

**Rambo v Madison Halal Food Corp.**

2023 NY Slip Op 31661(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 150090/2022

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05**

*Justice*

-----X	<b>INDEX NO.</b>	<u>150090/2022</u>
LEAH R. RAMBO,	<b>MOTION DATE</b>	<u>03/14/2023</u>
Plaintiff,	<b>MOTION SEQ. NO.</b>	<u>002</u>
- v -		

MADISON HALAL FOOD CORP., SAMOORA TRADING CORP., SCHIMENTI CONSTRUCTION COMPANY, LLC,63 MADISON OWNER LLC,THE CITY OF NEW YORK, JOHN DOE,

**DECISION + ORDER ON MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion for JUDGMENT - DEFAULT.

Upon the foregoing documents, plaintiff’s motion for a default judgment as to defendants Madison Halal Food Corp. and Samoora Trading Corp. (collectively, the “Food Truck Defendants”) is denied.

Plaintiff’s complaint alleges that on August 15, 2021 she was injured when a metal barricade, barrier, and/or fencing plate fell on her as she was walking by 63 Madison Avenue, New York, New York (NYSCEF Doc. No. 1 [Compl. at ¶¶120]). As pertinent here, the complaint also alleges that the Food Truck Defendants owned, operated, leased, managed, or controlled a food truck parked in the vicinity of this accident and further alleges that the John Doe defendant, acting in his capacity as an agent, employee, or servant of the Food Truck Defendants, negligently placed this metal barricade, barrier, and/or fencing plate in such a way that it subsequently fell on plaintiff (NYSCEF Doc. No. 1 [Compl. at ¶¶37, 40-48, 117]).

Plaintiff previously moved for a default judgment as against the Food Truck Defendants, which motion was denied based upon her failure to provide proof of the facts constituting the claim through either a complaint verified by plaintiff or an affidavit of merit (See NSYCEF Doc. No. 44 [July 22, 2022 Decision and Order]). Plaintiff now moves, again, for a default judgment as to the Food Truck Defendants. In support of this motion, plaintiff submits an affidavit of merit stating, in pertinent part:

I am fully familiar with the facts and circumstances set forth herein because I was struck by movable metal barricade(s), barrier(s) and/or fencing plate(s) collapsing on me and causing me to trip and fall, as I was walking on the sidewalk on E. 28th Street at or near 63 Madison Avenue, New York, New York 10016, in New York County, City and State of New York, an area where the Defendants were working on construction, and operating a food truck business, and otherwise under their ownership, management, control, supervision and maintenance, causing me serious injury.

On August 5, 2021, at approximately 8:45 a.m., I was walking on the sidewalk past 63 Madison Avenue, New York, New York 10016, in New York County, City and State of New York, on my way to a business meeting for my job as Training Director for the Sheet Metal Workers' Union, when suddenly movable metal barricade(s), barrier(s) and/or fencing plate(s) along the scaffolding collapsed and struck me on the left side of my body and landed on my left leg and foot causing me to trip and fall and be pinned to the temporary construction fence/wall.

...

Immediately after the accident occurred, construction workers nearby came to my aid and I telephoned for an ambulance. I saw as I waited for the ambulance that the movable metal barriers, barricades and/or fencing plates had been placed against the scaffolding support posts and columns, and they had fallen over and collapsed onto me as I walked past hitting the left side of my body and landing on top of my left leg and foot

...

I have been informed by my attorneys that some of the Defendants have not yet appeared in this action, despite having been duly served with summons and verified complaint, and this Affidavit of Merit is being submitted in support of my motion for default judgment against the Defendants, Madison

Halal Food Corp. and Samoora Trading Corp.  
(NYSCEF Doc. No. 68 [Aff. of Merit at ¶¶2, 3, 10, 13]).

### DISCUSSION

To establish her entitlement to a default judgment pursuant to CPLR §3215, plaintiff is required to submit proof of: (1) service of the summons and complaint; (2) the facts constituting the claim; and (3) defendant's default in answering or appearing (See Gordon Law Firm, P.C. v Premier DNA Corp., 165 NYS3d 691 [1st Dept 2022]). "CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has 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" (Feffer v Malpeso, 210 AD2d 60, [1st Dept 1994]). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (Id.). An affidavit of merit setting forth only vague and conclusory assertions is insufficient to satisfy this standard (See Peacock v Kalikow, 239 AD2d 188, 190 [1st Dept 1997]).

In this case, although plaintiff has established her initial service of the summons and complaint and the required follow-up mailing per CPLR §3215(g)(4) on the Food Truck Defendants, she has again failed to provide sufficient proof of the facts constituting her claim.

The affidavit of merit submitted by plaintiff does not state that the John Doe defendant negligently placed these metal barricades or that he did so in his capacity as an agent of the Food Truck Defendants, let alone set out specific facts establishing plaintiff's knowledge of this allegation asserted in her complaint. In fact, no acts by any of these defendants are mentioned in the affidavit of merit. As the affidavit of merit fails to state precisely the Food Truck Defendants (or their purported employee, John Doe) did to cause plaintiff's injury, a default judgment is

inappropriate at this juncture (See Onewest Bank, FSB v Deutsche Bank, 2013 NY Slip Op 34237[U] [Sup Ct, Bronx County 2013] [“An affidavit of merits cannot be premised on a surmise or on speculation, even if a reasonable probability supports such assertion”]; see also 128-138 Mott St., LLC v Woo’s Trading, Inc., 2013 NY Slip Op 30865[U] [Sup Ct, NY County 2013] [uncorroborated conclusory self-serving contentions in affidavit of merit are insufficient to support default judgment]).

In light of the foregoing, the Court encourages plaintiff to proceed with discovery with those defendants that have answered and to refrain from making any further default judgment motions as to the Food Truck Defendants until it can address the deficiencies outlined above.

Accordingly, it is

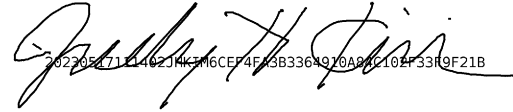
**ORDERED** that plaintiff’s motion for a default judgment is denied; and it is further

**ORDERED** that the Clerk of the Court is directed to set this matter down for a preliminary conference on the next available date; and it is further

**ORDERED** that, within twenty days of the date of this decision and order, plaintiff shall serve a copy of this decision and order, with notice of entry, upon all defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

**ORDERED** that such service upon the Clerk of the Court 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 “Efiling” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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5/17/2023

DATE

HON. JUDY H. KIM, 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