

Devda v Pratik News Stands Corp.

2024 NY Slip Op 31184(U)

April 8, 2024

Supreme Court, New York County

Docket Number: Index No. 152479/2022

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 04

Justice

-----X

DHARMPALSINH G. DEVDA,

Plaintiff,

- v -

PRATIK NEWS STANDS CORPORATION, JAYASHRI B.
PATEL, KAMLESHBAI PATEL, BABU PATEL, YASSER
KASIM,

Defendants.

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INDEX NO. 152479/2022

MOTION DATE 07/12/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, the motion by plaintiff for a default judgment against the Pratik News Stands Corporation (the “Corporate Defendant”) and Jayashiri B. Patel, Kamleshbai Patel, Babu Patel and Tasser Kassim (collectively, the “Individual Defendants”), is denied for the reasons set forth below.

Plaintiff commenced this action seeking monetary damages for unpaid wages, unpaid overtime wages, spread of hours pay and unlawful wage deduction under applicable Labor Laws and to recover statutory damages, attorneys’ fees and costs for violations of Labor Law §§195(1) and 195(3). To date, defendants have not filed Answers or appeared in this case.

DISCUSSION

Plaintiff’s motion for a default judgment is denied. To establish his entitlement to a default judgment pursuant to CPLR §3215, plaintiff is required to submit proof of: (1) proper service of the summons and complaint; (2) the facts constituting the claim; and (3) defendants’ default in

answering or appearing (See Gordon Law Firm, P.C. v Premier DNA Corp., 165 NYS3d 691 [1st Dept 2022]).

In this case, plaintiff has not established proof of defendants' defaults. As to the Corporate Defendant, where, as here, service of process was effected through the New York State Secretary of State, CPLR §3215(g)(4) mandates that plaintiff must also submit an affidavit of service documenting an additional service of the summons to defendant's last known address by first-class mail (See e.g., Sterk-Kirch v Uptown Communications & Elec. Inc., 124 AD3d 413, 414 [1st Dept 2015]). There being no such additional service of the summons and complaint made at the Pratik News Stand Corporation's last known address, a default judgment against the Corporate Defendant is precluded.

As to the Individual Defendants, each of these defendants were served pursuant to CPLR 308(2) or (4) which require, inter alia, that "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing" and that "service shall be complete ten days after such filing" (CPLR §§308[2], [4]) whereas plaintiff filed affidavits of service on July 12, 2023, approximately one year after the follow-mailings to each Individual Defendant on July 28, 2022. Accordingly, at the time this motion was made service had not been completed on these Individual Defendants and therefore they have not defaulted (See First Fed. Sav. & Loan Assn. of Charleston v Tezzi, 164 AD3d 758, 759-60 [2d Dept 2018]). However, as the "failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004" (Id. [internal citations and quotations omitted]), the Court now deems the affidavit of service

timely filed, sua sponte, pursuant to CPLR §2004, and, in the interest of justice, extends the Individual Defendants' time to answer by an additional thirty days after service upon them of a copy of this decision and order (Id. [internal citations omitted]).

Finally, the Court notes that plaintiff's affidavit of merit submitted in connection with this motion appears to have been taken without the state yet fails to include a certificate of conformity required by CPLR §2309(c).

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is denied without prejudice to renewal thirty days after his service of this decision and order upon the Individual Defendants; and it is further

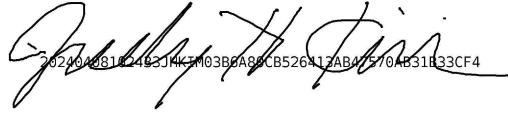
ORDERED that, within twenty days of the date of this decision and order, plaintiff shall serve a copy of this decision and order, with notice of entry, upon all defendants; and it is further

ORDERED that, within twenty days of the date of this decision and order, plaintiff shall serve a copy of this decision and order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the

“Efiling” page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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4/8/2024

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE