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

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

MARTINE ANNOZINE

- v -

ALPHONZO COLLINS, et al.

INDEX NO. 112461/2010

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for Vacate a default

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 5
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The motion by defendant 50 West 112th Street Housing Development Fund Corporation (HDFC) to vacate its default in opposing plaintiff's motion for a default judgment, restoring plaintiff's motion and vacating the default judgment against defendant HDFC, is granted pursuant to the accompanying stipulation. Upon restoration, the court denies plaintiff's motion for a default judgment against defendant HDFC.

FILED

NOV 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/22/12

Lucy Billings

LUCY BILLINGS J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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MARTINE ANNOZINE,

Plaintiff

- against -

ALPHONZO COLLINS, 50 WEST 112TH STREET HOUSING DEVELOPMENT FUND CORPORATION, FORCE ONE INTERNATIONAL SECURITY & CONSULTANT FIRM, INC., FORCE ONE SECURITY GROUP, INC., FORCE ONE SECURITY SOLUTION LTD., and "FORCE ONE,"

Defendants

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Index No. 112461/2010

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Defendant 50 West 112th Street Housing Development Fund Corporation (HDFC) moves to vacate its default in opposing plaintiff's motion for a default judgment, which resulted in the court's order dated June 18, 2012, granting plaintiff's motion for a default judgment on liability against both defendant Collins and defendant HDFC. C.P.L.R. § 3215(d). In a stipulation dated July 18, 2012, plaintiff and defendant HDFC agreed to the relief sought by defendant HDFC's motion, vacating its default in opposing the motion, restoring the motion against defendant HDFC for the court's redetermination, and thus vacating the default judgment against defendant HDFC.

I. PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

Plaintiff's affidavit supporting her motion for a default judgment attests simply that, in November 2007, "defendants were responsible for the security of the building I was residing in

located at 50 West 112th Street," New York County, when "I was harassed, annoyed and/or threatened by the defendant Alphonzo Collins, an agent, servant and/or employee of his co-defendants." Pl.'s Aff. of Merit ¶ 2. Her unverified complaint alleges claims against defendant HDFC for harassment; of vicarious liability for Collins's intentional and negligent infliction of emotional distress, assault, negligence, and prima facie tort; and for negligent supervision of Collins and negligent provision of security at 50 West 112th Street.

Even assuming plaintiff's attestation that Collins was co-defendants' agent or employee adequately specifies that he was defendant HDFC's agent or employee, the remainder of her affidavit, her only admissible evidence, fails to support her claims against this defendant. First, harassment is not a cognizable civil claim, Jerulee Co. v. Sanchez, 43 A.D.3d 328, 329 (1st Dep't 2007); Hartman v. 536/540 E. 5th St. Equities, Inc., 19 A.D.3d 240 (1st Dep't 2005), except under specific statutory and regulatory provisions that plaintiff does not rely on and do not apply here. Jerulee Co. v. Sanchez, 43 A.D.3d at 329.

A. Defendant HDFC's Vicarious Liability

Second, even if defendant HDFC may be vicariously liable for Collins's intentional as well as negligent conduct, plaintiff fails to support either intentional or negligent infliction of emotional distress by Collins. To establish Collins's intentional infliction of emotional distress, plaintiff must show

(1) that Collins engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between his acts and plaintiff's injury, and (4) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993); Suarez v. Bakalchuk, 66 A.D.3d 419 (1st Dep't 2009). Negligent infliction of emotional distress must be based on Collins's breach (1) of a duty owed to plaintiff (2) that unreasonably endangered her or caused her to fear for her own safety. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d 590, 591 (1st Dep't 2010); Sheila C. v. Povich, 11 A.D.3d 120, 130 (1st Dep't 2004). Extreme and outrageous conduct is also an element of negligent infliction of emotional distress. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 592; Lau v. S&M Enters., 72 A.D.3d 497, 498 (1st Dep't 2010); Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d 506, 508 (1st Dep't 2009); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 362 (1st Dep't 2005).

To support the element of extreme and outrageous conduct, plaintiff must show that Collins's conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22-23 (2008); Howell v. New York Post Co., 81 N.Y.2d at 122; Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983); Suarez v. Bakalchuk, 66 A.D.3d 419. Plaintiff's mere attestation that

Collins "harassed, annoyed and/or threatened" her does not amount to extreme and outrageous conduct. Pl.'s Aff. of Merit ¶ 2.

Although plaintiff suggests that Collins breached a duty to provide her security, she fails to show that he unreasonably endangered her safety or caused her to fear for her safety. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 591. For all these reasons, plaintiff's claims for intentional and negligent infliction of emotional distress fail. Lau v. S&M Enters., 72 A.D.3d at 498; Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d at 508; McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d 258, 259 (1st Dep't 2008); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 362-63.

Plaintiff's assault claim requires a showing of physical conduct causing plaintiff apprehension of immediate harmful contact. Nicholson v. Luce, 55 A.D.3d 416 (1st Dept 2008); Holtz v. Wildenstein & Co., 261 A.D.2d 336 (1st Dep't 1999); Charkhy v. Altman, 252 A.D.2d 413, 414 (1st Dep't 1998); Hassan v. Marriott Corp., 243 A.D.2d 406, 407 (1st Dep't 1997). Her assault claim suffers from at least two deficiencies. First, plaintiff nowhere alleges any physical conduct that caused an apprehension of harmful contact. Hassan v. Marriott Corp., 243 A.D.2d at 407. See Nicholson v. Luce, 55 A.D.3d 416. Second, she fails to show that Collins posed any threat of immediate harmful contact. Holtz v. Wildenstein & Co., 261 A.D.2d 336.

To support the prima facie tort claim, plaintiff must show that Collins (1) intentionally inflicted harm, (2) causing

special damages, (3) without justification or excuse, (4) by otherwise lawful acts. Posner v. Lewis, 18 N.Y.3d 566, 570 n.1 (2012); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-43 (1985); Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984); Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 (1983). She must attest to a "specific and measurable loss" from the tortious conduct to establish special damages. Freihofer v. Hearst Corp., 65 N.Y.2d at 143. See Curiano v. Suozzi, 63 N.Y.2d at 117; DeMicco Bros., Inc. v. Consolidated Edison Co. of N.Y., Inc., 8 A.D.3d 99, 100 (1st Dep't 2004); Vigoda v. DCA Prods. Plus, 293 A.D.2d 265, 266 (1st Dep't 2002); Havell v. Islam, 292 A.D.2d 210 (1st Dep't 2002). Malevolence must be the sole motivation for defendant's injurious actions. Posner v. Lewis, 18 N.Y.3d at 570 n.1; Curiano v. Suozzi, 63 N.Y.2d at 117; Burns Jackson Miller & Spitzer v. Lindner, 59 N.Y.2d at 333.

Plaintiff fails to specify that Collins's only purpose in harassing, annoying, or threatening her was a disinterested malevolence. Even if that conduct itself demonstrates the sole intent to injure her, Havell v. Islam, 292 A.D.2d 210; Smukler v. 12 Lofts Realty, 156 A.D.2d 161, 163 (1st Dep't 1989); Rad Adv. v. United Footwear Org., 154 A.D.2d 309, 310 (1st Dep't 1989), her affidavit nowhere alleges the requisite harm and special damages required to sustain her prima facie tort claim.

Finally, insofar as plaintiff claims defendant HDFC, as Collins's employer, is vicariously liable for his intentional, culpable acts, her allegations fail to indicate (1) how his

employer instigated, authorized, or at least condoned those acts, Taylor v. United Parcel Serv., Inc., 72 A.D.3d 573 (1st Dep't 2010); Velasquez-Spillers v. Infinity Broadcasting Corp., 51 A.D.3d 427 (1st Dep't 2008), or (2) how they related to his employer's business or his job duties, rather than his own personal objectives. Delran v. Prada USA Corp., 23 A.D.3d 308 (1st Dep't 2005); HT Capital Advisors v. Optical Resources Group, 276 A.D.2d 420 (1st Dep't 2000); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dep't 1997). See N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247, 251-52 (2002); Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933 (1999); White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d 243, 244 (1st Dep't 2006); Dykes v. McRoberts Protective Agency, 256 A.D.2d 2, 3-4 (1st Dep't 1998). If anything, her allegations indicate conduct that directly contravened the employer's interests and the employee's duties in carrying out their alleged shared responsibility for security: an "obvious departure from the normal duties" of security personnel to the tenants who are to be provided security. White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244. See N.X. v. Cabrini Med. Ctr., 97 N.Y.2d at 251; Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d at 933; Dykes v. McRoberts Protective Agency, 256 A.D.2d at 4.

B. Defendant HDFC's Negligent Supervision

To sustain the claim for negligent supervision, plaintiff must show that defendant HDFC, as Collins's employer, received notice, actual or constructive, of the employee's tortious propensities to cause plaintiff's injury. Coffey v. City of New

York, 49 A.D.3d 449, 450 (1st Dep't 2008); White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244; Nunez v. Caryl & Broadway, Inc., 30 A.D.3d 249, 250 (1st Dep't 2006); Chagnon v. Tyson, 11 A.D.3d 325, 326 (1st Dep't 2004). In short, defendant HDFC may be held liable only if it knew or had reason to know of Collins's propensity to harass, annoy, or threaten residents of the building where defendants allegedly were responsible for security. Taylor v. United Parcel Serv., Inc., 72 A.D.3d at 574; Pinkney v. City of New York, 52 A.D.3d 242, 243 (1st Dep't 2008).

Plaintiff nowhere attests that defendant HDFC knew or had reason to know of any prior criminal or other unlawful conduct by Collins or any history that he had been fired or separated from previous employment due to such behavior. Absent such a history before Collins's employment by defendant HDFC or his offensive conduct that surfaced during his employment, plaintiff presents no basis on which his harassing, annoying, or threatening conduct was known or at least foreseeable, to support the employer's liability.

Finally, the only means by which defendant HDFC negligently provided security as plaintiff attests was by the HDFC's employment and negligent supervision of Collins. Since her negligent supervision claim fails, so does any claim of negligent security against defendant HDFC. Insofar as plaintiff separately claims this defendant's negligence, she nowhere alleges any negligence other than the negligent supervision and negligent infliction of mental distress addressed above.

C. Conclusion

In moving for a default judgment, plaintiff bears the burden to support the judgment by presenting admissible evidence attesting on personal knowledge or otherwise establishing each of her claims against the defaulting defendants, as alleged in the complaint and claimed by plaintiff's attorney in support of her motion: a burden plaintiff's motion fails to meet. C.P.L.R. § 3215(f); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Beltre v. Babu, 32 A.D.3d 722, 723 (1st Dep't 2006). See Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007). Regardless of defendant HDFC's opposition to her motion or whether defendant articulates a meritorious defense through the affirmative defense of failure to state a claim in defendant's proposed answer, the deficiencies in the admissible evidence supporting plaintiff's claims are fatal to her motion.

II. DEFENDANT HDFC'S EXCUSES FOR ITS DEFAULT IN ANSWERING

In opposing plaintiff's motion for a default judgment, defendant HDFC explains its reasons for failing to answer timely and recites the prompter steps it took once it received the summons and complaint by mail August 8, 2011, and immediately forwarded them to its attorney. Immediately upon that transactional attorney retaining another attorney for the

litigation, the latter responded by serving an answer September 15, 2011, less than six weeks after the client's first receipt of the summons and complaint.

Plaintiff, on the other hand, presents affidavits of service of the summons and complaint on defendant HDFC via delivery to the New York State Secretary of State October 10, 2010; as part of her first, eventually withdrawn, motion for a default judgment via mail May 18, 2011; and in a second mailing of the pleadings May 18, 2011, C.P.L.R. § 3215(g)(4), in connection with that motion. Plaintiff does not present an affidavit that the Secretary of State, upon service of the summons and complaint, mailed them to defendant HDFC, yet defendant confirms that it maintained its current address with the Secretary of State, and plaintiff's two May 2011 mailings were to this address, the same address where defendant received the mailed pleadings August 8, 2011. While defendant HDFC may more easily explain, beyond simply denying receipt, why defendant failed to receive personal service via delivery to a person or address unassociated with defendant, it makes no attempt to explain, other than by simply denying receipt, how it never received three mailings to the same address where it then received a fourth mailing. Crespo v. Kynda Cab Corp., 299 A.D.2d 295 (1st Dep't 2002). See Dayco Mech. Servs., Inc. v. Toscani, 94 A.D.3d 1214 (3d Dep't 2012); C&H Import & Export, Inc. v. MNA Global, Inc., 79 A.D.3d 784, 785 (2d Dep't 2010).

III. EXTENDING THE DEFAULTING DEFENDANT'S TIME TO ANSWER

C.P.L.R. § 3012(d) allows a late answer upon a "reasonable excuse for delay or default" and "such terms as may be just." Although the latter provision may include a showing of a meritorious defense against plaintiff's claims, § 3012(d) does not specifically require a meritorious defense, and such a showing is unnecessary to support acceptance of a late answer. Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008); Spira v. New York City Tr. Auth., 49 A.D.3d 478 (1st Dep't 2008). The "reasonable excuse" for the delay and default, however, plus the absence of prejudice to plaintiff, is a necessary showing to allow a late answer. Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81. See, e.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011).

Although the court may extend the time to answer in the context of a motion for a default judgment absent a cross-motion to allow a late answer, C.P.L.R. § 3012(d); Higgins v. Bellet Constr. Co., 287 A.D.2d 377 (1st Dep't 2001); Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229 (1st Dep't 1990); Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989); Shure v. Village of Westhampton Beach, 121 A.D.2d 887, 888

(1st Dep't 1986), defendant HDFC does not expressly move to extend its time to answer. See Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484 (1st Dep't 2010); Spira v. New York City Tr. Auth., 49 A.D.3d 478; Tulley v. Straus, 265 A.D.2d 399, 401 (2d Dep't 1999). Absent any explanation for defendant HDFC's nonreceipt of plaintiff's pleadings before August 2011, when service on the Secretary of State was concededly effected 10 months before, and neither the Secretary of State nor plaintiff used an incorrect address, defendant does not justify excusing its default and allowing its late answer absent a motion for that relief. Crespo v. Kynda Cab Corp., 299 A.D.2d 295. See Dayco Mech. Servs., Inc. v. Toscani, 94 A.D.3d 1214; C&H Import & Export, Inc. v. MNA Global, Inc., 79 A.D.3d at 785. While defendant HDFC's further delay in serving an answer was relatively short after August 8, 2011, the curious delay before then was extensive, requiring an explanation that demonstrates both a reasonable excuse for the late answer and the absence of a willful default. C.P.L.R. § 3012(d); Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81; Obermaier v. Fix, 25 A.D.3d 327 (1st Dep't 2006); Wilson v. Sherman Terrace Coop., Inc., 14 A.D.3d 367 (1st Dep't 2005).

IV. DISPOSITION

The lack of admissible evidence supporting plaintiff's claims against defendant HDFC constitutes grounds alone to deny her motion for a default judgment, even if the defaulting defendant does not, in the context of plaintiff's motion and

without defendant's own motion, satisfactorily excuse its failure to answer timely or provide grounds to allow its late answer. Therefore the court denies plaintiff's motion for a default judgment against defendant 50 West 112th Street Housing Development Fund Corporation, but refrains from granting relief that is not sought by any motion. C.P.L.R. §§ 3012(d), 3215(f). This decision constitutes the court's order.

DATED: October 22, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.