

Fleury v Fonville
2024 NY Slip Op 35445(U)
April 22, 2024
Supreme Court, Queens County
Docket Number: Index No. 712859/2020
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



JEAN R. FLEURY,

IAS Part - 42

Plaintiff,

Index No.: 712859/2020

-against-

Motion Date: 2/29/24

TAMARA L. FONVILLE AND "JOHN DOE,"

Motion Cal. No. 12

Defendants.

Motion Seq. No. 3

The following electronically filed ("EF") documents read on this motion by Jean R. Fleury ("Mr. Fleury" or "plaintiff") for an order: a) pursuant to CPLR § 3215 directing the entry of judgment upon default in favor of plaintiff and against the defendants Tamara L. Fonville and JOHN DOE, on the issue of liability; b) setting the matter down for an inquest as to damages, for an award of costs, disbursements and reasonable attorney's fees to abide this motion; c) pursuant CPLR § 602 to consolidate the instant action No. 1 (Index No. 712859/2020) with Action No. 2 (Index No. 724332/2021); d) granting such other and further relief as to this Court may seem just and proper.

Papers
Numbered

Notice of Motion-Affirmation- Exhibits..... EF 30 - 38

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages based upon personal injuries the plaintiff allegedly sustained at Ms. Fonville's residence. As a result, on August 12, 2020, the plaintiff commenced this action against defendants. Thereafter, on September 12, 2020, the plaintiff allegedly served the summons and complaint upon Ms. Fonville, via conspicuous place service, pursuant to CPLR § 308(2). Notwithstanding the same, the plaintiff alleges that Ms. Fonville failed to interpose an answer, appear or seek an extension of time to appear in this action. As a result, the

plaintiff seeks entry of a default judgment against Ms. Fonville.

To demonstrate entitlement to a default judgment, a plaintiff is required to submit proof of service of the summons and complaint, the facts constituting the claim demonstrating a viable cause of action, and the opposing party's default in answering or appearing (*see* CPLR § 3215 (f); *Schimoler v. Newman*, 175 AD3d 70 [2d Dept 2019]; *Vidal v. Wyckoff Corp.*, 131 AD3d 600 [2d Dept 2015]; *Fried v. Jacob Holding, Inc.*, 110 AD3d 60 [2d Dept 2013]). Furthermore, “[a] plaintiff must allege enough facts to enable the court to determine that a viable cause of action exists” (*Hendeles v. Preferred Contractors Insurance Company RRG, LLC*, 167 AD3d 581 [2d Dept 2018]; *see also Roy v. 81E 98th KH Gym*, 142 AD3d 985 [2d Dept 2016]; *Jacobsen v. S & F Serv. Ctr. Co. Inc.*, 131 AD3d 450 [2d Dept 2015]). “Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default” (*Katz v. Blau*, 133 AD3d 987 [2d Dept 2019]).

Here plaintiff only avers that “. . . on April 4, 2020 . . . [he] was injured while a resident/tenant at the premises located at 198-11 118th Avenue, Queens County, City and State of New York 11412, when . . . Tamara L. Fonville's guest caused physical injury to [him] Robert Melendez, whose name was not readily known at the time of commencement, was a lawful guest of defendant Tamara L. Fonville and/or an agent and/or representative of defendant Tamara L. Fonville at the time of the occurrence.” However, the complaint was verified by the plaintiff's attorney, and not by a party with personal knowledge of the facts at issue; and the plaintiff failed to submit an affidavit of merit. It is well settled that proof of the facts constituting the claim cannot be established “without a complaint verified by someone or 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]; *see also Beltran v. Commercial Building Maintenance, Corp.*, 206 AD3d 549 [1st Dept 2022]). Moreover, a complaint verified by an attorney is insufficient to support entry of judgment pursuant to CPLR § 3215. (*HSBC Bank USA, N.A. v. Lem*, 194 AD3d 1027 [2d Dept 2021]; *Mattera v. Capric*, 54 AD3d 827, 828 [2d Dept 2008]; *Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]). Likewise, an attorney's affirmation is “utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR § 3215. (*Beltre v. Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *see also Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Trawally v. East Clarke Realty Corp.*, 92 AD3d 471 [1st Dept 2012]; *Thelen LLP v. Omni Contracting Co. Inc.*, 79 AD3d 605 [1st Dept

2010]; *Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]). Thus, the plaintiff has failed to submit sufficient proof of the facts constituting his claim requiring denial of the motion.

Lastly, pursuant to CPLR § 602, consolidation or a joint trial is appropriate to avoid unnecessary duplication of trials, save unnecessary costs and expenses, and prevent an injustice, which would result from divergent decisions based on the same facts. (*see Robinson v. 47 Thames Realty, LLC*, 158 AD3d 780, 781 [2d Dept 2018]; *Wang v. Wang*, 96 AD3d 1005 [2d Dept 2012]). Furthermore, a motion for consolidation or a joint trial rest within the sound discretion of the trial court. (*Tieshamaker v. EMB Contracting Corp.*, 143 AD3d 886 [2d Dept 2016]; *Matter of Long Is. Indus. Group v. Board of Assessors*, 72 AD3d 1090, 1091 [2d Dept 2010]; *Mattia v. Food Emporium, Inc.*, 259 AD2d 527 [2d Dept 1999]; *McDutchess Bldrs., Inc. v. Dutchess Knolls, Inc.*, 244 AD2d 534 [2d Dept 1997].) Absent prejudice to a substantial right of the opposing party, consolidation or a joint trial is proper, where common questions of law and fact exist. (*D'Abreau v. American Bankers Ins. Co. of Fla.*, 261 AD2d 501 [2d Dept 1999]; *Whiteman v. Parson Transportation Group of New York, Inc.*, 72 AD3d 677 [2d Dept 2010]; *Cromwell v. CRP 482 Riverdale Ave., LLC*, 163 AD3d 626 [2d Dept 2018].) Moreover, consolidation or joint trials are “. . . favored by the courts in serving the interest of justice and judicial economy.” (*Flaherty v. RCP Assoc.*, 208 AD2 496 [2d Dept 1994]; *Shanley v. Callanan Indus.*, 54 NY2d 52 [1981]; *see also Bruno v. Capetola*, 101 AD3d 785 [2d Dept 2012]).

Here, the court finds that the evidence in Action No. 2 and this action involves the same essential facts, and transactions between the parties, and will require the determination of common issues. Furthermore, the defendants have failed to demonstrate any prejudice that might result from a joint trial. (*Hae Sheng Wang v. Pao-Mei Wang*, 96 AD3d 1005, 1009 [2d Dept 2012]; *Moses v. B & E Lorge Family Trust*, 147 AD3d 427 [2d Dept 2017]). In the interest of justice, judicial economy, and to avoid inconsistent verdicts, both actions should be consolidated for joint trial, especially in light of the fact that the defendants have not demonstrated that consolidation would prejudice any substantial right.

Accordingly, it is hereby

ORDERED, that the branch of the plaintiff's motion seeking a default judgment against Tamara L. Fonville, pursuant to CPLR § 3215, is denied; and it is further,

ORDERED, that branch of the plaintiff's motion, pursuant to CPLR § 602, is granted, without opposition, and Action No. 1 shall be tried jointly in this court with Action No. 2; and it

is further,

ORDERED, that the captions in the actions shall retain their separate identities and read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JEAN R. FLEURY,

Plaintiff,

-against-

Index No. 712859/2020
(Action No. 1)

TAMARA L. FONVILLE AND "JOHN DOE,"

Defendants.

JEAN R. FLEURY,

Plaintiff,

-against-

Index No.: 724332/2021
(Action No. 2)

TAMARA L. FONVILLE and ROBERT MELENDEZ,

Defendants.

and it is further,

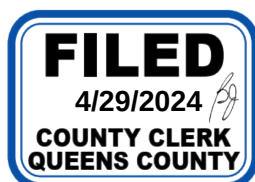
Accordingly, it is hereby

ORDERED that upon payment of the appropriate calendar fees, the filing of notes of issue and certificates of readiness for trial in each of the above actions, and upon service of a copy of this order with notice of entry on the clerk of this court, said clerk shall place the aforesaid actions upon the trial calendar for joint trial; and it is further,

ORDERED, that a copy of this order with notice of entry shall be served by the movant upon all parties and the clerk of this court on or before April 22, 2024.

The foregoing constitutes the decision and order of the court.

Dated: April 22, 2024
Long Island City, New York



A handwritten signature in black ink, appearing to read "Maurice E. Muir".

MAURICE E. MUIR, J.S.C.