

**Kunkel v New York City Dept. of Bldgs.**

2025 NY Slip Op 33937(U)

October 10, 2025

Supreme Court, New York County

Docket Number: Index No. 158997/2021

Judge: Ariel D. Chesler

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ARIEL D. CHESLER PART 62M**

*Justice*

-----X

GEORGE KUNKEL,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS, FRANK  
DAMIANI, HUGH MCQUILLAN, CHARLES COOPER,  
MICHAEL CHOLOWSKY, SKY MATERIAL CORP., PETER  
J. BYRNE

Defendant.

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**INDEX NO.** 158997/2021

**MOTION DATE** 02/20/2025,  
04/17/2025

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 74, 75 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79 were read on this motion to/for JUDGMENT – DEFAULT.

In this proceeding, defendants New York City Department of Buildings (“DOB”), Frank Damiani, as Chief Inspector and Individually (“Damiani”), Hugh McQuillan, as Inspector and Individually (“McQuillan”), and Charles Cooper, as Investigator of the Department of Buildings and Individually (“Cooper”), move for an Order (1) pursuant to CPLR 3211 (a)(7) dismissing plaintiff’s Complaint against NYCDOB as it is a non-suable entity; (2) pursuant to CPLR 3211 (a)(7) dismissing plaintiff’s Complaint against Damiani, McQuillan, and Cooper due to the failure of plaintiff to serve the Complaint upon Damiani, McQuillan and Cooper; and (3) pursuant to CPLR 3211(a)(7) dismissing plaintiff’s Complaint against Damiani, McQuillan and Cooper as abandoned for failure to move for default within one year (Motion Sequence 002).

Plaintiff cross-moves for an Order seeking (1) default judgment pursuant to CPLR 3215 (a) against defendants Damiani, McQuillan and Cooper; (2) an extension to plead pursuant to

CPLR 3012 (d) should the Court find a Complaint was not properly served upon the non-appearing defendants Damiani, McQuillan and Cooper; and (3) leave to amend the pleadings pursuant to CPLR 3025, if the Court finds that the “City of New York: was the appropriate defendant instead of “New York City Department of Buildings” (motion sequence 002).

Additionally, plaintiff moves for an Order seeking default judgment pursuant to CPLR 3215 (a) against defendants Michael Cholowsky (“Cholowsky”) and Sky Materials Corp. (“Sky”) (motion sequence 003).

This action seeks to recover damages arising from the alleged malicious prosecution of plaintiff in the action Dep’t of Buildings v. Kunkel OATH Index No. 2113/18, thus allegedly violating plaintiff’s civil rights and causing him loss of his employment and future business and causing intentional infliction of emotional distress. On or about September 30, 2021, plaintiff filed the Summons with Notice (*see* NYSCEF Doc. No. 47). Plaintiff served the Summons with Notice via personal service upon defendant Damiani on October 13, 2021 (*see* NYSCEF Doc. No. 49), defendant Cooper on October 13, 2021 (*see* NYSCEF Doc. No. 50), defendant McQuillan (*see* NYSCEF Doc. No. 57) and defendant Cholowsky on December 15, 2021 (*see* NYSCEF Docs. Nos. 54-55). Also on October 13, 2021, Plaintiff served the Summons with Notice upon DOB (*see* NYSCEF Doc No. 2). Plaintiff served the Summons with Notice upon defendant Sky via Secretary of State on December 7, 2021 (*see* NYSCEF Doc. No. 51).

Defendant DOB, by Corporation Counsel, filed a “Notice of Appearance and Demand” on December 10, 2021 (*see* NYSCEF Doc. No. 52). The “Notice of Appearance and Demand” did not include the other possible DOB defendants Damiani, McQuillan and Cooper. Plaintiff e-filed a Verified Complaint (verified by counsel) on December 30, 2021 (*see* NYSCEF Doc No.

58). On February 24, 2022, Corporation Counsel filed an Answer on behalf of DOB (*see* NYSCEF Doc. No. 60).

On or about June 12, 2024, plaintiff filed a notice that he filed for bankruptcy on April 4, 2024, and requested for the case to be stayed (*see* NYSCEF Doc. No. 64). On or about June 20, 2024, Parties entered into a stipulation that case is stayed (*see* NYSCEF Doc. No. 65). Following the apparent dismissal of the Bankruptcy proceeding, on or about October 16, 2024, the parties entered into a compliance conference order and the case became active (*see* NYSCEF Doc. No. 66).

### **Defendants' Motion to Dismiss (Motion Sequence 002)**

CPLR § 3211(a)(7) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the pleading fails to state a cause of action." CPLR § 3211(a)(7). While "plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss" (*Godfrey v. Spano*, 13 NY3d 358, 373 [2009]).

### **Dismissing Plaintiff's Complaint against NYCDB**

The moving defendants move for an Order dismissing the Complaint against NYCDOB as it is a non-suable entity.

In support, the moving defendants argue that it is well-established that the DOB is an agency of the City of New York and is not suable entity pursuant to Section 396 of the New York City Charter.

In opposition to defendants' motion, and in support of his cross-motion, plaintiff argues that the Court should not dismiss plaintiff's claim against defendant DOB, as it is an appropriate

entity to be sued. Plaintiff contends that the case law does not encompass the DOB as a city agency, and thus the DOB is in fact a suable entity who should remain defendant in this case.

Here, plaintiff's action named NYCDOB as the party against which relief was sought. However, New York City agencies are not jural entities capable of being sued independently (New York City Charter § 396; *Five Manhattan LLC v. Sanchez*, No. 150442/2020, 2020 WL 5290058 [Sup Ct, NY County 2020]).

As such, defendants' motion to dismiss the Complaint against NYCDOB is granted.

### **Dismissing Plaintiff's Complaint for failure to serve his Complaint**

The moving defendants move for an Order dismissing plaintiff's Complaint as to defendants Damiani, McQuillan, and Cooper for plaintiff's failure to serve his Complaint upon those defendants.

In support, the moving defendants highlight that plaintiff served a Summons with Notice upon defendants Damiani and Cooper on or about October 13, 2021, and defendant McQuillan on or about December 28, 2021. However, the moving defendants argue that no complaint was attached to the Summons with Notice that would allow the defendants to determine the cause of actions pled and properly respond thereto. Furthermore, the moving defendants note that, to date, no complaint has been received by defendants Damiani, McQuillan and Cooper. As such, the moving defendants attest, since plaintiff has failed to serve a copy of the complaint although more than twenty days have elapsed since service of Summons with Notice, and plaintiff has requested no extension of time and the Court has not granted one, plaintiff's complaint should be dismissed as to those defendants.

In opposition, plaintiff notes that defendants Damiani, McQuillan and Cooper never appeared by either having an attorney file a notice of appearance, demand for complaint, or via

motion. As such, plaintiff argues that if no notice of appearance on behalf of a defendant is filed, or no demand for complaint has been made by the defendant, there is no basis for dismissal for failure to serve the complaint.

When, as here, an action is begun by summons with notice, these are two scenarios in which CPLR 3012 (b) imposes a 20-day deadline to serve the complaint. First if the defendant serves a written demand for the complaint before the applicable appearance deadline set by CPLR 320 (a), then plaintiff must serve the complaint on the defendant. Second, if defendant serves a notice of appearance, but does not demand the complaint, plaintiff must serve the complaint within 20 days after service of the notice of appearance. If one of these two deadlines applies, and plaintiff does not then timely serve the complaint, the court may, on motion, dismiss the action (*see* CPLR 3012 [b]). If defendant neither serves the demand nor appears, plaintiff's time to serve a complaint does not begin to run, and dismissal under CPLR 3012 (b) is improper (*Howard B. Spivak Architect, P.C. v. Zilberman*, 59 AD3d 343, 344 [1<sup>st</sup> Dept 2009]).

Here, there was no demand or notice of appearance served for the individual defendants Damiani, McQuillan or Cooper, and as such, plaintiff's motion to dismiss the Complaint against these defendants for failure to serve the complaint upon them is denied.

**Dismissing Plaintiff's Complaint for failure to move for default within one year**

The moving defendants also seek relief dismissing plaintiff's complaint in its entirety against defendants Damiani, McQuillan and Cooper as abandoned for plaintiff's failure to move for default within one year.

In support, the moving defendants argue that based upon the Summons with Notice served upon defendants Damiani and Cooper on October 13, 2021, and defendant McQuillan on December 28, 2021, the one-year period to file for a default in turn expired on October 13, 2022,

and December 28, 2022, respectively. Therefore, the moving defendants contend that the Court should dismiss the Complaint as abandoned pursuant to CPLR 3215 (c).

In opposition, plaintiff argues the Court should not dismiss the Complaint against any defendant for the alleged failure to move for default within one year as plaintiff demonstrates sufficient cause for the delay in entering default judgment. Plaintiff asserts that he was unclear if defendants Damiani, McQuillan and Cooper were being represented by Corporation Counsel. Additionally, plaintiff notes that a preliminary conference was not held until February 1, 2024, despite plaintiff filing a PC request on February 24, 2022. Therefore, plaintiff argues the Court's scheduling delay coupled with the unclear representation of Corporation Counsel of the Defendants Damiani, McQuillan, and Cooper shows sufficient cause as to why the complaint cannot be dismissed for failure to move within one year.

Under CPLR 3215 (c), “[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” To establish sufficient cause “plaintiff is required to demonstrate both a reasonable excuse for the delay and that their cause of action is meritorious.” However, “it has been recognized that ‘[a]s long as ‘proceedings’ are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal” (*Brown v. Rosedale Nurseries, Inc.*, 259 AD2d 256, 256 [1<sup>st</sup> Dept 1999] [internal citations omitted]).

Here, plaintiff's papers demonstrate a reasonable excuse for the delay in moving to enter the default judgment within one year and an intent not to abandon the case (*Schiff v. Motor Vehicle Acc. Indemnification Corp.*, 155 AD2d 326, [1<sup>st</sup> Dept 1989] [“Plaintiff, however,

provided a valid affidavit of merits and a sufficient excuse for her failure to apply for a default judgment for over a year in that, prior to the expiration of the statutory period, there existed confusion over whether defendants were insured by one or two companies”]). As such, defendants’ motion for dismissal of plaintiff’s Complaint for failure to move for default judgment within one year is denied.

### **Plaintiff’s Cross-Motion (Motion Sequence 002)**

#### **Default Judgment**

Plaintiff cross-moves for a default judgment pursuant to CPLR 3215 (a) against defendants Damiani, McQuillan, and Cooper.

In support of his cross-motion, plaintiff argues that defendants Damiani, McQuillan and Cooper have never appeared by filing a notice of appearance, demand for a complaint, or by filing an answer. Further, plaintiff argues that Corporation Counsel has refused to definitively state if they are representing defendants Damiani, McQuillan or Cooper as no notice of appearance has been filed, however, the current motion has been brought by Corporation Counsel on their behalf. Plaintiff maintains that in the present case, the Verified Complaint is supported with sufficient facts as to enable a court to determine that viable causes of action exist.

CPLR 3215 (f) provides: “On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due...where 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 his attorney.” It has been held “[a] complaint verified by counsel amounts to no more than an

attorney affidavit and therefore insufficient to support entry of judgment pursuant to CPLR 3215” (*Mullins v. DiLorenzo*, 199 AD2d 218, 219 [1<sup>st</sup> Dept 1993]; *see also Martinez v. Reiner*, 104 AD3d 477, 478 [1<sup>st</sup> Dept 2013] [The complaint, which was verified by counsel, was “purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215”] [internal citations omitted]).

Here, in support of the motion for default judgment, plaintiff points to the Complaint which plaintiff claims is supported with sufficient facts as to enable a court to determine that viable causes of action exist. However, this attorney verified complaint is insufficient to support an entry of default judgment (*Brown v. Rosedale Nurseries, Inc.*, 259 AD2d 256, 256 [1<sup>st</sup> Dept 1999] [“[P]laintiffs' complaint, verified by their attorney, and their affidavit in support of entry of a default judgment in their favor, which incorporated conclusory, hearsay statements from their attorney, were insufficient to support entry of a default judgment pursuant to CPLR 3215(f)”]).

Even if plaintiff verified the Complaint, it was not served upon defendants Damiani, McQuillan, and Cooper, and as such, plaintiff’s motion for default judgment is denied (*Gaviola v. City of New York*, 234 AD3d 525, 526 [1<sup>st</sup> Dept 2025] [“Because CPLR 3215(f) permits reliance on a verified complaint as an affidavit of facts supporting default judgment only ‘[w]here a verified complaint has been served,’ plaintiff’s motion for a default judgment was properly denied”] [internal citations omitted]).

### **Leave to Amend**

Plaintiff cross-moves for leave to amend the pleadings pursuant to CPLR 3025, if the Court finds that the City of New York was the appropriate defendant instead of NYCDOB.

CPLR 3025 (b) provides: “A party may amend his or her pleading...at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” However, when a party fails to attach proposed amended pleadings with original moving papers, this is a technical defect the court can overlook (*Medina v. City of New York*, 134 AD3d 433 [1<sup>st</sup> Dept 2015] [“Since the limited proposed amendments were clearly described in the moving papers, plaintiff’s failure to submit proposed amended pleadings with his original moving papers...was a technical defect, which the court should have overlooked”]).

Generally, “leave to amend the pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay” (*McCaskey, Davies and Associates, Inc., v. New York City Health & Hospitals Corp.*, 59 NY2d 755, 756 [1983]). However, “mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side” (*Edenwald Contracting Co. v. City of New York*, 60 NY2d 957, 959 [1983]).

Here, the only proposed amendment is substituting the City of New York for New York City Department of Buildings, as New York City Department of Buildings is a non-suable agency of the City of New York. There is no prejudice or surprise resulting from the delay as Corporation Counsel, who represents the City of New York, filed a notice of appearance, an Answer, and is participating in this action already as counsel for defendant New York City Department of Buildings (*see Rivera v. New York City Dept. of Sanitation*, 183 AD3d 545 [1<sup>st</sup> Dept 2020] [“The summons and complaint were served on Corporation Counsel for the City of New York, which answered on behalf of the City of New York. Defendant’s motion to dismiss

the complaint should have been denied and plaintiff's cross motion to amend the summons and complaint to correct the misnomer granted. The City was not prejudiced by the mis-description and was on notice that plaintiff intended to seek a judgment against it").

As such, plaintiff's cross-motion to amend the Complaint to add defendant the City of New York is granted.

### **Extension to Plead**

Plaintiff cross-moves for an extension to plead pursuant to CPLR 3012 (d) should the Court find that plaintiff should have served the Complaint upon defendants Damiani, McQuillan, and Cooper.

This portion of plaintiff's cross-motion is moot as the Court determined above that plaintiff's time to serve the Complaint upon defendants Damiani, McQuillan, and Cooper did not start to run.

However, as a practical matter it is expected that those defendants either file a notice of appearance or demand for the complaint, and that upon such filing Plaintiff timely serves the verified answer upon them.

### **Plaintiff's Motion for Default Judgement (Motion Sequence 003)**

Plaintiff moves, unopposed, for default judgment pursuant to CPLR 3215 (a) against defendants Cholowsky and Sky Materials Corp.

In support of this motion, plaintiff argues that defendants Cholowsky and Sky have not filed a notice of appearance, demand for a complaint, or an answer to the complaint. As such, plaintiff contends procedurally, defendants Cholowsky and Sky have failed to appear or plead, and default judgment must be found against them. In support of this argument, plaintiff points to the Complaint contending that it is supported with sufficient facts as to enable a court to

determine that viable causes of action exist. Further, plaintiff argues that a motion for default was not brought earlier due to the delay caused by COVID-19 and bankruptcy filing of plaintiff which stayed the case, and the fact that a preliminary conference was not held by the Court until February 1, 2024. Additionally, plaintiff argues that after the stay was lifted, plaintiff has been actively trying to figure out what defendants are represented by Corporation Counsel to bring a motion for default as necessary. Plaintiff notes that the Summons with Notice was served upon defendant Cholowsky on December 15, 2021 (*see* NYSCEF Docs. Nos. 8-9), and upon defendant Sky on December 7, 2021 (*see* NYSCEF Doc. No. 5).

As stated above, “It has been held “[a] complaint verified by counsel amounts to no more than an attorney affidavit and therefore insufficient to support entry of judgment pursuant to CPLR 315” (*Mullins*, 199 AD2d at 219 [1<sup>st</sup> Dept 1993]; *see also Martinez*, 104 AD3d at 478 [1<sup>st</sup> Dept 2013] [The complaint, which was verified by counsel, was “purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215”] [internal citations omitted]).

Here, in support of the motion for default judgment, plaintiff only points to the Complaint which plaintiff claims is supported with sufficient facts as to enable a court to determine that viable causes of action exist. However, this attorney verified complaint is insufficient to support an entry of default judgment.

As such, plaintiff’s motion for a default judgment against defendants Cholowsky and Sky is denied.

Accordingly, it is hereby

**ORDERED**, that defendants’ motion to dismiss plaintiff’s Complaint against New York City Department of Buildings (motion sequence 002) is granted; and it is further

**ORDERED**, that defendants’ motion to dismiss plaintiff’s Complaint against defendants Damiani, McQuillan and Cooper for failure of the plaintiff to serve his Complaint upon them (motion sequence 002) is denied; and it is further

**ORDERED**, that defendants’ motion to dismiss plaintiff’s Complaint against defendants Damiani, McQuillan and Cooper as abandoned to move for default within one year (motion sequence 002) is denied; and it is further

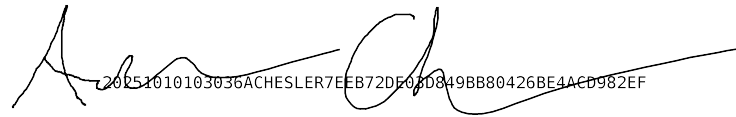
**ORDERED**, that plaintiff’s cross-motion for default judgment against defendants Damiani, McQuillan and Cooper (motion sequence 002) is denied; and it is further

**ORDERED**, that plaintiff’s cross-motion for leave to amend the pleadings to include the City of New York as a defendant (motion sequence 002) is granted; and it is further

**ORDERED**, that plaintiff’s motion for a default judgment against defendants Cholowsky and Sky (motion sequence 003) is denied; and it is further

**ORDERED**, that if Corporation Counsel is representing defendants Damiani, McQuillan and Cooper, they are directed to file a notice of appearance on these defendants’ behalf.

This constitutes the Decision and Order of the Court.



10/10/2025  
**DATE**

\_\_\_\_\_  
**ARIEL D. CHESLER, J.S.C.**

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