

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34159
O/prt

_____AD3d_____

Submitted - February 15, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2011-05665

DECISION & ORDER

Tarrytown Professional Center, Inc., appellant, v
Family Medicine of Tarrytown and Ossining, LLP,
et al., defendants.

(Index No. 25752/10)

Hans A. van Nes, Croton-on-Hudson, N.Y., for appellant.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Loehr, J.), entered March 31, 2011, as denied that branch of its unopposed renewed motion which was for leave to enter judgment against the defendant Aida M. Cruz-Soto, upon her failure to answer or appear, and, sua sponte, in effect, directed the dismissal of the complaint.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order entered March 31, 2011, as, sua sponte, in effect, directed the dismissal of the complaint, is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed insofar as appealed from, without costs or disbursements.

The plaintiff's proof was sufficient to establish that a viable cause of action existed against the defendant Aida M. Cruz-Soto (hereinafter the defendant) (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71; *Yellow Book Sales & Distrib. Co., Inc. v Mantini*, 85 AD3d

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1019, 1021; *Star Video Entertainment v J & I Video Distrib.*, 268 AD2d 423, 424; *Florence Corp. v Penguin Constr. Corp.*, 227 AD2d 442, 443) and that the defendant was served with the summons and complaint (*see* CPLR 308[1], 3215[f]; *Triangle Props. # 2, LLC v Narang*, 73 AD3d 1030, 1032). Accordingly, that branch of the plaintiff's unopposed renewed motion which was for leave to enter a default judgment against the defendant upon her failure to answer or appear should have been granted.

Furthermore, the Supreme Court erred by, *sua sponte*, in effect, directing the dismissal of the complaint, since the plaintiff's motion pursuant to CPLR 3215(f) was timely made (*see* CPLR 3215[c]).

SKELOS, J.P., DICKERSON, HALL, ROMAN and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court