

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

D36264
N/kmb

_____AD3d_____

Submitted - October 3, 2012

MARK C. DILLON, J.P.
L. PRISCILLA HALL
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2010-10263

DECISION & ORDER

Crown Waterproofing, Inc., respondent,
v Tadco Construction Corp., appellant.

(Index No. 2193/08)

Bryan Ha, New York, N.Y., for appellant.

Lyons McGovern, LLP, White Plains, N.Y. (Desmond C. B. Lyons and Diane B. Cavanaugh of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered August 25, 2010, as denied that branch of its motion which was to vacate an order of the same court entered May 27, 2010, granting those branches of the plaintiff's unopposed motion which were pursuant to CPLR 3126 to strike its answer and for leave to enter a judgment in favor of the plaintiff and against it in the principal sum of \$22,365.22.

ORDERED that the order entered August 25, 2010, is reversed insofar as appealed from, on the law, with costs, that branch of the defendant's motion which was to vacate the order entered May 27, 2010, is granted, the order entered May 27, 2010, and a judgment of the same court entered July 16, 2010, upon the order entered May 27, 2010, are vacated, and those branches of the plaintiff's motion which were pursuant to CPLR 3126 to strike the defendant's answer and for leave to enter a judgment in favor of the plaintiff and against the defendant in the principal sum of \$22,365.22 are denied.

By order to show cause dated May 3, 2010, the plaintiff moved, inter alia, pursuant to CPLR 3126 to strike the defendant's answer and for leave to enter a judgment in favor of the

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plaintiff and against the defendant in the principal sum of \$22,365.22. The defendant did not oppose the motion. However, although the order to show cause directed the plaintiff to serve the order to show cause and supporting papers upon the defendant's attorney on or before 5:00 P.M. on May 3, 2010, the plaintiff did not properly serve the defendant's attorney within the prescribed time (*see* CPLR 2214[d]; *Matter of Feldman v Feldman*, 54 AD3d 372; *Matter of Kapsis v Kelleher*, 37 AD3d 381; *European Am. Bank v Legum*, 248 AD2d 206, 207). The absence of proper service of an order to show cause is a sufficient and complete excuse for a default on the motion, and deprives the court of jurisdiction to entertain the motion (*see Zaidi v New York Bldg. Contrs., Ltd.*, 61 AD3d 747, 748; *Daulat v Helms Bros., Inc.*, 32 AD3d 410, 411; *Bianco v LiGreci*, 298 AD2d 482; *Welch v State of New York*, 261 AD2d 537, 538). Accordingly, the defendant's motion to vacate the order granting those branches of the plaintiff's motion which were pursuant to CPLR 3126 to strike the defendant's answer and for leave to enter a judgment in favor of the plaintiff and against the defendant in the principal sum of \$22,365.22 should have been granted (*see* CPLR 5015[a][4]; *Bianco v LiGreci*, 298 AD2d 482; *European Am. Bank v Legum*, 248 AD2d at 207). Since the court was deprived of jurisdiction to entertain the plaintiff's motion, the order entered May 27, 2010, and the judgment entered July 16, 2010, upon that order, were nullities and must be vacated (*see Financial Servs. Veh. Trust v Law Offs. of Dustin J. Dente*, 86 AD3d 532, 533; *Bonik v Tarrabocchia*, 78 AD3d 630, 632; *Bauerlein v Salvation Army*, 74 AD3d 851, 857; *Welch v State of New York*, 261 AD2d at 538).

In light of the foregoing, we need not reach the defendant's remaining contentions.

DILLON, J.P., HALL, ROMAN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court