

**Mosley v Restani Constr. Corp.**

2025 NY Slip Op 31839(U)

May 19, 2025

Supreme Court, Kings County

Docket Number: Index No. 518423/2024

Judge: Anne J. Swern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 19<sup>th</sup> day of May 2025.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

OSIRIS MOSLEY,

*Plaintiff,*

- against -

RESTANI CONSTRUCTION CORPORATION; SUNBELT RENTALS, DOES 1-10,

*Defendants.*

**DECISION & ORDER**

Index No.: 518423/2024

Calendar No.: 29

Motion Seq.: 001, 002, 003, & 004

*Recitation of the following papers as required by CPLR 2219(a):*

	<b>Papers Numbered</b>
MS001 Plaintiff's Notice of Motion, Affirmation, and Exhibits for a Default Judgment against Sunbelt (NYSCEF 6-12).....	1, 2
Affirmation and Exhibits in Opposition (NYSCEF 35-44) .....	3
MS002 Notice of Motion, Affirmations and Exhibits (NYSCEF 13-22) .....	4, 5
Affirmation in Opposition to Plaintiff's Cross-Motion and in Reply (NYSCEF 84-87).....	7
Plaintiff's Affirmation in Reply of Cross-Motion (NYSCEF 92).....	8
MS003 Sunbelt's Notice of Motion, Affirmation, Exhibits and Memorandum of Law (NYSCEF 23-34) .....	9, 10
Affirmation in Opposition and in Further Support of Plaintiff's Cross-Motion (NYSCEF 93) .....	11
Sunbelt's Affirmation and Memorandum of Law In Opposition to Plaintiff's Motion and in Further Support of Motion to Dismiss (NYSCEF 78-80) .....	12

MS004 Plaintiff’s Notice of Motion, Affirmations and Exhibits (NYSCEF (64-74).....13, 14

Sunbelt’s Affirmation in Opposition and Memorandum of Law in Further Support of Motion to Dismiss (NYSCEF 81-83).....15

Restani’s Affirmation in Opposition with Exhibits (88-91).....16

Affirmation in Reply (NYSCEF 94).....17

*Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:*

This is an action for personal injuries allegedly sustained by plaintiff in an accident on 8/5/21 while an employee of Restani Construction Corporation (Restani). Plaintiff served the summons and complaint on Sunbelt Rentals (Sunbelt) and Restani on 7/10/24 (NYSCEF 3 and 65). On 8/8/2024, Restani served an answer with an affirmative defense of lack of personal jurisdiction per CPLR § 3211 [a] [8] (NYSCEF 4). Sunbelt notified plaintiff verbally in July 2024 and in writing on 8/7/24 that service was improper (NYSCEF 7, ¶8; NYSCEF 40). The statute of limitations expired on 8/5/24. Plaintiff did not move to extend the time to serve the summons and complaint, move for a default judgment against Sunbelt or more to dismiss Restani’s affirmative defense of improper service until after the expiration of the statute of limitations. On 10/7/24, Restani moved to dismiss plaintiff’s complaint per CPLR § 3211 [a] [8].<sup>1</sup> On 11/25/24 after the expiration of the statute of limitations, plaintiff re-served both defendants through the Secretary of State (NYSCEF 49 and 50).

---

<sup>1</sup> Pursuant to CPLR § 3211 [e], a motion to dismiss pursuant to subdivision [a] [8] must be served within sixty (60) days after service of service of the answer. Restani’s time to serve the motion expired on Sunday, 10/6/24 and was extended to the next business day (General Construction Law 25-A).

[\*2]

**Plaintiff's Motion for a Default Judgment against Sunbelt (MS 001)**

Plaintiff has moved this Court for a default judgment against Sunbelt. The summons and complaint were filed on 7/8/2024. According to the affidavit of service, the process server served "Jane Doe – Refused to Provide a Name" at 12:00 a.m. on 7/10/2024. The description of the person served was listed as "Female, White Black Hair, Age 36-50, Height 5'2-5'5, Weight 131-160." In support of the motion, the attorney attached plaintiff's affirmation, and the attorney verified complaint.

In opposition to the motion, Sunbelt submitted the affidavit of Laura Campagna, the only female who works in Sunbelt's office located at One 12<sup>th</sup> Street, Brooklyn, New York. Ms. Campagna is 56 years old, weighs approximately 137 pounds, is about 4'11" and has white skin and blonde hair. She has worked for the defendant since 11/2021 in the front-end office answering the phone and taking and completing rental orders. On the date of the service, no one came into the Sunbelt branch during her normal working hours of 7:00 a.m. and 5:00 p.m. However, if service was made on Ms. Campagna, she was not "an officer, director, manager or managing agent, cashier or assistant cashier or any other agent authorized by appointment or by law to receive service" (CPLR § 311 [a] [1]).

Further, service at the 12<sup>th</sup> Street office was also improper because Sunbelt is not a domestic corporation as asserted in the affidavit service. Sunbelt is a foreign corporation incorporated in the State of North Carolina (NYSCEF 31, ¶7). Sunbelt's attorney advised plaintiff's attorney of this fact verbally in July 2024 and in writing in August 2024. Plaintiff re-served Sunbelt through the Secretary of State on 11/25/2024, more than 120 days after the filing of the summons and complaint (NYSCEF 50).

Lastly, Sunbelt argues that the motion is substantively defective because plaintiff's affirmation of merit does not comply with CPLR § 2106 and the attorney verified complaint cannot substitute for an affidavit of merit (CPLR § 3215 [f]).

The motion is denied. Plaintiff's affirmation does not comply with requirements of CPLR § 2106. It constitutes an unnotarized affidavit because it does not contain the requisite language to submit an affirmation in lieu of an affidavit. The affirmation lacks the following italicized language: "I affirm...under the penalties of perjury under the laws of New York, *which may include a fine or imprisonment*, that the foregoing is true, *and I understand that this document may be filed in an action or proceeding in a court of law.*" Additionally, the affirmation is insufficient because it does not state plaintiff reviewed the complaint and the allegations against Sunbelt are true to the best of his knowledge. Therefore, the complaint, verified by plaintiff's attorney, "is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215...Absent a complaint or affidavit sworn to by a person with personal knowledge of the facts, [defendant is not] required to show either a reasonable excuse [for defaulting] or a meritorious defense" in opposition to the motion for a default judgment (*Beltre v. Babu*, 32 AD3d 722, 723-724 [1<sup>st</sup> Dept. 2006]). Based on these substantive insufficiencies, the Court need not reach the issue of whether service was proper.

**Restani's Motion to Dismiss (MS 002), Sunbelt's Motion to Dismiss (MS 003) and and Plaintiff's Motion Pursuant to CPLR § 306-b (MS004)**

**a) Restani and Sunbelt's motions to dismiss**

The same affidavits and arguments in opposition to plaintiff's motion for a default judgment were relied upon in support of Sunbelt's motion to dismiss. Restani advances similar arguments.

A decision on the motions to dismiss is held in abeyance pending the outcome of a traverse hearing. The Court cannot judge the credibility of the process server, and the persons served on 7/10/24 on the papers. The Court may deny a motion to dismiss for lack of process service without an evidentiary hearing when defendant “fails to swear to specific facts to rebut the statements in the process server’s affidavit [of service]” (*City of New York v Miller*, 72 AD3d 726, 727 [2d Dept. 2010]). Here, defendant’s affirmations from the individuals served for Restani and Sunbelt, swear to specific facts to rebut the *prima facie* presumption of proper service in the affidavit of service (*id.*). Therefore, an evidentiary hearing is necessary.

a) **Plaintiff’s Motion to Extend the Time to Serve the Summons and Complaint on Sunbelt.**

Plaintiff’s motion to extend the time to serve the summons and complaint is denied (*Marzan v Petit-Frere*, 220 AD3d 852, 853 [2d Dept. 2023]).

Pursuant CPLR § 306-b, the Court shall extend plaintiff’s time to serve the summons and complaint upon a showing of “good cause” for the delay in service or that an extension is appropriate “in the interest of justice.” Plaintiff fails to meet either criterion.

Plaintiff’s attorney learned in July 2024 that service was improper but waited until 11/25/2024 to re-serve the summons and complaint. Plaintiff does not provide a reasonable excuse for waiting four months to re-serve the defendants and serving the motion to extend the time for service until after the statute of limitations expired in response to defendants’ motions to dismiss (*Calloway v Wells*, 79 AD3d 786, 787 [2d Dept. 2010]). Therefore, plaintiff has not demonstrated “good cause” to extend the time for service because plaintiff failed to make “a reasonably diligent effort at service” once it was learned that service on Ms. Campagna and Mr. Peralta was improper (*Marzan v Petit-Frere*, 220 AD3d 853).

An extension is also not warranted in the interest of justice. Plaintiff's accident occurred on 8/5/2021. Initially, an action was commenced against Rachel Perez and City of New York in Supreme Court, New York County to recover damages for the injuries sustained in the accident (NYSCEF 29). The New York County action was settled on 3/22/2023 more than one year prior to the commencement of the current action (NYSCEF 30). Plaintiff provides no explanation for the lack of diligence in commencing this action, or waiting until less than one month before the statute of limitations expired. Further, despite knowledge that service was improper, did not seek an extension of time until after service of the motion to dismiss. The complaint and plaintiff's affirmation cannot establish a meritorious cause of action against Sunbelt or Restani for the purposes of this motion. (*id.*). Plaintiff's separate affirmation in support of the motion for an extension of time does not state that he has reviewed the complaint and the allegations against defendants are true to the best of his knowledge. This affirmation also does not constitute an affirmation in lieu of an affidavit because it does not comply with the language requirements of CPLR § 2106 (NYSCEF 74)<sup>2</sup>

Plaintiff's second service on Sunbelt and Restani on 11/25/2024 was a nullity and could not cure the defect in service because the service was made beyond 120 days from the date of filing of the summons and complaint without leave of Court.

The Court has considered the parties' remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment against SUNBELT RENTALS is denied (MS 001), and it is further

---

<sup>2</sup> Plaintiff's affirmation does not include the language "*I understand that this document may be filed in an action or proceeding in a court of law.*" (See CPLR § 2106).

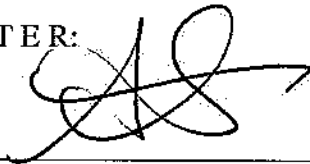
ORDERED that defendant, RESTANI CONSTRUCTION CORPORATION's motion to dismiss pursuant to CPLR § 3211 [a] [8] is held in abeyance pending the outcome of a traverse hearing to be held on June 10, 2025 at 10:30a.m. in courtroom 424 (MS 002), and it is further

ORDERED that defendant, SUNBELT RENTALS's motion to dismiss pursuant to CPLR § 3211 [a] [8] is held in abeyance pending the outcome of a traverse hearing to be held on June 10, 2025 at 10:30a.m. in courtroom 424 (MS 003), and it is further

ORDERED that plaintiff's motion to extend the time to serve the summons and complaint on RESTANI CONSTRUCTION CORPORATION and SUNBELT RENTALS pursuant to CPLR § 306-b is denied (MS 004).

This constitutes the decision and order of the Court.

ENTER:



Hon. Anne J. Swern, J.S.C.

Dated: 5/19/2025

For Clerks use only:
MG _____
MD _____
Motion seq. # _____

[\*7]