

Thomas v Tunnage

2023 NY Slip Op 31440(U)

April 28, 2023

Supreme Court, New York County

Docket Number: Index No. 159587/2021

Judge: Leslie A. Stroth

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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 12

Justice

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INDEX NO. 159587/2021

RICHARD THOMAS, RICHARD THOMAS AS EXECUTOR
OF ESTATE OF VESTA THOMAS,

MOTION DATE 04/18/2023

Plaintiff,

MOTION SEQ. NO. 003 005

- v -

IRINA TUNNAGE, LESLIE BOYD, OLIVIA LARA, HILLEL
BRYK, ELIZABETH TUBRIDY, MICHELLE LIGHTFOOT,

**DECISION + ORDER
ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 47,
48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for

SANCTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 69, 70, 71, 72, 73,
74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for

JUDGMENT - DEFAULT

The instant motions arise out of an action brought by plaintiff Richard Thomas (plaintiff) on behalf of himself and the Estate of Vesta Thomas, his mother, for injuries she allegedly suffered at Bellevue Hospital and for racial discrimination, among other claims. Plaintiff's motion sequence numbers 003 and 005 are consolidated for disposition. Oral argument was held for both motions on April 18, 2023, at which plaintiff appeared but defendant did not.

Plaintiff's motion sequence number 003 for sanctions was withdrawn by plaintiff in open Court on April 18, 2023.

Plaintiff's motion seq. no. 005 seeks a default judgment as against defendant Leslie Boyd (defendant Boyd) for her failure to appear. Defendant Boyd submits a written opposition and cross-motion for an order dismissing the complaint as against her, asserting that law office failure caused defendant Boyd's counsel to inadvertently exclude defendant Boyd from a motion to dismiss filed on January 4,

2022, which was interposed by her co-defendants. *See* NYSCEF doc. no. 24. Justice Barbara Jaffe granted that motion as against said defendants (but not defendant Boyd) on April 18, 2022, finding that plaintiff lacked capacity to sue on behalf of his mother's estate because he had not provided letters of administration from Surrogate's court. *See* NYSCEF doc. no. 66. Defendant Boyd argues that the complaint should similarly be dismissed as against her because of plaintiff's lack of capacity to sue on behalf of his mother's estate.

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 ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ...

On a motion for leave to enter a default judgment under CPLR 3215, the moving party must submit "proof sufficient to enable a court to determine that a viable cause of action exists." *Bigio v Gooding*, 213 AD 3d 480 (1st Dept 2023) (internal citations omitted).

The Court scheduled oral argument for motion sequence numbers 003 and 005 for April 18, 2023, and both sides were notified. Plaintiff appeared *pro se* but neither defendant nor her counsel appeared. This was not a voluntary appearance and defendant Boyd did not request nor did the Court grant defendant Boyd permission not to appear. Defendant Boyd's appearance was not excused, and counsel should have been present to explain defendant Boyd's failure to appear on which plaintiff's motion is based and answer any questions the Court had. The Court indicated in its March 31, 2023 so-ordered notice to the parties that failure of opposing counsel to timely appear may result in the motion being granted without opposition, irrespective of any prior written submissions. *See* NYSCEF doc. no. 111.

As plaintiff submits proof sufficient to enable a court to determine that a viable cause of action exists, pursuant to CPLR 3215 (8), plaintiff's motion for a default judgment as against defendant Boyd is granted without prejudice as to plaintiff's claims on behalf of himself. However, as Justice Jaffe held that plaintiff lacks capacity to sue on behalf of his mother's estate, the law of the case doctrine mandates that

defendant Boyd's cross-motion to dismiss the complaint as against her is granted only to the extent of dismissing plaintiff's claims brought on behalf of the Estate of Vesta Thomas.

As all claims brought on behalf of the Estate of Vesta Thomas are dismissed as against all defendants, the caption shall be amended to remove "Richard Thomas as Executor of Estate of Vesta Thomas" as a plaintiff. However, the Court notes that the action continues against all defendants as to plaintiff's claims brought on behalf of himself.

Accordingly, it is hereby

ORDERED that plaintiff's motion sequence number 003 for sanctions is withdrawn; and it is further

ORDERED that plaintiff's motion sequence number 005 for a default judgment as against defendant Leslie Boyd is granted without prejudice as to plaintiff's claims on behalf of himself; and it is further

ORDERED that defendant Leslie Boyd's cross-motion for an order dismissing the complaint as against her is granted as to plaintiff's claims on behalf of the Estate of Vesta Thomas; and it is further

ORDERED that the action shall bear the following amended caption:

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RICHARD THOMAS,

Plaintiff,

- against -

IRINA TUNNAGE, LESLIE BOYD, OLIVIA LARA, HILLEL BRYK, ELIZABETH TUBRIDY, MICHELLE LIGHTFOOT,

Defendants.
-----X

And it is further

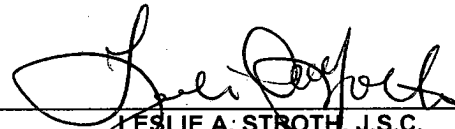
ORDERED that within 30 days of entry of this order plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's

Office (60 Centre Street, Room 119), who are directed to mark the Court's records to reflect the removal of plaintiff "Richard Thomas as Executor of Estate of Vesta Thomas" from the caption; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh]); and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

This constitutes the decision and order of the Court.


LESLIE A. STROTH, J.S.C.

4/28/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: