

Mesropian v Providence Care, Inc.
2022 NY Slip Op 30423(U)
February 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 502193/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

BELLA MESROPIAN,
Plaintiff,

DECISION AND ORDER

-against-

Index No. 502193/17

PROVIDENCE CARE, INC.,
Defendant.

Mot. Seq. No. 7

-----X

PROVIDENCE CARE, INC.,
Third-Party Plaintiff,

-against-

BETTY NELSON and MARVIN HALE-BEY;
Third-Party Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation, and Exhibits Annexed _____	<u>151-158</u>
Opposing Affirmation and Exhibits Annexed _____	<u>159-161</u>
Affirmation in Reply and Affidavit of Service _____	<u>162-163</u>

In this action to recover damages for personal injuries, defendant/third-party plaintiff Providence Care, Inc. ("PCI") moves (in Seq. No. 7) for leave, pursuant to CPLR 3215, to enter a default judgment against third-party defendants Betty Nelson and Marvin Hale-Bey (collectively, the "defendants"). Plaintiff Bella Mesropian (the "plaintiff") objects.

By third-party summons and complaint, dated December 17, 2020, PCI impleaded the defendants, alleging that they (rather than PCI) were responsible for the defective

sidewalk on which the plaintiff sustained injuries giving rise to the underlying action. The third-party summons and complaint were served on the defendants at 765 Lincoln Avenue in Brooklyn, New York (the “Lincoln Avenue address”) (NYSCEF Doc No. 157). By stipulation, dated March 18, 2021, the defendants’ time to answer the third-party complaint was extended through April 19, 2021 (*i.e.*, for a period of 30 days from the date thereof) (the “stipulation”) (NYSCEF Doc No. 158). The defendants’ address, as reflected in the stipulation, was listed as 843 Herkimer Street in Brooklyn, New York (the “Herkimer Street address”). The defendants failed to answer or otherwise respond to the third-party complaint. On October 22, 2021, PCI served the instant motion on the defendants at the Lincoln Avenue address (Notice of Motion) (NYSCEF Doc No. 151). On December 9, 2021, PCI served its reply to the plaintiff’s opposition on the defendants once again at the Lincoln Avenue address (NYSCEF Doc No. 163).

PCI has failed to demonstrate, *prima facie*, its entitlement to a default judgment against the defendants. The reasons are two-fold. First, PCI has failed to comply with the requirement of CPLR 3215 (g) (1) that “a party making [a motion] to the court for a default judgment . . . provide notice of the [motion] to any defendant that has appeared in the action” (*21st Mtge. Corp. v Raghu*, 197 AD3d 1212, 1218 [2d Dept 2021]). Inasmuch as the defendants have appeared in this action by executing the aforementioned stipulation, PCI was required to serve them at the Herkimer Street (rather than at the Lincoln Avenue) address as was reflected in the stipulation (*see Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 125-126 [2d Dept 2015] [“A plaintiff’s failure to provide a defendant who has appeared in the action with the statutorily required notice of a motion for leave to enter a default judgment . . . deprives the defendant of an opportunity to timely raise the issue of

whether the motion for leave to enter a default judgment is supported by sufficient proof of facts, and point out any perceived deficiencies.”))

Second and independent of the foregoing, PCI has failed to comply with the requirement of CPLR 3215 (f) that “[o]n any [motion] for judgment by default, the [movant] shall file . . . proof of the facts constituting the claim.” PCI’s submissions do not rise to the level of “sufficient proof to enable a court to determine if the claim is viable” (*Global Liberty Ins. Co. v Gorum*, 143 AD3d 768, 769 [2d Dept 2016]). PCI’s third-party complaint, as verified by counsel, does not constitute an affidavit (*see* CPLR 105 [u]). Further, the Court rejects as inadmissible evidence the undated and unsworn statement of a PCI employee purporting to place the location of the plaintiff’s accident at the sidewalk adjacent to the defendants’ house (NYSCEF Doc No. 154). The third and final document submitted by PCI is devoid of competent evidentiary value because that employee, by her own admission, did not witness the plaintiff’s fall (Timberlake EBT tr at page 34, lines 8-13; page 64, lines 18-20) (NYSCEF Doc No. 155) (*see generally Wachovia Mtge. FSB v Macwhinnie*, 175 AD3d 1587, 1588 [2d Dept 2019] [“A court does not have a mandatory, ministerial duty to grant a motion for leave to enter a default judgment, and retains the discretionary obligation to determine whether the movant has met the burden of stating a viable cause of action.”] [internal quotation marks and alteration omitted]).

Accordingly, it is

ORDERED that in Seq. No. 7 the motion of defendant/third-party plaintiff Providence Care, Inc. for leave, pursuant to CPLR 3215, to enter a default judgment against third-party defendants Betty Nelson and Marvin Hale-Bey is *denied*; and it is further

ORDERED that the plaintiff's counsel shall serve a copy of this decision and order with notice of entry on the defendant/third-party plaintiff's counsel electronically, and on the third-party defendants by first-class mail in a single mailing at the Herkimer Street address; and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER,

J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**