Acosta v City of New York
2025 NY Slip Op 34842(U)
December 15, 2025
Supreme Court, New York County
Docket Number: Index No. 157225/2022
Judge: Hasa A. Kingo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** — ***Justice*** **PART** **05M**

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JOHN X ACOSTA,

Plaintiff,

- v -

THE CITY OF NEW YORK, NYPD SERGEANT SEAN AMAN, WILLIAM PERRITT, COREY BEHAN, BRIAN BRANDEFINE, STEPHEN MALVAGNA, DOMINICK COGLIANO, THERESA FLETCHER, DAN FITZPATRICK

Defendant.

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INDEX NO. 157225/2022

MOTION DATE 09/25/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 127

were read on this motion for DEFAULT JUDGMENT.

Upon the foregoing documents, plaintiff John X. Acosta ("Plaintiff") moves pursuant to CPLR § 3215 (a) for entry of a default judgment against defendant NYPD Officer Corey Behan (Tax ID # 956425), or, in the alternative, for an order setting this matter down for an inquest in favor of the Plaintiff to assess damages. Defendant the City of New York ("City") opposes and cross-moves pursuant to CPLR §§ 2005 and 3012 (d) for an order compelling Plaintiff to accept service of an answer *nunc pro tunc*. For the reasons set forth herein, the motion is denied, and the cross-motion is granted.

BACKGROUND

In this civil rights action, Plaintiff seeks damages in connection with his arrest by members of the New York City Police Department ("NYPD"), while Plaintiff was allegedly participating in a lawful protest on May 25, 2021 (NYSCEF Doc No. 2, complaint ¶ 14). On August 23, 2022, Plaintiff commenced this action by filing a summons and complaint, which interposes causes of action for (1) excessive force, (2) First Amendment violation, (3) Due Process violation, (4) Equal Protection and Selective Enforcement violation, (5) deprivation of fair trial, (6) *Monell*, and (7) violations of New York state law against defendants the City of New York ("City") and NYPD Sergeant Sean Aman (Shield #3440), and against NYPD members designated as Does #1-7 (NYSCEF Doc Nos. 1-2). Copies of the summons and complaint were served on the City and Aman on December 16, 2022 and December 20, 2022 (NYSCEF Doc Nos. 3-4).

The City appeared by filing an answer only on behalf of itself on July 25, 2023 (NYSCEF Doc No. 5). On December 4, 2023, Plaintiff moved for entry of a default judgment against Aman

(Motion Seq. 001) (NYSCEF Doc No. 6, notice of motion). The City opposed and cross-moved to compel Plaintiff to accept the amended answer, *nunc pro tunc* (NYSCEF Doc No. 16, notice of cross-motion). The City filed an amended answer on February 14, 2024, on behalf of itself and defendant NYPD Sergeant Sean Aman (Shield #3440) ("Aman") (NYSCEF Doc No. 15, amended answer). The motion was denied and cross-motion granted by an order and decision of this court dated April 15, 2024 (NYSCEF Doc No. 24).

May 1, 2024, Plaintiff moved, by order to show cause, for an order directing the City and Aman (together, "Defendants") to provide the identities of seven John Doe defendants before expiration of the statute of limitations for Plaintiff's claims on May 20, 2024, and for leave to amend the complaint, or, in the alternative, to strike Defendants' answer as a sanction (Motion Seq. 002) (NYSCEF Doc No. 28, order to show cause). The City opposed the motion, arguing that Plaintiff had failed to provide an authorization pursuant to CPL § 160.50 (1)(d) to unseal police records regarding Plaintiff's arrest, which is necessary for the City to obtain the records needed to respond to the discovery request. By order and decision dated May 7, 2024, the court granted the motion to the extent that the City was directed to provide Plaintiff the identity of the seven Doe defendants to Plaintiff's counsel no later than May 21, 2024, or in the event that the City could not obtain the information, to provide an affidavit that outlines the efforts made to obtain the information (NYSCEF Doc No. 42, decision and order). Plaintiff was also granted leave to file an amended complaint (*id.*).

An amended complaint was filed on May 24, 2024 (NYSCEF Doc No. 43, amended complaint). The amended complaint added the individual officers identified by the City as defendants in this action, including NYPD Officer Corey Behan (Tax Id # 956425) ("Officer Behan"). After the amended complaint was filed, counsel for Plaintiff and the City engaged in ongoing email communications regarding when the individually named officers would answer the amended complaint (NYSCEF Doc No. 83, Green aff in support, exhibits E, F). In these communications, Corporation Counsel advised that an investigation pursuant to General Municipal Law ("GML") § 50-k regarding whether it would represent the officers was ongoing (*id.*). Plaintiff's counsel extended several courtesy adjournments of the City's time to answer during this time (*id.*).

At a discovery conference on July 24, 2025, the counsel for both parties entered into a stipulation and order wherein they agreed that the City would serve an answer on behalf of Officer Behan within 45 days, or September 7, 2025 (NYSCEF Doc No. 54, stipulation). After the City did not serve an answer by the agreed upon deadline, on September 25, 2025, Plaintiff filed the instant motion pursuant to CPLR § 3215, seeking entry of a default judgment against Officer Behan (NYSCEF Doc No. 77, notice of motion). The notice of motion was returnable on October 20, 2025, as designated by the notice of motion (*id.*). On October 24, 2025, after the motion was marked submitted without opposition, the City filed an attorney affirmation requesting an adjournment of the return date of the motion, along with its cross-motion and supporting papers (NYSCEF Doc Nos. 95-109). This court issued an order on October 29, 2025 that granted the adjournment request, adjourned the motion return date to November 7, 2025, deemed the cross-motion timely filed, and set a reply deadline of November 7, 2025 (NSYCEF Doc No. 113, order). Plaintiff's reply was timely filed on November 5, 2025 (NSYCEF Doc No. 127).

In support of the motion for default, Plaintiff argues that not only has the City defaulted in answering on behalf of Officer Behan in this action, it has engaged in a regular practice of failing to timely answer on behalf of officers in numerous other matters in New York state and federal courts, including seeking what Corporation Counsel refers to as "sua sponte" extensions of time to answer in federal actions (NYSCEF Doc No. 78, Green aff in support ¶¶ 42-46). Plaintiff asserts that this is an intentional and willful practice designed to gain a strategic advantage by causing Plaintiffs to miss the statutory one-year deadline for filing a motion for entry of a default judgment (*id.* ¶ 46; CPLR § 3215 [a]). Plaintiff further asserts that the City refused to enter into a stipulated agreement to extend the one-year deadline in furtherance of this strategy (*id.* ¶¶ 51-52).

The City opposes the motion and cross-moves to compel Plaintiff to accept service of a late answer for Officer Behan *nunc pro tunc* (NYSCEF Doc No. 95, notice of cross-motion). In support of its position, the City argues that the delay in answering was not deliberate and does not prejudice the Plaintiff, and Behan maintains a meritorious defense (NYSCEF Doc No. 96, Blaustein aff in opp ¶ 19). With respect to the delay in answering, the City cites to the high volume of matters handled by Corporation Counsel, lack of sufficient staff to handle these matters, and the need to make a representation determination pursuant to GML § 50k (*id.* ¶¶ 20-22). The City also represents that in this matter, the investigation process was completed on or about August 5, 2025, but the answer was not filed prior to the agreed-upon September 25, 2025 deadline due to a law office failure, specifically that "[d]ue to internal errors regarding the process of interposing the Answer on behalf of the officer, and unbeknownst to the Attorney handling the matter, the Amended Answer on the officers behalf was never interposed" (*id.* ¶ 23). The City further represents that it intended to include Officer Behan in its fourth amended answer filed August 20, 2025, but only Officer Brian Brandefine was added and not Officer Behan (*id.* ¶ 25).

In reply and opposition to the cross-motion, Plaintiff asserts that the City's representations regarding law office failure are untrue and pretextual, belied by Corporation Counsel's failure to advise Plaintiff's counsel of any such failure in their going communications and by the City's failure to timely respond to this motion (NYSCEF Doc No. 127, reply aff ¶¶ 6-9). Plaintiff also argues that the amended answer that was served is procedurally defective and a nullity because it is unverified (*id.* ¶¶ 14, 68). Finally, Plaintiff argues that if the motion for default is denied, Plaintiff should be granted an award of attorneys fees to account for the City's "deliberately placing the burden of forcing an answer on its adversaries" (*id.* ¶ 76).

DISCUSSION

A plaintiff that seeks entry of a default judgment must demonstrate service of the summons and complaint upon defendants, proof of the facts constituting its claims, and proof of default (CPLR § 3215 [f]). Proof of the facts constituting the claim may be by affidavit of the plaintiff or by verified complaint (*id.*). Plaintiff has demonstrated proof of service of the summons and complaint upon Officer Behan by submission of an appropriate affidavit of service (NYSCEF Doc No. 80), and has demonstrated proof of the default by submission of an affirmation of counsel attesting to the default (NYSCEF Doc No. 78, Green aff in support ¶¶ 6, 29, 30).

Nevertheless, the Plaintiff's affidavit submitted in support of the motion does not provide sufficient proof of the facts constituting the claim. "CPLR § 3215 does not contemplate that default

judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*id.*). This standard of proof "is not stringent, but the plaintiff must submit "some firsthand confirmation of the facts" (*id.*). The affidavit submitted in support of this motion is the same Plaintiff's affidavit submitted in support of a prior motion for entry of a default judgment against defendant Sergeant Aman. The affidavit states, in relevant part, that "[o]n May 25, 2021, Defendants, including Sergeant Aman, violated my civil rights when I was at a demonstration near City Hall and the City Hall Metropolitan Transportation Authority Stay in lower Manhattan" . . . "[a]s a result of Defendants' civil rights violations against me, I was assaulted and arrested, causing me to suffer physical and emotional injuries" (NYSCEF Doc No. 85, Pl aff in support ¶¶ 3-4).

The affidavit does not contain any specific factual allegations regarding Officer Behan and the conclusory allegation that Defendants violated his civil rights is not sufficient to satisfy Plaintiff's burden on the motion for default (*see Feffer v Malpeso*, 210 AD2d at 61). The affirmation of Plaintiff's counsel cannot make up for this deficit because the affirmation of an attorney with no personal knowledge of the underlying facts constituting the claim is insufficient to support entry of a judgment pursuant to CPLR § 3215 (*Feffer*, 210 AD2d at 61["a complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR § 3215"; *see also Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987] ["complaint, verified as it is by his attorney, is pure hearsay, utterly devoid of evidentiary value"]). Therefore, the motion for entry of a default judgment must be denied.

With respect to the cross-motion to compel Plaintiff to accept service of the answer, it is within the court's discretion whether to "extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of a reasonable excuse for delay or default" (CPLR § 3012 [d]). A short delay while the City performs an investigation pursuant to GML § 50-k has been held to be a reasonable excuse, where the delay does not result in other prejudice (*Hirsch v New York City Dept of Educ.*, 105 AD3d 522, 522 [2013]; *Myers v City of New York*, 110 AD3d 652, 652 [1st Dept 2013]). Discovery has continued during the course of Officer Behan's default, and Plaintiff has not demonstrated any prejudice resulting from the delay caused by the GML § 50-k investigation or the subsequent law office failure, which resulted in an additional shorter delay in the City's answer. The court is not persuaded that the City's failure to timely answer on behalf of Officer Behan is part of a scheme to cause Plaintiff to miss the statutory deadline to move for entry of a default judgment. Certainly, Plaintiff could have moved for entry of a default judgment at any time after the default, regardless of the City's representations regarding the status of its GML § 50-k investigation. This is not to excuse or overlook the myriad procedural defects present here; rather, in the absence of demonstrated prejudice, the court is constrained to grant the City's motion, consistent with New York's long-standing and strong public policy favoring the resolution of cases on their merits (*Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [2016]).

Accordingly, it is

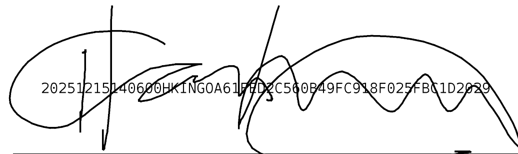
ORDERED that the motion for entry of a default judgment is denied; and it is further

ORDERED that the City's cross-motion is granted; and it is further

ORDERED that the defendant NYPD Officer Corey Behan (Tax ID # 956425)'s shall, within 10 days of service of a copy of this order with notice of entry, serve and file an amended answer that conforms to the proposed amended answer annexed to the City's papers on this motion, properly verified as required by statute; and it is further

ORDERED that the amended answer served in accordance with this order shall be deemed timely *nunc pro tunc*.

This constitutes the order and decision of the court.



12/15/2025
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE