

Lovett v ESRT 1333 Broadway, L.L.C.

2022 NY Slip Op 32652(U)

August 8, 2022

Supreme Court, New York County

Docket Number: Index No. 154725/2021

Judge: William Perry

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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. WILLIAM PERRY PART 23

Justice

INDEX NO. 154725/2021
MOTION DATE 03/24/2022
MOTION SEQ. NO. 001 002 003

WILLIAM LOVETT,

Plaintiff,

- v -

ESRT 1333 BROADWAY, L.L.C., EMPIRE STATE REALTY TRUST, INC., PLAZA CONSTRUCTION LLC, 1345 LEASEHOLD LLC, FISHER BROTHERS MANAGEMENT CO. LLC

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 14

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - DEFAULT

In this action motion sequence numbers 001, 002 and 003 are consolidated for disposition.

Motion sequence number 001 is resolved as moot and is permitted to be withdrawn, as the parties have stipulated to discontinue the action against defendants ESRT 1333 BROADWAY, LLC and EMPIRE STATE REALTY TRUST, INC., pursuant to NYSCEF Doc. Nos. 14 and 15. In motion sequence number 002, plaintiff seeks an order pursuant to CPLR 305 and 3025 (b), for leave to amend the complaint and add 1345 FEE LLC as a direct defendant in this action. The motion is submitted to the court without opposition.

"It is well established that leave to amend a pleading [pursuant to CPLR 3025 (b)] is freely given 'absent prejudice or surprise resulting directly from the delay' " (*Anoun v City of New York*, 85 AD3d 694, 694, 926 NYS2d 98 [1st Dept 2011], quoting *Fahey v County of Ontario*, 44 NY2d 934, 935, 380 NE2d 146, 408 NYS2d 314 [1978]).

Here, plaintiff's proposed amended complaint, in the form annexed to the motion papers, alleges that 1345 FEE LLC was performing construction, renovation, excavation, demolition, repair, inspection, cleaning, and/or alteration of the building, where plaintiff's alleged accident occurred and that prior to and including December 4, 2020, plaintiff's employer, Karo Sheet Metal, was hired and/or retained by proposed defendant 1345 FEE LLC pursuant to a written contract. (NYSCEF Doc No. 23, paragraphs 31 – 34, 38, 46). Discovery in this matter has not yet commenced and a Preliminary Conference has not been held. Accordingly, plaintiff's motion to amend the complaint and add 1345 FEE LLC as a defendant is granted.

In motion sequence number 003, plaintiff William Lovett moves, pursuant to CPLR 3215, for a default judgment against defendant Plaza Construction LLC (Plaza). Submitted on the motion is the summons and complaint, an affidavit of service, a notice pursuant to Business Corporation Law § 306 and other exhibits. Plaza has not submitted opposition.

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]).

Motion sequence number 003 is denied. Plaintiff avers that “[o]n December 4, 2020, I was seriously injured at a construction site located at 1345 6th Avenue, New York, New York 10105” and that “[t]his incident was caused by the negligence of the Defendants and in no way did I contribute to it” (NYSCEF Doc No. 30, Jenny Xu [Xu] affirmation, Ex 5, ¶¶ 5-6). Plaintiff further avers, “I believe that my claims against ... PLAZA ... has merit” (*id.*, ¶ 9). These averments are entirely conclusory and are insufficient to establish the prima facie validity of his claims against Plaza (*see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Ritzer v 6 E. 43rd St. Corp.*, 47 AD3d 464, 464 [1st Dept 2008]).

Furthermore, according to a “BCL-306 Notice” dated March 10, 2022, plaintiff claims to have served Plaza with process pursuant to Business Corporation Law § 306 (NYSCEF Doc No. 28, Xu affirmation, Ex 3). However, according to the affidavit of service sworn to on May 21, 2021, plaintiff served process upon “PLAZA CONSTRUCTION LLC C/O CT CORP” by delivering a copy of the summons, complaint and notice of electronic filing to Randal Umplerre, an intake specialist, on May 21, 2021 at 28 Liberty Street, New York, New York 10005 (NYSCEF Doc No. 27, Xu affirmation, Ex 2). Based upon plaintiff’s submissions, it is unclear whether the summons and complaint were served upon the Secretary of State in accordance with

Business Corporation Law § 306 (b) (1), which requires delivery of duplicate copies of process “at the office of the department of state in the city of Albany.” The notice pursuant to Business Corporation Law § 306 and counsel’s February 14, 2022 letter were mailed to the 28 Liberty Street address (NYSCEF Doc Nos. 28-29, Xu affirmation, Exs 3-4). Plaintiff has not explained these discrepancies. As such, plaintiff has not furnished adequate proof of service of the summons and complaint.

Additionally, it does not appear that Plaza was given notice of the present motion (*see* CPLR 2103 [c] and 2214 [b]). Although this is an electronically filed action (*see* Unif Rules for Trial Cts [22 NYCRR] § 202.5-bb), Plaza has yet to appear. The moving papers do not include an affidavit showing that the motion was served upon Plaza by mail or by other means apart from the e-filing system. Accordingly, it is hereby

ORDERED that defendants’ motion number 001 seeking to dismiss the action against defendants ESRT 1333 BROADWAY, LLC and EMPIRE STATE REALTY TRUST, INC., is resolved as moot and is permitted to be withdrawn; and it is further

ORDERED that the plaintiff’s motion sequence number 002, for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; 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

X

WILLIAM LOVETT,
Plaintiff

-against-

PLAZA CONSTRUCTION LLC, 1345 LEASEHOLD LLC,
FISHER BROTHERS MANAGEMENT CO. LLC,
and 1345 FEE LLC,
Defendants.

X

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)); and it is further

ORDERED that plaintiff's motion sequence number 003 for a default judgment against defendant Plaza Construction LLC is denied.

8/8/2022

DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: