

<b>Carabajo v Cornell Univ.</b>
2022 NY Slip Op 32806(U)
August 19, 2022
Supreme Court, New York County
Docket Number: Index No. 159678/2018
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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FREDY CARABAJO,

Plaintiff,

- v -

CORNELL UNIVERSITY, THE ROCKEFELLER UNIVERSITY, MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES INDIVIDUALLY, AND AS PREDECESSOR IN INTEREST TO MEMORIAL SLOAN KETTERING CANCER CENTER, MEMORIAL SLOAN KETTERING CANCER CENTER, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES, LENOX HILL HOSPITAL, AS SUCCESSOR IN INTEREST TO MANHATTAN EYE, EAR AND THROAT HOSPITAL, NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED, MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY, ALSO KNOWN AS HOSPITAL FOR SPECIAL SURGERY, THE NEW YORK AND PRESBYTERIAN HOSPITAL, PREVIOUSLY KNOWN AS THE NEW YORK AND PRESBYTERIAN HOSPITALS, INC., AND AS SUCCESSOR IN INTEREST TO THE SOCIETY OF THE NEW YORK HOSPITAL, BASED UPON THE MERGER OF THE SOCIETY OF THE NEW YORK HOSPITAL, BREND RENOVATION CORPORATION, CALDWELL & WALSH BUILDING CONSTRUCTION, INC., ROSE ASSOCIATES, INC., S/H/A ROSE ASSOCIATES INC, LUX MAINTENANCE & REN. CORPORATION A/K/A LUX MAINTENANCE & RENO CORP,

Defendant.

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CORNELL UNIVERSITY, THE ROCKEFELLER UNIVERSITY, LENOX HILL HOSPITAL, AS SUCCESSOR IN INTEREST TO MANHATTAN EYE, EAR AND THROAT HOSPITAL, NEW YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED, MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY, ALSO KNOWN AS HOSPITAL FOR SPECIAL SURGERY, THE NEW YORK AND PRESBYTERIAN HOSPITAL, PREVIOUSLY KNOWN AS THE NEW YORK AND PRESBYTERIAN HOSPITALS, INC., AND AS SUCCESSOR IN INTEREST TO THE SOCIETY OF THE NEW YORK HOSPITAL, BASED UPON THE MERGER OF THE SOCIETY

**INDEX NO. 159678/2018**  
**MOTION DATE 05/26/2022**  
**MOTION SEQ. NO. 001**

**DECISION + ORDER ON MOTION**

Third-Party  
Index No. 595036/2021

OF THE NEW YORK HOSPITAL

Plaintiff,

-against-

LUX MAINTENANCE & REN. CORPORATION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - DEFAULT.

In this Labor Law action, defendants/second third-party plaintiffs Cornell University, The Rockefeller University, Memorial Hospital For Cancer And Allied Diseases, individually, and as predecessor in interest to Memorial Sloan Kettering Cancer Center, Memorial Sloan Kettering Cancer Center, individually and as successor in interest to Memorial Hospital For Cancer And Allied Diseases, Lenox Hill Hospital, as successor in interest to Manhattan Eye, Ear And Throat Hospital, New York Society For The Relief Of The Ruptured And Crippled, Maintaining The Hospital For Special Surgery, also known as Hospital For Special Surgery, The New York And Presbyterian Hospital, previously known as The New York And Presbyterian Hospitals, Inc., and as successor in interest to The Society Of The New York Hospital, based upon the merger of The Society Of The New York Hospital and The Presbyterian Hospital In The City Of New York, each individually, and as Tenants-In-Common (collectively, the Hospital Defendants), and Rose Associates, Inc. s/h/a Rose Associates Inc. (Rose) (together with the Hospital Defendants, the Hospital/Rose Defendants) move, pursuant to CPLR 3215, for a default judgment against third-party/second third-party defendant Lux Maintenance & Ren. Corporation (a/k/a Lux Maintenance & Reno Corp) (Lux) on the second third-party complaint. Lux has not submitted opposition.

## Background

Plaintiff Fredy Carabajo, a Lux employee, alleges he was injured on October 19, 2015 when he was caused to fall from a scaffold while working at 450 East 63rd Street, New York, New York (the Premises) (NYSCEF Doc No. 59, Dana M. Catanzaro [Catanzaro] affirmation, Ex A, ¶¶ 42-43). Plaintiff initially brought an action against some of the defendants, including Rose, in Queens County, and Rose commenced a third-party action against Lux, also in Queens County. Plaintiff then commenced a separate action against other defendants in New York County. After the Queens County and New York County actions have been consolidated (NYSCEF Doc No. 64, Catanzaro affirmation, Ex F), the Hospital/Rose Defendants brought a second third-party action against Lux and have pled five causes of action for (1) contractual indemnification; (2) common law indemnification; (3) contribution; (4) breach of contract for Lux's failure to procure insurance; (5) defense and indemnity.

The Hospital/Rose Defendants now move for a default judgment against Lux on the second third-party complaint. Submitted on the motion are the pleadings, an affidavit of service, and a notice of default.

## 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 damages” (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

The affidavit of service sworn to on May 4, 2021 shows that the Hospital/Rose Defendants served Lux with process pursuant to Business Corporation Law § 306 by delivering duplicate copies of a notice of impleader statement, the third-party summons and third-party complaint the Secretary of State on May 4, 2021 (NYSCEF Doc No. 66, Catanzaro affirmation, Ex H). Service upon a domestic corporation is complete when the Secretary of State is served (*see* Business Corporation Law § 306 [b] [1]). The Hospital/Rose Defendants have established that Lux has not timely answered the second-third party complaint or appeared in the action (*see* CPLR 320), nor has it sought an extension of time to do so (*see* CPLR 3012).


Absent from the moving papers, however, is proof of service of a notice of electronic filing upon Lux, in accordance with Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb (c) (2) which states, in relevant part, that personal service of initiating documents “shall be accompanied by a notice, in a form approved by the Chief Administrator, advising the recipient that the action is subject to electronic filing pursuant to this section.” “Absent proof of service of such notice, service is not complete” (*Pollack, Pollack Isaac & De Cicco LLP v Brach*, 2022 NY Slip Op 30755[U], \*3 [Sup Ct, NY County 2022]). Accordingly, the motion is denied for the

Hospital/Rose Defendants’ failure to demonstrate its compliance with Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb (c) (2).

The court also notes that the notice accompanying the additional service of the summons pursuant to CPLR 3215 (g) (4) (ii) references service of process upon Lux via the Secretary of State under Limited Liability Company Law § 303, not Business Corporation Law § 306 (NYSCEF Doc No. 67, Catanzaro affirmation, Ex I at 3).

Accordingly, it is

ORDERED that the motion brought by defendants/second third-party plaintiffs for a default judgment against third-party/second third-party defendant Lux Maintenance & Ren. Corporation (a/k/a Lux Maintenance & Reno Corp) on the second-third-party complaint (motion sequence no. 001) is denied.

<u>8/19/2022</u> DATE		 WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
APPLICATION:	<input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:		