

**Global Merchant Cash Inc. v RGJ Trans, LLC**

2024 NY Slip Op 31536(U)

April 22, 2024

Supreme Court, Kings County

Docket Number: Index No. 520555/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of April 2024

HONORABLE FRANCOIS A. RIVERA

-----X  
GLOBAL MERCHANT CASH INC.

Plaintiff,

- against -

**DECISION & ORDER**

Index No.: 520555/2021  
Motion sequence three

RGJ TRANS, LLC D/B/A RGJ TRANS, ROBERT NOLAN  
WHITWORTH JR, and JAMES JOSEPH SPILLMAN

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on notice of motion filed on November 28, 2023, under motion sequence number three, by Global Merchant Cash Inc.(hereinafter the plaintiff or movant) for an order for default judgment to be entered against defendants RGI Trans, LLC d/b/a/ RGI Trans, Robert Nolan Whitworth Jr., and James Joseph Spillman (hereinafter the defendants), jointly and severally, in the amount of \$70,845.00 plus interest at the statutory rate (9%) from 7/19/21, plus costs and disbursements of this action. The motion is opposed.

- Notice of motion
- Affirmation in support
  - Exhibits A-I
- Affidavit in support
  - Exhibits 1-2
- Affirmation in opposition
  - Exhibits A-D
- Affidavit in opposition
  - Exhibits A-D
- Memorandum of law in opposition
- Affirmation in reply

## BACKGROUND

On August 12, 2021, plaintiff commenced the instant action by filing a summons with notice with the Kings County Clerk's office (KCCO). On October 22, 2021, the defendants jointly file a notice of appearance and a demand for a complaint. On November 8, 2021, the plaintiff filed a complaint with the KCCO.

On November 19, 2021, the defendants jointly filed a notice of motion under sequence number one, seeking an order dismissing the complaint pursuant to CPLR 3211(a).

On February 24, 2022, motion sequence number one was marked off due to the defendants' failure to appear for oral argument.

On December 14, 2022, the defendants jointly filed a motion of motion under sequence number two, seeking an order restoring motion to sequence number one to the active motion calendar.

By decision and order dated July 6, 2023, and entered on July 7, 2023, the Court granted motion sequence number two and restored motion sequence number one to the active motion calendar. Motion sequence number one was then adjourned to October 12, 2023, for further proceedings.

On October 12, 2023, the defendants' motion filed under motion sequence number one was denied. On April 30, 2024, the decision and order denying the defendants' motion filed under motion sequence number one was entered with the KCCO.

## LAW AND APPLICATION

CPLR 3215 provides in pertinent part as follows:

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him ...

(f) Proof. 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 ... 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 the party's attorney.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215(f), *Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 651, 932 N.Y.S.2d 109 [2nd Dept 2011]). CPLR 3215(f) states specifically, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim are to be set forth in an affidavit made by the party (*HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736, 888 N.Y.S.2d 203 [2nd Dept 2009]).

CPLR 3211(f) provides in pertinent part as follows:

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

The defendants have moved pursuant to CPLR 3211(a) to dismiss the complaint.

On October 12, 2023, the Court denied the motion. On April 30, 2024, the decision and order denying the defendants' motion filed under motion sequence number one was entered with the KCCO.

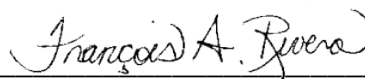
In accordance with CPLR 3212(f), the defendants time to answer will not expire until 10 days after service upon them of a copy of the order deciding motion sequence number one with notice of entry (*Levine v Singal*, 172 AD3d 402 [1<sup>st</sup> Dept 2019] citing *DeFalco v JRS Confectionary Inc*, 118 A.D.2d 752, 754 [2d Dept 1986]). Hence, the plaintiff's motion for a default judgment is premature.

## CONCLUSION

The motion by Global Merchant Cash Inc. for an order granting a default judgment against defendants RGI Trans, LLC d/b/a/ RGI Trans, Robert Nolan Whitworth Jr., and James Joseph Spillman is denied without prejudice.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.