

Rodriguez v Rosen & Gordon, LLC
2022 NY Slip Op 30690(U)
March 4, 2022
Supreme Court, New York County
Docket Number: Index No. 156846/2020
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. WILLIAM PERRY

PART

23

Justice

-----X

INDEX NO. 156846/2020

RODRIGUEZ, FRANCES

MOTION DATE 02/14/2022

Plaintiff,

002 003 004

- v -

MOTION SEQ. NO. 005

ROSEN & GORDON, LLC

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for

JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for

JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Plaintiff Frances Rodriguez alleges that she was caused to trip and fall on a sidewalk on October 1, 2019 while exiting the premises located at 12 West 125th Street, New York, NY. Plaintiff alleges that this was due to the negligence of Defendants Rosen & Gordon, Harlem Furniture Corp., and Harlem Furniture One Corp.

In motion sequence 002, Plaintiff moves for a default judgment against Defendants Harlem Furniture Corp. and Harlem Furniture One Corp. In motion sequence 003, Defendant Rosen & Gordon moves for a default judgment on its cross-claims against Harlem Furniture Corp. Both

motions are submitted without opposition, although Harlem Furniture One Corp. has since answered both the complaint and Rosen & Gordon's cross-claims.

In motion sequence 004, Rosen & Gordon move to compel Plaintiff to respond to its demand for authorization for litigation funding company and its demand for litigation funding information. The motion is fully submitted.

In motion sequence 005, Plaintiff moves to amend the complaint to add additional Defendants JBAM TRG 125 LLC and JBAM TRG 124 LLC. Rosen & Gordon opposes the motion because it lacks an affidavit of merit.

The motions are consolidated for disposition.

Motions for default

On a motion for leave to enter a default judgment, "the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party[.]" (CPLR 3215 [f]; *see also SMROF II 2012-I 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, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Plaintiff's motion sequence 002 for default judgment

Plaintiff submits affidavits of service indicating that Harlem Furniture Corp. and Harlem Furniture One Corp. were both served on September 9, 2020, pursuant to Business Corporation Law § 306. (NYSCEF Doc. No. 29, Affidavit of Service.)

During the pendency of motion sequence 002, Defendant Harlem Furniture One Corp. filed its answer on August 26, 2021. (NYSCEF Doc No. 35.) Plaintiff has not objected to the lateness of the answer. Since Harlem Furniture One Corp. has now appeared in this action, and in light of the preference to resolve cases on the merits (*Murray v Matusiak*, 247 AD2d 303, 304 [1st Dept 1998]), the court, in its discretion, denies the motion.

Rosen & Gordon's motion sequence 003 for default

Rosen & Gordon move for default judgment against Harlem Furniture One Corp. on its cross-claims for common law indemnification, contractual indemnification, apportionment, and breach of contract from failure to secure insurance. (NYSCEF Doc No. 13, Answer; NYSCEF Doc No. 38, Ms003 Memo.)

Similarly, Harlem Furniture One Corp. filed its answer to Rosen & Gordon's cross-claims on August 31, 2021. (NYSCEF Doc No. 45.) Rosen & Gordon has not objected to the lateness of the answer. Motion sequence 003 is denied.

Rosen & Gordon's motion sequence 004 to compel

In motion sequence 004, Rosen & Gordon moves to compel Plaintiff "to respond to [its] Demand for Authorization for Litigation Funding Company and Demand for Litigation Funding Information dated February 22, 2021." (NYSCEF Doc No. 48, Ms004 Memo, at ¶ 2; NYSCEF Doc No. 51, Demands.) Rosen & Gordon alleges that this information is vital to its defense due to one document from the New York Surgery Center, titled "Clearance Checklist", which includes the following notation: "Dr. Dowd – clearance may come in after 9:30am on Mondays if not in chart." (NYSCEF Doc No. 53 at 5.) Rosen & Gordon then alleges that Dr. Dowd was indicted by the US Attorney's Office of the Southern District of New York, as explained in *United States v Duncan*, 2019 WL 5824205 [SD NY 2019] (attached as NYSCEF Doc No. 56.)

Plaintiff has responded to the demands by objecting on the grounds that the information sought is not material or necessary. (NYSCEF Doc No. 54.) As the court finds that the litigation funding information sought in this matter is not material and necessary, motion sequence 004 is denied. (*Heidi Alberto Coronado v Veolia N.A. Inc. & Subsidiaries*, 2021 WL 1374261, at *1 [Sup Ct, NY County 2021] [finding litigation funding information not material or necessary and generally not discoverable].) Further, the court notes that the *Duncan* decision submitted by Rosen & Gordon does not mention Dr. Dowd, and only deals with the indictment relating to “Bryan Duncan, Robert Locust, and Ryan Rainford”.

Plaintiff's motion sequence 005 to amend

In motion sequence 005, Plaintiff moves to amend the complaint to add JBAM TRG 125 LLC and JBAM TRG 124 LLC as Defendants, which she alleges are “additional responsible parties” identified through discovery. (NYSCEF Doc No. 64, Ms005 Memo, at 1-2.) Rosen & Gordon argue that the “motion contains no affidavit of merit which mandates denial of the motion.” (NYSCEF Doc No. 68, Ms005 Opposition, at ¶ 5.)

However, as stated in Rosen & Gordon’s affirmation in support of its motion for default judgment, JBAM TRG LLC was the original lessee of the premises before it transferred its interest to the principal of Harlem Furniture. (NYSCEF Doc No. 38 at ¶ 3.) Moreover, Rosen & Gordon fails to allege or demonstrate prejudice. Motion sequence 005 is granted. (*Centrifugal Assocs. Inc. v Highland Metal Industries, Inc.*, 193 AD2d 385 [1st Dept 1993].) Thus, it is hereby

ORDERED that Plaintiff’s motion sequence 002 for default judgment is denied; and it is further

ORDERED that Defendant Rosen & Gordon’s motion sequence 003 for default judgment is denied; and it is further

ORDERED that Defendant Rosen & Gordon's motion sequence 004 to compel is denied; and it is further

ORDERED that Plaintiff's motion sequence 005 to amend the complaint to add JBAM TRG 125 LLC and JBAM TRG 124 LLC as additional Defendants is granted; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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FRANCES RODRIGUEZ

Plaintiff,

-against-

ROSEN & GORDON, LLC, HARLEM FURNITURE
CORP., HARLEM FURNITURE ONE CORP.,
JBAM TRG 125 LLC and JBAM TRG 124 LLC,

Defendants.

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And it is further;

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)).

3/4/2022

DATE

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☐

DENIED

☐

SETTLE ORDER

APPLICATION:

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


WILLIAM PERRY, J.S.C.