

**Roma Scaffolding, Inc. v Winn**

2023 NY Slip Op 32632(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156209/2021

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. 156209/2021

ROMA SCAFFOLDING, INC.,  
Plaintiff,

MOTION DATE 03/23/2023

MOTION SEQ. NO. 003

- v -

MANDEL WINN and JACOB WEIMAN,  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff Roma Scaffolding, Inc. moves, pursuant to CPLR 3215, for a default judgment against defendants Mandel Winn (Winn) and Jacob Weiman (Weiman) (together, defendants).

**I. Background**

This property damage action arises out of a motor vehicle accident that occurred June 5, 2021, when the two vehicles owned by Winn and Weiman were involved a collision and struck plaintiff's scaffold that had been erected outside the building located at 875 Amsterdam Avenue, New York, New York 10025.

Plaintiff's two prior motions for a default judgment against defendants were denied for a number of reasons, including plaintiff's failure to submit an affidavit establishing the merit of its claims; a certificate of conformity for the affidavit of service of process upon Winn, who resides in Richmond, Virginia; affidavits attesting to defendants' military status subsequent to their defaults; and proof of ownership of the two vehicles involved in the collision (NY St Cts Elec Filing [NYSCEF] Doc Nos. 35 and 37, Michael M. Rabinowitz [Rabinowitz] affirmation, exhibits

H and J). Plaintiff submits that it has cured these deficiencies and now renews its motion for a default judgment against both defendants. Neither Winn nor Weiman have submitted opposition.

## II. Discussion

An application for a default judgment must be supported with “proof of service of the summons and complaint[,] ... proof of the facts constituting the claim, [and] the default.” CPLR 3215 (f). In addition to furnishing proof of service, the plaintiff must offer “some proof of liability ... to satisfy the court as to the prima facie validity of the uncontested cause of action.” *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.” *Id.* “[A] complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim” satisfies this statutory requirement. *Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006). A party in default “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damage.” *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 (1984).

The affidavit of service sworn to on July 27, 2021 shows that plaintiff served Winn with process pursuant to CPLR 308 (2) by delivering the summons and complaint and a notice of e-filing to Yolanda Winn, Winn’s mother as a person of suitable age and discretion, on July 23, 2021 at 3936 Bolling Rd, Richmond, Virginia 23223-1147 (NYSCEF Doc No. 32, Rabinowitz affirmation, exhibit E). The affidavit of service is accompanied by a certificate of conformity, as required under CPLR 2309.

However, CPLR 313 states that “[a] person ... subject to the jurisdiction of the courts of the state under section 301 or 302 ... may be served with the summons without the state, in the same manner as service is made within the state,” and CPLR 308 (2) states that the summons must

be mailed to the person to be served within 20 days after its delivery to a person of suitable age and discretion. The affidavit of service does not reflect additional service of the summons by mail to Winn's last known residence or his actual place of business in accordance with CPLR 308 (2). Plaintiff submits an affirmation from its attorney attesting to an additional mailing of the summons and complaint having been made on October 20, 2021 (NYSCEF Doc No. 34, Rabinowitz affirmation, exhibit G), but this is well outside the 20-day period prescribed in the statute. Accordingly, plaintiff has not demonstrated that service upon Winn is complete, and the motion insofar as it seeks a default judgment against Winn is denied. *See Commissiong v Mark Greenberg Real Estate Co. LLC*, 203 AD3d 657, 657 (1st Dept 2022) (denying a motion for a default judgment where service under CPLR 308 [2] was incomplete).

The affidavit of service sworn to on September 16, 2021 shows that plaintiff served Weiman with process pursuant to CPLR 308 (2) by delivering the summons and complaint and a notice of e-filing to Gaby "Doe," a tenant as a person of suitable age and discretion, on September 14, 2021 at 44 Bennett Avenue, Apt. 2K, New York, New York 10033, and by mailing the papers to Weiman at that same address two days later (NYSCEF Doc No. 33, Rabinowitz affirmation, exhibit F). Plaintiff's counsel avers that, based upon a search of the Department of Defense Manpower website conducted on April 25, 2022, Weiman is not active in the military (NYSCEF Doc No. 36, Rabinowitz affirmation, exhibit I). The results from the search are affixed to counsel's affidavit. Plaintiff has demonstrated that Weiman has not answered the complaint or appeared in the action. *See* CPLR 320 (a).

Turning to the merits, plaintiff relies on the affidavit of its CFO, Peter Karaolis (Karaolis), who avers that nonparty New York City Housing Authority had rented one of its scaffolds prior to the date of the accident, and that the scaffold had been installed outside of 875 Amsterdam Avenue,

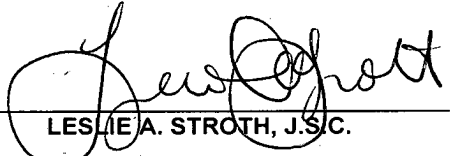
New York, New York 10025 (NYSCEF Doc No. 27, Karaolis aff, ¶¶ 3-4). Karaolis further avers that Weiman's vehicle was involved in a collision and struck plaintiff's scaffold (*id.*, ¶ 7). An uncertified copy of the police accident report indicates that an unknown driver operating Weiman's vehicle struck four unoccupied, parked vehicles, including Winn's vehicle, an MTA bus stop post and building scaffolding (NYSCEF Doc No. 29, Rabinowitz affirmation, exhibit B). A certified registration plate record from the State of New York Department of Motor Vehicles shows that Weiman is the registered owner of a Volkswagen with license plate number JRU8644, which matches the license plate listed on the police accident report (NYSCEF Doc No. 28, Rabinowitz affirmation, exhibit A).

Vehicle and Traffic Law § 388 provides, in relevant part, that vehicle owners "shall be liable and responsible for...injuries to...property resulting from negligence in the use or operation of such vehicle...by any person using or operating the same with the permission, express or implied, of such owner" and that the owner's liability shall be joint and several. Thus, a vehicle owner's liability is vicarious. *See Guevara v Ortega*, 136 AD3d 508, 509 (1st Dept 2016), provided that the operator's use of the vehicle was permissive. Here, there is no indication, at least on the police accident report, that use of the Weiman vehicle was not permissive. *See Lopez v Achdary*, 155 AD3d 553, 554 (1st Dept 2017) (cellular phone records established that the vehicle had been reported stolen before the accident); *Mun Loong Khor v Caesar*, 2019 NY Slip Op 33378[U], \*4 (Sup Ct, Kings County 2019) (police accident report indicated that the defendant's motor vehicle had been stolen prior to the accident). Plaintiff's proof is sufficient to establish Weiman's liability.

Accordingly, the motion of plaintiff Roma Scaffolding, Inc. for a default judgment against defendants Mandel Winn and Jacob Weiman (motion sequence no. 003) is granted to the extent of granting the motion on the issue of defendant Jacob Weiman's liability, and that an assessment of

damages against said defendant shall be made at the time of trial or following the disposition of the action against the remaining defendant, and that the balance of the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

<u>7/26/2023</u> DATE			 LESLIE A. STROTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN.		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE