

**Carr v New York City Tr. Auth.**

2023 NY Slip Op 31582(U)

May 11, 2023

Supreme Court, New York County

Docket Number: Index No. 157274/2021

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21**

*Justice*

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INDEX NO. 157274/2021

ARNOLD CARR,

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY, THE CITY OF NEW  
YORK, CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., HP WASHINGTON HEIGHTS PORTFOLIO  
HOUSING DEVELOPMENT FUND COMPANY, INC., 1091 ST.  
NICOLAS AVE OWNER LLC, NIEUW AMSTERDAM  
PROPERTY MANAGEMENT, LLC, TUNTICHART THAI  
CORP D/B/A RAIN II THAI

**DECISION + ORDER ON  
MOTION**

Defendant.

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

Upon reading the above listed documents, Plaintiff's motion for default judgment pursuant to CPLR 3215, against Defendant 1091 ST. NICOLAS AVE OWNER LLC is denied without prejudice.

This personal injury matter arises out of an October 31, 2020 trip and fall accident. Plaintiff ARNOLD CARR has alleged to have sustained various injuries as a result of the accident.

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]).

In support of the within motion, the Plaintiff submits an attorney affirmation (NYSCEF Doc. #27), the complaint, verified by Plaintiff's counsel, (NYSCEF Doc. #28), the affidavit of service regarding the service of the complaint on Defendant 1091 ST. NICOLAS AVE OWNER LLC, (NYSCEF Doc. #29), a letter advising Defendant 1091 ST. NICOLAS AVE OWNER LLC

it was in default (NYSCEF Doc. #30), and an affidavit of merit by Plaintiff ARNOLD CARR (NYSCEF Doc. #31).

On August 4, 2021, Plaintiff commenced this negligence action against the Defendants. Plaintiff's motion shows that Defendant 1091 ST. NICOLAS AVE OWNER LLC was served via the New York Secretary of State on August 18, 2021 (NYSCEF Doc. #29). Plaintiff also shows that on January 20, 2022, Plaintiff sent, via regular and certified mail, a second copy of the Summons and Complaint to Defendant 1091 ST. NICOLAS AVE OWNER LLC at 80 5<sup>th</sup> Avenue, Suite 1201, New York, NY 10001 (NYSCEF Doc. #30) in accordance with CPLR 3215(g)[4].

However, the Plaintiff has failed to establish the facts constituting his claim as against Defendant 1091 ST. NICOLAS AVE OWNER LLC as per CPLR 3215(f), as the motion does not enable this court to determine that a viable cause of action exists sounding in negligence as against Defendant 1091 ST. NICOLAS AVE OWNER LLC.

Although a party in default is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70–71, 790 N.E.2d 1156, 1162 [2003]), the movant must still set forth the facts constituting a viable cause of action against the defaulting party. (*see State Farm Mut. Auto. Ins. Co. v. AK Glob. Supply Corp.*, 203 A.D.3d 556, 165 N.Y.S.3d 507, 509 [1<sup>st</sup> Dept 2022]).

Upon review, neither the Plaintiff's affirmation in support of motion, nor affidavit of merit, clearly set forth sufficient facts to establish a viable cause of action as against Defendant 1091 ST. NICOLAS AVE OWNER LLC.

Plaintiff's complaint (NYSCEF Doc. #1) and Plaintiff's affidavit of merit (NYSCEF Doc. #31) both identify the location of the subject accident as the sidewalk abutting 1095 St. Nicholas Avenue in Manhattan. Specifically, that the Plaintiff was caused to trip and fall on the sidewalk between two metal grates in front of 1095 St. Nicholas Avenue (NYSCEF Doc. #31).

However, Plaintiff's affirmation in support fails to set forth what connection Defendant 1091 ST. NICOLAS AVE OWNER LLC has to the subject premises and fails to identify what duty Defendant 1091 ST. NICOLAS AVE OWNER LLC owed the Plaintiff (NYSCEF Doc. #27). Nor does the affidavit of merit (which identifies the date of the accident as October 30, 2020, appears to support a motion for default judgment against all of the named defendants, rather than just Defendant 1091 ST. NICOLAS AVE OWNER LLC, and fails to properly attach its supporting exhibits) clarify the relationship Defendant 1091 ST. NICOLAS AVE OWNER LLC has to the

subject premises. Rather, both the affirmation in support of motion and affidavit of merit discuss the collective defendants' obligations and responsibilities, and not the duty of the specific party against which the relief is sought, Defendant 1091 ST. NICOLAS AVE OWNER LLC.

A review of the complaint does not help clarify Defendant 1091 ST. NICOLAS AVE OWNER LLC's connection to the subject premises. Although the Plaintiff's complaint alleges that Defendant 1091 ST. NICOLAS AVE OWNER LLC owned the premises located at 1095 St. Nicholas Avenue at the time of the October 31, 2020 accident, the complaint makes the same allegation as to Defendant HP WASHINGTON HEIGHTS PORTFOLIO HOUSING DEVELOPMENT FUND COMPANY, INC (NYSCEF Doc. #1), which has appeared in this matter. Additionally, although the Plaintiff's complaint alleges that Defendant 1091 ST. NICOLAS AVE OWNER LLC operated, managed, controlled, maintained, repaired and/or leased the subject premises, these same allegations are also asserted as to Defendants HP WASHINGTON HEIGHTS PORTFOLIO HOUSING DEVELOPMENT FUND COMPANY, INC., NIEUW AMSTERDAM PROPERTY MANAGEMENT, LLC and TUNTICHART THAI CORP D/B/A RAIN II THAI. Moreover, the motion does not set forth what relationship, if any, Defendant 1091 ST. NICOLAS AVE OWNER LLC has concerning the subject metal grates themselves; the complaint asserts that Defendants NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE CITY OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC owned, maintained, repaired and controlled the grates at issue (NYSCEF Doc. #1).

Finally, Plaintiff has failed to show that Defendant 1091 ST. NICOLAS AVE OWNER LLC was served with a copy of the within motion as a duly executed affidavit of service reflecting service of the within motion on Defendant 1091 ST. NICOLAS AVE OWNER LLC has not been filed (NYSCEF Doc. #26, 27, 28, 29, 30, 31).

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 is denied without prejudice.

It is hereby

ORDERED that the Plaintiffs' motion for default judgment against Defendant 1091 ST. NICOLAS AVE OWNER LLC is denied without prejudice; and it is further

ORDERED that the Plaintiff's motion seeking unspecified costs, attorneys' fees and sanctions is denied.

~~3/20/2023~~ 5/11/2023  
DATE

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

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  FIDUCIARY APPOINTMENT

INCLUDES TRANSFER/REASSIGN  REFERENCE