

Feliciano v Hope Gardens I, LLC

2023 NY Slip Op 32656(U)

July 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 518232/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July 2023

HONORABLE FRANCOIS A. RIVERA

-----X
FELICIANO, TRIVIA

Plaintiff,

- against -

HOPE GARDENS I, LLC, BUENA VIDA CORPORATION, NYCHA HOPE GARDENS I HOUSING DEVELOPMENT FUND CORPORATION, and NEW YORK CITY HOUSING AUTHORITY,

RAUL TRIVIA

Defendants.
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DECISION & ORDER

Index No.: 518232/2022

Oral Argument: 5/18/23

Cal. No.: 27, Ms. No.: 2

Recitation in accordance with CPLR 2219(a) of the papers considered on the notice of motion of plaintiff Trivia Feliciano (hereinafter the plaintiff) filed on February 14, 2023, under motion sequence number two, for an order pursuant to CPLR 3215 granting a default judgment against defendant Buena Vida Corporation (hereinafter BVC) for failing to appear or answer the complaint. There is no opposition to the motion.

- Notice of Motion
- Affirmation in Support
Exhibit A-C
- Affidavit of service

BACKGROUND

On June 24, 2022, the plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk's office.

The verified complaint alleges the following salient facts. On or about August 23, 2021, at approximately 3:00 a.m., plaintiff was lawfully traversing on the interior stairs of 1280 Greene Avenue, Brooklyn, New York. While traveling from the third floor to the second floor, plaintiff was caused to slip and fall because the stairs contained dangerous defects.

The defendants allegedly failed to properly maintain, inspect, service, and repair the staircase between the third and second floors. Upon information and belief, the rubber traction tread on the steps of the aforesaid stairway was defective, broken, and in a state of disrepair, with a broken, loose, and defective stair tread, as well as improper tread length, improper and defective tread covering, improper riser height, and improper handrail positioning. As a direct and proximate result of defendants' negligence, the Plaintiff was caused to slip and fall, which caused the plaintiff to suffer physical injuries, physical pain, and mental anguish.

Defendant BVC violated the good and accepted principles of architecture, construction, and engineering in the design, building ownership, inspection, operation, maintenance, and management of the building more specifically, allowing the staircase in said building to have improper tread length, improper and defective tread covering, improper riser height, and improper handrail positioning.

LAW AND APPLICATION

Plaintiff seeks a default judgment against BVC based on its failure to appear or answer the complaint. In support of the motion the plaintiff annexed the pleading, a copy of the transcript of the plaintiff's 50-h testimony, and an affidavit of service of service of

the commencement papers. On a motion for leave to enter a default judgment pursuant to CPLR 3215, the plaintiff must prove proper service of the summons and complaint on the defendant (*Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 AD3d 649, 651 [2nd Dept 2011]). Additionally, the plaintiff must submit proof of the defendants' default in answering or appearing and must submit proof of facts sufficient to establish a viable claim (*Id.*; also see CPLR 3215[f]). CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit "made by the party" (*HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735, 736 [2nd Dept 2009]).

On July 6, 2022, BVC was served with the commencement papers by service on the Secretary of State pursuant to Business Corporation Law § 306 (b) (1). Service of process on a corporation is deemed to be complete upon service to the Secretary of State (see Business Corporation Law § 306). Plaintiff submitted an affirmation of its counsel setting forth BVC's default in answering the verified complaint. The affirmation demonstrated no personal knowledge of any facts alleged in the verified complaint.

The verified complaint is verified by the plaintiff's attorney pursuant to CPLR 3020(d) and therefore may not be used in lieu of an affidavit by plaintiff pursuant to CPLR 105(u) (*see King v. King*, 99 A.D.3d 672 [2nd Dept 2012]). The annexed transcript of plaintiff's sworn 50-H hearing testimony, the only other sworn testimony submitted with the motion papers, did not contain any allegations of fact regarding BVC. Consequently, the motion did not contain any sworn testimony setting forth a viable

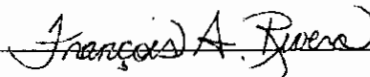
claim against BVC. The motion is, therefore, denied without prejudice (*HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736 [2nd Dept 2009]).

CONCLUSION

The motion by plaintiff Trivia Feliciano for an order pursuant to CPLR 3215 granting a default judgment against defendant Buena Vida Corporation for failing to appear or answer the complaint is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

 x

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.