Davis v 574 Lafa Corp.
2021 NY Slip Op 33660(U)
March 16, 2021
Supreme Court, Queens County
Docket Number: Index No. 711374 2018
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice — IAS Part 14

PAUL DAVIS,
Plaintiff(s),

- against -

574 LAFA CORP., et ano.,
Defendant(s).

Index No. 711374 2018

Motion Date February 9, 2021

Motion Cal. No. 4

Motion Seq. No. 6

FILED
3/16/2021
COUNTY CLERK
QUEENS COUNTY

The following papers read on this motion by plaintiff for an order awarding him judgment by default against defendant Shantel Brown (Brown); and on this cross motion by Brown for an order (1) renewing her prior motion to dismiss the action; (2) renewing her opposition to plaintiff's motion to vacate the dismissal of this action; (3) dismissing the action pursuant to CPLR 3211 (a) (7); and (4) staying further proceedings pending the hearing and determination of her appeal.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF81-100
Notice of Cross Motion - Affirmation - Exhibits.....	EF101-103
Answering Affirmation - Exhibits.....	EF104-105
Reply.....	EF106

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This matter was reassigned to this Part, as having been originally assigned to Justice Richard G. Latin, who is temporarily sitting in Supreme Court, New York County.

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a dog attack that occurred on March 11, 2017 at the premises located at 1049 Hancock Street, Brooklyn, New York. The action was originally commenced against defendant 574 Lafa Corp. (574 Lafa) on July 24, 2018, and judgment by default against 574 Lafa was awarded to plaintiff by order dated August 22, 2019, and the matter was set down for inquest (Latin, J.).

On August 23, 2019, plaintiff then commenced an action against Brown in Supreme Court, Kings County, under Index No. 520854/2019, based upon the same incident. Per the process server's affidavit, sworn to on November 13, 2019, Brown was served with process on November 12, 2019 at the premises by affix and mail. The premises were specified as Brown's "last known place of residence." Per a second affidavit of service, sworn to on November 25, 2019, Brown was served with process on November 22, 2019 by affix and mail at the address known as 869 Flushing Avenue, Apartment 3H, Brooklyn, New York, same being Brown's place of residence. Both affidavits were e-filed on December 2, 2019.

By motion e-filed on December 26, 2019, Brown, by counsel, served and filed a motion to dismiss the Kings County action against her, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action against her. This was the only basis for dismissal. Plaintiff opposed the motion. The motion was adjourned several times, until it was eventually marked off calendar on July 21, 2020. Plaintiff's counsel presumes the motion was marked off the court's calendar on account of the consolidation of the two cases, discussed, *infra*.

Just prior to the making of that motion, plaintiff moved – in this action – to consolidate the two actions. The motion was granted by order dated February 24, 2020 (Latin, J.). By that order, the Kings County action was transferred to this court and consolidated for all purposes into this action. Further, the inquest against 574 Lafa was held in abeyance until the time of trial of the action.

On March 12, 2020, the action was dismissed pursuant to 22 NYCRR 202.27 for plaintiff's failure to appear for inquest in the Trial Scheduling Part (Silver, J.). However, by order dated September 14, 2020, plaintiff's motion to vacate that dismissal was granted, the court finding that plaintiff's non-appearance at the inquest was reasonable in light of the February 24, 2020 order holding said inquest in abeyance until after trial of the consolidated action (Latin, J.). Brown filed a Notice of Appeal of that order on October 1, 2020.

Counsel argues that, despite the fact that this action has been restored to active status and that Brown's motion to dismiss was marked off calendar, she has failed, to date, to serve an answer to the complaint or otherwise seek to vacate her default. By correspondence to defense counsel dated October 29, 2020, plaintiff's attorney advised of Brown's default, and

offered to accept an answer waiving jurisdictional defenses. It appears that the offer was rejected by correspondence dated November 3, 2020, and defense counsel stated that Brown was not, in fact, in default.

Plaintiff's counsel now moves for judgment by default against Brown. Counsel points out that, while Brown's motion to dismiss extended her time to answer the complaint, CPLR 3211 (f) states that a defendant will be in default if he or she fails to serve an answer within 10 days after notice of entry of an order denying the dismissal motion. Counsel has not uncovered any case law which deals with the marking off of a CPLR 3211 motion rather than a denial of one; however, counsel argues that it was defense counsel's obligation to stay abreast of the status of any motion he brought on Brown's behalf.

In terms of the proof of facts constituting the claim, plaintiff's counsel contends that the court has already ruled that plaintiff has demonstrated such facts and the merit of plaintiff's actions in both the order holding 574 Lafa in default and in the order vacating the dismissal of the consolidated action (which requires a showing of, inter alia, a potentially meritorious cause of action pursuant to CPLR 5015 [a] [1]). The proof upon which plaintiff has previously relied is again submitted on this motion.

Brown opposes the motion and cross-moves to, among other things, renew her pre-answer motion to dismiss. As a preliminary matter, defense counsel points out that the court, in deciding the motion to consolidate, ignored opposition papers filed on Brown's behalf and "mistakenly granted the motion as unopposed."[1] Defense counsel also points out – presumably in support of Brown's renewal of her opposition to plaintiff's CPLR 5015 motion – that the misunderstanding or misinterpretation by plaintiff's counsel of previous orders, which resulted in counsel's failure to appear for the scheduled inquest, is not a reasonable excuse for failure to miss a court date.

Defense counsel also argues that, in granting the order of consolidation, the caption was amended to include Brown as a defendant, which required plaintiff to file and serve an amended complaint which would reflect the new caption and would include allegations against both defendants. Counsel argues that, since an amended complaint was never filed, Brown simply cannot respond to the allegations as they exist under this Index No.

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1. While this court is not personally aware of the circumstances surrounding the consideration of that motion as unopposed, as the undersigned was not the assigned Justice at the time of the issuance of the resulting order, it is noted that Brown does not, by this cross motion and as part of the relief sought therein, seek to vacate the order of consolidation.

Defense counsel also asserts that plaintiff lacks a meritorious claim against Brown: Brown is an out-of-possession owner who has not resided at the premises as of the date of the incident; the complaint does not allege that Brown resided there at that time; it does not allege that she owned the dogs; Brown does not know plaintiff, does not have a "house manager" as alleged by plaintiff, does not know the person who brought the dogs to the premises, does not know the dogs or their alleged vicious propensities; there are no facts alleged to indicate how plaintiff came to be lawfully present at the premises, or how Brown was on notice; and there are no facts showing that Brown owed plaintiff a duty of care.

Brown's affidavit specifies the following, in relevant part: since she purchased her interest in the premises in 2015, she has not resided there; plaintiff's affidavit of merit submitted in support of this and previous motions makes no mention or allegation against her which would subject her to liability in this case; she does not know plaintiff, plaintiff has never been her tenant, and plaintiff never had her permission or consent to reside at the premises; she does not know the person mentioned in plaintiff's affidavit who brought the dogs to the premises; and she is unaware of any dogs at the premises, let alone any dogs with vicious propensities. She calls for dismissal of the complaint as a result.

Finally, defense counsel seeks to stay further proceedings herein pending Brown's appeal of the order vacating plaintiff's dismissal since the likely success of that appeal will render further proceedings herein moot.

In opposition to the cross motion and in further support of the motion, plaintiff's counsel first argues that Brown has failed to rebut plaintiff's showing of entitlement to judgment by default. Counsel initially points out that plaintiff was not required to file and serve an amended complaint; rather, the actions were simply consolidated and the pleadings in the Kings County action were incorporated into this action. Otherwise, counsel states that Brown's opposition to plaintiff's requirement that he show proof of facts constituting the claim is really a challenge to the ultimate merits of plaintiff's claim, and are inappropriately based on issues of fact and evidence which would have had to have been proven at the summary judgment or trial stage of this action, had Brown not defaulted. Counsel again points out that the question of the sufficiency of plaintiff's showing of a meritorious action against Brown has already been adjudicated, over Brown's objection. Further, Brown does not even attempt to request leave to vacate her default or to submit a late answer.

Second, counsel states that Brown's cross motion to renew her motion to dismiss pursuant to CPLR 3211 (a) (7) should be denied as without merit. He states that the motion is untimely, as it was made well after Brown's time to answer has expired. Counsel also states that it remains unclear how the motion is styled as a "renewal" motion, inasmuch as, inter alia, defense counsel does not address that prior motion at all. In any event, plaintiff's

counsel contends that Brown's arguments in support of dismissal are fundamentally flawed inasmuch as they reveal a misunderstanding of pleading requirements under the law.

Third, plaintiff's counsel argues that Brown should not be entitled to renew her opposition to plaintiff's motion to vacate his default, as Brown has failed to identify what new facts not offered in support of Brown's prior opposition justify renewal here or why those facts could not have been previously submitted.

Finally, plaintiff's counsel states that Brown is not entitled to a stay pending her unperfected appeal, arguing that her reliance on CPLR 5519 (c) is misplaced. In any event, counsel argues that Brown's arguments in support are lacking in merit.

In further support of the cross motion, defense counsel states that plaintiff has failed to address: (1) the court's failure to obtain personal jurisdiction over Brown; (2) the true identity of plaintiff and his relationship to the premises; and (3) Brown's lack of knowledge of the presence of dogs on the premises as well as their vicious propensities. Further, the complaint against Brown is not verified by plaintiff himself, and contains nothing but conclusory allegations against Brown.

Under the circumstances – such as the complicated procedural history of this case and the fact that Brown, through what appears to be no fault of her own, never had the benefit of a determination on her initial motion to dismiss – the court finds it appropriate and in the interest of justice to consider the branch of Brown's cross motion seeking renewal of her motion to dismiss. The being said, that branch of the cross motion is denied. On a motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.,* 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Odierna v RSK, LLC*, 171 AD3d 769 [2d Dept 2019]; *Ramirez v Donado Law Firm, P.C.*, 169 AD3d 940 [2d Dept 2019]; *Webster v Sherman,* 165 AD3d 738 [2d Dept. 2018]; *Murphy v Department of Educ. of the City of N. Y.*, 155 AD3d 637 [2d Dept 2017]; *Bank of New York Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850 [2d Dept 2016]). A motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]).

In order to recover in tort for a dog attack, a plaintiff must prove that the dog had vicious propensities and that the person in control of the premises where the dog was knew or should have known of such propensities (*see Velez v Andrejka*, 126 AD3d 685 [2d Dept 2015]). To recover against a landlord for injuries caused by a tenant's dog, the plaintiff must demonstrate the following: (1) that the landlord had notice that a dog was being harbored on the premises; (2) that the landlord knew or should have known that the dog had vicious propensities, and (3) that the landlord had sufficient control of the premises to allow the landlord to remove or confine the dog (*id.*, 126 AD3d at 686).

Here, plaintiff pleaded every element to support this cause of action against Brown. Brown's contentions, to wit, among other things, that she was an out-of-possession owner, and that she had no notice of the animal on her property, much less its vicious propensities, is irrelevant for purposes of considering a motion to dismiss since, as noted above, the inquiry is whether plaintiff has stated a cause of action, not whether he ultimately has one (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Morales v Copy Right, Inc.*, 28 AD3d 440 [2d Dept 2006]).

The branch of Brown's cross motion seeking renewal of her opposition to plaintiff's motion to vacate the dismissal of this action is also denied, as Brown has failed to both (1) identify what new facts not offered on the prior motion would change the court's initial determination (CPLR 2221 [e] [2]) and (2) provide a reasonable explanation for the failure to present such facts (CPLR 2221 [e] [3]). In any event, it must be noted that Brown's argument that plaintiff's misunderstanding/misinterpretation of prior orders, resulting in his counsel's failure to appear for the scheduled inquest is not reasonable is without merit, as courts certainly permit vacaturs when counsel proffers a detailed and credible explanation for missing a scheduled appearance (*see e.g. 555 Prospect Assoc., LLC v Greenwich Design & Dev. Group Corp.*, 154 AD3d 909 [2d Dept 2017]). Moreover, plaintiff needed only to show a potentially meritorious cause of action against Brown, which he did by virtue of his affidavit as well as Brown's affidavit.

The branch of Brown's cross motion for a stay pending her appeal is denied. It appears that Brown misapprehends CPLR § 5519 (c) inasmuch as the scope of the stay authorized thereby is limited to "a stay of enforcement proceedings only, not a stay of acts or proceedings other than those commanded by the order or judgment appealed from" (*Schwartz v New York City Hous. Auth.*, 219 AD2d 47 [1996]). In any event, to the extent Brown merely seeks a stay of these proceedings (*e.g.* CPLR 2201), same is also denied in light of the above discussion.

Turning to plaintiff's motion for judgment by default, as it was discussed above, this matter has a complex procedural history. Through what appears to be no fault of her own,

Brown's initial motion to dismiss was never considered by the court (it is noted that the motion was adjourned several times in Kings County even after the consolidation order was issued). Thereafter, motion practice herein ensued, in which Brown took an active part (evincing her desire to participate in this litigation and not to default). Therefore, the court deems it appropriate under these circumstances to afford Brown an opportunity to answer the complaint. However, there is no authority to suggest that plaintiff was or is required to file an amended pleading. The consolidation simply merged the two actions into one. Brown may respond to the allegations of the complaint as they originally appeared in the Kings County case, using the instant Index No.

Accordingly, Brown's cross motion is denied. Plaintiff's motion is denied. Brown shall have 30 days from the entry date of this order to answer the complaint against her.

Dated: March 16, 2021

J.S.C.

FILED
3/16/2021
COUNTY CLERK
QUEENS COUNTY