

Rogers v County of Westchester
2022 NY Slip Op 35221(U)
May 31, 2022
Supreme Court, Westchester County
Docket Number: Index No. 63732/2020
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
CHRISTOPHER ROGERS,

Plaintiff,

-against-

COUNTY OF WESTCHESTER, SOMERS
CENTRAL SCHOOL DISTRICT, BARRETT
ROOFS, INC. and TRITON CONSTRUCTION
COMPANY, LLC,

Defendants.
-----X

BARRETT ROOFS, INC.,

Third-Party Plaintiff,

-against-

NYC DAYLIGHTING, INC.,

Third-Party Defendant.
-----X

SOMERS CENTRAL SCHOOL DISTRICT,

Second Third-Party Plaintiff,

-against-

NYC DAYLIGHTING, INC.,

Second Third-Party Defendant.
-----X

The following papers (NYSCEF document nos. 66-84; 88-101) were read on: (1) the motion by the defendant/second third-party plaintiff, Somers Central School District, for an order, pursuant to CPLR 3215, granting leave to enter a default judgment against the second third-party defendant, NYC Daylighting, Inc. (sequence no. 02); and (2) the motion

by the defendant/third-party plaintiff, Barrett Roofs, Inc., for an order, pursuant to CPLR 3215, granting leave to enter a default judgment against the third-party defendant, NYC Daylighting, Inc. (sequence no. 03).

Motion Sequence No. 02

Notice of Motion-Affirmation-Exhibits (A-P)-Affidavit of Service

Motion Sequence No. 03

Notice of Motion-Affirmation-Exhibits (A-L)

Upon reading the foregoing papers, the motions are determined as follows:

Plaintiff sues to recover monetary damages for personal injuries allegedly sustained on August 16, 2019, when he fell from a ladder during the course of his employment with the third/second third-party defendant, NYC Daylighting, Inc. (hereinafter, NYC Daylighting). Plaintiff alleges he fell from the ladder while performing construction-related work at premises located at 110 Primrose Street, Lincolndale, New York, more commonly known as Primrose School. Plaintiff's complaint alleges causes of action sounding in common law negligence as well as violations of the Labor Law.

Plaintiff commenced the within action with the filing of a summons and complaint on October 29, 2020. Shortly thereafter, on November 2, 2020, plaintiff filed a supplemental summons and amended complaint. Subsequently, On March 8, 2021, the defendant, Barrett Roofs, Inc. (hereinafter, Barrett Roofs), commenced a third-party action against NYC Daylighting for common-law and contractual indemnification and contribution and for breach of contract. On March 11, 2021, the defendant, Somers Central School District (hereinafter, Somers) commenced a second third-party action against NYC Daylighting for common-law and contractual indemnification and contribution and for breach of contract. Thereafter, on June 18, 2021, plaintiff filed a second supplemental summons and second amended complaint wherein plaintiff added, as a direct party defendant, an entity known as Triton Construction Company, LLC.

As relevant herein, Somers and Barret Roofs each separately move (#02 and #03) for an order, pursuant to CPLR 3215, for leave to enter a default judgment against NYC Daylighting based upon NYC Daylighting's failure to appear/interpose an answer to the third-party and second third-party complaints. The court consolidates the motions for joint disposition and decides them as follows.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff must submit proof of proper service of the summons and complaint, the facts constituting the cause of action, and the defendant's default in answering or appearing (*see* CPLR 3215 [f]; *Global Liberty Ins. Co. v Surgery Ctr. of Oradell, LLC*, 153 AD3d 606, 606 [2d Dept 2017]). "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also

required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Resnick v Lebovitz*, 28 AD3d 533, 534 [2d Dept 2006]).

Here, both movants tender affidavits of service indicating that NYC Daylighting was served with a copy of the pleadings in accordance with Business Corporation Law (hereinafter, BCL) § 306 (b)(1) (*see* NYSCEF Doc Nos. 79 and 97). CPLR 3215 (g)(4)(i) provides that:

“When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.”

Moreover, CPLR 3215 (g)(4)(ii) provides, in pertinent part, as follows:

“The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment.”

Here, both movants failed to comply with the mandates of CPLR 3215 (g)(4). In particular, Somers failed to tender an affidavit of mailing demonstrating that an additional service of the summons by first class mail was sent to NYC Daylighting as required by CPLR 3215 (g)(4)(i) together with a notice that service was previously effectuated upon it in accordance with BCL § 306 (b)(1) as required by CPLR 3215 (g)(4)(ii). Similarly, Barrett Roofs failed to comply with CPLR 3215 (g)(4). Although in an attorney affirmation counsel for Barrett Roofs affirms that on June 30, 2021, Barrett Roofs served the additional mailing of the third-party summons on NYC Daylighting (*see* Holmgren affirmation at ¶ 23, NYSCEF Doc No. 89), it failed to tender the affidavit of mailing demonstrating same as required by CPLR 3215 (g)(4)(i) and it additionally failed to establish that the additional mailing of the third-party summons was accompanied by a notice to NYC Daylighting indicating that service had been effectuated upon it via the Secretary of State in accordance with BCL § 306 (b) as required by CPLR 3215 (g)(4)(ii). In addition, Barrett Roofs failed to proffer an affidavit of service of the motion papers upon NYC Daylighting.

Inasmuch as both movants failed to establish proper service of the pleadings upon NYC Daylighting, both motions must be denied (*see Burlington Ins. Co. v Aisyrk Co., Inc.*, 153 AD3d 777, 778 [2d Dept 2017]; *Bank of N.Y. v Willis*, 150 AD3d 652, 654 [2d Dept

2017]; *Lopez v Trucking & Stratford*, 299 AD2d 187, 187 [1st Dept 2002]). Since the aforesaid defects may be cured, the motions are each denied without prejudice to a further motion upon properly supported papers. Any such motion shall be filed no later than June 30, 2022.

In view of the foregoing, it is hereby:

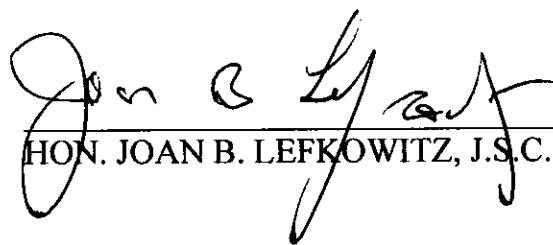
ORDERED the motion (#02) by the defendant/second third-party plaintiff, Somers Central School District, is denied with leave to remake on or before June 30, 2022; and it is further

ORDERED the motion (#03) by the defendant/third-party plaintiff, Barrett Roofs, Inc., is denied with leave to remake on or before June 30, 2022; and it is further

ORDERED the parties shall appear for a compliance conference on June 14, 2022, at 11:30 a.m. which shall be conducted virtually via Microsoft Teams.

E N T E R,

Dated: White Plains, New York
May 31, 2022


HON. JOAN B. LEFKOWITZ, J.S.C.