

Ollivierre v Ollivierre

2023 NY Slip Op 34597(U)

December 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 500836/2014

Judge: Sharon Bourne-Clark

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LEMORE OLLIVIERRE,

Plaintiff,

-against-

LEONETTE OLLIVIERRE, ANTHONY
MATTHEWS, TOWER GROUP INTERNATIONAL,
LTD., TOWER INSURANCE COMPANY OF NEW
YORK and JP MORGAN CHASE & CO.,

Defendants.
-----X

Index No: 500836/2014

Motion Date: 10/03/2023

Mot. Seq. 005

DECISION
AND ORDER
ON MOTION

HON. SHARON BOURNE-CLARKE, J.S.C.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 141, 142, 143, 144, were read on this motion to vacate default judgment and extend time to appear.

In the present tort action, commenced by plaintiff, LEMORE OLLIVIERRE ("Plaintiff"), on January 31, 2014 as against, *inter alia*, defendant ANTHONY MATTHEWS ("Matthews") charging, Matthews now moves to: (a) pursuant to CPLR 5015, to restore this action to the calendar; (b) pursuant to CPLR 317, 2001, 2004 and 5015, to vacate and set aside the default judgment as against Matthews, entered by Decision & Order (the "Default Judgment") of Hon. Johnny Lee Baynes, J.S.C., dated February 18, 2015, NYSCEF 26, and entered on February 20, 2015, granting Plaintiff a default judgment as against Matthews, the order upon inquest award and an inquest award (the "Inquest Order") dated December 24, 2019, NYSCEF 105, 106, entered as against Matthews, and the Judgment and Bill of Costs (the "Judgment") dated October 27, 2021, NYSCEF 110, as against Matthews; (c) to dismiss pursuant to CPLR 3211(a)(8); and (d) if the case is not dismissed,

pursuant to CPLR 2004 and 3012(d), enlarging the time in which Matthews has to answer the complaint; and (d) directing Plaintiff to cease any and all collections efforts as against Matthews.

Following oral argument, for the reasons set forth below, it is hereby ordered and adjudged application is granted in part and denied in part. To the extent that this application seeks dismissal of this action pursuant to CPLR 3211(a)(8), this application is denied.

With respect to Matthews' application to vacate and set aside the Default Judgment, the Inquest Order and the Judgment (collectively, the "Default"), and for an order directing Plaintiff to cease and withdraw any collections efforts as against Matthews, the application is granted in its entirety.

Matthews submits various reasons for vacating the Default, however, the court need not address all of them because the court finds Matthews is entitled to this relief for the following reason: no affidavit of merit was supplied with the default judgment motion and therefore it should never have been granted in the first place.

CPLR 3215(f) is the basis for the affidavit of merit requirement when a party seeks a default judgment against another. It states in relevant part:

Proof. On any application for judgment by default, the applicant shall file...proof of the facts constituting the claim, the default and the amount due by affidavit made by the party...Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney.

No affidavit of merit of the party was ever submitted in connection with Plaintiff's original default judgment motion. See NYSCEF 18, 19, 20, 21, 119. Absent such an affidavit or a pleading verified by a person with personal knowledge, as discussed below, the Default Judgment should never have been granted.

A verified pleading may only be relied upon as an affidavit of merit when it is verified by someone with personal knowledge of the allegations. See Clarke v Liberty Mut. Fire Ins. Co., 150

A.D.3d 1192, 1194 (2d Dept. 2017) (“While a pleading is to be verified by affidavit of the party, if all the material allegations of the pleading are within the personal knowledge of...the attorney, the verification may be made by such...attorney”). In this case, the pleading was verified by Plaintiff’s attorney, not Plaintiff himself. See NYSCEF 1, 20, and 117, all at p. 26.

However, there is nothing that would suggest that Plaintiff’s attorney had personal knowledge. Defendant is charged with assault, battery, malicious prosecution, negligent infliction of emotional distress and punitive damages. Id. at ¶¶ 77-89, 108-112. There is no allegation and no indication whatsoever that the verifying attorney was personally present on July 4, 2013 when the allegations giving rise to these causes of action are claimed to have taken place. Id. Moreover, Plaintiff’s opposition to this application does not contain any argument or contention that Plaintiff’s attorney had personal knowledge. See NYSCEF 137, 138.

“Facts appearing in the movant’s papers, which the opposing party does not controvert, may be deemed admitted.” Kuehne & Nagel v. F. W. Baiden, 36 N.Y.2d 539, 544 (1975). I find that Plaintiff conceded the following fact: that Plaintiff’s counsel had no personal knowledge of the facts and therefore, his verification cannot serve as an affidavit of merit. See Clarke, 150 A.D.3d at 1194. Accordingly, I further find, that the original request for a default judgment did not contain either an affidavit of merit or a pleading sufficiently verified to take the place of an affidavit of merit.

The Court of Appeals is clear: a failure to provide an affidavit of merit requires reversal of the default judgment. See Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200 (2013):

A failure to submit the proof required by CPLR 3215(f) should lead a court to deny an application for a default judgment, but a court that does not comply with this rule has merely committed an error—it has not usurped a power it does not have. The error can be corrected by the means provided by law—i.e., by an application for relief from the judgment pursuant to CPLR 5015.

Id. at 203-204.

Since Matthews sought the relief as delineated by Manhattan Telecom, this Court is empowered and compelled to correct the error—to vacate the default judgment and any orders flowing therefrom and to permit this case to be heard on the merits.

Accordingly, it is hereby

ORDERED that the application to vacate and set aside the Default Judgment, the Inquest Order and the Judgment is granted, as to defendant Anthony Matthews only; and it is further

ORDERED, to the extent that the Judgment has been docketed, the Clerk of the Court is directed to reverse such docketing, as to defendant Anthony Matthews only; and it is further

ORDERED that the Clerk of the Court take any steps necessary to vacate Default Judgment, the Inquest Order and the Judgment, as to defendant Anthony Matthews only; and it is further

ORDERED that Plaintiff is directed to cease any collections efforts as he no longer has a judgment against Anthony Matthews only; and it is further

ORDERED that Matthews' application for dismissal is denied; and it is further

ORDERED that Matthews' application to restore this action to the calendar and to enlarge his time to answer to the complaint is granted. In light of the foregoing, Matthews shall have thirty days from the date of entry of this order to interpose an answer.

Dated: 12/2/23



HON. SHARON BOURNE-CLARKE, J.S.C.

Hon. Sharon A. Bourne-Clarke
Acting Justice, Supreme Court

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FILED
KINGS COUNTY CLERK