

**Carney v Metropolitan Transp. Auth.**

2023 NY Slip Op 30848(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 100219/2019

Judge: Denise M. Dominguez

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 100219/2019
MOTION DATE 02/22/2022, 03/03/2022
MOTION SEQ. NO. 002 003

ASHLEY D CARNEY, Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, MABSTOA, JOHN DOE,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISS

Upon reading the above listed documents, Plaintiff's motion (Motion Sequence No. 2) pursuant to CPLR 2221 for leave to renew Plaintiff's motion for default judgment against Defendants METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY and MABSTOA is granted, and upon renewal, the Plaintiff's motion for default judgment is denied and the Defendant's motion to dismiss the Plaintiff's complaint for lack of personal jurisdiction (Motion Sequence No. 3) is denied.

This personal injury matter arises out of an August 21, 2018 incident wherein the Plaintiff alleges that she was struck by a bus that was owned and operated by the Defendants while she was in a crosswalk at the intersection of West 52nd Street and 5th Avenue in Manhattan. Plaintiff ASHLEY D. CARNEY has alleged to have sustained various injuries as a result of the accident.

The Plaintiff commenced this action on February 19, 2019 by the filing of the summons and complaint as a pro se litigant (NYSCEF Doc. #6). This action was not initially commenced via electronic filing, but as per the parties' stipulation and consent to electronic filing (NYSCEF

Doc. #1), this matter was converted to electronic filing as of August 23, 2022. The Plaintiff purports to have served the summons and complaint on the Defendants by certified mailing on June 24, 2019 (NYSCEF Doc. #7). The Defendants argue that service of the complaint was not proper and the Defendants have not submitted an answer to the Plaintiff's complaint to date.

**Plaintiff's Motion to Renew her Motion for Default Judgment**

The Plaintiff moves for an Order pursuant to CPLR 2221 to renew her prior motion for default judgment, and upon renewal, seeks a default judgment against the Defendants.

Plaintiff's initial motion for default judgment was filed on May 21, 2021 and sought default judgment against the Defendants. The Plaintiff's motion was denied by Order of Judge Suzanne Adams, dated October 28, 2021, which has been annexed to the within motion as Plaintiff's Exhibit "1" (NYSCEF Doc. #17). The Plaintiff's initial motion was denied as it was found that: 1) the Plaintiff failed to include proof of the facts of her claim in proper form, as a verified complaint was not submitted in support of the motion; and 2) both the Plaintiff's affidavit in support of the motion and affidavit of service of the motion on the Defendants were both sworn to by an out-of-state notary and lacked a certificate of conformity as required by CPLR 2309(e).

In support of her motion to renew, the Plaintiff submits an affidavit in support (NYSCEF Doc. #16), as well as the October 28, 2021 Order denying the initial motion, the summons and complaint and a purported certificate of conformity (NYSCEF Doc. #17). The Defendants oppose the Plaintiff's motion and submits an affirmation in opposition (NYSCEF Doc. #19), a copy of the Plaintiff's initial motion (NYSCEF Doc. #21) and three affidavits (NYSCEF Doc. #22, 23, 24).

"Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice." (*Mejia v. Nanni*, 307 A.D.2d 870, 871, 763 N.Y.S.2d 611, 612 [1<sup>st</sup> Dept. 2003]; *see Pasanella v. Quinn*, 126 A.D.3d 504, 505, 5 N.Y.S.3d 413, 414 [1<sup>st</sup> Dept. 2015]).

Upon review, and in the interest of justice, although the evidence submitted in support of the Plaintiff's motion to renew is not based upon newly discovered facts, but is based upon the Plaintiff's efforts to cure procedural deficiencies in her initial motion, this Court grants the motion to renew and will address the application for the default judgment on the merits.

To establish entitlement to a default judgment against a non-appearing defendant pursuant to CPLR 3215, a plaintiff must show proof of service of the summons and complaint and proof of the facts constituting the claim, the default and the amount due. (*see* CLPR 3215(f); *Gantt v. N. Shore-LIJ Health Sys.*, 140 A.D.3d 418, 418, 31 N.Y.S.3d 864 [1<sup>st</sup> Dept 2016]). Additionally, pursuant to CPLR 3215(a) and (c), a plaintiff shall take proceedings for the entry of judgment within one year of the default.

Upon review, the Plaintiff has still not provided evidence in proper form establishing the facts constituting the claim as neither a verified complaint, nor duly notarized affidavit in support or affidavit of merit have been submitted in connection with the instant motion. The Plaintiff's complaint does not contain a verification, and a verified complaint has not been submitted in support of the within motion (NYSCEF Doc. #17, Exhibit "2"). Moreover, the Plaintiff's affidavit in support (NYSCEF Doc. #16) is again notarized by an out-of-state notary and the purported Certificate of Conformity does not adhere to the requirements of CPLR 2309(c) as the certificate is executed by the Plaintiff herself, who is not duly identified as a person authorized to administer the oath, such as a notary, attorney or other authorized person. (CPLR 2309(c)).

However, as the failure to provide a proper certificate of conformity "is a mere irregularity, and not a fatal defect" (*Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673, 891 N.Y.S.2d 394, 395 [1<sup>st</sup> Dept. 2009]), a court, in its discretion, may forgive a violation of CPLR 2309(c).

Yet, even if this court were to accept the unverified complaint or the affidavit in support of motion as proof of the facts constituting the claim, as the Plaintiff failed to seek judgment against the Defendants within a year of their alleged default, Plaintiff's motion is denied. (CPLR 3215(c)).

The Plaintiff commenced this action by the filing of the summons and complaint on February 21, 2019. Plaintiff alleges that she effectuated service on the Defendants by mailing the summons and complaint to the Defendants, via certified mailing, on June 24, 2019. As set forth in the Defendants' opposition, pursuant to CPLR 312-a, the Defendants would have had up to 50 days from the service of the complaint to serve an answer, or by August 13, 2019. Thus, pursuant to CPLR 3215(c), the Plaintiff would have had year, or until August 13, 2020, to seek a default judgment against the Defendants. The Executive Order by the Governor of the State of New York tolled filing deadlines as of March 20, 2020 due to the global COVID-19 pandemic. The Executive Order expired on November 3, 2020. Thus, at the time of the Executive Order, the Plaintiff had

146 days (from March 20, 2020 to August 13, 2020) remaining to timely pursue a default judgement against the Defendants. When the tolling period ended on November 3, 2020, the Plaintiff had 146 days, or until March 29, 2021, to timely pursue default judgment. However, the Plaintiff did not pursue a default judgment against the Defendants until the filing of her initial motion on May 21, 2021. As the Plaintiff failed to take proceedings for the entry of judgment within one year after the Defendants' default, the motion for default is denied.

In opposition to the Motion, the Defendants argue that the Plaintiff's complaint should be dismissed as the Plaintiff failed to secure the judgment within one year of the Defendant's default pursuant to CPLR 3215(c). Upon review, the Plaintiff's explanation concerning her delay in proceeding with a motion for default judgment was due to the fact that she had moved out of state to care for an ailing family member and could not access filings at the courthouse (prior to this matter being converted to e-filing) during the COVID-19 pandemic. This Court finds such explanation sufficient cause to avoid a dismissal of this action due to Plaintiff's failure to adhere to the one year requirement of CPLR 3215(c). (*See Selective Auto Ins. Co. of New Jersey v. Nesbitt*, 161 A.D.3d 560, 78 N.Y.S.3d 97, 98 [1<sup>st</sup> Dept. 2018]).

Accordingly, for the above reasons, and in light of New York State's strong policy of litigating matters on the merits, (*see Peg Bandwidth, LLC v. Optical Commc'ns*, 150 A.D.3d 625, 626, 56 N.Y.S.3d 66 (1<sup>st</sup> Dept 2017)), the Plaintiffs' motion for default judgment is denied and the Defendants request for the complaint to be dismissed is denied.

### **The Defendants' Motion to Dismiss the Complaint**

The Defendants move to dismiss the Plaintiff's complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8).

In support of the motion, the Defendants submit an affirmation in support, the Plaintiff's summons and complaint (NYSCEF Doc. #28), the Plaintiff's purported affidavit of service of the summons and complaint (NYSCEF Doc. #29) and affidavits on behalf of Defendants NEW YORK CITY TRANSIT AUTHORITY (NYSCEF Doc. #30), MTA BUS COMPANY (NYSCEF Doc. #31) and the METROPOLITAN TRANSPORTATION AUTHORITY (NYSCEF Doc. #32). No opposition to the Defendants' motion is submitted on behalf of the Plaintiff.

The Plaintiff's complaint was filed on February 21, 2019. The Plaintiff served the Defendants with the summons and complaint via certified mail on June 24, 2019. According to

the Affidavit by Ronald Roberts, on behalf of Defendant NEW YORK CITY TRANSIT AUTHORITY, one copy of the complaint was received by Defendant NEW YORK CITY TRANSIT AUTHORITY and there was no record of the complaint having been received by Defendant MABSTOA. According to the Affidavit by Marlo Polese on behalf of Defendant MTA BUS COMPANY, one copy of the complaint was received by Defendant MTA BUS COMPANY. According to the Affidavit by Robin Lowery on behalf of Defendant METROPOLITAN TRANSPORTATION AUTHORITY, there was no record of the complaint having been received by Defendant METROPOLITAN TRANSPORTATION AUTHORITY.

Defendants NEW YORK CITY TRANSIT AUTHORITY and MTA BUS COMPANY argue that although they received the summons and complaint via the certified mailing, service of process was not proper as the Plaintiff failed to include a statement of service by mail or acknowledgement of receipt pursuant to CPLR 312. Defendants MABSTOA and METROPOLITAN TRANSPORTATION AUTHORITY argue that they were never served with the Plaintiff's summons and complaint.

A motion to dismiss pursuant to CPLR 3211(a)(8) shall be made "at any time before service of the responsive pleading is required". (CPLR 3211(e); *Han v. New York City Transit Auth.*, 203 A.D.3d 511, 164 N.Y.S.3d 602, 604 [1<sup>st</sup> Dept. 2022], *U.S. Bank N.A. v. Gilchrist*, 172 A.D.3d 1425, 1426–1427, 102 N.Y.S.3d 625 [2d Dept. 2019]).

Upon review, as the complaint was mailed to the Defendants on June 24, 2019, pursuant to CPLR 312-a, the Defendants would have had up to 50 days from the service of the complaint, or by August 13, 2019, to appear in this matter by either serving an answer or by filing a motion to dismiss pursuant to CPLR 3211. However, the Defendant's motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction was not filed until December 12, 2022. Although the Defendants claim that a prior motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction was filed on March 1, 2022, and was not properly assigned a motion sequence number by the County Clerk's Office, even if this court were to consider that prior motion as properly filed, its filing date is also well past the time for which a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction was to be filed. Additionally, the Defendants offer no explanation for the delay in proceeding with such a motion. Accordingly, the Defendants' motion to dismiss is denied as untimely.

It is hereby

ORDERED that Plaintiff's motion to renew is granted, and upon renewal, the Plaintiff's motion for default judgment against Defendants METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY and MABSTOA is denied; it is further

ORDERED that the Defendants' motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is denied; and it is further

ORDERED that the Defendants file and serve a copy of this Order with Notice of Entry within 20 days; and it is further

ORDERED that the Defendants are directed to file and serve their Answer within 10 days from the filing of this Order with Notice of Entry and accepted *nunc pro tunc* to June 24, 2019.

2/17/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

HON. DENISE M. DOMINGUEZ  
J.S.C.