

**Allen v Warner**

2022 NY Slip Op 31396(U)

April 29, 2022

Supreme Court, New York County

Docket Number: Index No. 155961/2021

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DAKOTA D. RAMSEUR** PART: **34M**

*Justice*

-----X  
AUDRA ALLEN

Plaintiff,

- v -

JONATHAN WARNER,

Defendant.

INDEX NO. 155961/2021  
MOTION DATE N/A  
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 were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff, Audra Allen (plaintiff), commenced this action against Jonathan Warner as Executor of the Estate of Rajendra Prem a/k/a Raj Prem, a/k/a Rajendra Bhurga, and a/k/a Raj Bhurga (defendant), seeking damages stemming from allegations that between 2014 and 2019, decedent, Rajendra Prem, physically and emotionally abused plaintiff (NYSCEF doc. no. 1, complaint, ¶¶ 6-28). Plaintiff now moves pursuant to CPLR 3215 for a default judgment against defendant. Defendant opposes the motion and cross-moves, pre-answer, pursuant to CPLR 2004 and 3012(d) for an extension of time to appear, and pursuant to CPLR 3211 (a) (1), (7), (8) to dismiss the complaint. Plaintiff's motion is unopposed. For the following reasons, plaintiff's motion is denied, and defendants' cross-motion is granted in part.

According to the affidavit of service electronically filed on August 3, 2021, plaintiff served defendant with the summons and complaint by leaving a copy at defendant's place of business on July 15, 2021 and mailing a copy to defendant on July 16, 2021 (NYSCEF doc. no. 2, affidavit of service). Defendant acknowledges receipt of the summons and complaint on July 15, 2021, but denies receipt of the mailed copy (NYSCEF doc. no. 10, affirmation in support, ¶ 4). According

to defendant, he did not believe that his time to answer began to run because he never received substituted service of the summons and complaint by mail and his firm did not receive an online notification when plaintiff filed the affidavit of service with the court (NYSCEF doc. no. 10, affirmation in support, ¶ 4-5). Defendant asserts that had he been properly served, he would have promptly moved to dismiss (NYSCEF doc. no. 10, affirmation in support, ¶ 5).

When moving for a default judgment, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default (CPLR 3215 [f]). Here, plaintiff's motion is denied as plaintiff failed to submit an affidavit of merit constituting the facts of the claim or a verified complaint containing evidentiary facts from someone one with personal knowledge of the facts (*Blam v Netcher*, 17 AD3d 495, 496 [2d Dept 2005] [denying plaintiff's motion for a default judgment where the plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts]).

A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense (CPLR 3012 [d]). Whether the excuse for default is reasonable is within the sound discretion of the court, based upon all relevant facts including the length of delay, prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*Chevalier v 368 E. 148th St Assoc., LLC*, 80 AD3d 411, 413 [1st Dept 2011]). Defendant concedes receipt of the summons and complaint on July 15, 2021. Further, plaintiff filed an affidavit of service showing that a copy of the summons and complaint was mailed to defendant. Therefore, defendant should have been aware that the time to answer had begun to run. However, considering all the factors, including that the delay was not lengthy and that there was no prejudice to plaintiff, the Court finds defendant's excuse reasonable and that this case should be resolved on the merits.

Under CPLR 3211(c), the court has discretion to convert a motion to dismiss under CPLR 3211(a)(7) to a motion for summary judgment, whether an issue has been joined, after giving adequate notice to the parties. On April 26, 2022 the Court notified the parties by email of the Court's intention to treat the branch of defendant's cross-motion to dismiss the complaint as a motion for summary judgment and that the Court intended to file a decision on April 29, 2022. The Court further directed the parties to contact the Court if they had any concerns regarding the Court's intention to convert the motion to dismiss. Neither party contacted the Court nor otherwise opposed.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Defendant argues, in principle, that he is an improper party in this action because he was never appointed as executor to the decedent's estate. "An estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity" (*Grosso v Est. of Gershenson*, 33 AD3d 587, 822 [2d Dept 2006] [internal citations and quotation marks omitted]). Here, defendant establishes, prima facie, his entitlement to summary dismissal of the complaint by submitting his affidavit wherein he states that he is not

the executor of the decedent's estate. As plaintiff does not oppose defendant's cross-motion, defendant's prima facie showing is un rebutted.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that defendant's cross-motion to extend time for defendant to appear is granted; and it is further

ORDERED that defendant's motion pursuant to CPLR 3211(a)(7) is converted to a motion for summary judgment pursuant to CPLR 3211(c), and upon conversion, plaintiff's complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this decision upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

DAKOTA D. RAMSEUR, J.S.C.

4/29/2022  
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE