

Shreyberg v Martynchuk
2024 NY Slip Op 35511(U)
August 28, 2024
Supreme Court, Westchester County
Docket Number: Index No. 72505/2023
Judge: David F. Everett
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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
FRANK SHREYBERG,

Plaintiff,

-against-

ANDRIY MARTYNCHUK,

Defendant.
-----X

EVERETT, J.

INDEX NO. 72505/2023

**DECISION/ORDER
Motion Seq. 1**

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 5-11, relative to the motion by plaintiff for a default judgment, the Court determines as follows:

Background

In the affirmation in support (NYSCEF Doc No. 6), plaintiff's attorney states:

3. This is a lawsuit bringing causes of action for assault, battery, and intentional infliction of emotional distress, arising from an incident that occurred on June 26, 2021, wherein Plaintiff was violently attacked by Defendant Martynchuk on the premises of Plaintiff's former residence, located at 3155 Lexington Avenue, Unit 7B, Mohegan Lake, New York 10547. Plaintiff brings this lawsuit seeking financial compensation for the damages incurred from the battery and assault.
4. On September 5, 2023, Defendant Martynchuk pleaded guilty to harassment in the second degree under New York Penal Law § 240.26.01, and a certificate of disposition was issued on September 11, 2023....
7. More than thirty (30) days have passed since the Supplemental Summons and Amended Complaint was served.

Plaintiff submits an affirmation of merit (NYSCEF Doc No. 7) stating the information as affirmed by his attorney.

Default (CPLR 3215)

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].)

Service on an individual may be made pursuant to CPLR 308 (2). In *Everbank v Kelly* (203 AD3d 138, 143 [2d Dept 2022]), the Court explained: “Service of process under CPLR 308 (2) ... requires that the summons be delivered within the state to a person of suitable age and discretion at the defendant's ‘actual place of business, dwelling place or usual place of abode,’ along with a mailing of the summons to the defendant's last known residence or actual place of business.”

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]).

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]).

Here, the affidavit of service (NYSCEF Doc No. 4) states that defendant was served by substituted service; that Nikolai “Doe”, co-resident was served with the notice of electronic filing, supplemental summons and amended verified complaint; that the documents were mailed to defendant; and that upon inquiry the response to military service was “in the negative.” An affidavit of service (NYSCEF Doc No. 11) states that service of the motion was made on defendant by mail. Plaintiff has complied with the CPLR 3215 requirements.

Accordingly, it is,

ORDERED that plaintiff’s unopposed motion, for a default judgment against defendant, is granted, and it is further

ORDERED that plaintiff shall file a note of issue, within 20 days of the filing of this Decision and Order on NYSCEF, for an inquest as to damages including any costs; and it is further

ORDERED that all parties are directed to appear in the Trial Assignment Part, at a date and time to be designated by that Part, to schedule a date for an inquest on damages; and it is further

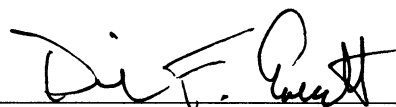
ORDERED that plaintiff shall serve a copy of this Decision and Order, with notice of entry, on defendant by first class mail within 7 days of the filing of this Decision and Order on NYSCEF; and it is further

ORDERED that plaintiff shall file proof of service of this Decision and Order with notice of entry to NYSCEF within 3 days of service of this Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 28, 2024

ENTER:



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

Filed in NYSCEF