

Singh v City of New York
2022 NY Slip Op 31837(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 158781/2020
Judge: Judy H. Kim
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

CYNTHIA SINGH,

Plaintiff,

- v -

THE CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, HOTEL 99, INC., FRANCO MARTINEZ

Defendants.

-----X

INDEX NO. 158781/2020
MOTION DATE 03/01/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33

were read on this motion for DEFAULT JUDGMENT.

Upon the foregoing documents, plaintiff's motion for a default judgment as to defendant Franco Martinez is denied.

Plaintiff alleges that on September 17, 2019, defendant New York City Department of Housing Preservation and Development ("HPD") moved her into a room in HPD's "safest shelter"—a hotel located at 244 West 99th Street owned and operated by defendant Hotel 99, Inc. ("Hotel 99") (NYSCEF Doc. No. 1 [Compl. at ¶¶10-11]). As relevant here, plaintiff alleges that late in the evening on July 17, 2020, defendant Franco Martinez—a maintenance man employed by Hotel 99—tried to gain entry to her room, telling plaintiff that he wanted to have sexual intercourse with her (Id. at ¶¶9, 30-31). When Martinez failed to gain entry to plaintiff's room he allegedly masturbated in front of the door to her room and left (Id. at ¶33). According to plaintiff, Martinez was arrested and pleaded guilty to public lewdness on August 3, 2021 (NYSCEF Doc.

No. 21 [Singh Aff. of Merit at ¶9]).

Plaintiff subsequently had a conference call with various HPD employees who declined to discuss Martinez's actions, stating that the incident in question was a matter for the police (Id. at ¶¶40, 42). However, plaintiff alleges that after she reported Martinez to the police, HPD employees threatened to evict her in what plaintiff contends was retaliation for making this police report (Id. at ¶46).

On October 19, 2020, plaintiff commenced this action asserting claims against all defendants for: (1) discrimination pursuant to Executive Law §296(2)(a) and New York City Administrative Code §8-107(1)(a); (2) retaliation pursuant to Executive Law §296(7) and Administrative Code §8-107(7), and (3) negligence (Id. at ¶¶52-72). The complaint also asserts additional claims against Hotel 99 for negligence and negligent hiring (Id. at ¶¶73-88).

Martinez did not answer and plaintiff now moves, pursuant to CPLR §3215(a), for a default judgment against Martinez. In support of this motion, plaintiff submits: (1) an affidavit detailing the facts underlying her claim (NYSCEF Doc. No. 21); (2) an affidavit of service detailing service of the summons and complaint on Martinez pursuant to CPLR §308(2) by service at Hotel 99 on Joanna Rodriguez, a co-worker of Martinez, and a follow-up mailing to that address on October 26, 2020 (NYSCEF Doc. No. 24); and (3) an affirmation from plaintiff's counsel attesting to Martinez's default (NYSCEF Doc. No. 22 [Myers Affirm. at ¶8]).

While Martinez has not opposed the instant motion, Hotel 99 submits opposition disputing the validity of plaintiff's service of process on Martinez. Specifically, Hotel 99 submits an affidavit from Joanna Rodriguez, its front desk agent, in which she states that plaintiff's process server served her with only one copy of plaintiff's summons and complaint which she accepted on behalf

of Hotel 99 NYSCEF Doc. No. 27 [Rodriguez Aff. at ¶6]). Rodriguez also attests that she did not identify herself to the process server as a co-worker of Martinez or otherwise represent that Hotel 99 was Martinez's actual place of business (Id. at ¶5). Hotel 99 also submits an affidavit from Beata Simonetti, the Manager of Hotel 99, stating that Martinez has never been employed by Hotel 99 but is a resident of Hotel 99 (NYSCEF Doc. No 28 [Simonetti Aff. at ¶4]).

In reply, plaintiff does not attempt to rebut these affidavits but instead argues that Hotel 99 lacks standing to oppose her motion, citing Home Sav. of Am., F.A. v. Gkanios, 233 AD2d 422, 423 (2d Dept 1996), Defreestville Area Neighborhood Ass'n v Tazbir, 23 AD3d 70, 73 (3d Dept 2005), and NYCTL 1996-1 Trust v King, 13 AD3d 429, 430 (2d Dept 2004).

DISCUSSION

On a motion pursuant to CPLR §3215, the plaintiff is required to submit proof of: (1) service of the summons and complaint; (2) the facts constituting the claim; and (3) defendant's default in answering or appearing (See Gordon Law Firm, P.C. v Premier DNA Corp., 165 NYS3d 691 [1st Dept 2022]). Plaintiff has satisfied two of these three requirements.

Plaintiff's affidavit of service "constitutes prima facie evidence of proper service" (Ocwen Loan Servicing, LLC v Ali, 180 AD3d 591, 591 [1st Dept 2020], lv to appeal dismissed, 36 NY3d 1046 [2021]). To the extent Hotel 99's opposition seeks to, in essence, challenge the Court's jurisdiction over Martinez, the Court agrees with plaintiff that Hotel 99 does not have standing to do so¹ (See Gray-Joseph v Shuhai Liu, 90 AD3d 988, 990 [2d Dept 2011]).

While plaintiff has submitted an affidavit of merit attesting to the facts constituting her claim, it is insufficient to support the instant motion. Plaintiff must, as a condition precedent to

¹ The Court notes that this determination is without prejudice to Hotel 99's defense that Martinez has never been a Hotel 99 employee. In addition, plaintiff has established Martinez's default.

obtaining a default judgment under CPLR §3215, establish that she has stated a viable cause of action (See Woodson v Mendon Leasing Corp., 100 NY2d 62, 71 [2003]). Plaintiff has failed to do so.

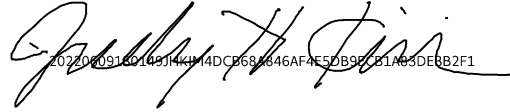
In this case neither the allegations of the complaint nor plaintiff's affidavit set forth facts sufficient to establish that her claims against Martinez are viable. Specifically, plaintiff does not allege that Martinez refused, withheld, or denied plaintiff public accommodation under Executive Law §296(2)(a) or engaged in employment discrimination under Administrative Code §8-107(1)(a). Neither are there any allegations that Martinez engaged in retaliatory behavior against her under either Executive Law §296(7) or New York City Administrative Code §8-107(7). Finally, plaintiff's negligence claim is not viable as to Martinez as the complaint alleges only intentional conduct on his part (See e.g., Mees v Stibbe New York B.V., 195 AD3d 569, 569-70 [1st Dept 2021] citing Trayvilla v Japan Airlines, 178 AD3d 746, 747 [2d Dept 2019]).

In light of the foregoing, plaintiff's motion for leave to enter a default judgment against Martinez must be denied (See CPS Group, Inc. v Gastro Enterprises, Corp., 54 AD3d 800, 801 [2d Dept 2008] [leave to enter default judgment properly denied where “neither the allegations of the complaint nor the plaintiff's affidavit set forth facts sufficient to satisfy the plaintiff's burden of establishing viable claims, inter alia, for declaratory relief as to its purported absence of liability to the defendant for any damages sustained by the alleged misappropriation”]; see also Cohen v Schupler, 51 AD3d 706 [2d Dept 2008] [Supreme Court improvidently granting default judgment where “neither conclusory allegations of the complaint nor the affidavit of merit set forth the facts constituting the alleged negligence sufficiently to support a default judgment”]).

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment as to defendant Franco Martinez is denied.

This constitutes the decision and order of the Court.



20220809162149314414DCB68A846AF4E5DB9FCB1A63DE8B2F1

6/9/2022

DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE