

SCAW

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

ROSA CALVO, as administratrix of the estate of
Angelo Calvo,

Plaintiff(s),

-against-

MOTION DATE: 11/12/02
INDEX No. 9493/01:
MOTION SEQUENCE NO: 2

ANTHONY CALVO,

CAL. NO.:

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-5
Answering Affidavits.....	6,7
Replying Affidavits.....	8,9
Briefs:	10,10a

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 5015 vacating his default and compelling plaintiff's attorney to accept the defendant's previously served untimely answer is granted.

This is a wrongful death action which was commenced by the filing of a summons and complaint on June 20, 2001. The plaintiff's affidavit of service alleges that the defendant was personally served with the summons and complaint on the same date. The defendant failed to either appear or answer in this action. The plaintiff moved for a default judgment on or about October 12, 2001 and this court granted said unopposed motion in an order dated November 29, 2001. This motion to vacate the defendant's default was made on July 3, 2002.

The defendant moves to vacate his default on the grounds that the plaintiff's motion for a default judgment was defective. Counsel for the defendant argues that the allegations in the verified complaint "are conclusory and fail to set forth facts establishing a claim of negligence as to [Anthony Calvo]." The court agrees. CPLR 3215(f) provides in relevant part that: "On any application for judgment by default, the applicant shall file ... proof by affidavit made by the party of the facts constituting the claim, the default and the amount due." CPLR 3215(f) further provides that: "Where a verified complaint has been served it may

be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney."

Since counsel for the defendant concedes that the plaintiff's complaint was verified, procedurally the plaintiff's motion for a default judgment complied with CPLR 3215(f). While a verified complaint may be used in lieu of an affidavit of merit in an application for a default judgment, the verified complaint "must set forth the facts establishing the claim" (**Dyno v Rose**, 260 AD2d 694, 698, app. dism. 93 NY2d 998, app. den. 94 NY2d 753; **Celnick v Freitag**, 242 AD2d 436, 437). Put another way: "Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (**Green v Dolphy Constr. Co.**, 187 AD2d 635, 636; **Cree v Cree**, 124 AD2d 538, 541). The plaintiff's complaint in this case does not state a cause of action.

The verified complaint alleges that: "On March 8, 2001, the defendant was careless, reckless and negligent in the manner in which he maintained and controlled the premises resulting in [Angelo Calvo], deceased, sustaining a fall on defendant's premises. [and] That the fall, injuries and death suffered by plaintiff were due to the negligence, carelessness and recklessness of the defendant in failing to exercise and use reasonable care, maintenance and control of the premises known as 814 Adele Street, Franklin Square, New York." This verified complaint clearly fails set forth the facts constituting the plaintiff's claim.

In a premises liability case, to prove a prima facie case, "a plaintiff is required to show that the defendant created the condition [which] caused the accident or that the defendant had actual or constructive notice of the condition" (**Sanchez v Delgado Travel Agency, Inc.**, 279 AD2d 623, app. den. 96 NY2d 711, quoting **Bradish v Tank Tech Corp.**, 216 AD2d 505, 506). The verified complaint in this case does not allege what condition caused the decedent to fall and sustain fatal injuries; nor does it allege facts showing that the defendant either created the condition or had actual or constructive notice of the condition. Since the plaintiff's failure to set forth the facts establishing her claim cannot be cured by testimony at the hearing on the issue of damages (see **Francisco v Soto**, 286 AD2d 573), there is no basis for a default judgment in this case.

Accordingly, in the exercise of the court's inherent power over its own orders, the order dated November 29, 2001, which granted the default judgment, is hereby vacated and the plaintiff is directed to accept the defendant's answer to the verified

complaint, which is annexed to the motion papers as defendant's Exhibit E.

The attorneys for the respective parties shall appear at Part 15 on January 31, 2003, at 9:30 a.m. in order to proceed with a discovery schedule.

Dated: JAN 23 2003

U. Whaley
J.S.C.

ENTERED

JAN 28 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE