

Noboa v AGBH Print. House Holdings, L.L.C.

2020 NY Slip Op 33555(U)

October 23, 2020

Supreme Court, Kings County

Docket Number: 513027/2016

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____ X

JAIME NOBOA,
Plaintiff,
-against-

AGBH PRINTING HOUSE HOLDINGS, L.L.C., et al.,
Defendants.

DECISION / ORDER

**Index No. 513027/2016
Motion Seq. No. 19, 20
Date Submitted: 10/1/20
Cal No. 38, 39**

_____ X

AGBH PRINTING HOUSE HOLDINGS, L.L.C.,
Third-Party Plaintiff,
-against-

J RAPPAPORT WOOD FLOORING, LLC,
Third-Party Defendant.

_____ X

**AGBH PRINTING HOUSE HOLDINGS, L.L.C.,
FOUNDATIONS INTERIOR DESIGN CORP.,
FOUNDATIONS GROUP, INC.,**

Second Third-Party Plaintiffs,
-against-

**ADAM WILK, INC., PEJA GROUP CONSTRUCTION,
INC., WANCO GLASS AND ALUMINUM CORP., AND
AGL INDUSTRIES,**

Second Third-Party Defendants.

_____ X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of second third-party plaintiffs' motion and cross motion for default judgments.

Papers	NYSCEF Doc.
Notices of Motion, Affirmations and Exhibits Annexed.....	<u>399-417, 426; 418-419</u>
Affirmation in Opposition and Exhibits Annexed.....	_____
Reply Affirmation.....	_____

**Upon the foregoing cited papers, the Decision/Order on these applications is
as follows:**

This is an action arising out of a workplace accident which occurred on May 6, 2016. Plaintiff Jaime Noboa, an employee of J. Rappaport Wood Flooring LLC (J. Rappaport), was working at a property located at 421 Hudson Street in Manhattan when the accident took place. Noboa brought this action against ten defendants, some of whom asserted cross claims against one another. The original ten defendants are AGBH Printing House Holdings, L.L.C. (AGBH), the Printing House Condominium (the Printing House), the Board of Managers of the Printing House (the Board), Orb Management, Ltd. (Orb), S&E Bridge & Scaffold LLC (S&E), Rock Group NY Corp. (Rock Group), Foundations Interior Design Corp. (Foundations), Foundations Group, Inc. (Foundations Group), K Restoration & Roofing Corp. (K Restoration), and Tribute Restoration Inc. (Tribute).

Defendants S&E and Tribute's motions for summary judgment were both granted. Defendant Orb moved for summary judgment, but the parties stipulated to discontinue the claims against it. The claims against defendants K Restoration and Rock Group were also discontinued. Noboa filed a second action against defendant Sterling Project Development, which was consolidated with this action, but the complaint was later dismissed as against said defendant. Defendant AGBH has impleaded J. Rappaport as a third-party defendant.

On August 12, 2019, defendants AGBH, Foundations, and Foundations Group (hereinafter "second third-party plaintiffs") all commenced a second third-party action against Adam Wilk, Inc. (Adam Wilk), Wanco Glass and Aluminum Corp. (Wanco), AGL Construction, Inc. (AGL), and Peja Group Construction, Inc. (Peja). This second third-party action, which makes claims for contribution, common law indemnification, contractual indemnification, and breach of contract, was severed from this action by an order issued in JCP by Justice Sherman dated November 25, 2019. The second third-party plaintiffs

subsequently moved to re-consolidate the two actions, which motion was denied, albeit with an order for joint discovery. In February 2020, AGBH retained separate counsel from the other two second third-party plaintiffs, and the other two second third-party plaintiffs changed counsel.

Now, second third-party plaintiffs Foundations and Foundations Group¹ move for the entry of a default judgment against Peja and AGL (MS #19). The remaining second third-party plaintiff AGBH cross-moves for entry of a default judgment against Peja and AGL (MS #20). Subsequently and before the return date of these motions, the attorneys for all three of the second third-party plaintiffs in MS #19 and 20 e-filed (E-File Doc 426) a stipulation indicating that they were withdrawing their motion [sic] as against Peja “subject to receipt of an answer prior to October 1, 2020. Peja Construction Group agrees to waive jurisdictional defenses.” Peja did answer, by e-filing their answer under the index number of this action—the wrong index number—on September 21, 2020 (E-file Doc 427). In fact, none of the second third-party defendants have filed their answers under the correct index number, 527304/2019, despite an order that all the papers for the now-severed action be e-filed under the new index number.

While movants have erroneously made these motions under the index number of the main action, and not in the severed action, the court has considered the merits of the motions and determined that they are deficient. It would be a waste of time to deny them

¹ The court will continue to refer to the moving parties as “second third-party plaintiffs” to avoid confusion, but in fact they are plaintiffs, albeit in the severed action, which has a different index number than this main action. The caption of the second third-party action as reflected in the parties’ submissions for MS 19 and 20 is incorrect, as is the caption in the stipulation, as new counsel for the third-party plaintiffs are under the misapprehension that all of the remaining defendants in the main action are second third-party plaintiffs, but they are not. Further, the second third-party action was severed, and these motions are brought under the wrong index number.

solely for being in the wrong index number and then deny them again for being deficient. If they are renewed, however, they must be brought under the correct index number, issued for the severed action, 527304/2019, *AGBH PRINTING HOUSE HOLDINGS, L.L.C. et al. v ADAM WILK, INC. et al.*

Process was effectuated by all movants in MS #19 and 20 (as they were then represented by one law firm) on AGL by serving the Office of the Secretary of State, so AGL had thirty days to answer the second third-party complaint (see E-File Doc 212 [Affidavit of Service]). Because AGL did not serve an answer within this timeframe (i.e., on or before September 11, 2019), it defaulted.

In two letters dated April 14 and April 16, 2020, respectively, the second third-party plaintiffs notified AGL of its default status, giving AGL twenty days to respond before seeking a default judgment. Additional copies of both the second third-party summons and the complaint were enclosed with the letters.

Discussion

CPLR 3215 governs the entry of default judgments against parties who fail to appear or answer. CPLR 3215 (c) sets forth the timing requirements for the entry of a default judgment:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Since AGL's default occurred on September 11, 2019, the second third-party plaintiffs had until September 11, 2020 to move for the entry of default judgment against it. The first motion for default judgment against AGL was made by Foundations and Foundations Group on August 6, 2020. The second motion for default judgment against AGL, made by

AGBH, was filed on August 19, 2020. Thus, both of the second third-party plaintiffs' motions are timely, having been made within one year of AGL's default.

Nevertheless, the entry of a default judgment against AGL must be denied because the moving parties fail to provide sufficient evidence to prevail. A party moving for a default judgment must submit "proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party" (CPLR 3215 [f]). In support of their motion, second third-party plaintiffs Foundations and Foundations Group submit proof of service of the summons and complaint on AGL, as well as an attorney affirmation setting forth the facts underlying the claims against AGL for contribution, indemnification, and breach of contract due to its alleged failure to purchase liability insurance. However, these submissions are insufficient to establish the parties' entitlement to a default judgment.

The parties fail to submit any affidavit made by even one of the three parties plaintiff themselves, as is required by CPLR 3215 (f). While CPLR 3215 (f) also provides that a verified complaint may be sufficient to serve as an affidavit in the context of default judgments, the parties' complaint here does not suffice since it was verified by an attorney and not by the parties themselves (*id.*; *Velez v Mr. Demolition, Inc.*, 172 AD3d 1140, 1141 [2d Dept 2015]).

AGBH's cross-motion for a default judgment (MS #20) must also be denied. It also fails to include either a party's affidavit or a complaint verified by a party in its supporting papers. The letters sent providing twenty days' notice given to AGL by counsel for the Foundation plaintiffs was sufficient, per the notice requirements of CPLR 3215 (g) (4) (i) and (ii) (CPLR 3215 [g] [3] [i]).

For the foregoing reasons, both motions for the entry of a default judgment against AGL must be denied.

Additionally, the court repeats that neither the motion nor the cross motion were filed under the correct index number. The court severed the second third-party action and directed that all the pleadings in the second third-party action must be filed under a separate index number. While the parties did obtain an index number for the severed second third-party action, 527304/2019, and an RJI was purchased, these motions were not filed therein. The answers from the four answering defendants are not filed there either. All future activity with regard to the severed second third-party action must be done using the correct caption under the appropriate index number, 527304/2019, *AGBH PRINTING HOUSE HOLDINGS, L.L.C. et al. v ADAM WILK, INC. et al.*

Because a motion for a default judgment must be brought within a year, the court grants movants additional time, sixty days from the date this order is entered, to make their renewed motions.

Accordingly, it is **ORDERED** that the motions are denied.

This constitutes the decision and order of the court.

Dated: October 23, 2020

ENTER:



Hon. Debra Silber, J.S.C.