

<b>Tiburcio v Brusco W. 78th St., LLC</b>
2011 NY Slip Op 34337(U)
July 27, 2011
Supreme Court, New York County
Docket Number: 112340/09
Judge: Judith J. Gische
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Supreme Court of the State of New York  
Country of New York: Part 10

-----X  
ANDRES TIBURICIO and BELEN ORTEGA,

Plaintiff,

-against-

BRUSCO WEST 78<sup>TH</sup> STREET, LLC,

Defendants.

-----X  
BRUSCO WEST 78<sup>TH</sup> STREET, LLC,

Third-Party Plaintiff,

-against-

VIN-RAY PLUMBING & HEATING INC.,

Third-Party Defendant.  
-----X

Decision/Order  
Index No.: 112340/09  
Seq. No.:002

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

**FILED**  
JUL 28 2011  
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*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):*

Papers	Numbered
3P Plt's n/m [3215] w/MAT affirm, exhs. ....	1

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is a personal injury action based on a violation of the Labor Law brought by plaintiffs Andres Tiburcio ("Tiburcio") and his spouse Belen Ortega ("Ortega") against Defendant/Third-Party plaintiff, Brusco West 78<sup>th</sup> Street, LLC ("Brusco"). The third-party action by Brusco is for contribution and indemnification. Brusco now moves, pursuant to CPLR § 3215, for an order directing the Clerk of the Court to enter a default judgment in

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its favor and against third party defendant Vin-Ray Plumbing & Heating ("Vin-Ray").

The action in chief was commenced by Tiburcio and Ortega with the filing of a summons and complaint on August 28, 2009. Brusco answered the complaint and on or about March 29, 2010, Brusco filed a third-party summons and complaint against Vin-Ray. Service was completed on the New York Secretary of State pursuant to BCL § 306 on April 16, 2010.

Although there is due proof of service of the underlying summonses and complaints, as well as the instant motion, Vin-Ray has not answered or appeared in this action and its time to do so has expired. It has not been extended by the court. This motion is before the court unopposed. Therefore, Vin-Ray has defaulted in this action and on the motion.

#### Discussion

A moving party is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3<sup>rd</sup> dept. 2001). A default in answering a complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., In. v. Camera King, Inc., 63 N.Y.2d 728 (1984). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 AD2d 227 (1<sup>st</sup> dept. 1996); and CPLR 105 (u)].

Brusco provides the affirmation of Mark A. Taustine ("Attorney Taustine"), Brusco's attorney, who states he is acquainted with the facts surrounding plaintiff's claim. The following facts are alleged:

Tiburco asserts a cause of action in Labor Law against Brusco for injuries sustained from falling from a ladder. The alleged incident occurred at 170 West 78<sup>th</sup> Street, New York City, NY (the "Premises"). Plaintiff claims, *inter alia*, that Brusco, as owner, operator and manager of the Premises, negligently failed to provide a reasonably safe place to work in accordance with the Labor Law of New York State.

Brusco, in its third-party complaint, alleges four causes of action against Vin Ray for indemnification and contribution, which are: Vin Ray is responsible for plaintiff's injuries due to their negligence, carelessness, and recklessness (1<sup>st</sup> COA); pursuant to contracts and agreements between Brusco and Vin Ray, Vin Ray is responsible for any judgment recovered against Brusco (2<sup>nd</sup> COA); pursuant to the terms of contracts and agreements between Brusco and Vin Ray, Vin Ray agreed to indemnify Brusco from claims such as those being made by Tiburco against Brusco (3<sup>rd</sup> COA); pursuant to contracts and agreements between Brusco and Vin Ray, Vin Ray has failed to obtain public liability insurance therefore is liable for breach of contract (4<sup>th</sup> COA).

Each cause of action relies on, and makes direct reference to, a contract in which Vin Ray allegedly indemnified Brusco from certain liabilities. However, Brusco fails to include the contract or documentation of any agreement between Brusco and Vin Ray. Without such documentary support, the court cannot determine the terms, parties, or any other relevant information to decide this motion. A claim for contribution exists only when two or more tortfeasors share in responsibility for an injury, in violation of duties they respectfully owed to the injured party (Sommer v. Federal Signal Corp., 79 NY2d 540 [1992]). Furthermore, plaintiff has failed to provide an affidavit of someone with personal knowledge. CPLR 3215(f). The verified complaint, verified only by plaintiff's

attorney, is insufficient to fulfill this requirement. Natradeze v. Rubin, 33 A.D.3d 535 (1st Dep't 2006). Therefore, even though submitted on default, Brusco has failed to set forth a *prima facie* case.

Accordingly, Brusco's motion is denied without prejudice to renew within 90 days from the date of this decision/order upon proper documentation including an affidavit of someone with personal knowledge and with the underlying contracts between Brusco and Vin Ray.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that Defendant/Third-Party plaintiff, Brusco West 78<sup>th</sup> Street, LLC's, motion for a default judgment is denied without prejudice to renew within 90 days from the date of this decision/order upon proper documentation including an affidavit of someone with personal knowledge and with the underlying contracts between Brusco and Vin Ray.; and it is further

**ORDERED** that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the Court.

Dated: New York, New York  
July 27, 2011

**FILED**

**JUL 28 2011**

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So Ordered:



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