

**Dillman v City Cellar Wine**

2012 NY Slip Op 33741(U)

August 29, 2012

Supreme Court, Nassau County

Docket Number: 001609/12

Judge: James P. McCormack

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/JAS TERM, PART 43 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack**  
**Acting Justice of the Supreme Court**

\_\_\_\_\_ X

**ROBERT DILLMAN,**

Plaintiff(s),

-against-

Index No. **001609/12**

Motion Seq. No.: **001**  
Motion Submitted: **6/29/12**

**CITY CELLAR WINE, BAR & GRILL, WESTBURY  
TAVERN, LLC d/b/a CITY CELLAR WINE, BAR &  
GRILL, (CITY CENTER RESTAURANT, BIG TIME  
RESTAURANT GROUP, BE RACEWAY, LLC, 4 B's  
REALTY CITY CELLAR, LLC and MAJESTIC  
CLEANING.)**

Defendant(s).

\_\_\_\_\_ X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X  
Affirmation in Opposition.....  
Reply Affirmation.....

Plaintiff moves this court for an order pursuant to CPLR § 3215, directing a default judgment against defendants, CITY CELLAR WINE, BAR & GRILL, WESTBURY TAVERN, LLC d/b/a CITY CELLAR WINE, BAR & GRILL, CITY CENTER RESTAURANT, BIG TIME RESTAURANT GROUP, BE RACEWAY, LLC, 4 B's REALTY CITY CELLAR, LLC and MAJESTIC CLEANING on the grounds that they have failed to appear in this action.

This action was commenced by the filing of a summons and complaint on

February 8, 2012. The defendants were each served with the summons and complaint pursuant to CPLR § 308; CPLR § 311-a and Limited Liability Company Law § 303. All affidavits of service were filed with the County Clerk's Office on or before March 7, 2012. To date none of the defendants have appeared in the action by serving an answer and the time to do so has expired.

A plaintiff seeking a default judgment under CPLR § 3215 must present *prima facie* proof of a cause of action, and while a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination (*McGee v. Dunn*, 75 A.D.3d 624 [2d Dept. 2010]; *Green v. Dolphy Constr. Co.*, 187 A.D.2d 635 [2d Dept. 1992]; *Silberstein v. Presbyterian Hospital in the City of New York*, 96 A.D.2d 1096 [2d Dept. 1983] ).

Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default (see *Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 841 N.Y.S.2d 882 [2d Dept. 2007]; *Beaton v. Transit Facility Corp.*, 14 A.D.3d 637, 789 N.Y.S.2d 314 [2d Dept. 2005]; *Cree v. Cree*, 124 A.D.2d 538, 507 N.Y.S.2d 683 [2d Dept. 1986]; *Green v. Dolphy Constr. Co.*, 187 A.D.2d 635, 590 N.Y.S.2d 238 [2d Dept. 1992]; *Silberstein v. Presbyterian Hospital in the City of New York*, 96 A.D.2d 1096 [2d Dept. 1983] ).

CPLR § 3215 (a) permits a plaintiff to seek default when the defendant has failed to appear. "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 plaintiff's claim, and proof of the defaulting party's default

in answering or appearing" (*Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 AD3d 649 [2d Dept. 2011]). "CPLR § 3215(f) states that upon any application for judgment by default, proof of facts constituting claim, default, and amount due are to be set forth in affidavit made by the party" (*HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735, 736 [2d Dept. 2009]).

CPLR § 311-a provides that personal service on a limited liability company shall be made by delivering a copy personally to:

(i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant.

Limited Liability Company Law § 303 governs service of process on limited liability companies, as follows:

(a) Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose. (b) Nothing in this section shall limit or affect the

right to serve any process required or permitted by law to be served upon a limited liability company in any other manner now or hereafter permitted by law or applicable rules of procedure.

A plaintiff seeking to assert jurisdiction over a defendant “bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process” (*Gottesman v. Friedman*, 90 AD3d 608, 609 [2d Dept. 2011]). Service of process must be made in strict compliance with statutory methods for effecting service (see CPLR § 308; CPLR 311-a; Limited Liability Company Law § 303; see also *SFR Funding, Inc. v Studio Fifty Corp.*, 36 AD3d 604 [2d Dept. 2007]). It is therefore;

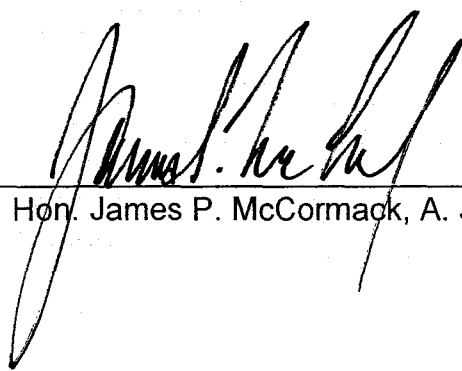
ORDERED, Plaintiff's motion for an order pursuant to CPLR § 3215, directing a default judgment against defendants, City Cellar Wine, Bar & Grill; Westbury Tavern, LLC d/b/a City Cellar Wine, Bar & Grill; City Center Restaurant; Big Time Restaurant Group; BE Raceway, LLC; 4B's Realty City Cellar, LLC and Majestic Cleaners, on the grounds that they have failed to appear in this action is GRANTED, only to the extent of liability, and an inquest and assessment of damages against said defendants, shall be conducted at the time of the trial of this action; and it is further;

ORDERED, a copy of this order shall be served on the Calendar Clerk and accompanying notice of issue when filed. **The failure to file note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing; and it if further;**

ORDERED, notwithstanding anything to the contrary, the attorney for the movant shall serve a copy of this order, with notice of entry, on the defendants, City Cellar Wine, Bar & Grill; Westbury Tavern, LLC d/b/a City Cellar Wine, Bar & Grill; City Center Restaurant; Big Time Restaurant Group; BE Raceway, LLC; 4B's Realty City Cellar, LLC and Majestic Cleaners, by regular mail and by certified mail **within twenty days of entry** and shall notify the defendants **once the note of issue has been filed of the date it first appears on the calendar in the Calendar Control Part** by regular mail and certified mail.

This constitutes the decision and order of the court.

Dated: August 29, 2012  
Mineola, N.Y.



---

Hon. James P. McCormack, A. J. S. C.