

Fray v Figueroa

2007 NY Slip Op 31663(U)

June 12, 2007

Supreme Court, New York County

Docket Number: 0115089/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 115089/2006 *Justice*

FRAY, TREVOR

vs

FIGUEROA, ADRIAN R.

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____ d on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 18 2007

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

JUN 12 2007

Dated: _____

JJG
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

Trevor Fray,
Plaintiff

DECISION/ORDER
Index No.: 115089/06
Seq. No.: 001

-against-

Adrian R. Figueroa and
A.R. Figueroa Architect, LLC,

Present:
Hon. Judith J. Gische
J.S.C.

Defendants.

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
N/M for default j/m w/RDI affirm, exhs	1

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Although this motion for entry of a default judgment against each named defendant is submitted to the court on default, it must be denied as to each defendant for the reasons that follow.

Plaintiff delivered a copy of the summons and verified complaint to a "Ms. Valerie Doe" at the LLC's actual place of business and to "Ms. Ingrid Roe" at Mr. Figueroa's actual place of business, and then mailed copies to each one of them. While service upon Ms. Roe (a person of suitable age and discretion) is proper service under CPLR § 308 (2) as to Mr. Figueroa who is a natural person, the service upon Ms. Doe is improper because A.R. Figueroa Architect, LLC is a limited liability company.

A limited liability company must be served in the manner provided under CPLR §

311-a and LLC Law § 303. CPLR § 311-a requires that service on an LLC be made upon a member or manager of the LLC, an agent authorized by the LLC to accept service, or any other person identified in LLC § 303. Plaintiff has not identified who Ms. Doe is, by either providing her title or any statement that she is a person authorized for service under CPLR § 311-1 or LLC § 303. Therefore the defendant LLC was not properly served.

Generally, a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984). Plaintiff, nonetheless, still has to demonstrate upon proper papers that it has a prima facie cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd Dept. 2001). Here, plaintiff's complaint is verified by its attorney. Although for purposes of commencing an action, an attorney's verification will suffice, it is insufficient as a basis upon which to direct entry of judgment on default in this case because the attorney does not have personal knowledge of the facts. Mullins v. DiLorenzo, 199 AD2d 218 (1st Dept 1993); Joosten v. Gale, 129 AD2d 531 (1st Dept 1987). Since the only proof plaintiff offers in support of its motion for default judgment is the complaint verified by the attorney, its motion must be denied.


The denial of plaintiff's motion is without prejudice to renewal. Such renewal motion shall, at a minimum, provide the court with a complete identification of who Ms. Doe is and a statement that she is a person whom may be served (e.g. service on her is compliant with CPLR § 311-a and LLC § 303). Also, the plaintiff must set forth in the affidavit of a person with knowledge facts that would support a cause of action for negligence against an architect.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 12, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
JUN 18 2007
COUNTY CLERK'S OFFICE
NEW YORK