

**Fennell v Vesta Contr. Group, Corp.**

2017 NY Slip Op 31508(U)

July 14, 2017

Supreme Court, New York County

Docket Number: 156215/16

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  
COUNTY OF NEW YORK: IAS PART 2

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JENNIFER FENNELL,

Plaintiff,

-against-

VESTA CONTRACTING GROUP, CORP.,

Defendant.

**DECISION AND ORDER**

Index No. 156215/16

Mot. Seq. 001

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**Kathryn Freed, J.:**

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS  
CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
SUMMONS AND COMPLAINT	1
NOTICE OF MOTION AND AFFIDAVIT ANNEXED	2-3 (Exs. A-D)
CROSS MOTION AND AFF. IN OPP.	12 (Exs. A-E)
PLAINTIFF'S REPLY/OPPOSITION AFFIRMATION	18 (Exs. E-H)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON  
THE MOTION IS AS FOLLOWS:

This is a personal injury action by plaintiff Jennifer Fennell  
against defendant Vesta Contracting Group, Corp. ("Vesta"), arising  
from a trip and fall on August 21, 2013, on the sidewalk adjacent  
to the premises located at 160 East 88<sup>th</sup> Street in Manhattan ("the  
premises"). Plaintiff moves, pursuant to CPLR 3215, for an order

of default against Vesta due to its failure to appear in this action, and for an inquest on damages. Vesta cross-moves, pursuant to CPLR 602(a), for an order consolidating the instant action ("Fennell 2") with a previously commenced action in this court styled *Fennell v City of New York, et al*, Index No. 153196/14 ("Fennell 1"). The motion and cross motion are **granted to the extent set forth below.**

### **Background**

Plaintiff was allegedly injured on August 21, 2013 when she tripped and fell on the sidewalk adjacent to the premises while construction and renovation work was being performed there. In March, 2014, Fennell commenced the Fennell 1 action under New York County Index Number 153196/14 against The City of New York, Lexington Towers Company, L.P., Lexington Towers GP Co., LLC, Schneider & Schneider, Inc., Schneider & Schneider Management, LLC, Helmsley-Spear Inc., DF Restoration, Inc. ("DFR"), DF Restoration of NY, Inc., Skyline Scaffolding Group and Total Safety Consulting seeking damages for her injuries. Ind. No. 153196/14 NYSCEF Doc. 1.

In August of 2014, DFR, a contractor on the construction project, commenced a third-party action for contribution and indemnification against Vesta as its subcontractor. Ind. No.

153196/14 NYSCEF Doc. 129. Vesta answered the third-party complaint in Fennell 1 on or about August 18, 2014. Ind. No. 153196/14 NYSCEF Doc. 75.

Fennell commenced the instant Fennell 2 action against Vesta on July 26, 2016. NYSCEF Doc. 1. In Fennell 2, plaintiff also sought damages for the injuries she allegedly sustained on August 21, 2013. Id. On August 2, 2016, plaintiff served process on Vesta pursuant to Business Corporation Law (BCL) § 306 by serving the Secretary of State of the State of New York. NYSCEF Doc. 5. On August 9, 2016, Fennell's attorneys sent a letter to Vesta's attorneys notifying them of the commencement of the Fennell 2 action. The letter specifically set forth the names and index numbers of both the Fennell 1 and Fennell 2 actions. The letter stated:

Your office represents third-party defendant Vesta Contracting Group in the action *Fennell v. The City of New York et. al.* Enclosed herewith please find a copy of a Summons and Complaint for the companion action, *Fennell v. Vesta Contracting Group*, which has been served on your client through the Secretary of State. I am also providing a copy of the Affidavit of Service.

Upon receipt, please take the necessary steps to have an answer interposed in behalf of your client.

Thereafter, on September 16, 2016, Fennell sent a letter to

Vesta, its attorneys, its insurance broker and its insurer. The letter noted that Vesta's time to appear in this action had expired. However, the letter stated that, if Vesta appeared by September 16, 2016, plaintiff would not seek a default judgment against it.

Vesta did not appear in this action and, on September 27, 2016, Fennell brought the instant motion for a default judgment and for an inquest on damages. Vesta opposes the motion and cross-moves to consolidate the Fennell 1 and Fennell 2 actions. Upon consolidation, Vesta requests that the Fennell 2 action be dismissed.

By order dated November 17, 2016, this Court (Kotler, J.) granted a conditional order of preclusion against Vesta due to its failure to provide discovery in Fennell 1. Ind. No. 153196/14 NYSCEF Doc. 141. The order provided Vesta with a final opportunity to provide discovery before it was precluded. Id. By order dated January 26, 2017, this Court (Kotler, J.) held that, in light of Vesta's failure to comply with the order of November 17, 2016, "Vesta is hereby precluded from introducing any evidence on the issue of liability at a trial of this matter." Ind. No. 153196/14 NYSCEF Doc. 175.

A note of issue was filed in Fennell 1 on February 22, 2017.

Ind. No. 153196/14 NYSCEF Doc. 200.

## Discussion

### Plaintiff's Motion For Default Against Vesta

CPLR 3215 (a) provides that, when a defendant has failed to appear in an action, the plaintiff may seek a default judgment against it.

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 [it]." "On 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).

Here, plaintiff's counsel has submitted proof of proper service of process. It is undisputed that Vesta was served via the Secretary of State pursuant to BCL § 306 on August 2, 2016. It is also undisputed that Vesta failed to serve a timely answer. Further, plaintiff has set forth proof of the facts constituting the claim in the form of a complaint verified by plaintiff. Thus,

plaintiff has established each of the elements needed to establish her entitlement to a default judgment against Vesta. See *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649 at 651.

BCL § 306 (a) provides for service of process on a registered agent "as if the registered agent was a defendant." BCL § 306 (b) (1) provides a mechanism for service of process on the Secretary of State as agent of a domestic corporation, and it further provides that service of process on a corporation shall be complete when the Secretary of State is properly served. Plaintiff's proof of service on Vesta via the Secretary of State has not been refuted. Therefore, this Court finds that plaintiff has demonstrated that she is entitled to a default judgment against Vesta for failure to appear in this action.

Vesta argues that plaintiff's motion should be denied for several reasons. First, it contends that it never received actual notice of Fennell 2 until service of the instant motion for a default. It contends that plaintiff served the Secretary of State without also serving Vesta. It also contends that its address is no longer the one listed on the summons.

Defendant's arguments are unpersuasive. As set forth above, service on Vesta was complete when plaintiff completed service on the Secretary of State pursuant to BCL § 306. To the extent that

Vesta claims that it changed its address, such a change is not an excuse for its default. It is undisputed that the address on the summons is the same as the one on file with the Secretary of State. If Vesta changed its address, it was responsible for notifying the Secretary of State of such change, and its failure to do so does not relieve it of its default. *State Farm Mut. Auto. Ins. Co. v Dr. Ibrahim Fatiha Chiropractic, P.C.*, 147 AD3d 696, 697 (1<sup>st</sup> Dept 2017).<sup>1</sup>

Further, Vesta does not dispute that it received the two letters from plaintiff's attorneys notifying it of the Fennell 2 action. Vesta claims that such letters did not clearly inform it of the commencement of the Fennell 2 action. However, the letters clearly state that a new action, Fennell 2, was being commenced directly against Vesta. Nothing in the letters was unclear or would serve to confuse or mislead Vesta about the commencement of the Fennell 2 action.

Thus, this Court finds that plaintiff has demonstrated that it is entitled to a default judgment against Vesta and that Vesta has failed to set forth a reasonable excuse for its failure to appear

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<sup>1</sup>Although this Court notes that Vesta attempted to serve an untimely answer by mailing it to plaintiff's counsel on October 11, 2016, plaintiff's counsel rejected the purported answer by correspondence dated October 14, 2016. NYSCEF Docs. 10 and 11. Vesta did not move for an extension of time to answer.



in this action. See *State Farm* 147 AD3d at 697; *Carmody v 208-210 E. 31st Realty, LLC*, 135 AD3d 491 (1<sup>st</sup> Dept 2016).

While a default would ordinarily lead to an inquest on damages, this Court does not order that an inquest be held in Fennell 2 since, as noted below, this matter is to be consolidated with Fennell 1 and the damages to be assessed against Vesta will be determined in the action consolidated under Fennell 1's 2014 Index Number. As noted above, in Fennell 1, Vesta was precluded by Justice Kotler from introducing evidence regarding its liability.

#### **Vesta's Cross Motion for Consolidation**

Vesta's cross motion for consolidation is granted.

CPLR 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact. Although great deference is to be accorded to the motion court's discretion (see *Matter of Hill v Smalls*, 49 AD2d 724 [1975], appeal dismissed 38 NY2d 893 [1976]), there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1994]; *Firequench, Inc. v Kaplan*, 256 AD2d 213 [1998]).

*Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d 518, 519 (1<sup>st</sup> Dept 2004).

Here, there is no question that Fennell 1 and Fennell 2 arise

from the same incident and thus involve common questions of law and fact. Plaintiff, "as the party opposing consolidation, has not demonstrated prejudice to a substantial right." *Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d at 519.

In opposition to the cross motion, plaintiff, 82 years of age, contends, *inter alia*, that she will be prejudiced by the delay caused by a consolidation. *Pltf.'s Aff. In Opp. To Cross Mot.*, at pars. 33-36. On the contrary, however, since the note of issue has already been filed in Fennell 1, that case is trial ready and plaintiff, who is over the age of 70, is entitled to a trial preference. See CPLR 3403(a)(4).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Jennifer Fennell for a default judgment against defendant Vesta Contracting Group, Corp. is granted; and it is further

ORDERED that the cross motion by defendant Vesta Contracting Group, Corp. for consolidation is granted and Fennel 1 and Fennel 2 are to be consolidated under New York County Index Number 153196/14; and it is further

ORDERED that the damages, if any, to be awarded against Vesta Contracting Group, Corp. shall be determined at the time of the trial of the consolidated action; and it is further

ORDERED that the caption of the consolidated action shall read as follows:

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Jennifer Fennell,

Plaintiff,

Index No. 153196/14

-against-

The City of New York, Lexington Towers Company, L.P., Lexington Towers GP Co., LLC, Schneider & Schneider, Inc., Schneider & Schneider Management, LLC, Helmsley-Spear Inc., DF Restoration, Inc., DF Restoration of NY, Inc., Skyline Scaffolding Group, Total Safety Consulting, and Vesta Contracting Group, Corp.,

Defendants.

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and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is

further

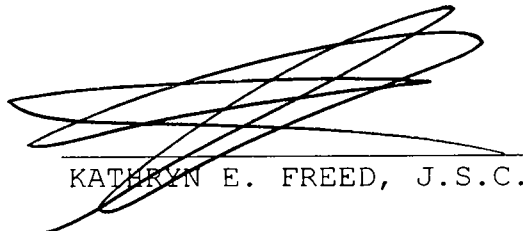
ORDERED that the third-party claim by DF Restoration, Inc. against Vesta Contracting Group, Corp. in Fennell 1 is hereby converted into a crossclaim;

ORDERED that plaintiff Jennifer Fennell is directed to serve a copy of this order, with notice of entry, upon the County Clerk (Room 141B), and on the General Clerk's Office (Room 119), who shall consolidate the papers in the actions hereby consolidated and shall mark their records to reflect the consolidation; and it is further

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

Dated: July 14, 2017

ENTER:



KATHRYN E. FREED, J.S.C.