, thereby resulting in his injuries. The allegations that Jackson assaulted and battered the plaintiff, however, defeat his claim that Jackson was negligent, since

New York does not recognize a cause of action to recover for “negligent assault” (see *Johnson v City of New York*, 148 AD3d 1126 [2d Dept 2017]; *Smiley v North Gen. Hosp.*, 59 AD3d 179 [1st Dept 2009]). Rather, the causes of action to recover for assault and battery are intentional torts inconsistent with an allegation of negligence (see *Allstate Ins. Co. v Mugavero*, 79 NY2d 153 [1992]; *Sphere Drake Ins. Co. v 72 Centre Ave. Corp.*, 238 AD2d 574 [2d Dept 1997]).

With respect to the cause of action to recover for negligent infliction of emotional distress

“[i]t is well-settled that a person ‘to whom a duty of care is owed . . . may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations’ (*Johnson v State of New York*, 37 NY2d 378, 381 [1975] [citations omitted]). A breach of the duty of care ‘resulting directly in emotional harm is compensable even though no physical injury occurred’ (*Kennedy v McKesson Co.*, 58 NY2d 500, 504 [1983]) when the mental injury is ‘a direct, rather than a consequential, result of the breach’ (*id.* at 506) and when the claim possesses “some guarantee of genuineness’ (*Ferrara v Galluchio*, 5 NY2d 16, 21 [1958])”

(*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008]). Nonetheless, for the same reasons underlying the dismissal of the negligence cause of action, the cause of action to recover for negligent infliction of emotional distress cannot stand, as it is inconsistent with the intentional torts that are the crux of this action. Therefore, the plaintiff is not entitled to enter a default judgment against Jackson on the issue of liability on the third and eighth causes of action.

New York does not recognize the right to assert an independent cause of action to recover punitive damages (see *Rivera v City of New York*, 40 AD3d 334, 344 [1st Dept. 2007]). Hence, the seventh cause of action, which seeks to recover punitive damages, must be dismissed for failure to state a cause of action. At the inquest, however, the plaintiff may seek to establish that Jackson’s conduct was not only intentional, but “evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations” (*Walker v Sheldon*, 10 NY2d 401, 405 [1961]; see *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]; *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613,

[1994]; *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 57-58 [1st Dept 2015]), so as to entitle the plaintiff to an award of punitive damages.

The court notes that, although the plaintiff made a prima facie showing that Jackson committed an assault and a battery upon him, he has yet to identify the remaining defendants, John Does 1-4, or serve them with process. Consequently, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against those fictitious parties (*see generally Fountain v Ocean View II Assocs., L.P.*, 266 AD2d 339 [2d Dept 1999]), he is not entitled to enter a default judgment against John Does 1-4 on any causes of action, and the complaint must be dismissed as to those defendants.

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that he is granted leave to enter a default judgment against the defendant Curtis Jackson, also known as Timco Daville, on the issue of liability on the causes of action to recover for assault and battery, as set forth in the first, fifth, and sixth causes of action, the motion is otherwise denied, the second, third, fourth, seventh, and eighth causes of action are dismissed insofar as asserted against that defendant, and the complaint is dismissed in its entirety insofar as asserted against the defendants John Does 1-4; and it is further,

ORDERED that, upon the plaintiff's filing of a note of issue and certificate of readiness in a nonjury action, the matter shall be set down for an inquest to assess damages before this court on June 23, 2021, at 9:30 a.m., or on any adjourned date fixed by the court, via the Microsoft Teams remote conference application, and the court shall send an e-mail invitation to counsel for all parties to participate in said inquest; and it is further,

ORDERED that the plaintiff shall serve a copy of this order, with notice of entry, upon the defendant Curtis Jackson, also known as Timco Daville, by regular first-class mail, and upon that defendant's attorney by electronically uploading those papers to the NYSCEF system, within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

4/28/2021

DATE


JOHN J. KELLEY, 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: