

Cea v Matthew

2018 NY Slip Op 33249(U)

December 12, 2018

Supreme Court, New York County

Docket Number: 160558/2016

Judge: Lisa A. Sokoloff

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This opinion is uncorrected and not selected for official publication.

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

X

SANDRA CEA,

Index No. 160558/2016

Plaintiff,

Motion Seq. 1

-against-

DECISION AND ORDER

GREGORY MATTHEW, NEW YORK CITY TRANSIT
AUTHORITY, MTA BUS COMPANY and
METROPOLITAN TRANSIT AUTHORITY,

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Plaintiff's Motion for Default Judgment /Affirmation	<u>1</u>	7-18
Defendant's Cross-Motion/Exhibits	<u>2</u>	20-28
Plaintiff's Reply Affirmation, Opposition to Cross-Motion	<u>3</u>	29-30

LISA A. SOKOLOFF, J.

This is an action by Plaintiff Sandra Cea to recover damages for personal injuries sustained in an accident on November 11, 2015 when the motor vehicle Plaintiff was driving was stopped by a construction worker and struck in the rear by a Defendant New York City Transit Authority (Transit) bus operated by Defendant Gregory Matthew (Matthew) at 125th Street at its intersection with Lenox Avenue.

Plaintiff commenced this action by filing a Summons and Complaint on December 16, 2016. Defendant Matthew was served on December 30, 2016 and an affidavit of service was electronically filed on February 7, 2017. Matthew was served a second time on January 11, 2017 and an affidavit of service was filed on April 3, 2017.

Plaintiff now moves pursuant to CPLR § 3215(a) and (b) for a default judgment against Defendant Matthew on the ground that the time to answer has expired and Defendant Matthew has not answered or moved with respect to the complaint.

Defendants Transit, MTA Bus Company and Metropolitan Transportation Authority (sued herein as "Metropolitan Transit Authority") (collectively, "Transit Defendants") oppose and cross-move pursuant to CPLR § 3211(a)(8), to dismiss all claims against Matthew as the court lacks personal jurisdiction over Matthew because Plaintiff failed to complete service within 120 days after the commencement of the action as required by CPLR § 306-b, or in the alternative, pursuant to CPLR § 3215(c), on the ground that Plaintiff failed to take proceedings for the entry of judgment within one year after the default.

On February 7, 2017, Plaintiff electronically filed an Affidavit of Service, virtually illegible, via New York State Courts Electronic Filing system (NYSCEF) setting forth that Matthew was served on December 30, 2016 by James M. Geiger, a resident of North Carolina, who delivered a copy of the Summons and Complaint to Michael Baker, who identified himself as Matthew's stepson, at 601 N. Mulberr Rd, Shallotte, NC 28740 (1st Matthew Affidavit of Service). Another Affidavit of Service, setting forth identical information except on Geiger Investigative Services letterhead, was not filed by Plaintiff, but attached as part of Exhibit B to Plaintiff's motion.

This method of service on Matthew, presumably pursuant to CPLR § 313, New York's long-arm statute, permitted delivery to a person of suitable age and discretion. However, with respect to the persons permitted to serve process in the foreign jurisdiction, there were only three options available: (1) any person who is a resident of New York over the age of 18 and not a party to the action (CPLR 2103[a]); (2) any person authorized to

make service under the law of the jurisdiction where service is to be made; and (3) any qualified attorney, solicitor, barrister or the equivalent in the other jurisdiction (Vincent Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR §313). It is not clear to the court that the process server, James M. Geiger, a North Carolina resident according to the 1st Matthew Affidavit of Service, was authorized to serve process on Matthew.

Even assuming this method of service was proper, CPLR § 3215(c) requires that the court dismiss a complaint as abandoned if a plaintiff fails to take proceedings for the entry of judgment within one year after a default unless sufficient cause is shown why the complaint should not be dismissed. A party seeking to vacate a default must demonstrate both a reasonable excuse and the existence of a meritorious defense (*US Bank Nat. Ass'n v Brown*, 147 AD3d 428 [1st Dept 2017]).

According to the 1st Matthew Affidavit of Service, personal service was made on Defendant Matthew on December 30, 2016. Matthew was allowed 30 days to answer (CPLR § 3012[c]), but an answer was never interposed on his behalf and he is now in default of pleading. Thus, Plaintiff was required to move for default within one year from January 29, 2017, or by January 30, 2018 and failed to do so.

With regard to a meritorious cause of action, the Transit Defendants argue correctly that because Transit would be vicariously liable under the doctrine of *respondeat superior* for any negligent act committed by Matthew while acting in the scope of his duties (*Neiger v City of New York*, 72 AD3d 663 [2nd Dept 2010]; Public Authorities Law § 1212[3]), there is no merit to a cause of action against Matthew as an individually named defendant. The Transit Defendants have admitted in their Verified Answer that the bus was operated by Matthew with the permission and consent of Transit. Although Matthew was an

by Matthew with the permission and consent of Transit. Although Matthew was an employee of Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") and acting within the scope of his employment as a bus operator for MABSTOA, Transit would nonetheless be vicariously liable for any of Matthew's alleged negligent action by the principal-agent relationship. "[W]here conduct falls within the scope of the agents' authority, everything they know or do is imputed to their principals" (*Kirschner v KPMG LLP*, 15 NY3d 446 [2010]).

Accordingly, Plaintiff failed to show sufficient cause to defeat Defendants' dismissal motion because he neither set forth a viable excuse for the delay nor demonstrated a meritorious cause of action against Matthew.

On April 3, 2017, Plaintiff electronically filed an Affidavit of Service via NYSCEF setting forth that service was made upon Matthew, pursuant to New York Vehicle and Traffic Law (VTL) § 253 or 254, by a process server who personally delivered a copy of the Summons and Complaint on January 11, 2017 to Lorette Powell on behalf of the Secretary of State of the State of New York, and notice of such service was sent to Matthew, by certified mail, at 601 N. Mulberry Rd, Shallotte, NC 28470 ("2nd Matthew Affidavit of Service"). Although the 2nd Matthew Affidavit of Service states that Defendant Matthew received the certified mail on March 30, 2017, the USPS tracking printout, which was not filed, shows that it was delivered on January 30, 2017 (Exhibit B to Plaintiff's submission).

According to VTL § 253, Plaintiff was required to file with the clerk of the court an affidavit of compliance with the service requirements, a copy of the summons and complaint and a return receipt signed by the defendant or someone authorized to sign on his behalf (VTL § 253[2]). Here, however, Plaintiff electronically filed only the 2nd

Matthew Affidavit of Service without attaching the return receipt, or the USPS tracking printout, and the papers were not filed within 30 days after the return receipt was received by Plaintiff, as required by the statute. Nor has Plaintiff complied with CPLR § 306-b which requires service of the summons and complaint be made within 120 days after commencement of the action. Since Plaintiff failed to comply with VTL § 253 and CPLR § 306-b, the action must be dismissed as against Matthew for lack of personal jurisdiction.

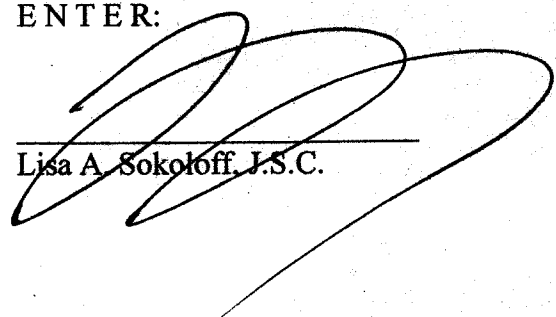
Accordingly, it is

ORDERED, that Plaintiff's motion for default judgment as against Gregory Matthew is DENIED and the cross-motion by New York City Transit Authority, MTA Bus Company and Metropolitan Transportation Authority pursuant to CPLR § 3211(a)(8) to dismiss all claims against Defendant Matthew is GRANTED as service of process was improper and the court lacks personal jurisdiction over Defendant.

Any other requested relief not expressly granted is denied.

Dated: December 12, 2018
New York, New York

ENTER:



Lisa A. Sokoloff, J.S.C.

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