

Murray v Consolidated Edison Co. of N.Y., Inc.

2022 NY Slip Op 34386(U)

December 22, 2022

Supreme Court, New York County

Docket Number: Index No. 153559/2020

Judge: Leslie A. Stroth

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. LESLIE A. STROTH PART 52

Justice

-----X

MATTHEW MURRAY,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK,

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

MANETTA ENTERPRISES

Defendant.

-----X

INDEX NO. 153559/2020
MOTION DATE 08/12/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party Index No. 595377/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the instant motion for default judgment is denied. Plaintiff Matthew Murray (plaintiff) brings this action to recover for personal injuries allegedly sustained on March 13, 2019, when he tripped and fell over a steel plate on the sidewalk in front of 150 West 51st Street, New York, NY.

Defendant and third-party plaintiff Consolidated Edison Company of New York, Inc. (Con Ed) now seeks an order pursuant to CPLR 3215 granting a default judgment in its favor as against third-party defendant, Manetta Enterprises (Manetta), upon its indemnification claim. Manetta submits opposition to the motion and Con Ed submits a reply.

Con Ed filed a third-party complaint against Manetta on May 6, 2022 and served same on May 18, 2022. Con Ed sent Manetta a letter on July 6, 2022 advising it of the default and requesting an answer. To date, Con Ed asserts that Manetta has failed to appear and has not requested an extension of time to answer.

In opposition, Manetta asserts that the company had been effectively shut down as an operating business for over two years due to the COVID-19 pandemic and after Con Ed terminated its contracts due to insurance issues. It states that it is in the process of reopening and reaching an agreement with Con Ed to start bidding on projects again, of which it asserts Con Ed is well aware. Due to the shut-down, Manetta's in-house counsel says he has not been in the office frequently, and therefore did not receive the third-party complaint or subsequent correspondence for some time after the papers were mailed. Further, Manetta's in-house counsel asserts that an answer or response could not be completed before the instant motion was filed.

Manetta's president, Enrico Manetta, avers in his affidavit that the delay in responding to the third-party complaint is directly attributable to the company having been shut down since October 2019 and to the lack of full-time employees during this time. *See* NYSCEF doc. no. 25. Further, he attests that the indemnity clause in Manetta's contract with Con Ed only obligates Manetta to indemnify Con Ed for injuries involving projects on which Manetta performed work and for which it was responsible for maintaining. He asserts that Manetta does not perform any sidewalk work and, therefore, would not be obligated to indemnify Con Ed for plaintiff's injuries allegedly caused by an improperly maintained plate on the sidewalk near the subject premises.

In reply, Con Ed argues that the results of its record search for permits issued at the subject premises indicate that a permit was issued to Manetta for sidewalk work and that an opening ticket shows that Manetta performed work on the subject sidewalk. Further, Con Ed asserts that

Manetta's argument that its shutdown caused the delay in responding to the third-party complaint is without merit, because the COVID-19 pandemic should have no impact on the company retaining appropriate legal representation.

Pursuant to CPLR 3215 (f), governing entry of default judgments:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise.

On a motion for leave to enter a default judgment under CPLR 3215, "a plaintiff must allege enough facts to enable the court to determine that a viable cause of action exists." *Hendeles v Preferred Contractors Ins. Co. RRG, LLC*, 167 AD3d 581, 582 (2d Dept 2018) (citations omitted). The court may exercise its discretion in the interests of justice to excuse delay resulting from law office failure. *See* CPLR 2005. The First Department has held that, "to successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense. *See Morrison Cohen LLP v Fink*, 81 AD3d 467 (1st Dept 2011).

In support of its motion, Con Ed sufficiently provides proof of service of the third-party summons and complaint; proof of the undisputed default; and proof of the facts constituting the claim via the complaint, which was verified by a Con Ed employee with personal knowledge of the claim. *See Zelnick v Bidermann Industries U.S.A., Inc.*, 242 AD2d 227, 228 (1st Dept 1997), citing *Goodyear v Weinstein*, 224 AD2d 387 (2d Dept 1996) ("Judgment by default further requires 'proof by affidavit made by the party of the facts constituting the claim' ... or at least a verified complaint"); *see* CPLR 105 (u).

However in opposition, Manetta has provided a reasonable excuse for its default and a meritorious defense through both an affidavit of Enrico Manetta and its attorney's affirmation. Manetta asserts that the delay in responding to the third-party complaint was due to the company's shutdown and lack of full-time employees. It claims that the shutdown was both due to contractual issues with Con Ed as well as the COVID-19 pandemic. Further, it is undisputed that Con Ed was aware of its termination of Manetta's contracts due to insurance issues. Manetta has sufficiently tendered a reasonable excuse for the delay in responding to Con Ed's third-party complaint. Additionally, Manetta sets forth a potentially meritorious defense. Pursuant to the terms of the governing contract, Manetta may not be required to indemnify Con Ed because it does not perform work on sidewalks, which is where plaintiff alleges his accident occurred.

Accordingly, it is hereby

ORDERED that Consolidated Edison Company of New York, Inc.'s motion for a default judgment against Manetta Enterprises is denied.

This constitutes the decision and order of the Court.

12/22/2022

DATE



LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE