

Landusco v Big Bus Tours N.Y., LLC

2017 NY Slip Op 31468(U)

July 12, 2017

Supreme Court, New York County

Docket Number: 151084/2017

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED, J.S.C.
Justice

PART 2

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PETER LANDUSCO,
Plaintiff,

INDEX NO. 151084/2017

MOTION DATE 3/22/2017

- v -

MOTION SEQ. NO. 001

BIG BUS TOURS NEW YORK, LLC, MICHAEL JOHNSON,
Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20

were read on this application to/for Judgment - Default

Upon the foregoing documents, it is

ordered that the motion is denied with leave to renew upon proper papers.

Plaintiff Peter Landusco commenced this action against defendants Big Bus Tours New York, LLC, and Michael Johnson seeking damages for personal injuries he allegedly sustained on August 12, 2016, when he was violently assaulted by Johnson who, plaintiff alleges, was an employee of defendant, Big Bus Tours. The summons and verified complaint were filed with the Court on or about February 2, 2017 and served on defendants on or about February 10, 2017.

Plaintiff moves, pursuant to CPLR 3215, for an order directing that a default judgment be entered against defendants and that this matter be set down for an inquest on damages. This Court notes that, pursuant to a “Stipulation Partially Withdrawing Motion,” executed on April 24, 2017, that branch of plaintiff’s motion seeking a default judgment against defendant Big Bus Tours, LLC was withdrawn and plaintiff acknowledged that said defendant had interposed a Verified Answer. Therefore, only that branch of the motion seeking a default judgment against defendant Johnson is at issue.

Defendant Johnson was purportedly served with the summons and complaint on February 10, 2017. See Ex. 2. According to the affidavit of service, plaintiff’s process server served the summons and complaint on “Andrea Ramirez, Co-Habitant a person of suitable age and discretion.” The address where service was allegedly made was “509 Madison Avenue, Suite 1200, New York, NY 10022. Additionally, the process server mailed a copy of the summons and complaint to the same address, indicating that it was defendant Johnson’s “usual place of abode, last known residence.”

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Plaintiff has failed to submit proper proof of service with respect to defendant Johnson. Although plaintiff purports to have served defendant Johnson, the affidavit of service indicates it was served at Johnson's residence. However, it was clearly not served at his residence but rather at the business office of co-defendant Big Bus Tours. Plaintiff's process server was clearly aware of this because it was the same address at which he served Big Bus Tours. Additionally, the same individual, Andrea Ramirez, accepted service for both defendants, although the affidavit of service relating to Big Bus Tours reflects that she was an "individual authorized to accept service". It is evident that Johnson could not have been a co-habitant of Ramirez at the business office of Big Bus Tours. Since the address where process was served was not Johnson's residence, it was clearly improper for the process server to serve Ramirez as his "co-habitant." The process server thus failed to comply with the requirements for substituted service set forth in CPLR 308(2), which mandates "delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served . . ."

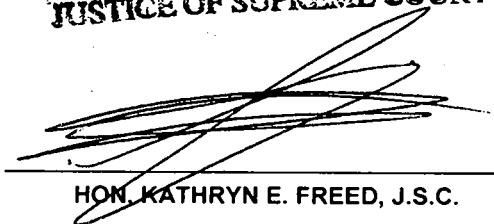
Finally, this Court notes that, even if the process server had represented that Johnson was served at his actual place of business, such a claim would be dubious given that Big Bus Tours denies that Johnson was its employee.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff for a default judgment against defendant Michael Johnson is denied with leave to renew upon the submission of proper papers; and it is further,

ORDERED that this constitutes the decision and order of this Court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT



7/12/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE