

Ramirez v Diverse Solutions Inc.
2024 NY Slip Op 35603(U)
April 24, 2024
Supreme Court, Nassau County
Docket Number: Index No. 610785/2023
Judge: Sarika Kapoor
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

-----X
JUAN DAVID RAMIREZ,

TRIAL/IAS PART 34
Index No.: 610785/2023

Plaintiff,

DECISION AND ORDER

- against -

Motion Seq. Nos.: 001, 003
Motion Submission Date:
03/20/2024

DIVERSE SOLUTIONS INC., ROPER WHITNEY, LLC AND
TENNSMITH, LLC,

Defendants.
-----X

NYSCEF docs. 1, 5-15, 21 23-42 were read and considered in deciding these motions.

Relief Requested

Seq. 001: Defendants, Roper Whitney LLC and Tennsmith, LLC, move, pre-answer, for an Order pursuant to CPLR §§ 3211(a)(1), (7) and (8) dismissing with prejudice the Complaint dated July 7, 2023 (doc. 1).

Seq. 003: Plaintiff cross moves for an Order pursuant to CPLR 3025 permitting him to amend the complaint to plead with more particularity a de facto merger on behalf of Roper Whitney of Rockford, Inc. and the movants, defendants Roper Whitney, LLC and Tennsmith, LLC, and pursuant to CPLR § 3215 granting him a default judgment against defendant Diverse Solutions, Inc. That part of the cross motion which seeks to amend the complaint is opposed.

Background

Briefly, this action stems from plaintiff's claims that he was injured on August 17, 2020 when operating a gauge sheer machine (for use with sheet metal) identified as PEXTO Model No. U-1120B in the course and scope of his employment with Pro Metal of NY Corp. that had been previously supplied to Pro Metal of NY Corp. by defendant Diverse Solutions, Inc. ("Diverse") The product liability causes of action against defendants include negligence, breach of express and implied warranties, and strict liability.

This action was commenced by the filing of a Summons and Verified Complaint on July 7, 2023. Plaintiff's counsel concedes that "[t]o date, Defendants have not served Answers" (doc. 24, p. 2). On September 19, 2023, counsel for defendants, Roper Whitney LLC and Tennsmith LLC, moved (doc. 15) for the admission, pro hac vice, of John G. Jackson, Esq., as attorney for defendants, which motion was granted by the Decision and Order of this Court on October 23, 2023 (doc. 21).

Relevant Law and Discussion

CPLR 3025(a) entitled "Amendments without leave" provides, in pertinent part, as follows: "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires. . ." Pursuant to CPLR 3211 (f), the service of a motion to dismiss extends the time for movant to serve a responsive pleading until 10 days after service of notice of entry of an order denying the motion to dismiss (*Eaton v Bluestone*, --- N.Y.S.3d ---, 2024 NY Slip Op 01906 [2d Dept April 10, 2024]; *Rosas v Petkovich*, 218 AD3d 814 [2d Dept 2023]). Here, because defendants' motion to dismiss has not yet been decided, the deadline for plaintiff to amend as of right necessarily has not yet expired (see *Roam Capital, Inc. v Asia Alternatives Mgt. LLC*, 194 AD3d 585, 585-586 [1st Dept 2021]). Thus, plaintiff's cross motion seeking leave to file its amended complaint is **denied as unnecessary and academic** (*id.*).

Furthermore, because plaintiff still had time to amend the complaint as of right under CPLR 3025(a) when it, instead, made a motion to amend under CPLR 3025(b), this court deems plaintiff's proposed amended complaint submitted with its cross motion (doc. 39) to be the operative pleading herein (see generally, *Seidler v. Knopf*, 186 AD3d 886 [2d Dept 2020] [determining an amended complaint supersedes the original complaint]).

Under these circumstances, defendants', Roper Whitney, LLC and Tennsmith LLC, motion to dismiss the original complaint is **denied without prejudice** (*134 Emmut Properties LLC v. Galaxy Lighting 136, Inc.*, 211 AD3d 505 [1st Dept. 2022]).

Insofar as plaintiff seeks leave to enter a default judgment against defendant, Diverse, said application is granted.

As noted above, this action was commenced against Diverse with the filing of the Summons and Complaint on July 7, 2023. In his verified complaint plaintiff asserts four causes of action against Diverse: (1) negligence; (2) breach of express warranty; (3) breach of implied warranty; and, (4) strict liability.¹

The documentary evidence furnished herewith confirms that, on July 20, 2023, the summons and verified complaint was served on defendant Diverse, by delivering to and leaving

¹ As stated above, although the Amended Verified Complaint is the operative pleading in this action, it is plain and undisputed that the allegations and claims as against Diverse are identical in both documents; indeed, in support of his motion to amend the complaint herewith, counsel for plaintiff asserts that the principal basis and reason for the amended pleading is to plead with more particularity a de facto merger on behalf of Roper Whitney of Rockford, Inc. and defendants Roper Whitney, LLC and Tennsmith, LLC. Allegations and claims relating to Diverse remain undisturbed in the amended verified complaint.

with Nancy Dougherty, authorized agent in the Office of the Secretary of State, of the State of New York, personally at the Office of the Secretary of State of the State of New York, two (2) true copies thereof, pursuant to Section 306 of the Business Corporation Law of the State of New York, as appears by the affidavit of service of Sean Warner (doc. 40). Furthermore, the evidence also establishes that, on November 8, 2023, Diverse was then served with an “additional” service of the summons and complaint, along with a notice that a copy of the summons and complaint so enclosed had been served upon defendant pursuant to Section 306 (b) of the Business Corporation Law of The State of New York. This “additional” service was made by first class mail by depositing a true copy of the summons and complaint in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to Diverse Solutions, Inc. at the last known address for Diverse (CPLR 3215[g][4]) (doc. 41).

The law provides that where a defendant has defaulted in appearing or answering a complaint, default judgments are not “rubber-stamped once jurisdiction and a failure to appear have been shown” (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]). Rather, “[s]ome proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*id.* at 535; see CPLR 3215[f]; *Dupps v Betancourt*, 99 AD3d 855, 855 [2d Dept 2012]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). As such, notwithstanding the fact that “defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them,” a plaintiff must nevertheless establish “enough facts to enable a court to determine that a viable cause of action exists” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). In order to sustain this burden, a plaintiff must submit evidence from one “with personal knowledge of the relevant facts constituting the claim” (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009]; see *Triangle Props. # 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]).

Here, plaintiff annexes his verification to the (original) complaint wherein he asserts, in pertinent part:

I am the Plaintiff in the action herein; I have read the attached VERIFIED COMPLAINT, know the contents thereof, and the same are true to my knowledge except those matters therein which are stated to be alleged upon information and belief, and as to those matters, I believe them to be true.
(doc.1).

Thus, in the end, this Court finds that the plaintiff, having submitted proof of service of the summons and the complaint (see CPLR 311[a][1]), and a factually-detailed complaint, which he verified (see CPLR 105[u]; *Woodson v Mendon Leasing Corp.*, 100 NY2d at 70-71), has established his entitlement to a default judgment against Diverse. Accordingly, that part of the plaintiff’s motion seeking leave to enter a default judgment against Diverse is granted.

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Conclusion

Accordingly, it is hereby,

ORDERED, that defendants' motion to dismiss the original complaint is **denied without prejudice**; and it is further,

ORDERED, that plaintiff's cross motion seeking leave to file its amended complaint is **denied as unnecessary and academic**; and it is further,

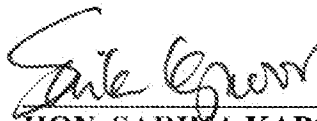
ORDERED, that that part of the plaintiff's cross motion which seeks leave to enter a default judgment against Diverse is **GRANTED**.

Any applications not specifically addressed are **denied**.

This shall constitute the decision and order of this Court.

Dated: Mineola, New York
April 24, 2024

ENTER:



HON. SARIKA KAPOOR, A.J.S.C.

ENTERED

Apr 29 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE