

McIntosh v 7 Lawrence St. Inc.
2014 NY Slip Op 30430(U)
February 7, 2014
Sup Ct, New York County
Docket Number: 114483/2011
Judge: Lucy Billings
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

JOHN A. MCINTOSH

INDEX NO. 114483/2011

-v-
7 LAWRENCE ST. INC., 7 LAWRENCE STREET INC.,
and MITCH BAILEY

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion ~~to~~ for a default judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies plaintiff's motion for a default judgment and accepts the answers of defendants 7 Lawrence St. Inc. and Bailey, pursuant to the accompanying decision. C.P.L.R. §§ 3012(d), 3215(f).

FILED
FEB 25 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/7/14

Lucy Billings, J.S.C.

LUCY BILLINGS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x
JOHN A. MCINTOSH,

Index No. 114483/2011

Plaintiff

- against -

DECISION AND ORDER

7 LAWRENCE ST. INC.,
7 LAWRENCE STREET INC.,
and MITCH BAILEY,

Defendants

FILED

FEB 25 2014

NEW YORK
COUNTY CLERK'S OFFICE

-----x
LUCY BILLINGS, J.S.C.:

Plaintiff moves for a default judgment against the two similarly named corporate defendants and the individual defendant Bailey. C.P.L.R. § 3215. Plaintiff's affidavits, however, show that plaintiff served only one corporate defendant, 7 Lawrence St. Inc., via the New York Secretary of State April 17, 2012. C.P.L.R. § 311(a)(1); N.Y. Bus. Corp. Law § 306(b)(1). Plaintiff's affidavits also show a second mailing of the summons to this defendant May 2, 2013, when he served this motion. C.P.L.R. § 3215(g)(4)(i). Although his further affidavit of service does not name Bailey, the process server recites that he served an "Individual" by delivering the summons and complaint "to the defendant personally" April 14, 2012. Aff. of John A. McIntosh Ex. E, at 1. As the complaint names only one individual defendant, the affidavit unmistakably refers to Bailey.

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I. PLAINTIFF'S EVIDENCE IN SUPPORT OF A DEFAULT JUDGMENT

The verified complaint alleges that 7 Lawrence St. Inc. employed Bailey as its head of security and that he punched plaintiff, without provocation and without notice to plaintiff that his presence at 7 Lawrence St. Inc.'s business premises was not permitted, causing physical injury to plaintiff. Second, the complaint alleges that Bailey, in his position as head of security, caused plaintiff's false arrest on the false accusation that plaintiff had been instructed to leave the premises and was trespassing, leading to plaintiff's false imprisonment for a criminal charge that subsequently was dismissed.

Third, the complaint alleges that Bailey uttered defamatory words "out loud," id. Ex. A ¶ 27, but without indicating that anyone other than plaintiff was present, Frechtman v. Gutterman, ___ A.D.3d ___, 979 N.Y.S.2d 58, 61 (1st Dep't 2014); O'Neill v. New York Univ., 97 A.D.3d 199, 212 (1st Dep't 2012); Garcia v. Puccio, 62 A.D.3d 598 (1st Dep't 2009), and that Bailey defamed plaintiff by falsely attesting to his trespass in the criminal action, but without specifying the defamatory words, as required. C.P.L.R. § 3016(a); Medina v. City of New York, 102 A.D.3d 101, 108 (1st Dep't 2012); Glazier v. Harris, 99 A.D.3d 403, 404 (1st Dep't 2012); LoFaso v. City of New York, 66 A.D.3d 425, 426 (1st Dep't 2009); BCRE 230 Riverside LLC v. Fuchs, 59 A.D.3d 282, 283 (1st Dep't 2009). Finally, the complaint alleges 7 Lawrence St. Inc.'s negligent training and supervision of its employees, in that its other security "agents" as well as Bailey assaulted and

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battered plaintiff, McIntosh Aff. Ex. A ¶ 32, and Bailey was visibly intoxicated when he did so. Plaintiff's other allegations regarding the corporate defendant's negligent training and supervision are only "upon information and belief" and therefore inadmissible to support a default judgment.

C.P.L.R. § 3215(f); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 203 (2013); Martinez v. Reiner, 104 A.D.3d 477, 478 (1st Dep't 2013); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010). See Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007).

At minimum, the verified complaint supports a default judgment for battery and false imprisonment against Bailey. Insofar as plaintiff claims 7 Lawrence St. Inc., as Bailey's employer, is vicariously liable for his intentional, culpable acts, the admissible, first hand allegations fail to indicate (1) how his employer instigated, authorized, or at least condoned those acts, Taylor v. United Parcel Serv., Inc., 72 A.D.3d 573 (1st Dep't 2010); Velasquez-Spillers v. Infinity Broadcasting Corp., 51 A.D.3d 427 (1st Dep't 2008), or (2) that they related to his employer's business or his job duties, rather than his own personal objectives. McCann v. Varrick Group LLC, 84 A.D.3d 591 (2011); Delran v. Prada USA Corp., 23 A.D.3d 308 (1st Dep't 2005); HT Capital Advisors v. Optical Resources Group, 276 A.D.2d

420 (1st Dep't 2000); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dep't 1997). See N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247, 251-52 (2002); Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933 (1999); White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d 243, 244 (1st Dep't 2006); Dykes v. McRoberts Protective Agency, 256 A.D.2d 2, 3-4 (1st Dep't 1998). The complaint's allegations are as susceptible as not of an interpretation that Bailey's conduct directly contravened the employer's interests and the employee's duties in carrying out their alleged shared responsibility for security: an "obvious departure from the normal duties" of security personnel to the patrons who were to be provided security. White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244. See N.X. v. Cabrini Med. Ctr., 97 N.Y.2d at 251; Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d at 933; McCann v. Varrick Group LLC, 84 A.D.3d 591; Dykes v. McRoberts Protective Agency, 256 A.D.2d at 4.

The admissible, first hand allegations also fail to sustain the claim for negligent supervision and training, which requires a showing that defendant employer received notice, actual or constructive, of the employee's tortious propensities to cause plaintiff's injury. Noel v. 325 Wadsworth Realty LLC, 112 A.D.3d 493, 494 (1st Dep't 2013); Coffey v. City of New York, 49 A.D.3d 449, 450 (1st Dep't 2008); White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244; Nunez v. Caryl & Broadway, Inc., 30 A.D.3d 249, 250 (1st Dep't 2006). In short, 7 Lawrence St. Inc. may be held liable only if it knew or had reason to know of

Bailey's propensity to threaten, physically injure, or engage in violent behavior toward persons in its premises. Nouel v. 325 Wadsworth Realty LLC, 112 A.D.3d at 494; Taylor v. United Parcel Serv., Inc., 72 A.D.3d at 574; Pinkney v. City of New York, 52 A.D.3d 242, 243 (1st Dep't 2008). Plaintiff nowhere attests on personal knowledge that 7 Lawrence St. Inc. knew or had reason to know of any prior violent, criminal, or other unlawful conduct by Bailey or any history that he had been separated from previous employment due to such behavior. Absent such a history before Bailey's employment by defendant employer or his offensive conduct that surfaced during his employment, plaintiff presents no basis on which his threatening or violent conduct was known or at least foreseeable, to support the employer's liability.

Consequently, the court denies plaintiff's motion for a default judgment against defendant 7 Lawrence St. Inc. Regardless of 7 Lawrence St. Inc.'s opposition to his motion or whether 7 Lawrence St. Inc. articulates a meritorious defense through the affirmative defense of failure to state a claim in this defendant's proposed answer, the deficiencies in the admissible evidence supporting plaintiff's claims are fatal to his motion. C.P.L.R. § 3215(f); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d at 203; Martinez v. Reiner, 104 A.D.3d at 478; Utak v. Commerce Bank, 88 A.D.3d at 523; Mejia-Ortiz v. Inoa, 71 A.D.3d 517. The court also denies his motion for a default judgment against defendant 7 Lawrence Street Inc. due to that absence of evidence that plaintiff served this

entity. C.P.L.R. § 3215(a).

II. DEFENDANTS' SHOWING IN OPPOSITION TO A DEFAULT JUDGMENT

Bailey shows that he served an answer on plaintiff by regular mail May 2, 2012, within the required 20 days. C.P.L.R. § 3012(a). Therefore the court denies plaintiff's motion for a default judgment against Bailey. C.P.L.R. §§ 3012(a), 3215(a).

In opposing plaintiff's motion for a default judgment, 7 Lawrence St. Inc. explains its reasons for failing to answer timely and recites the prompter steps it took once it received plaintiff's motion in May 2013. The explanation, however, that 7 Lawrence St. Inc. never received the summons and complaint except through Bailey and his attorney and that the corporate defendant does not receive mail at 7 Lawrence Street, Rochester, New York, where the Secretary of State forwarded the pleadings and where plaintiff mailed the second summons, is by defendant's attorney. The attorney does not indicate any personal knowledge of these facts. Coleman v. Maclas, 61 A.D.3d 569 (1st Dep't 2009); 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d 288, 289 (1st Dep't 2005); Figueroa v. Luna, 281 A.D.2d 204, 205 (1st Dep't 2001).

Nevertheless, 7 Lawrence St. Inc. timely opposed plaintiff's motion and simultaneously served an answer. C.P.L.R. § 3012(d) allows a late answer upon a "reasonable excuse for delay or default" and "such terms as may be just," the most critical being the absence of prejudice to plaintiff. Delay alone, without any demonstrated prejudice to plaintiff from the delay, is not a

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basis to preclude the answer. Myers v. City of New York, 110 A.D.3d 652 (1st Dep't 2013); Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009). See, e.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011). The "terms as may be just" may include a showing of a meritorious defense against plaintiff's claims, C.P.L.R. § 3012(d), but § 3012(d) does not specifically require a meritorious defense, and such a showing is unnecessary to support acceptance of a late answer. Pena-Vazquez v. Beharry, 82 A.D.3d 649 (1st Dep't 2011); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008).

Although 7 Lawrence St. Inc. does not expressly move to extend its time to answer, the court may extend the time to answer in the context of a motion for a default judgment absent a cross-motion to allow a late answer. C.P.L.R. § 3012(d); Higgins v. Bellet Constr. Co., 287 A.D.2d 377 (1st Dep't 2001); Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229 (1st Dep't 1990); Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989); Shure v. Village of Westhampton Beach, 121 A.D.2d 887, 888 (1st Dep't 1986). See Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484 (1st Dep't 2010); Spira v. New York City Tr. Auth., 49 A.D.3d 478 (1st Dep't 2008); Tulley v. Straus, 265 A.D.2d 399, 401 (2d Dep't 1999). 7 Lawrence St. Inc.'s prompt

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answer upon receipt of plaintiff's motion demonstrates the absence of a willful default on its part. Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484; Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d 306, 307 (1st Dep't 2005); Palmieri v. Aliberti, 281 A.D.2d 156 (1st Dep't 2001); Parker v. I.E.S.I. N.Y. Corp., 279 A.D.2d 395 (1st Dep't 2001). Plaintiff waited until the 114th day of the allowed 120 days, C.P.L.R. § 306-b, to serve this defendant by the easiest means, the Secretary of State, which required no effort to locate a person to accept service, see C.P.L.R. § 311(a)(1), and until the 360th day of the 365 days allowed to serve his motion for a default judgment. C.P.L.R. § 3215(c). Thus he does not indicate a particular interest in prosecuting this action as expeditiously as possible. This action has progressed no farther against any other defendant than against 7 Lawrence St. Inc. Plaintiff shows neither prejudice to him nor any willfulness on the corporate defendant's part in connection with its delay, nor does the court discern any.

III. CONCLUSION

Since plaintiff does not articulate, nor does the court discern, how defendant 7 Lawrence St. Inc.'s delay has changed plaintiff's position to his prejudice, e.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d at 582, the court extends the corporate defendant's time to answer to when this defendant served its answer with its opposition to plaintiff's motion. Id.; Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484; Pagan v. Four Thirty

Realty LLC, 50 A.D.3d 265 (1st Dep't 2008). See Mut. Mar. Off., Inc. v. Joy Constr. Corp., 39 A.D.3d 417, 419 (1st Dep't 2007); Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d at 307-308. The absence of prejudice and of willfulness provides just terms on which to allow the answer. C.P.L.R. § 3012(d); Gazes v. Bennett, 70 A.D.3d 579; Forastieri v. Hasset, 167 A.D.2d 125, 126 (1st Dep't 1990); Shure v. Village of Westhampton Beach, 121 A.D.2d at 888. See Aloizos v. Trinity Realty Corp., 171 A.D.2d 426, 427 (1st Dep't 1991). It is considered served and filed when served and filed in connection with the motion for a default judgment. Therefore the court denies plaintiff's motion for a default judgment and accepts the answers of both Bailey and 7 Lawrence St. Inc. C.P.L.R. §§ 3012(d), 3215(f). This decision constitutes the court's order.

DATED: February 7, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

FILED
 FEB 25 2014
 NEW YORK
 COUNTY CLERK'S OFFICE

LUCY BILLINGS
 J.S.C.