Smart v 3rd St. Mini Mkt., Corp.
2020 NY Slip Op 30114(U)
January 14, 2020
Supreme Court, New York County
Docket Number: 154098/2019
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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LARISSA SMART,

Plaintiff,

- v -

3RD ST. MINI MARKET, CORP. and 327 EAST 3RD STREET HOUSING DEVELOPMENT FUND CORPORATION

Defendants.

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INDEX NO. 154098/2019

MOTION DATE 01/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for JUDGMENT - DEFAULT.

In this personal injury action arising from a slip-and-fall accident on a public sidewalk in front of an apartment building, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants. Although neither defendant opposes the motion, the plaintiff's motion is denied, albeit without prejudice to renewal upon proper papers.

The plaintiff allegedly slipped and fell and was injured while walking along a public sidewalk adjacent to a residential cooperative apartment building on Avenue D in Manhattan. The plaintiff commenced this action to recover damages against the owner of the building and the proprietor of a convenience store that leased the ground floor of the building from the owner.

The complaint, which was verified only by an attorney, asserts that, on December 7, 2018, at approximately 7:30 a.m., "while the plaintiff herein was lawfully walking at said location . . . the plaintiff was caused to slip and fall due to dangerous conditions including but not limited to the presence of oil, garbage, and/or slippery substances and thereby sustaining severe injuries . . . , due to the negligence of the defendants." It further alleges that "the defendants knew or should have known of said dangerous conditions at said location," and that the

defendants "caused, created, permitted and/or allowed said dangerous conditions to remain on said location for many days and/or hours." In addition, the complaint asserts that the defendants, at the time of the accident, "negligently caused, created, allowed and/or permitted said location to remain in a dangerous condition, and failed to correct the condition," and that they "had actual and constructive notice of the condition on the day of the accident., thus contributing to the allegedly dangerous sidewalk condition." The complaint also asserted that both defendants owned, operated, managed, maintained, and controlled the accident location.

In her own affidavit, the plaintiff asserted that

> "on 12/07/18, while on the premises of 23 Avenue D in the County, City and State of New York, I was injured when I was caused to slip and fall due to dangerous conditions including but not limited to the presence of oil, garbage, and/or slippery substances and thereby sustaining severe injuries due to the negligence of the Defendant(s). As a result, I required medical treatment and care."

Pursuant to CPLR 3215(f), a plaintiff seeking leave to enter a default judgment must 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 (*see* CPLR 3215[f]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720)" (*Atlantic Cas. Ins. Co. v RJNJ Services, Inc.* 89 AD3d 649 [2d Dept. 2011]; *see Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]).

The plaintiff established, through the affidavits of service from her process server, and her attorney's affirmation attesting that the defendants neither answered the complaint nor otherwise appeared in the action, that the defendants were served with the summons and complaint and defaulted in answering the complaint. She has nonetheless failed to set forth proof of facts constituting the claim.

> "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts"

Joosten v Gale, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered" (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). Thus, the proof must establish a prima facie case (*see id.*; *Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [2d Dept 1983]).

Here, the plaintiff failed to meet even that minimal standard. In the first instance, "[a] complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215" (*Feefer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]; *see Martinez v Reiner*, 104 AD3d 477 [1st Dept 2013]; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Trawally v East Clarke Realty Corp.*, 92 AD3d 471 [1st Dept 2012]; *Thelen LLP v Omni Contracting Co. Inc.*, 79 AD3d 605 [1st Dept 2010]). Moreover, while an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of the motion (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985]; *Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324 [1st Dept 2004]), no such relevant documentation is appended.

"To establish a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the condition that caused the accident or had actual or constructive notice of it" (*Mullin v 100 Church, LLC*, 12 AD3d 263, 264 [1st Dept 2004]; *see Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107, 107 [1st Dept 2003]; *see also Juarez v Wavecrest Mgt. Team, Ltd.*, 88 NY2d 628, 646 [1996]; *Iannuzzi v Town of Walkill*, 54 AD3d 812, 813 [2d Dept 2008]; *Dulgov v City of New York*, 33 AD3d 584, 584-585 [2d Dept 2006]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]). The plaintiff's affidavit of merit and the papers submitted in support of her motion

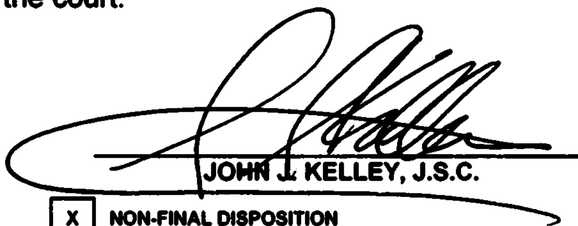
contain no testimonial or documentary evidence supporting the allegations in the complaint as to the defendants' acts of commission or omission that breached any duty of care imposed upon them. There is no allegation of fact from a person with firsthand knowledge that the defendants created the dangerous condition, that they had actual notice thereof, or that the condition was visible and apparent for a sufficient length of time prior to the accident to permit them to discover and remedy it. Rather, the plaintiff's affidavit alleges only that she slipped and fell on a slippery substance in front of the defendants' premises, but omits how the defendants either created the condition or had actual or constructive notice thereof; even if the plaintiff adopted the allegations set forth in the complaint in affidavit form, those allegations simply constitute boilerplate recitations that the defendants had actual or constructive notice of the condition, but articulate no facts that support those allegations. Hence, "[n]either the conclusory allegations of the complaint nor the affidavit of merit set forth the facts constituting the alleged negligence sufficiently to support a default judgment" (*Cohen v Schupler*, 51 AD3d 706, 707 [2d Dept 2008]; *see Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005]).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants is denied, without prejudice to renewal upon proper papers; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendants by regular mail at their last known addresses within 30 days of the entry of this order.

This constitutes the Decision and Order of the court.



1/14/2020
DATE

JOHN J. KELLEY, 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