

Trejo v Nokit Realty Corp.

2018 NY Slip Op 32377(U)

September 24, 2018

Supreme Court, New York County

Docket Number: 152745/2017

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 PART IAS MOTION 2

Justice

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INDEX NO. 152745/2017

ANNY TREJO,

Plaintiff,

MOTION SEQ. NO. 003

- v -

NOKIT REALTY CORP. and SAINT NICHOLAS ELECTRONICS,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for AMEND CAPTION/DEFAULT JUDGMENT

Upon the foregoing documents, it is **ordered that the motion is granted without opposition.**

In this personal injury action, plaintiff Anny Trejo moves, pursuant to CPLR 2001, for leave to amend the caption to correct a misnomer in that it has discovered that the true name of defendant in the caption should read St. Nicholas Electronics, Inc., i/s/h/a Saint Nicholas Electronics. Plaintiff further moves, pursuant to CPLR 3215(a)(b), for an order directing that a default judgment be entered against defendant St. Nicholas Electronics, Inc., i/s/h/a Saint Nicholas Electronics (hereinafter "Saint Nicholas").

This personal injury action was commenced by plaintiff Anny Trejo (“Trejo”) on or about March 23, 2017 by filing of a Summons and Complaint (Docs. No. 1 and 36).¹ Trejo alleged that she was injured when she fell on the sidewalk/ramp at or near the building located at and known as 1283-85 St. Nicolas Avenue, New York, New York, on or about February 23, 2017 and that the incident occurred due to the negligence of Defendants Nokit Realty Corp. (“Nokit”) and Saint Nicholas Electronics. Issue was joined by Defendant Nokit on or about April 19, 2017. Docs. No. 7 and 16.

Service of the summons and complaint of the within motion was effectuated on Saint Nicholas by serving the Secretary of State, on or about April 7, 2017. Docs. 10 and 47. Notice pursuant to CPLR 3215 was served on Saint Nicholas, with the corrected caption, pursuant to BCL §306(b), on April 23, 2018. Doc. 48. An Affirmation of said mailing was also made part of Doc. 48. The within motion was filed on April 27, 2018 and plaintiff appends an Affirmation of Mailing dated April 27, 2018. Doc. 49.

Plaintiff, through her attorney, Stephen J. Smith, Esq., an associate of Subin Associates, LLP, affirms that the caption should be amended and that any error in

¹ All references are to the documents filed with NYSCEF in connection with this matter.

the designation of the defendant was a mistake or mere irregularity which did not substantially prejudice the defendant. Plaintiff further asks that the Court allow her to retroactively correct this misdescription. Smith additionally affirms that plaintiff has a meritorious cause of action against Saint Nicholas for serious injury caused by its negligence. Smith further alleges that Saint Nicholas's time to answer has not been extended and that it is now in default. Doc. 44, at ¶¶ 12, 13, 14. Finally, plaintiff also submits her own affidavit in the within motion, attesting to the truth and accuracy of the documents. Doc. 45.

Motion to Amend Caption

A party may amend a pleading, or supplement it at any time by leave of court, and such leave shall be freely given upon such terms as may be just. CPLR 3025(b). Pursuant to CPLR 305(c), "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced." The amendment of a summons is justified "where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it." *Medina v. City of New York*, 167 A.D.2d 268, 269-70 (1st Dept. 1990). A motion

to amend the caption to reflect the true name of the defendant should be granted where the designated entity was the intended subject of the lawsuit, knew or should have known of the existence of the litigation against it, and will not be prejudiced thereby. *See, Rodriguez v. Dixie N.Y.C., Inc.*, 26 A.D.3d 199 (1st Dept. 2006); *National Refund and Utility Services, Inc. v. Plummer Realty Corp.*, 22 A.D.3d 430 (1st Dept. 2005).

Here, plaintiff seeks to amend the caption to reflect that the defendant is properly known as St. Nicholas Electronics, Inc., i/s/h/a Saint Nicholas Electronics. Plaintiff's amendment of the caption to name the proper defendant is not prejudicial, especially since defendant was properly served and notified of the within motion under the corrected name. The Court notes that the address is the same for both the originally named defendant and the correctly named defendant.

Motion for Default

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). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, plaintiff has submitted proof of service of the summons and complaint on Saint Nicholas, as well as proof of its failure to answer or otherwise appear in this action. Further, through her affidavit in support of the motion, she has established the facts giving rise to the claim. Therefore, plaintiff is entitled to a default judgment against Saint Nicholas and this matter is referred to a Special Referee for the calculation of damages, if any, to which she is entitled.²

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

ORDERED that the branch of the motion by plaintiff Anny Trejo seeking to amend the caption is granted to amend the name of defendant from Saint Nicholas

² This Court notes, that although plaintiff seeks both attorneys' fees, and sanctions, she has set forth no basis for an award of the same.

Electronics to St. Nicholas Electronics, Inc., i/s/h/a Saint Nicholas Electronics; and
it is further

ORDERED that the caption of this action will hereinafter read as follows:

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ANNY TREJO,

Plaintiff,

Ind. No.152745/2017

against

NOKIT REALTY CORP., ST. NICHOLAS, INC.
I/S/H/A SAINT NICHOLAS ELECTRONICS,

Defendants.

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and it is further

ORDERED that the branch of the motion by plaintiff Anny Trejo for a default judgment against defendant St. Nicholas Electronics, Inc., i/s/h/a Saint Nicholas Electronics is granted; and it is further


ORDERED that, following the filing of the note of issue, this matter is to be set down for an inquest in favor of plaintiff Anny Trejo assessing damages against defendant, St. Nicholas Electronics, Inc., i/s/h/a Saint Nicholas Electronics, with

said inquest and assessment of damages to take place at the time of trial, or other disposition, of the remaining portion of the action; and it is further,

ORDERED that within twenty (20) days of the entry of this order plaintiff Anny Trejo shall serve a copy of this order on all parties to this action, and on the Trial Support Office at 60 Centre Street, Room 158; and it is further,

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

9/24/2018
DATE


KATHRYN E. FREED, J.S.C.

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