

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
**MARK SONNENSCHNEIN and 477 WILLIS
AVE LLC,**

Plaintiffs,

- against -

Index No. **816525/2021E**

Hon. **FIDEL E. GOMEZ**
Justice

**1986-F&S OF NEW YORK, LTD., and NEW
YORK DEFERRED EXCHANGE
CORPORATION,**

Defendants.

-----X

The following papers numbered 1 to 4, read on these motions, noticed on 6/27/2022, and duly submitted as no. 2 on the Motion Calendar of 9/2/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits	2	

Plaintiffs Mark Sonnenschein and 477 Willis Ave LLC's motion and Defendant New York Deferred Exchange Corporation's cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 11/3/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: December 19, 2022, at 2:00 p.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
**MARK SONNENSCHNEIN and 477 WILLIS
AVE LLC,**

Plaintiffs,

DECISION AND ORDER

- against -

Index No. **816525/2021E**

**1986-F&S OF NEW YORK, LTD., and NEW
YORK DEFERRED EXCHANGE
CORPORATION,**

Defendants.

-----X

Plaintiffs Mark Sonnenschein and 477 Willis Ave LLC (“Plaintiffs”) move for default judgment against Defendant New York Deferred Exchange Corporation (“Defendant”) pursuant to CPLR § 3215. Defendant opposes and cross-moves for dismissal of the complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), and to cancel the notice of pendency pursuant to CPLR § 6501 and § 6514.

For the reasons which follow, Plaintiffs’ motion is denied, and Defendant’s cross-motion is also denied.

BACKGROUND:

On December 3, 2021, Plaintiffs commenced the instant action against Defendants 1986-F&S of New York, Ltd. and New York Deferred Exchange Corporation (“Defendants”) by filing a summons and verified complaint, alleging causes of action for specific performance and breach of contract. On the same date, Plaintiffs filed a notice of pendency on the real property located at 477 Willis Avenue, Bronx, NY (the “Property”).

On June 8, 2022, this Court granted Defendant 1986-F&S of New York, Ltd.’s motion to dismiss the complaint as alleged against it.

On June 9, 2022, Plaintiffs filed the instant motion. On July 29, 2022, Defendant filed the instant cross-motion. On September 2, 2022, the motions were marked fully submitted.

DISCUSSION:

Plaintiffs' Motion for Default Judgment:

Plaintiffs seeks a default judgment pursuant to CPLR § 3215 against Defendant in an amount to be determined at an inquest.

CPLR § 3215(a) provides in relevant part that: “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him.”

CPLR § 3215(f) provides in relevant part that:

On any application for judgment by default, the applicant shall file 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. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(See also *Zelnik v Biedermann Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Stevens v Law Office of Blank & Star, PLLC*, 155 AD3d 917 [2d Dept 2017]). Thus, “[o]n a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant’s default” (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005]). “To demonstrate ‘the facts constituting the claim’ the movant need only submit sufficient proof to enable a court to determine that ‘a viable cause of action exists’. CPLR 3215(f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint” (*Fried*, 110 AD3d 56 at 59-60).

In support of their motion, Plaintiffs submitted, *inter alia*, the affirmation of their counsel; a copy of the summons and verified complaint; an affidavit of service dated December 9, 2021; and a copy of a document entitled “Assignment and Acceptance Sale of ‘Relinquished Property’ Contract.”

Here, Plaintiffs have not demonstrated their entitlement to default judgment. Plaintiffs did not comply with CPLR 3215(f), as they did not submit proof of the facts constituting the claim. Plaintiffs did not submit an affidavit made by the party. Moreover, the complaint is verified only by counsel, and as such, cannot satisfy this requirement (*Ritzer v 6 E. 43rd St. Corp.*, 47 AD3d

464, 464 [1st Dept 2008] [“Plaintiff’s complaint, which was verified by his attorney, may not be considered as proof of the facts constituting his claims”]; *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994] [“We have previously held that a complaint verified by counsel amounts to no more than an attorney’s affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215. Therefore, plaintiff’s entry of default judgment was erroneous and must be deemed a nullity”]).

Accordingly, Plaintiffs’ motion for default judgment is denied.

Defendant’s Cross-Motion to Dismiss:

Defendant cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7) and to cancel the notice of pendency pursuant to CPLR § 6501 and § 6514.

CPLR 3211(e) provides, in relevant part, that:

At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven, or ten of subdivision (a) of this rule may be made at any subsequent time or in a later pleading, if one is permitted.

A motion made pursuant to CPLR 3211(a) must be made before service of the responsive pleading is required (CPLR 3211[e]; *U.S. Bank National Association v Gilchrist*, 172 AD3d 1425, 1426-1427 [2d Dept 2019] [“A motion to dismiss a complaint pursuant to CPLR 3211(a) may be based on various grounds . . . Such a motion must be made ‘before service of the responsive pleading is required’ (CPLR 3211[e]), or is untimely”]; *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257 [2d Dept 2012] [“All motions under CPLR 3211 are to be made ‘[a]t any time before service of the responsive pleading’ (CPLR 3211[e]), except that CPLR 3211 motions may be made after service of the party’s answer in three circumstances: when the motion is based upon subdivision (a)(2) subject matter jurisdiction, (a)(7) failure to state a cause of action, or (a)(10) nonjoinder of a necessary party”]; *McGee v Dunn*, 75 AD3d 624, 625 [2d Dept 2010]).

Here, Defendant was served with the summons and verified complaint on December 9, 2021, by service upon the Secretary of State of the State of New York. Presumably, service was effectuated pursuant to Business Corporation Law § 306 (Plaintiffs’ Exhibit 2). As such, Defendant

had until January 8, 2022 to serve an answer (BCL § 306[b][1]; CPLR 320[a]). It is undisputed that Defendant did not serve an answer by that date and is thus in default. Defendant brought the instant cross-motion on July 29, 2022.¹ As such, at the time Defendant brought this motion, it was already in default. Having defaulted, Defendant cannot move for dismissal without first vacating its default and obtaining leave to serve a late answer (*U.S. Bank National Association*, 172 AD3d 1425 at 1428). Defendant did not seek to vacate its default or move for leave to serve a late answer prior to making this motion or on this motion. Moreover, Defendant did not seek an extension of time to make this motion. As such, the cross-motion is untimely, and must be denied (*Ultimate One Distrib. Corp. v 2900 Stillwell Ave., LLC*, 140 AD3d 1054, 1055 [2d Dept 2016] [“Since the defendant’s pre-answer motion to dismiss was made after the time to appear or answer had expired, the Supreme Court should have denied the defendant’s motion to dismiss as untimely”]; *U.S. Bank Nat. Ass’n v Gonzalez*, 99 AD3d 694, 694-695 [2d Dept 2012]; *Holubar v Holubar*, 89 AD3d 802, 802-803 [2d Dept 2011] [“The defendant Michelle Holubar (hereinafter the defendant) was in default for failing to timely answer the complaint or appear in this action. Thus, the defendant’s cross motion to dismiss the complaint insofar as asserted against her was untimely and should not have been considered. . . . The defendant did not request an extension of time to answer or appear. In granting the defendant’s untimely motion to dismiss the complaint insofar as asserted against her, the Supreme Court improperly, in effect, excused the defendant’s default in the absence of a request for such relief”]; *McGee*, 75 AD3d 624 at 625 [“However, the Supreme Court should not have granted the defendant’s motion pursuant to CPLR 3211(a) to dismiss the complaint as it was not made prior to the time by which the defendant was required to serve an answer or notice of appearance. Furthermore, the defendant’s motion failed to request an extension of time to answer or appear.”]).

Accordingly, Defendant’s cross-motion to dismiss the complaint is denied.

It is hereby

ORDERED that the parties for a status conference on **Monday, December 19, 2022, at 2:00 p.m.** It is further

¹ The Court notes that the parties entered into stipulations dated June 24, 2022, and July 14, 2022, pursuant to which Plaintiffs’ motion, originally returnable June 27, 2022, was adjourned to July 22, 2022, and then to August 5, 2022, and allowed Defendant to respond to the motion by July 29, 2022. However, these stipulations do not account for Defendant’s delay in making its cross-motion, because Defendant was in default since January 9, 2022, long before Defendant brought the instant cross-motion or obtained a stipulation allowing it more time to oppose Plaintiffs’ motion.

ORDERED that Plaintiffs serve a copy of this Decision and Order upon Defendant, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court

Dated: 11/3/22

Hon

FIDEL E. GOMEZ, A.J.S.C.