

Gunther v Castillo
2024 NY Slip Op 35252(U)
June 12, 2024
Supreme Court, Westchester County
Docket Number: Index No. 68748/2023
Judge: David F. Everett
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
PETER GUNTHER,

Plaintiff,

-against-

JOVANIE A. CASTILLO,

Defendant.

-----X
EVERETT, J.

INDEX NO. 68748/2023

**DECISION/ORDER
Motion Seq. 1**

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 4-9, relative to the motion by plaintiff for a default judgment against defendant Jovanie A. Castillo, the Court determines as follows:

In his affidavit (NYSCEF Doc No. 6), plaintiff avers the following:

2. The subject matter of this litigation arises from an incident which occurred on March 23, 2022 at the Saw Mill River Road and Barney Street, County of Westchester, State of New York.
3. On that date, I was injured when the motor vehicle operated by the Defendant JOVANIE A. CASTILLO, struck a bunch of vehicles at the aforementioned location.
4. As a result of the negligence of the Defendant, I sustained severe and permanent injuries including but not limited to ringing in the ears and loss of hearing.

Plaintiff's attorney submits an affirmation of support (NYSCEF Doc No. 5), which states that service of the summons and verified complaint was made on November 2, 2023, by delivering the pleadings to Jose, the brother of defendant (NYSCEF Doc No. 8), and that defendant "has not yet appeared or answered."

CPLR 3215 (a) provides: “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.” In a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default (*Bank of N.Y. Mellon v Van Roten*, 181 AD3d 549, 550 [2d Dept 2020]).

CPLR 3215 (f) requires the applicant for a judgment by default to submit proof “by affidavit made by the party” of the facts constituting the claim, and provides that “[w]here 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.” (See *DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015].)

Uniform Rules for Trial Courts (22 NYCRR) §202.5-bb (b) (3) states that personal service of initiating documents in an action commenced electronically “shall be accompanied by a notice, in a form approved by the Chief Administrator, advising the recipient that the action is subject to electronic filing pursuant to this section.”

CPLR 2214 provides: “A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard.” If a movant fails to give requisite notice of motion, the Court is deprived of jurisdiction to entertain the motion, which is invalidated (see *Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 124-125 [2d Dept 2015]; *Morabito v Champion Swimming Pool Corp.*, 18 AD2d 706, 707 [2d Dept 1962]; see also 3215 [g] [1]).

CPLR 308 (2) provides in part:

Personal service upon a natural person shall be made by any of the following methods:

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service....

(*See Rattner v Fessler*, 202 AD3d 1011, 1014 [2d Dept 2022].)

Before a default judgment can be entered against a natural person who has otherwise not answered or appeared in an action or proceeding, the party seeking to enter the default judgment must submit an affidavit to the court showing that the defaulting party is neither in active military service nor dependent on anyone else who is (50 USC Appendix § 520 [1]; § 536; Military Law § 303 [1]; § 306) (*see Citibank v McGarvey*, 196 Misc 2d 292, 298 [Civil Ct, Richmond County 2003]).

Here, plaintiff submits an affidavit asserting a meritorious claim and that defendant failed to answer or otherwise appear (NYSCEF Doc Nos. 6 and 5; CPLR 3215); an affidavit of service, which shows that defendant was served with the summons, verified complaint, and electronic filing notice by substituted service (NYSCEF Doc No. 8; CPLR 308 [2]), and notes that the person served confirmed that defendant is not currently in military service; and a copy of correspondence providing additional notice (NYSCEF Doc No. 9; CPLR 3215 [g]). However, there is no affidavit of service, which shows the notice of motion and motion papers were mailed to defendant’s last known address (CPLR 2214).

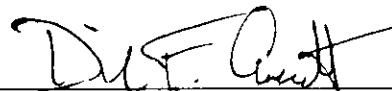
Accordingly, it is,

ORDERED that plaintiff's motion for a default judgment against defendant is denied without prejudice to renew on proper papers.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 12, 2024

ENTER:

A handwritten signature in black ink, appearing to read "D.F. Everett", is written over a horizontal line.

HON. DAVID F. EVERETT, J.S.C.

To: Filed in NYSCEF