

Francischelli v JS Pools Inc.

2023 NY Slip Op 32657(U)

July 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 519546/2022

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

JAMES FRANCISCHELLI

Plaintiff

-against-

DECISION & ORDER

Index No. 519546/2022

JS POOLS INC., ADAN GARCIA ARIAS

and MOHAMED SHALABY,

Defendants

Oral Argument: 5/18/23

Cal. No.: 30, Ms. No.: 1

-----X

Recitation in accordance with CPLR 2219(a) of the papers considered on the notice of motion of plaintiff James Francischelli (hereinafter the plaintiff) filed on November 8, 2022, under motion sequence number one, for an order pursuant to CPLR 3215 granting a default judgment against defendant JS Pool Inc¹ (hereinafter JSP) for failing to appear or answer the complaint. There is no opposition to the motion.

- Notice of Motion
- Affirmation in Support
- Exhibit A-B
- Affidavit of Merit

BACKGROUND

On July 11, 2022, the plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint (hereinafter the

¹ Originally plaintiff's instant motion sought a default judgment JSP, Adan Garcia Arias and Mohamed Shalaby. By stipulation filed on January 27, 2023, plaintiff withdrew the instant motion as asserted against Mohamed Shalaby. At oral argument plaintiff averred that it had also withdrawn the instant motion as asserted against Adan Garcia

commencement papers) with the Kings County Clerk's office. The verified complaint alleges the following salient facts. On December 26, 2021, plaintiff was driving a motor vehicle bearing New York State registration number KTM9421 on the roadway at Poospatuck Lane and Pawnee Avenue in Brookhaven, New York. At the same time and location, defendant Adan Garcia Arias was driving a motor vehicle bearing New York State registration number HVR6067 with the knowledge and consent of JS Pools Inc, the vehicle's owner. At the same time and location Mohamed Shalaby was operated a motor vehicle bearing New York State registration number GAN151. All three motor vehicles collided. The collision was caused by Arias and Shalaby's negligent operation of their respective vehicles. Th collision seriously injured the plaintiff.

LAW AND APPLICATION

Plaintiff seeks a default judgment against JSP based on its failure to appear or answer the complaint. In support of the motion the plaintiff annexed the pleading, affidavits of service of service of the commencement papers, an affirmation of plaintiff's counsel, and an affidavit of service of the motion 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]).

Plaintiff submitted an affirmation of its counsel setting forth JPS'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 plaintiff, however, submitted an affidavit setting forth a viable claim against JPS.

CPLR 3215 (g)(4)(i) and (ii) provides in pertinent part as follows.

- (i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

- (ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.

Plaintiff's affidavit of service of the commencement papers demonstrates that service was effectuated upon JPS, a domestic corporation, by serving the New York State

Secretary of State. Plaintiff utilized Business Corporations Law (hereinafter BCL) 306[b][1] which provides that service is complete the date that the Secretary of State is served. JPS had thirty days from July 13, 2022, to answer the complaint (CPLR 3012[c]) and did not do so. Accordingly, the plaintiff has established that JPS has defaulted.

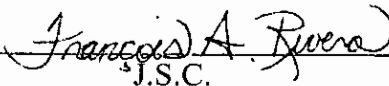
However, plaintiff did not annex an affidavit of service evidencing the additional mailing of the summons to the last known address of the business as required by CPLR 3215(g)(4)(1). Accordingly, the plaintiff's motion is denied without prejudice.

CONCLUSION

The motion by plaintiff James Francischelli for an order pursuant to CPLR 3215 granting a default judgment against defendant JS Pools Inc. for failing to appear or answer the complaint is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

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