

Pascual v New York City Tr. Auth.

2023 NY Slip Op 31816(U)

May 24, 2023

Supreme Court, New York County

Docket Number: Index No. 160106/2022

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

-----X INDEX NO. 160106/2022

MARGARITA PASCUAL,

MOTION SEQ. NO. 001

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK, 145 VERMILYEA ASSOCIATES, LLC, 145 VERMILYEA, L.P., 145 VERMILYEA CORP., SDG MANGAEMENT CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., "XYZ CORP." d/b/a "LA NACIONAL", Conducting business at 571 West 207th Street, NY, NY and 207 OPTICA INTERNATIONAL, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is

Upon reading the above listed documents, Plaintiff's motion for default judgment pursuant to CPLR §3215, against Defendants 145 VERMILYEA CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., and 207 OPTICA INTERNATIONAL, INC., ("non-appearing Defendants") is denied without prejudice.

This personal injury matter arises out of a December 7, 2021 trip and fall incident along the sidewalk abutting 571-573 West 20th Street in Manhattan.

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 [1st Dept 2016]).

In support of the motion, Plaintiff submits an affirmation in support, the affidavits of service on the non-appearing Defendants and the Plaintiff's affidavit of merit (NYSCEF Doc. #41, 43, 44, 45, 46, 47). No opposition has been submitted.

On November 28, 2022, Plaintiff commenced this negligence action against the Defendants (NYSCEF Doc. #1). Defendant “XYZ” CORP. d/b/a “LA NACIONAL” joined issue by filing an answer on January 17, 2023 (NYSCEF Doc. #13). Defendant NEW YORK CITY TRANSIT AUTHORITY joined issue by the filing of an answer on January 19, 2023 (NYSCEF Doc. #15). Defendant SDG MANAGEMENT CORP. joined issue by the filing of an answer on February 2, 2023 (NYSCEF Doc. #20). An amended answer was filed on behalf of SDG MANAGEMENT CORP. and 145 VERMILYEA ASSOCIATES, L.P. i/s/h/a 145 VERMILYEA, L.P. on February 21, 2023 (NYSCEF Doc. #23). Defendant THE CITY OF NEW YORK joined issue by the filing of an answer on March 29, 2023 (NYSCEF Doc. #33). Neither Defendants 145 VERMILYEA CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., nor 207 OPTICA INTERNATIONAL, INC. have appeared in the action to date.

Plaintiff now moves pursuant to CPLR §3215 for a default judgment against Defendants 145 VERMILYEA CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., and 207 OPTICA INTERNATIONAL, INC. only, due to their respective failure to appear in this matter.

Plaintiff’s motion shows that Defendant 145 VERMILYEA CORP. was served via the New York Secretary of State on December 9, 2022 pursuant to CPLR §311 and New York Business Corporation Law (“N.Y. Bus. Corp. Law”) §306 (NYSCEF Doc. #5, 47). Plaintiff also shows that Defendant SERVICIOS EXPRESS LA NACIONAL, LTD. was served via the New York Secretary of State on December 9, 2022 pursuant to CPLR §311 and N.Y. Bus. Corp. Law §306 (NYSCEF Doc. #6, 47) and that Defendant 207 OPTICA INTERNATIONAL, INC. was served via the New York Secretary of State on December 9, 2022 pursuant to CPLR §311 and N.Y. Bus. Corp. Law §306 (NYSCEF Doc. #7, 47).

As Plaintiff has claimed that Defendants 145 VERMILYEA CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., and 207 OPTICA INTERNATIONAL, INC. failed to duly appear in this action, Plaintiff was required to provide these non-appearing Defendants with notice per CPLR §3215(g)[4]. However, Plaintiff did not submit an affidavit or other proof that additional service of the summons was made on the Defendant at least twenty days before the filing of the initial motion for default as per CPLR §3215(g)[4], nor has such evidence been submitted in support of the within motion. (CPLR §3215(g); *see Sterk-Kirch v. Uptown Commc'ns & Elec., Inc.*, 124 A.D.3d 413, 2 N.Y.S.3d 80 [1st Dept 2015]; *Balaguer v. 1854 Monroe Ave. Hous. Dev. Fund Corp.*, 71 A.D.3d 407, 894 N.Y.S.2d 749 [1st Dept 2010]; *see also LAM Grp. v. Anthony T.*

Rinaldi LLC, 77 Misc. 3d 1217(A), 178 N.Y.S.3d 924 [N.Y. Sup. Ct. 2022, Index No. 650465/2022]). Although Plaintiff's attorney affirmation claims that the Summons and Complaint were sent to the non-appearing Defendants, neither the dates of such mailings nor evidence of such mailing has been submitted in support of the motion. Accordingly, as the Plaintiff has not established that a second copy of the Summons and Complaint was sent to any of the non-appearing Defendants in accordance with CPLR §3215(g)[4], the motion for default judgment is denied without prejudice.

Additionally, 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. (*Id.*; see *State Farm Mut. Auto. Ins. Co. v. AK Glob. Supply Corp.*, 203 A.D.3d 556, 165 N.Y.S.3d 507, 509 [1st Dept 2022]).

Upon review, at this juncture, neither the Plaintiff's affirmation in support of motion, nor affidavit of merit, clearly set forth sufficient facts showing a viable cause of action as against the non-appearing Defendants.

Plaintiff's complaint (NYSCEF Doc. #1) and Plaintiff's affidavit of merit (NYSCEF Doc. #44) both identify the location of the subject accident 571-573 West 20th Street in Manhattan. However, no explanation is offered as to whether this is a single property that is owned, occupied and maintained by one or more entities or whether this is two different properties having different owners, tenants and property managers. Thus, it is also unclear to this Court what role the non-appearing Defendants may have in connection to the subject premises. Plaintiff's affirmation in support claims that all of the named Defendants collectively owned and occupied the subject premises. This generalized claim does not make clear what role or connection to the premises the non-appearing Defendants may have had, let alone what duty the respective non-appearing Defendants may have owed the Plaintiff.

Moreover, the nature and location of the defective condition complained of are not clearly identified. Neither the affirmation in support, nor Plaintiff's affidavit of merit specifically identifies what caused her to trip and fall. The only description offered is "unremediated defects". Nor is the location of the "unremediated defects" further identified in any manner. Although photos of what appear to be sidewalk grates are submitted, as the grates are not referenced in any manner

in either the affirmation in support or affidavit of merit, their connection to the subject incident is unclear at this juncture (NYSCEF Doc. #43).

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 (1st Dept 2017), the Plaintiff's motion is denied without prejudice.

It is hereby

ORDERED that the Plaintiff's motion for default judgment against Defendants 145 VERMILYEA CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., and 207 OPTICA INTERNATIONAL, INC. is denied without prejudice.

5/24/2023

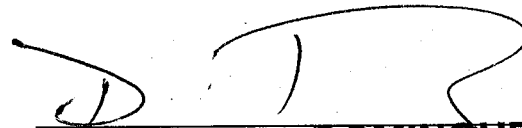
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:


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

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT
 OTHER
 REFERENCE