

Armstrong v AIMCO Columbus Ave., LLC
2022 NY Slip Op 32623(U)
August 4, 2022
Supreme Court, New York County
Docket Number: Index No. 153414/2021
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

CAROLINE ARMSTRONG,

Plaintiff,

- v -

AIMCO COLUMBUS AVE., LLC, LEXINGTON-OXFORD
ASSOCIATES, L.P., TUJUNGA GARDENS LIMITED
PARTNERSHIP, BNY CONTRACTING, INC.,

Defendant.

-----X

AIMCO COLUMBUS AVE., LLC, LEXINGTON-OXFORD
ASSOCIATES, L.P., TUJUNGA GARDENS LIMITED
PARTNERSHIP

Plaintiff,

-against-

BNY CONTRACTING, INC.

Defendant.

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INDEX NO. 153414/2021

MOTION DATE 04/25/2022,
05/20/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595046/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - DEFAULT

In this personal injury action, plaintiff Caroline Armstrong (motion sequence no. 001) and defendants/third-party plaintiffs AIMCO Columbus Ave., LLC (AIMCO), Lexington-Oxford Associates, L.P. and Tujungga Gardens Limited Partnership (collectively, the Building Defendants) (motion sequence no. 002) move, pursuant to CPLR 3215, for a default judgment

against defendant/third-party defendant BNY Contracting, Inc. (BNY). Motion sequence nos. 001 and 002 are consolidated for disposition.

Background

The Building Defendants, collectively, own real property located at 77 West 68th Street, New York, New York (the Premises) (NYSCEF Doc No. 23, Neil A. Zirlin [Zirlin] affirmation, Ex D, ¶¶ 10, 24 and 38; NYSCEF Doc No. 24, Zirlin affirmation, Ex E, ¶¶ 10, 24 and 38). BNY entered into a contract with the Building Defendants to perform work at the Premises, which included insulating a steam pipe/riser in the bathroom of Apartment 4C (NYSCEF Doc No. 23, ¶¶ 52-53). Plaintiff alleges that on April 4, 2019, she was lawfully utilizing the bathroom in Apartment 4C when she was caused to suffer injuries because of a “dangerous, hazardous, unsafe, extremely and excessively hot and unsafe condition of the steam pipe/riser in the bathroom” (*id.*, ¶ 71).

Plaintiff commenced this action sounding in negligence against the Building Defendants by filing a summons and complaint on April 8, 2021, and the Building Defendants brought a third-party action against BNY for contribution, indemnification and breach of contract (NYSCEF Doc.No. 36, José Interiano [Interiano] affirmation, Ex F). Plaintiff then filed a supplemental summons and amended complaint naming BNY as a defendant. The Building Defendants have answered the amended complaint. Plaintiff and the Building Defendants now move for a default judgment against BNY for its failure to answer the amended complaint and the third-party complaint. BNY has not submitted any opposition to either motion.

Discussion

A motion for a default judgment must be supported with “proof of service of the summons and complaint[,] ... proof of the facts constituting the claim, [and] the default” (CPLR

3215 [f]; *see also Gordon Law Firm, P.C. v Premier DNA Corp.*, 205 AD3d 416, 416 [1st Dept 2022]). “[A] complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim” satisfies this statutory requirement (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] [stating that “the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists”]). The plaintiff must also offer “some proof of liability ... to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*id.*). A party in default “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damage” (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

A. Motion Sequence No. 001

Submitted on plaintiff’s motion are the pleadings, an affidavit of service, a letter informing BNY of its default, and an affidavit from plaintiff (NYSCEF Doc No. 27, Zirlin affirmation, Ex H, ¶ 2).

The motion is denied as plaintiff has failed to furnish sufficient proof of service of the supplemental summons and amended complaint upon BNY or her compliance with CPLR 3215 (g). According to the affidavit of service sworn to on January 31, 2022, plaintiff served BNY, a domestic corporation (NYSCEF Doc No. 23, ¶ 8), with process pursuant to “Section 303 Limited Company Liability Law” by delivering two copies of the supplemental summons and amended complaint to the Secretary of State on January 31, 2022 (NYSCEF Doc No. 25, Zirlin

affirmation, Ex F). Plaintiff has not explained this discrepancy regarding BNY's corporate status in the affidavit of service.

Plaintiff's counsel also affirms that by letter dated March 15, 2022, his office sent a default letter to BNY together with an additional copy of the supplemental summons and amended complaint (NYSCEF Doc No. 19, Zirlin affirmation, ¶ 8; NYSCEF Doc No. 26, Zirlin affirmation, Ex G). However, CPLR 3215 (g) (4) (i) provides that a party moving for a default judgment based on the non-appearance of a domestic corporation served with process under Business Corporation Law § 306 shall submit an affidavit stating that "additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." Additionally, CPLR 3215 (g) (4) (ii) provides that additional service of the summons by mail shall be accompanied by a notice to the corporation that service had been made pursuant to Business Corporation Law § 306. Assuming that BNY is a domestic corporation, as plaintiff has alleged, and not a limited liability company, counsel's letter to BNY is deficient, as it fails to inform BNY that it had been served with process pursuant to Business Corporation Law § 306. And while counsel affirms that his office sent BNY a copy of the supplemental summons, he fails to state whether this was accomplished by first class mail to BNY's last known address. Accordingly, plaintiff's motion for a default judgment against BNY is denied.

B. Motion Sequence No. 002


On its motion, the Building Defendants submit the pleadings, an affidavit of service, an affidavit of merit from Jenny Saunders (Saunders), a "General Construction Services Contract" between AIMCO and BNY in effect as of November 23, 2016, a change order in effect May 4, 2017 and other exhibits.

According to the affidavit of service sworn to on February 3, 2022, the Building Defendants served BNY with process by delivering the third-party summons, the verified third-party complaint, notice and exhibits to the Secretary of State on February 3, 2022 (NYSCEF Doc No. 38, Interiano affirmation, Ex H). Pursuant to Business Corporation Law § 306 (b) (1), service of process upon a domestic corporation is complete when the Secretary of State is served. Plaintiff has alleged that BNY is a domestic corporation, and the third-party complaint incorporates plaintiff's verified complaint (NYSCEF Doc No. 36, Interiano affirmation, Ex F, ¶ 2). Thus, the Building Defendants have furnished proof of valid service of the summons and complaint. Nevertheless, the motion is denied for the Building Defendants' failure to comply with the additional service of the summons required under CPLR 3215 (g) (4) (i) and (ii).

Accordingly, it is hereby

ORDERED that the motion brought by plaintiff Caroline Armstrong for a default judgment against defendant/third-party defendant BNY Contracting, Inc. (motion sequence no. 001) is denied; and it is further

ORDERED that the motion brought by defendants/third-party plaintiffs AIMCO Columbus Ave., LLC, Lexington-Oxford Associates, L.P. and Tujung Gardens Limited Partnership for a default judgment against defendant/third-party defendant BNY Contracting, Inc. (motion sequence no. 002) is denied.

8/4/2022 DATE					 WILLIAM PERRY, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	