Engelhart v Lake Enters. of Suffolk, Ltd.
2018 NY Slip Op 31176(U)
June 12, 2018
Supreme Court, Suffolk County
Docket Number: 07359/2016
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 07359/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

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STEVEN ENGELHART,

Plaintiff,

-against-

LAKE ENTERPRISES OF SUFFOLK, LTD., EL PROGRESO CORP.,

Defendants.

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LAKE ENTERPRISES OF SUFFOLK, LTD.,

Third-Party Plaintiff,

-against-

CUERVOS FAMILY RESTAURANT, INC.,

Third-Party Defendant.

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Motions Submit Date: 01/25/18
Mot Seq #: 001 - Mot D
Mot Seq #: 002 - MD
Mot Seq #: 003 - MD

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DEFENDANTS *Pro Se*:
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Ronkonkoma, New York 11779

TITO CORPORATION
299-17 Hawkins Avenue
Ronkonkoma, New York 11779

On the pending motions, the following was considered by the Court:

1. Notice of Motion & Affirmation in Support dated October 6, 2017 and supporting papers;
2. Notice of Motion & Affirmation in Support dated November 30, 2017 and supporting papers;
3. Notice of Motion & Affirmation in Support dated November 1, 2017 and supporting papers; and on due deliberation and full consideration, it is

ORDERED that plaintiff's motion for consolidation of the pending actions is deemed a motion for joint trial instead and as such is **granted**; and it is further

ORDERED that the separate motions by plaintiff and co-defendants Lake Enterprises of Suffolk Ltd. and El Progreso for entry of default judgment against defendants Tito Corp. and Cuervos Family Restaurant pursuant to CPLR 3215(d) is **denied** for failure to submit statutory requisite proof of compliance with CPLR 3215(g)(4); and it is further

ORDERED that counsel for the plaintiff serve a copy of this decision and order with notice of entry on all parties forthwith.

FACTUAL BACKGROUND

Plaintiff Steven Engelhart commenced this premises liability negligence action against defendants Lake Enterprises of Suffolk, Ltd. and El Progreso Corp., arising out of an incident which occurred at B.L.D.'s Restaurant located at 299 Hawkins Avenue, Ronkonkoma, New York 11779 in Suffolk County. Plaintiff alleges that on December 26, 2015, while a patron of the restaurant and on his exiting, he was struck on the left elbow by a door, sustaining serious physical injuries.

PROCEDURAL HISTORY

The matter commenced with plaintiff's filing of his summons and complaint on July 28, 2016. Defendants joined issue serving answers on October 10, 2016 and February 22, 2017 respectively. Thereafter, a second putatively related subsequent action was filed under Index Number 605856/2017 by plaintiff against defendants Tito Corporation and Cuervos Family Restaurant.

Additional litigation and third-party practice then ensued by and between the parties whereby defendant Lake Enterprises commenced a third-party action impleading Cuervos as a third-party defendant for indemnification and/or contribution by third-party summons and complaint filed on June 23, 2017.

A second third-party action was subsequently commenced by defendant El Progreso against defendant Cuervos seeking contribution and/or indemnification by third-party summons and complaint filed July 14, 2017.

SUMMARY OF THE ARGUMENTS

Now before the Court are motions by plaintiff and defendant Lake Enterprises seeking entry of default judgment pursuant to CPLR 3215(d) against defendants Tito Corp and Cuervos for their failure to date to answer the pleadings, or appear and participate in this action. Further, plaintiff separately moves pursuant to CPLR 602(a) to consolidate for all purposes the two separately pending actions into one single action. Each application is taken in turn and discussed below.

I. Consolidation

The Court is mindful that a motion to consolidate actions or for a joint trial pursuant to CPLR § 602(a) rests in the sound discretion of the trial court. Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation for trial should be granted where common questions of law or fact exist (*see,* ***Mattia v. Food Emporium, Inc.***, 259 AD2d 527 [2d Dept. 1999]).

New York CPLR § 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Interpreting this statute, the Second Department routinely holds that "[w]here common questions of law or fact exist, a motion to consolidate or join for trial pursuant to CPLR 602 should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (***Oboku v New York City Tr. Auth.***, 141 AD3d 708, 709, 35 NYS3d 710, 712 [2d Dept 2016]; *accord* ***Geneva Temps, Inc. v New World Communities, Inc.***, 24 AD3d 332, 334–35, 806 NYS2d 519, 522 [1st Dept 2005][finding consolidation warranted where there is an identity of issues and common questions of law and fact]).

However, it is also the case that consolidation is an improper exercise of discretion where it would result in jury confusion to the extent that certain parties might appear as both plaintiff and defendant as a result of consolidating actions (*see e.g.* ***M & K Computer Corp. v MBS Indus., Inc.***, 271 AD2d 660, 660, 706 NYS2d 194, 194–95 [2d Dept 2000]). Because of this, this Court **denies** plaintiff's application to extent that his request, if granted in whole, would allow a party such as defendant and third-party plaintiff Lake Enterprises to appear on both side of the v.

Since this Court finds that the actions arise from the same incident and involve common questions of fact, consolidation is appropriate to avoid inconsistent verdicts (*see* ***Fransen v Maniscalco,*** 256 AD2d 305, 681 NYS2d 310 [2d Dept. 1998]); *see also* ***Okin v White Plains Hospital,*** 97 AD2d 399, 467 NYS2d 225 [2d Dept. 1983]). Moreover, it would be a waste of judicial resources and duplicitous to require two separate trials with the concomitant costs and expenses (*see* ***Wieder v Skala,*** 218 AD2d 507, 630 NYS2d 308 [1st Dept. 1995]). Thus, this Court determines the more prudent course is plaintiff's application shall be deemed as one seeking joint trial pursuant to CPLR 602, and as such that application is **granted** since the claims, cross-claims and third-party claims all arise from the same transaction or occurrence, i.e. plaintiff's premises liability action against the present and/or prior premises owner or operator of the B.L.D.'s Restaurant.

Accordingly, it is

ORDERED that plaintiff's motion for an order for joint trial of Action No. 1 under Index Number 7359/2016 and Action No. 2 under Index Number 605856/2017 is considered under CPLR 602(a) and is **granted** since the actions arise from the same incident and involve common questions of fact, consolidation is appropriate to avoid inconsistent verdicts (*see* ***Fransen v Maniscalco,*** 256 AD2d 305, 681 NYS2d 310 [2d Dept. 1998]); *see also* ***Okin v White Plains Hospital,*** 97 AD2d 399, 467 NYS2d 225 [2d Dept. 1983]).

Therefore, the Court directs the parties to proceed expeditiously t o complete discovery proceedings and all parties shall exchange any materials previously received through pretrial disclosure with any party so demanding since they share common questions of fact and law and a joint trial will serve the interests of the court, the parties and their witnesses (*see* ***Import Alley of Mid-Island, Inc. v Mid-Island Shopping Plaza, Inc.,*** 103 AD2d 797, 477 NYS2d 675 [2d Dept. 1984]; *see also* ***Indemnity Ins. Co. v Lamendola,*** 261 AD2d 580, 690 NYS2d 659 [2d Dept. 1999]); and it is further

ORDERED that each action joined for trial and discovery shall retain a separate caption and separate court costs shall be paid in each action, including those costs attendant with the filing of Notes of Issue; and it is further

ORDERED that the movants shall promptly serve a copy of this Order via certified first-class mail, return receipt requested upon all appearing parties or their counsel in both actions, and upon the Suffolk County Clerk; and it is further

ORDERED that all counsel shall appear before this Court for a discovery compliance conference on **July 25, 2018 at 10:00 a.m.** for a discovery compliance conference in both joined actions. Counsel for all parties in each joined action are further and hereby directed to appear at that time prepared to discuss and enter binding and mutually agreeable discovery schedules for the now joined actions.

II. Default Judgment

" 'A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215' " (***U.S. Bank, N.A. v. Razon,*** 115 AD3d 739, 740, 981 NYS2d 571, *quoting* ***Beaton v. Transit Facility Corp.,*** 14 AD3d 637, 637, 789 NYS2d 314; *see* ***Todd v. Green,*** 122 AD3d 831, 831–832, 997 NYS2d 155). "Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer" (*see* CPLR 3215[f]; ***Triangle Props. # 2, LLC v. Narang,*** 73 AD3d 1030, 1032, 903 NYS2d 424; ***DLJ Mortg. Capital, Inc. v United Gen. Tit. Ins. Co.***, 128 AD3d 760, 761, 9 NYS3d 335, 336 [2d Dept 2015]).

Generally, where a defendant has defaulted in appearing or answering a complaint, he or she will be "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Mortgage Elec. Registration Sys., Inc. v. Smith,*** 111 AD3d 804, 806, 975 NYS2d 121 [citations and internal quotation marks omitted]; ***Boudine v Goldmaker, Inc.***, 130 AD3d 553, 554, 14 NYS3d 405, 407 [2d Dept 2015]).

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

Service of Process

Included in his application, plaintiff has submitted proof of service on defendants Tito Corp. and Cuervos Family Restaurant. Having reviewed the moving papers, the motion record reflects that plaintiff Tito Corp. with a copy of the pleadings via the New York Secretary of State pursuant to Business Corporation Law § 306, as indicated in its Affidavit of Service dated May 3, 2017, filed with the Suffolk County Clerk on May 18, 2017. Plaintiff also served Cuervos Family Restaurant in similar fashion on May 3, 2017 via its Affidavit of Service, also field with the County Clerk on May 18, 2017.

For their part, movant Lake Enterprises of Suffolk, Ltd. as part of its application has also provided requisite proof of service on defendant and third-party defendant Cuervos. By its Affidavit of Service dated July 5, 2017, they allege that copies of the third-party summons and complaint were served on the third-party defendant Cuervos pursuant to Bus. Corp. L. § 306 via the Secretary of State on July 5, 2017, said affidavit further being filed with the County Clerk on July 17, 2017. Follow up service was rendered by mail as reflected in an Affidavit of Service dated July 5, 2017.

Lastly, movant El Progreso submits proof of service on defendant Cuervos with submission of its Affidavit of Service dated July 18, 2017 reflecting service of a copy of its third-party summons and complaint via the Secretary of State on July 18, 2017.

Generally, a process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; *see* ***NYCTL 2009–A Trust v. Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571; ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984, 912 NYS2d 96). Bare and unsubstantiated denials are insufficient to rebut the presumption of proper service (*see* ***Wachovia Bank N.A. v. Greenberg***, 138 AD3d 984, 985, 31 NYS3d 110; ***Wells Fargo Bank, N.A. v. Christie***, 83 AD3d 824, 825, 921 NYS2d 127; ***Wachovia Mtge. Corp. v Toussaint***, 144 AD3d 1132, 1133, 43 NYS3d 373, 374 [2d Dept 2016]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*see* ***Edwards, Angell, Palmer & Dodge, LLP v. Gerschman***, 116 AD3d 824, 825, 984 NYS2d 392; ***Simonds v. Grobman***, 277 AD2d 369, 370, 716 NYS2d 692; ***Mtge. Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 733, 5 NYS3d 112, 113 [2d Dept 2015]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (***Ennis v. Lema***, 305 AD2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Furthermore, as applicable here, it is settled that the mere denial of receipt of the summons and the complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (*see* Business Corporation Law § 306 [b] [1]; ***Commissioners of State Ins. Fund v. Nobre, Inc.***, 29 AD3d 511, 816 NYS2d 493; ***Truscello v. Olympia Constr.***, 294

AD2d 350, 741 NYS2d 709; ***De La Barrera v. Handler***, 290 AD2d 476, 736 NYS2d 249; ***Trini Realty Corp. v Fulton Ctr. LLC***, 53 AD3d 479, 480, 861 NYS2d 743, 744–45 [2d Dept 2008]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012][" mere denial by corporate defendant of service of the summons and the complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service"]).

Under Bus. Corp. L. § 306, service is complete upon service on the Secretary of State. As per CPLR 320(a), defendants thereafter had 30 days after service was complete to answer the complaint. Since that time has come and gone with no answer, response or appearance from defendants, movants' proof of default is adequate.

Pursuant to CPLR § 3215(c), a plaintiff must take proceedings for the entry of a default within one year of the default. The pending applications all were filed within one year of defendant's failure to answer the Verified Complaint.

Further, pursuant to CPLR § 3215(d), when one or more defendants have defaulted, the Court, upon timely application, may enter an order directing that the proceedings for the assessment of damages or entry of a judgment be conducted at the time of or following the trial or other disposition of the action.

A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215 (*see* ***Reynolds Sec. v. Underwriters Bank & Trust Co.***, 44 NY2d 568, 572, 406 NYS2d 743, 378 NE2d 106), which requires that the plaintiff state a viable cause of action (*see* CPLR 3215[f]; ***Fappiano v. City of New York***, 5 AD3d 627, 774 NYS2d 773, *lv. denied* 4 NY3d 702, 790 NYS2d 648, 824 NE2d 49 [2004]; ***Green v. Dolphy Constr. Co.***, 187 AD2d 635, 636, 590 NYS2d 238). In determining whether a party has a viable cause of action, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff (*see* ***Woodson v. Mendon Leasing Corp.***, 100 NY2d 62, 71, 760 NYS2d 727, 790 NE2d 1156; ***Feffer v. Malpeso***, 210 AD2d 60, 619 NYS2d 46), ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314, 315 (2005). Judgment by default further requires "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due", or at least a verified complaint (***Zelnik v. Bidermann Indus. U.S.A., Inc.***, 242 AD2d 227, 228, 662 NYS2d 19, 19 [1997]).

Pursuant to CPLR 3215(f), plaintiff is required to submit for judicial review the viability of the facts underlying movant's claims, either by affidavit or verification of the pleadings (*see e.g.* CPLR 3215[f]; ***Giovanelli v. Rivera***, 23 A.D.3d 616, 804 NYS2d 817; ***599 Ralph Ave. Dev., LLC v. 799 Sterling Inc.***, 34 AD3d 726, 726, 825 NYS2d 129, 129-30 [2d Dept. 2006][Supreme Court properly granted the plaintiff's motion for leave to enter judgment against the defendant upon the plaintiff's submissions of proof of service of the summons and complaint, a factually-detailed verified complaint, and an affirmation from its attorney regarding the defendant's default in appearing and answering]; ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 70 [2003][CPLR 3215(f) requires that an applicant for a default judgment file "proof by affidavit made by the party of the facts constituting the claim." A verified complaint may be submitted instead of the affidavit when the complaint has been properly served]).

Here, Lake Enterprises has complied with this requirement via submission of its

verified answer with cross-claims, verified by the Vice President of Lake Enterprises dated October 21, 2016. Plaintiff similarly has complied supplying the Court with an Affidavit of Merit sworn by plaintiff Steven Engelhart on September 20, 2017, corroborating the material and relevant facts and contentions contained in the verified pleadings.

Similarly, movant El Progreso has also complied having submitted adequate proof of compliance with CPLR 3215 (f), via pleadings verified by its counsel ((*see e.g.* ***Clarke v Liberty Mut. Fire Ins. Co.***, 150 AD3d 1192, 1194, 55 NYS3d 400, 403 [2d Dept 2017][interpreting CPLR 3020[d][3] and holding sufficient basis existed to support granting of default judgment where motion court accepted counsel's verification of the pleadings determining that all the material allegations of the pleading were within the counsel's personal knowledge of counsel]).

However, the Court's analysis is not yet complete, as CPLR 3215(g)(4) requires additional notice by first class mail on defaults sought against parties who are domestic corporations served with process pursuant to Bus. Corp. L. § 306. Since, defendants Cuervos and Tito Corp. fit that description and were putatively served by that method of service, to be successful and warrant entry of default judgment, movants must supply proof of compliance win this regard. Having reviewed the parties' submissions, this Court determines that none of the movants have done so, the plaintiff coming closest submitting correspondence, but not affidavits, indicating mailing of additional notice of the pleadings to defendants. Having failed to comply with the strict requirements of CPLR 3215(g)(4), this Court is constrained to **deny** each application without prejudice with leave to renew on the submission of proper papers (*see* ***Burlington Ins. Co. v Aisyrk Co., Inc.***, 153 AD3d 777, 778, 61 NYS3d 89, 90 [2d Dept 2017][denying application for default judgment where although the plaintiff demonstrated proper service of process over corporate defendant pursuant to Business Corporation Law § 306 motion court properly denied default judgment on movant's failure to submit the statutorily required proof of compliance with CPLR 3215(g)(4)(I)]).

The foregoing constitutes the decision and order of this Court.

Dated: June 12, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION **_X_ NON-FINAL DISPOSITION**