

Harrison v 345 Lenox, LLC

2022 NY Slip Op 34160(U)

December 8, 2022

Supreme Court, New York County

Docket Number: Index No. 156754/2019

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 156754/2019

ROSALIE HARRISON,

Plaintiff,

MOTION SEQ. NO. 003

- v -

345 LENOX, LLC D/B/A 345 LENOX AVENUE
CONDOMINIUM, HARLEM PROPERTY MANAGEMENT,
INC., JSK PROPERTY MANAGEMENT, LLC, 345
MALCOLM X LLC, JOHN BENTON, and JOHN DOE (SAID
NAME BEING FICTITIOUS DUE TO THE UNKNOWN
IDENTITY),

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114

were read on this motion to/for DEFAULT JUDGMENT.

In this property damage action commenced by plaintiff Rosalie Harrison, defendants/third-party plaintiffs 345 Lenox LLC d/b/a Lenox Avenue Condominium, Harlem Property Management, Inc., JSK Property Management, LLC, and 345 Malcolm X, LLC (collectively “TPPs”) move, pursuant to CPLR 3215, for a default judgment against third-party defendant NYC High Skilled Builder, Inc. (“TPD”). TPD opposes the motion and cross-moves, pursuant to CPLR 3012(d), to compel TPPs to accept its third-party answer. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the captioned action by filing a summons and complaint on July 10, 2019. Doc. 1. She thereafter filed an amended complaint on November 22, 2019. Doc. 5. TPPs joined issue by filing an answer to the amended complaint on February 10, 2020. Doc. 16. On or about June 14, 2021, TPPs commenced a third-party action against TPD seeking, inter alia, common-law indemnification. Doc. 72. The third-party summons and complaint were served on TPD via the Secretary of State on June 16, 2021. Doc. 73. An additional copy of the papers served on the Secretary of State were mailed to TPD on July 28, 2021. Doc. 74.

TPPs now move, pursuant to CPLR 3215, for a default judgment against TPD. Docs. 60-74. TPD opposes the motion and cross-moves, pursuant to CPLR 3012(d), to compel TPPs to accept its answer. Docs. 78-83. TPPs oppose the cross motion. Doc. 99.

LEGAL CONCLUSIONS

In order to obtain a default judgment pursuant to CPLR 3215, a movant must provide proof of service of the summons and complaint and the default, as well as proof of the facts constituting the claim (CPLR 3215[f]; *see Gantt v North Shore-LIJ Health System*, 140 AD3d 418 [1st Dept 2016]). Here, although TPPs submit proof of service of process on TPD (Doc. 73) as well an affidavit of a principal of 345 Malcolm X, LLC setting forth the facts constituting their claims (Doc. 61), they are not entitled to a default judgment against TPD since they fail to submit proof of TPD's default. Specifically, the attorney affirmation and client affidavit in support of the motion are devoid of any mention that TPD failed to answer or otherwise appear in this action.

Even assuming, arguendo, however, that TPPs established that TPD defaulted, this Court may, in its discretion, refuse to enter a default judgment against it (*See Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]). CPLR 3012(d) provides that "[u]pon the

application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." The Appellate Division, First Department has held that, in considering whether to grant a motion under CPLR 3012(d), the following factors "must . . . be considered and balanced": "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense." (*Emigrant Bank v Rosabianca*, 156 AD3d at 472-473 [citation omitted]).

Here, the principal of TPD submits an affidavit in opposition to TPPs' default motion in which he attests that TPD was not aware of the claims against it in this action until June 13, 2022, when it received an order from counsel in a related insurance action pending in this Court under Index Number 654633/21 and styled *Union Mutual Fire Ins. Co. v 345 Lenox, LLC d/b/a 345 Lenox Avenue Condominium, et. al.* Doc. 79 at par. 3. Approximately 1½ months after receiving the order, TPD cross-moved to file a late answer. Doc. 78. This delay was rather brief, and there is nothing in the motion papers suggesting that it was willful or that TPPs would be prejudiced if TPD were permitted to file its answer at this time.

TPD offers as a reasonable excuse for failing to answer that it was never served with the summons and complaint. However, since TPPs submit an affidavit of service reflecting that TPD was served with process via the Secretary of State, service was presumptively valid (*See Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 111 AD3d 800 [2d Dept 2013]). Although third-party defendant's excuse for its delay is "less than compelling", such an excuse is acceptable on a CPLR 3012(d) motion given the "strong preference in our law that matters be decided on their merits in the absence of demonstrable prejudice" (*See Elemery Corp. v 773 Assoc.*, 168 AD2d 246, 247 [1st Dept 1990]). Given this policy, as well as the fact that TPD

