

**Whiting v City of New York**

2023 NY Slip Op 32378(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 157153/2021

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. 157153/2021

JAMES E WHITING,

MOTION SEQ. NO. 001

Plaintiff

- v -

THE CITY OF NEW YORK, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK CITY
TRANSIT AUTHORITY, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC, BERT BRANDER,
CLAUDIO BUETI D/B/A CLAUDIO'S PIZZERIA G.V. &
PARTNER FOOD SERVICE AMERICA CORP.,

DECISION AND ORDER ON
MOTION

Defendants

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BERT BRANDER

Third-Party Plaintiff

Third-Party
Index No. 595815/2021

-against-

CLAUDIO BUETI D/B/A CLAUDIO'S PIZZERIA

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - DEFAULT

For the reasons that follow, Plaintiff's motion seeking a default judgment against Defendants CLAUDIO BUETI D/B/A CLAUDIO'S PIZZERIA and G.V. & PARTNER FOOD SERVICE AMERICA CORP. is denied.

This personal injury matter arises out of a trip and fall incident. Plaintiff alleges that on September 1, 2020, at or about 12:15 a.m., he tripped and fell on a broken sunken area of the curb, abutting the sidewalk and subway grates at 7th Avenue and West 27th Street, specifically in front of 295 7th Avenue in New York County.

*Procedural History*

Plaintiff, JAMES E. WHITING, commenced this negligence action on August 2, 2021. Defendant BERT BRANDER (BRANDER) joined issue on August 30, 2021. Defendants METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY (TRANSIT) joined issue on September 3, 2021.

On September 6, 2021, Defendant-Third-Party Plaintiff BRANDER commenced a third-party action against Third-Party Defendant CLAUDIO BUETI d/b/a CLAUDIO'S PIZZERIA.

On September 15, 2021, Plaintiff filed a supplemental summons and amended complaint adding CLAUDIO BUETI d/b/a CLAUDIO'S PIZZERIA ("CLAUDIO'S") and G.V. & PARTNER FOOD SERVICE AMERICA CORP. ("G.V. & PARTNER") as Defendants.

On September 17, 2021, Defendant THE CITY OF NEW YORK joined issue. TRANSIT filed an answer to the amended complaint on October 21, 2021. Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK ("CON ED") joined issue with a cross-complaint on November 5, 2021 and filed an answer to the Plaintiff's amended complaint on May 16, 2021. To date, neither Defendants-Third Party Defendants CLAUDIO'S nor G.V. & PARTNER. have appeared in the action.

By letter dated May 27, 2022, this Court learned that Defendant BRANDER passed away. Thus, the action was stayed pursuant to CPLR 1015(a). By So Ordered Stipulation filed on March 13, 2023, the stay was lifted in light of the substitution of Brooke Brander as Executor.

*Default Motion*

On or about October 2022, Plaintiff filed a motion pursuant to CPLR 3215 for a default judgment against Defendants CLAUDIO'S and G.V. & PARTNER for failing to appear and answer. This motion was also held in abeyance and will be decided now that the stay was lifted.

To establish entitlement to a default judgment against a non-appearing defendant, the plaintiff must among other things provide proof that the sued party received notice of the action with proof of service of the summons and complaint upon the defendant (CPLR §3215[f]).

As proof of service upon CLAUDIO'S, Plaintiff submits an affidavit of service by process server, Zaneke Pow from PM Legal LLC, stating that on October 12, 2021, at 2.23 p.m. she served the summons and complaint upon a JOHN DOE, who refused to give his name yet without explanation as to how, the process server states that JOHN DOE was "authorized to accept" service. The affidavit further states that service was made at 295 7<sup>th</sup> Avenue, NY NY 10001. Yet it there is no apartment number or unit number, no indication that service was made on a ground floor, or that service was made at the Defendant's place of business or dwelling (see CPLR 308; CPLR 310; *Martinez v. Church of St. Gregory*, 261 AD2d 179 [1<sup>st</sup> Dept 1999]). Accordingly, while an affidavit of service is presumed proper and valid, here the Court cannot determine whether Plaintiff's intent was to commence an action against CLAUDIO BUETI d/b/a CLAUDIO'S PIZZERIA as an individual or a business.

If Plaintiff's intent was to sue this Defendant as an individual, service was not proper pursuant to CPLR 308. The supplemental summons and amended complaint was not served on Claudio Bueti *personally* as required by CPLR §308[1]. Nor does the affidavit of service indicate whether service was made *at the Defendant's place of business or dwelling* upon a person of suitable age and discretion as required by CPLR §308[2]. Additionally, as per the photographs of the premises (NYSCEF Doc. 42) there is more than one door for 295 7<sup>th</sup> Avenue and Plaintiff's "Lexis Search" reflects multiple unit/apartment numbers at the premises, yet no unit or apartment number is indicated in the affidavit (NYSCEF Doc. 43). Further, JOHN DOE was not identified as an agent, an employee or co-tenant of the Defendant, thus this Court does not know in what capacity or how the JOHN DOE was "authorized to accept" service (see CPLR §308[3]; CPLR §318). Nor was the complaint mailed to Claudio Bueti at his last known address or actual place of business within twenty days and/or served via "nail and mail" at Claudio Bueti's actual place of business or dwelling place as required by CPLR §308[4].

If Plaintiff's intent was to sue Defendant as a business, service was not proper pursuant to CPLR 310. The affidavit and Plaintiff's papers do not provide any indication whether Defendant is a business or a corporation and whether service was made upon an authorized agent such as partner of the business, employee, director, managing or general agent, or cashier or assistant cashier or to any other agent

authorized (see CPLR 310; CPLR 311(a)(1); Bus. Corp. Law §306; *Martinez*, 261 AD2d 179; see e.g. *Lombay v. Padilla*, 70 AD3d 1010 [2d Dept 2010]). Nor is there any indication that it was also mailed within 20 days. Accordingly, Plaintiff has not established proof of service of the supplemental summons and amended complaint on Defendant CLAUDIO'S.

Plaintiff alleges serving Defendant G.V. & PARTNER in the same manner it served Defendant CLAUDIO at 295 7<sup>th</sup> Avenue. However, it also served this Defendant via the New York Secretary of State on September 29, 2021, as required by CPLR 311 and N.Y. Bus. Corp. Law §306. Thus, service was proper and sufficient upon this Defendant pursuant to CPL 311. Yet Plaintiff moved for this default judgment more than one year after serving Defendant G.V. & PARTNER and gives no explanation for the delay. Thus, the complaint against Defendant G.V. & PARTNER is deemed abandoned pursuant to CPLR 3215[c].

Accordingly, it is hereby ORDERED that the Plaintiff's motion for default judgment against Defendants CLAUDIO BUETI D/B/A CLAUDIO'S PIZZERIA and G.V. & PARTNER FOOD SERVICE AMERICA CORP. is denied; and it is further ORDERED that the complaint against Defendant G.V. & PARTNER FOOD SERVICE AMERICA CORP is deemed abandoned and dismissed.

7/13/2023  
DATE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

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

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