

Awe v WK Ivy LLC

2025 NY Slip Op 32516(U)

July 15, 2025

Supreme Court, New York County

Docket Number: Index No. 159717/2020

Judge: Hasa A. Kingo

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

PRESENT: HON. HASA A. KINGO PART 05M

Justice

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OLUKUNLE AWE,

Plaintiff,

- v -

WK IVY LLC, THE IVY CONDOMINIUM, BRG
MANAGEMENT LLC, BENEDICT PROPERTIES
LLC, CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Defendant.

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INDEX NO. 159717/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion for DEFAULT JUDGMENT.

Before the court is the motion (Mot. Seq. 003) by Defendants/Second Third-Party Plaintiffs The Ivy Condominium and BRG Management LLC (“Ivy/BRG”) for a default judgment against Second Third-Party Defendant New York City Transit Authority (“NYCTA”), pursuant to CPLR § 3215. NYCTA opposes the motion and cross-moves to dismiss the second third-party complaint under CPLR §§ 306-b and 3211(a)(8), and on the grounds that Ivy/BRG previously discontinued their claims against NYCTA with prejudice. For the reasons set forth below, Ivy/BRG’s motion for default judgment is denied, and NYCTA’s cross-motion to dismiss is granted.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Olukunle Awe (“Plaintiff”) commenced this action on November 11, 2020, seeking damages for personal injuries allegedly sustained in a trip-and-fall accident that occurred on November 4, 2020, on the sidewalk abutting 2301 Second Avenue/249 East 118th Street in Manhattan, New York. Ivy/BRG are the owners of the premises.

On May 23, 2022, Ivy/BRG commenced a second third-party action against NYCTA, asserting causes of action for common-law indemnification and contribution, contractual indemnification, breach of contract, and failure to procure insurance. Ivy/BRG were required to serve the second third-party summons and complaint on NYCTA by September 20, 2022.

Instead, on April 15, 2024, Ivy/BRG filed a notice of discontinuance with prejudice as to NYCTA. The next day, April 16, 2024, Ivy/BRG purported to withdraw that notice, but failed to move for vacatur or serve the withdrawal on NYCTA. Nevertheless, Ivy/BRG purportedly served

the second third-party complaint on NYCTA on October 10, 2024, over two years after its filing. When NYCTA failed to answer, Ivy/BRG filed the instant motion for default judgment on May 1, 2025.

ARGUMENTS

In support of the instant motion, Ivy/BRG maintain that proper service was effected on NYCTA on October 10, 2024, yet NYCTA has neither answered nor taken any responsive action. They further assert that NYCTA had constructive notice of the third-party action as early as May 23, 2022, when the second third-party complaint was filed. To bolster their position, Ivy/BRG submit the sworn affidavit of their property manager, Andy Falkin, who explains that the grate implicated in Plaintiff's accident was installed pursuant to a joint undertaking between NYCTA and the City of New York in connection with the planned northern extension of the Second Avenue Subway. Relying on 34 RCNY § 2-07(b) and the decision in *Flynn v. City of New York*, 84 AD3d 1018 (2d Dept 2011), Ivy/BRG contend that NYCTA bears responsibility for maintaining vault covers—and the surrounding twelve-inch perimeter—on which the grate rests.

In opposition, NYCTA advances three independent grounds for dismissing the second third-party complaint. First, NYCTA points out that Ivy/BRG voluntarily discontinued their claims with prejudice on April 15, 2024, and never sought to vacate that discontinuance; as a result, the claims against NYCTA were extinguished. Second, NYCTA underscores that the summons and second third-party complaint were not served within the 120-day window mandated by CPLR § 306-b, and that Ivy/BRG never moved for an extension of time or demonstrated any good-cause or interest-of-justice justification for the delay. Third, NYCTA asserts that Ivy/BRG have failed to establish a meritorious cause of action: the Falkin affidavit rests on hearsay and lacks firsthand knowledge of the grate's installation, and no contract or other admissible proof has been produced to show NYCTA's role in installing or maintaining the subject grate.

In their reply, Ivy/BRG attribute any procedural irregularities to a mislabeling of the third-party pleadings, explaining that what was originally denoted a "fourth-party" action had to be refiled as a second third-party complaint. They reiterate that NYCTA possessed either actual or constructive notice of the suit and urge the Court to excuse the service delay in the "interest of justice." To that end, Ivy/BRG distinguish the Court of Appeals' decision in *Slate v. Schiavone Constr. Co.*, 4 NY3d 816 (2005), and invoke *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 (2001), arguing that the same principles of judicial discretion under CPLR § 306-b warrant lenient treatment here.

DISCUSSION

A. Discontinuance with Prejudice Bars Further Prosecution

The court begins with the April 15, 2024 notice of discontinuance filed by Ivy/BRG pursuant to CPLR § 3217(a). A voluntary discontinuance with prejudice is a final disposition of claims. Ivy/BRG's subsequent "withdrawal" of that notice was ineffective because they failed to seek leave of court or serve NYCTA with the withdrawal notice. As a result, NYCTA remained entitled to rely on the discontinuance. As held in *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193

(2d Dept 2017), a party's unilateral withdrawal of a discontinuance with prejudice, without court approval or service, is legally ineffective.

Accordingly, the second third-party complaint is barred as discontinued with prejudice, and the motion for default judgment must be denied on this ground alone.

B. Failure to Timely Serve Under CPLR § 306-b

Even assuming the discontinuance was a nullity, the motion fails on independent grounds. CPLR § 306-b requires service of a third-party complaint within 120 days of its filing. Here, the second third-party complaint was filed on May 23, 2022, and Ivy/BRG claims to have served NYCTA on October 10, 2024—873 days later.¹

No motion for extension of time to serve was ever made. The court cannot retroactively deem service proper without a motion and proper showing under *Leader*, which requires consideration of diligence, prejudice, and the merits of the claim. In this case, the delay is extreme, Ivy/BRG offer no excuse, and NYCTA is prejudiced by being brought into the action after discovery is well underway. Ironically, although Ivy/BRG moved for a default judgment against NYCTA, it itself defaulted by failing to appear for oral argument in this matter on July 15, 2025—and offered no reasonable excuse for its absence. In so doing, Ivy/BRG presented no evidence of any additional diligent efforts that might excuse its late notice to NYCTA.

Indeed, as the Court of Appeals held in *Slate v Schiavone, supra*, even a two-year delay in service, absent diligence and justification, cannot be excused. Ivy/BRG's argument that NYCTA had "notice" based on the mere filing of pleadings is meritless; actual service is required to confer jurisdiction.

Therefore, the motion must be denied and the complaint dismissed under CPLR §§ 306-b and 3211(a)(8).

¹ Service is also defective on account of deficiencies by the court upon a careful searching of the records proffered. First, a careful review of the service affidavits (Docs. 82, 85, 89) reveals that each purports to effectuate service of a "third third-party summons and complaint" on NYCTA—yet the pleading at issue here is the **second** third-party complaint. In other words, there is simply no competent proof that the instrument upon which Ivy/BRG rely was ever properly served on NYCTA. Neither the parties nor this court's prior decision on the initial default motion identified this threshold defect, but it cannot be overlooked: absent valid service of the **second** third-party complaint, NYCTA has never been brought before the court on that pleading. Notably, at oral argument before the court on July 15, 2025, counsel for the NYCTA mentioned that NYCTA received the second third-party complaint, thereby rendering the purported service of the "third third party summons and complaint" a scrivener's error. Nevertheless, even crediting Ivy/BRG's belated assertion that service occurred on October 10, 2024, the timeline is staggering: over two years and five months after commencement of the action, and more than two years beyond the 120-day limit prescribed by CPLR § 306-b. Ivy/BRG never sought an enlargement of time, offer no rationale for the extraordinary delay, and compound the confusion by alternatively claiming service on October 7, 2024 in their reply—despite the sole affidavit attesting to October 10. Such glaring inconsistencies, coupled with an utter failure to request or justify relief under CPLR § 306-b, fatally undermine any claim that NYCTA was properly served or that the delay should be excused.

C. Insufficient Proof of a Meritorious Claim

Lastly, Ivy/BRG fails to meet the requirements of CPLR § 3215(f), which mandates proof of a meritorious cause of action. The Falkin affidavit is insufficient. As in *Mullins v DiLorenzo*, 199 AD2d 218 (1st Dept 1993), an affidavit submitted in support of default must be made by someone with personal knowledge. Mr. Falkin expressly admits he lacks such knowledge, as the grate was installed before his employment. His assertions about NYCTA’s involvement are speculative and unsupported by documentary evidence or contractual proof.

No contract was annexed to support Ivy/BRG’s contractual indemnity or insurance claims, rendering those causes of action facially deficient (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). Similarly, general maps and subway expansion plans submitted in support of the motion do not establish NYCTA’s control over the specific grate or sidewalk condition in question.

In the absence of competent, admissible evidence demonstrating a viable cause of action, default judgment cannot be granted.


For the foregoing reasons, it is hereby:

ORDERED that the motion by The Ivy Condominium and BRG Management LLC for a default judgment against the New York City Transit Authority is denied in its entirety; and it is further

ORDERED that the cross-motion by the New York City Transit Authority to dismiss the second third-party complaint is granted, and the second third-party complaint is hereby dismissed with prejudice; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the court.


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HASA A. KINGO, J.S.C.

7/15/2025
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> CROSS-MOTION GRANTED	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE