

Russo v 51 E. 129th St. Tenant Assn.

2019 NY Slip Op 32288(U)

July 10, 2019

Supreme Court, New York County

Docket Number: 151597/2018

Judge: Margaret A. Chan

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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. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 151597/2018

THOMAS RUSSO,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

51 EAST 129TH STREET TENANT ASSOCIATION, 51-55 EAST
129TH STREET TENANT ASSOCIATION, JOHN DOES, SAID
NAMES OF EMPLOYEES OF 51 EAST 129TH STREET TENANT
ASSOCIATION BEING UNKNOWN, JOHN DOES SAID NAMES
OF EMPLOYEES OF 51-55 EAST 129 129TH STREET TENANT
ASSOCIATION BEING UNKNOWN

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - DEFAULT

In this action, plaintiff Thomas Russo claims that on July 16, 2015, he sustained injuries from an assault perpetrated by defendants John Does, unknown employees of 51 East 129th Street Tenant Association (51 East), whose conduct is imputable to 51 East under the doctrine of respondeat superior. Plaintiff moves for default judgment against 51 East, and to amend the complaint pursuant to CPLR 3025(b) and CPLR 203 to include Andrea Lacy, President of 51 East, as a defendant.

This is plaintiff's second motion for a default judgment. The first motion for this relief was denied for two reasons: (1) plaintiff sought default on an improperly submitted amended complaint; and (2) service of the amended complaint was improper pursuant to CPLR 311 (NYSCEF # 13 - Decision and Order of this court dated January 14, 2019). In the instant motion, plaintiff moves for default judgment on the original complaint filed on February 21, 2018, claiming it was properly served on 51 East, and 51 East has not answered. Thereby, plaintiff argues that defendant 51 East is in default.

Pursuant to CPLR 3215, the requirements for a motion for default judgment are: (i) proof of service of initiatory papers; (ii) demonstrating the other party is in default; and (iii) proof of the party's claim. Plaintiff showed that the service on the complaint was proper, that defendant 51 East has not answered, and the time to answer has expired. The remaining question is whether plaintiff has submitted proof of his claim.

Proof of claim pursuant to CPLR 3215(f) requires the party seeking to enter a default judgment submit “some firsthand confirmation of the facts” (*Joosten v Gale*, 129 AD2d 531,535 [1st Dept 1987]; see also *Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005] [plaintiff’s complaint which incorporated conclusory statements alleging negligence which failed to set forth facts constituting alleged negligence is insufficient to support a default judgment pursuant to CPLR 3215(f)]. Plaintiff must prove “enough facts to enable a court to determine that a viable cause of action exists” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] [internal citation omitted]).

In assessing whether plaintiff submitted proof of his claim, plaintiff’s inability to gain facts through discovery is considered. “Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*id.*). Still, plaintiff must provide “enough facts to enable a court to determine that a viable cause of action exists” (*id.*).

Plaintiff’s verified complaint and affidavit in support allege that he was lawfully on the premises known as 51 East 129 Street on July 16, 2015, at 7:30 p.m. when John Does, 51 East’s employees or independent contractors, whom plaintiff alleges that 51 East negligently hired and supervised, assaulted him on the ground floor within the premises and confined him without his consent (NYSCEF # 1 – Complaint, ¶¶ 2, 6, 19-20; NYSCEF # 16 – Affidavit). Plaintiff, in his affidavit, states that “I was assaulted, battered and taken into custody, imprisoned and confined by defendants,” and in the complaint states that he “was a victim of tortious conduct, excessive force, assault, battery perpetrated by agents, servants, officers and or employees of the defendant ... conduct consisted of negligence, false imprisonment, libel, slander, negligent and intentional infliction of emotional distress, negligent hiring and intentional physical conduct placing plaintiff in imminent apprehension of harmful contact” (NYSCEF #16; NYSCEF #1 ¶¶ 29-30).

The verified complaint and plaintiff’s affidavit lack facts, let alone details, on the nature of the assault, battery, false imprisonment, libel, slander, or negligent hiring practice of defendants John Does by 51 East or any of the other various claims. Because the alleged claims such as assault, battery, and false imprisonment involved plaintiff as the victim, plaintiff would have information and details about those claims even without the benefit of discovery. However, there is nothing more than a conclusory statement that employees or independent contractors of 51 East caused plaintiff’s purported injury. Plaintiff has not provided enough facts for a determination that any viable causes of action exist. As such, plaintiff’s complaint and affidavit are insufficient to show proof of his claims to support his motion for a default judgment. Hence, the branch of plaintiff’s motion for default judgment is denied.

The branch of plaintiff's motion to amend the complaint to add Andrea Lacy as a defendant is also denied. "Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). However, a court must examine the merits of the proposed amendment in order to conserve judicial resources. As such, a motion for leave to amend a pleading "must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Zaid Theatre Corp v Sona Realty Co.*, 18 AD3d 352 [1st Dept 2005]). When a court concludes that an application for leave to amend a pleading clearly lacks merit, leave is properly denied (*see Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

Here, the basis of plaintiff's motion to amend to add Andrea Lacy is that, Lacy, as the president of the tenant's association, is vicariously liable for the acts of the employees of the building. Since the complaint and affidavits consist only of conclusory allegations and are devoid of any factual evidence demonstrating that plaintiff's alleged unspecified injuries were caused by employees of defendant 51 East, plaintiff fails to demonstrate that the proposed amendment is meritorious (*see Velarde v City of New York*, 149 AD3d 457 [1st Dept 2017] [denying motion to amend complaint, as purported proof was insufficient to prove the claim]; *see also Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107 [1st Dept 1998] [motion to amend complaint was denied as complaint lacked specificity]).

The court also notes that the 51-55 East 129th Street Tenant Association (51-55 East) is improperly included as a defendant. As indicated in this court's January 14 Decision and Order, 51-55 East and the John Doe employees of 51-55 East were never properly added as a defendant in this matter (NYSCEF # 13).

Accordingly, it is ORDERED that the branch of plaintiff's motion for default judgment against 51 East 129th Street Tenant Association is denied without prejudice; it is further

ORDERED that the branch of plaintiff's motion to amend complaint to include Andrea Lacy is denied without prejudice; and it is further

ORDERED that the caption is corrected to read as follows:

-----X
THOMAS RUSSO,

Plaintiff,

- v -

51 EAST 129TH STREET TENANT ASSOCIATION,

JOHN DOES, SAID NAMES OF EMPLOYEES OF 51 EAST 129TH STREET TENANT ASSOCIATION BEING UNKNOWN,

Defendants.

-----X.

This constitutes the Decision and Order of the court.

7/10/2019

DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE