

Turan v KMO-361 Realty Assoc., LLC

2024 NY Slip Op 33620(U)

October 8, 2024

Supreme Court, New York County

Docket Number: Index No. 157811/2020

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 12M

Justice

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GUSTINE AHUMADA TURAN,
Plaintiff,

- v -

KMO-361 REALTY ASSOCIATES, LLC, THE NEW YORK
RESOURCE CENTER CONDOMINIUM, THE BOARD OF
MANAGERS OF THE NEW YORK RESOURCE CENTER
CONDOMINIUM,

Defendant.

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THE NEW YORK RESOURCE CENTER CONDOMINIUM,
THE BOARD OF MANAGERS OF THE NEW YORK
RESOURCE CENTER CONDOMINIUM

Plaintiff,

-against-

A&H INSTALLATION INC., GEMINI WATERPROOFING &
RESTORATION CORPORATION, HKS CONSTRUCTION GP.

Defendant.

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INDEX NO. 157811/2020
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595493/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 68, 69 were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiff commenced this action for injuries sustained from a trip and fall on June 25, 2019 as a pedestrian in front of the premises located at 365 5th Avenue, New York, NY, owned, operated, managed and/or maintained by defendants. Third-party plaintiffs The New York Resource Center Condominium and The Board of Managers of the New York Resource Center Condominium filed a third-party complaint against third-party defendants A&H Installation Inc.,

Gemini Waterproofing & Restoration Corporation, and HKS Construction GP filed a third-party complaint for contractual indemnification, common law contribution/indemnification, and breach of contract for failure to procure insurance. Third-party plaintiffs now move here for default judgment against third-party defendants for failure to appear in this action.

Pursuant to CPLR §3215(f), “On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice . . . and proof of the facts constituting the claim, the default and the amount due . . . Any request for a default judgment must include some proof of liability . . . to satisfy the court as to the prime facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). The source of this can be “an affidavit executed by a party with personal knowledge of the merits of the claim” (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]).

In support of the motion for default judgment, plaintiff attached affidavits of service (Exh A) to demonstrate that the third-party defendants were served. Letters of default dated August 11, 2023 were also provided (Exh F). As to the merits of the claim, third-party plaintiffs provided an Affidavit of Merit by Peter S. Duncan, president of George Comfort & Sons, Inc., who indicated that “Prior to and on June 25, 2019, George Comfort & Sons, Inc.'s had a management contract with New York Resource Center Condominium” and that “[p]rior to June 25, 2019, NY Resource Center Condominium c/o George Comfort entered into an agreement with third party defendant Gemini Waterproofing to perform certain construction work at the premises” (Para 5 & 6). The affidavit further provided the following (para 12-15):

*On June 25, 2019, A&H Installation Inc., Gemini Waterproofing & Restoration Corporation, and HKS Construction GP. were present at the site performing construction work at the premises.

*Prior to June 25, 2019, HKS Construction GP was the original name of the sidewalk shed vendor. HKS Construction GP later changed its name to A&H Installation Inc, and

A&H Installation Inc continued to provide services to the building after the name was changed.

*Pursuant to the contracts in effect on June 25, 2019, A&H Installation Inc., Gemini Waterproofing & Restoration Corporation, and HKS Construction GP were responsible for furnishing and maintaining the existing sidewalk pedestrian bridge near the premises and at the alleged accident location which was the entrance way leading into the CUNY Graduate Center, located at 365 5th Avenue, New York, New York and ensuring ingress and egress into the building was safe for all persons.

*The alleged incident that forms the basis of plaintiff's claims arose out or the resulted from the work performed pursuant to the agreements between NY Resource Center Condominium /George Comfort and A&H Installation Inc., Gemini Waterproofing & Restoration Corporation, and HKS Construction GP in covering the entrance way to the CUNY Graduate Center located at 365 5th Avenue, New York, New York and obscuring its view from people entering the building.

Third-party plaintiffs also attached an Agreement dated July 11, 2018 between third-party plaintiff NY Resource Center Condominium c/o George Comfort & Sons, Inc. and third-party defendant Gemini Waterproofing and Restoration Corporation (Exh D), as well as an Agreement between Gemini Waterproofing and third-party defendant A&H Installation dated February 22, 2020. The Agreement dated July 11, 2018 contained an indemnification and insurance clause (Exh D, p 29), which included the following:

To the fullest extent permitted by law, Contractor shall defend, indemnify and hold harmless the Owner, George Comfort & Sons, Inc. ("Owner's Agent")... from and against any and all claims, suits, damages, losses, costs and expenses... arising out of or in connection with (i) the performance of the Services, (ii) this Agreement and/or Contractor's breach of any covenant, representation or warranty contained herein, (iii) entry onto the Project site, and (iv) any negligent act or omission of Contractor or Contractor's employees, agents, subcontractors, suppliers, workers, invitees, successors and assigns...

The following insurance is to be provided by Contractor at its expense. A certificate of insurance evidencing the coverages required herein and endorsements showing all of the Owner Parties as additional insureds (except for Workers' Compensation) and waiver of subrogation must be presented to Owner's Agent by Contractor and each of Contractor's subcontractors, in form and content satisfactory to Owner's Agent prior to commencing Services and prior to receiving any payments or being permitted access to the Project Site...

The Agreement dated February 22, 2020 also contained an indemnity and insurance clause (Exh E, p 2-3): “In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor’s sole expense, Gemini Waterproofing and Restoration Corp... The Subcontractor shall procure and shall maintain such insurance as will protect the Contractor, owner and their officers, directors, agents and employees, for claims arising out of or resulting from Subcontractor’s Work under this Contract Agreement.” No opposition has been provided. In view of the foregoing, third-party plaintiffs motion for default judgment against third-party defendants.

Accordingly, it is hereby

ORDERED, that motion #001 by third-party plaintiffs The New York Resource Center Condominium and The Board of Managers of the New York Resource Center Condominium against third-party defendants A&H Installation Inc., Gemini Waterproofing & Restoration Corporation, and HKS Construction GP for default judgment is granted, and that damages shall be determined during trial.

The foregoing constitutes the decision and order of the Court.



HON. LESLIE A. STROTH
J.S.C.

DATE: 10/8/2024

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE