

Hernandez v MDL Equip. Corp.
2022 NY Slip Op 30425(U)
February 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 503025/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____x

LUIS HERNANDEZ,

Plaintiff,

DECISION/ORDER

-against-

Index No. 503025/2018

Motion Seq. No. 3

Date Submitted: 12/9/2021

**MDL EQUIPMENT CORP., 73 EMPIRE DEVELOPMENT
LLC, and CS CONSTRUCTION GROUP LLC,**

Defendants.

_____x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion by defendant MDL Equipment Corp.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits Annexed.....	<u>45-50</u>
Affirmation in Opposition and Exhibits Annexed.....	_____
Reply Affirmation.....	_____

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This personal injury action was commenced on February 3, 2018. On September 20, 2019, the action was stayed by an order of this court [Doc 52] because defendant 73 Empire Development LLC had filed a Chapter 11 Bankruptcy petition in the U.S. Bankruptcy Court, Southern District of NY, case 19-22285. Before the stay had been put in place, plaintiff timely moved on September 27, 2018 [Motion Seq. 2] for a default judgment order against defendant 73 Empire Development LLC, who had not answered the complaint. Defendant MDL Equipment Corp. then cross-moved [Motion Seq. 3] on January 24, 2019 for a default judgment order on its cross claims. Both motions were adjourned several times, then they were held in abeyance while the stay was in effect.

The case was inactive until counsel for defendant 73 Empire Development LLC ["73 Empire"] obtained an order relieving them as counsel for this defendant, in Motion Seq. #7, which stayed all proceedings for 60 days so the defendant could obtain new counsel [Doc 88 dated September 29, 2021]. The court granted the motion even though this law firm had never actually appeared in this action. Document 50 is a limited notice of appearance, which was never filed with the court. The affirmation of counsel in support of the motion to be relieved states that the Bankruptcy stay had expired, but counsel failed to request that the stay of this action be lifted. The court has confirmed from the Bankruptcy Court's website that the Bankruptcy proceeding was dismissed on January 23, 2020 by Bankruptcy Judge Robert D. Drain.

The two motions, sequence 2 and 3, appeared on the court's motion calendar on December 9, 2021 and both were submitted without any opposition. Motion #2 which was filed by plaintiff was granted on this date and a default judgment order form was issued. The court will now address motion sequence #3.

Counsel for movant states that "inasmuch as 73 Empire Development LLC is now in default in answering MDL's cross-claims, it is respectfully requested that this Honorable Court grant a default judgment in favor of MDL." This is not relief that may be granted on these papers. The motion is thus denied despite the absence of opposition.

To be entitled to such relief, movant is required to demonstrate, inter alia, "proof of service" of the cross claims on 73 Empire Development LLC (CPLR 3215 [f]). Here, MDL has failed to submit proof of service of its Answer with cross claims on 73 Empire Development LLC. As this co-defendant has not appeared, mailing the Answer did not constitute service upon 73 Empire. CPLR 3012(a) provides that if a defendant has not appeared in the action, then any subsequent pleading must be served upon it in the same

manner as a summons and complaint. However, if the party has already appeared, a pleading can be served in the manner provided for service of papers generally and, of course, papers may be served upon a party through their attorney of record via regular mail. Here, as co-defendant 73 Empire has not appeared, movant's answer with cross claims was required to be served in the manner of a summons and complaint. (See CPLR 3012, Conners, Practice Commentaries, 7B C3012:7 Serving Cross-Claim on Non-Appearing Defendant). As movant did not effectuate personal service on 73 Empire pursuant to CPLR 311-a or Limited Liability Company Law § 303, 73 Empire had no obligation to respond to movant's cross claims, and its failure to do so may not serve as a basis for a default judgment.

Even if the Answer with cross claims had been properly served, movant's Answer does not demand a response to its cross claims. CPLR 3011 provides that "[t]here shall be ... an answer to a cross-claim that contains a demand for an answer [and that] [i]f no demand is made, the cross-claim shall be deemed denied or avoided" (CPLR 3011; see *Green Point Sav. Bank v Pagano*, 103 AD2d 735 [2d Dept 1984]). In instances where an answer is not demanded in response to a cross claim, the denial that is "deemed" to have been made under CPLR 3011 will foreclose any motion for a default judgment on the cross claim, even if the Answer with cross claims had been properly served. (see *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 310 [2d Dept 2011]).

The next requirement for a default judgment is an affidavit from the moving party, containing "admissible proof of the facts constituting the claim" (CPLR 3215[f]). None is provided here, and the answer was not verified. The court will not enumerate the other requirements contained in CPLR 3215, as these deficiencies are sufficient to deny the motion.

Accordingly, it is **ORDERED** that the motion is denied. It is further **ORDERED** that the stay of this action is lifted, and this case is returned to active status.

It is further **ORDERED** that this action shall appear on the CCP calendar for a Compliance conference on April 7, 2022.

This shall constitute the decision and order of the court.

Dated: February 8, 2022

ENTER:



Hon. Debra Silber, J.S.C.