

Ortiz v 420 Kent Ave. LLC
2022 NY Slip Op 32653(U)
August 8, 2022
Supreme Court, New York County
Docket Number: Index No. 154736/2021
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

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INDEX NO. 154736/2021

GERMAN ORTIZ, BEVERLY RUIZ,

MOTION DATE 05/14/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

420 KENT AVENUE LLC, ZDG, LLC, SPRING
SCAFFOLDING LLC, TOHFAZ UDDIN PE, P.C., BAILEYS
ENGINEERING P.C., TOTAL SAFETY CONSULTING,
L.L.C.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for JUDGMENT - DEFAULT

In this action, plaintiffs German Ortiz (Ortiz) and Beverly Ruiz (Ruiz) (together, plaintiffs) move, pursuant to CPLR 3214, for a default judgment against defendant Baileys Engineering P.C. (Baileys) and for a preliminary conference. No party has submitted any opposition.

Background

According to the verified complaint, plaintiffs were lawfully and legally traversing upon the bicycle paths and/or bicycle lanes adjacent to the premises located at “416, 418, 422, 430 and 438 Kent Avenue, a/k/a 420 Kent Avenue ... a/k/a 416 and/or 418 Kent Avenue ... a/k/a 420,422 and/or 438 Kent Avenue, Brooklyn, New York” (the Premises) on May 15, 2018 when a sidewalk shed, sidewalk bridge, high shed or scaffold collapsed, causing them to sustain injuries (NYSCEF Doc No. 13, Andrew H. Rosenbaum [Rosenbaum] affirmation, ¶¶ 22, 432 and 434). Plaintiffs commenced this action by filing a summons and complaint against defendants 40 Kent

Avenue LLC, ZDG, LLC, Spring Scaffolding LLC, Tohfaz Uddin PE, P.C., Total Safety Consulting, L.L.C. and Baileys alleging they either owned or performed work at the Premises. Only Baileys has not answered the complaint (NYSCEF Doc Nos. 18-19, Rosenbaum affirmation, Exs F and G). Plaintiff now moves for a default judgment against Baileys and for a preliminary conference.

Discussion

A. Default Judgment

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]).

The motion is denied. Here, only one of the plaintiffs, Ruiz, has verified the 150-page complaint NYSCEF Doc No. 13 at 147). And while the complaint contains a second verification

by counsel (*id.* at 148), counsel's verification is not sufficient to serve as proof of the facts constituting the claim (*see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Feffer*, 210 AD2d at 61). Moreover, Ortiz has not proffered an affidavit in support of the motion.

Additionally, an affidavit of service sworn to on May 28, 2021 shows that plaintiffs served Baileys with process pursuant to Business Corporation Law § 306 by delivering duplicate copies of the summons, verified complaint and notice of electronic filing to the Secretary of State on May 28, 2021 (NYSCEF Doc No. 15, Rosenbaum affirmation, Ex C). As such, plaintiffs were required, pursuant to CPLR 3215 (g) (4) (i) and (ii), to submit an affidavit that additional service of the summons by first class mail had been made upon Baileys at its last known address, and that such service was accompanied by a notice to Baileys that service of process had been made upon it pursuant to Business Corporation Law § 306 (b). Counsel's letters dated June 28, 2021 and March 11, 2022 fail to state whether a copy of the summons was enclosed with each letter or to apprise Baileys that service of process had been made in accordance with Business Corporation Law § 306 (b). Accordingly, the part of plaintiffs' motion for a default judgment against Baileys is denied.

B. Preliminary Conference

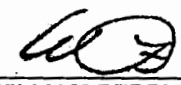
Although counsel's good faith affirmation is deficient (*see Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1057 [4th Dept 2006] [merely sending letters to opposing counsel is not evidence of a diligent, good faith effort to resolve a discovery dispute]), this part of the motion is granted.

Accordingly, it is

ORDERED that the part of plaintiffs' German Ortiz and Beverly Ruiz motion sequence no. 001 for a default judgment against defendant Baileys Engineering P.C. is denied; and it is further

ORDERED that the part of plaintiffs' German Ortiz and Beverly Ruiz motion sequence no. 001 seeking a preliminary conference is granted; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order on the form available on Justice Perry's Judicial Assignments Page, for the court's review and signature, within thirty (30) days.

<u>8/8/2022</u> DATE					 WILLIAM PERRY, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
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