

Pan Am. Mag. Bldg., Inc. v 1140 Sixth Ave., LLC

2012 NY Slip Op 33979(U)

January 6, 2012

Supreme Court, New York County

Docket Number: 116104/09

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

PAN AMERICAN MAGAZINE BUILDING, INC., a New York corporation,

Index No.: 116104/09

Plaintiff,

Motion Date: 10/24/11

- v -

Motion Seq. No.: 03

1140 SIXTH AVENUE, LLC, a New York limited liability company and RP STELLAR 1140 LESSEE LLC, a Delaware limited liability company,

Motion Cal. No.: _____

Defendants.

1140 SIXTH AVENUE, LLC, a New York limited liability company and RP STELLAR 1140 LESSEE LLC, a Delaware limited liability company,

Third-Party Plaintiffs,

- v -

BOVIS LEND LEASE, LMB, INC. and ENTERPRISE ARCHITECTURAL SALES, INC.,

Third-Party Defendants.

BOVIS LEND LEASE, LMB, INC.
Second Third-Party Plaintiff

- v -

BIERZO CONSTRUCTION CORP.
Second Third-Party Defendant

ENTERPRISE ARCHITECTURAL SALES, INC.
Third Third-Party Plaintiff

- v -

BIERZO CONSTRUCTION CORP.
Third Third-Party Defendant

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

The following papers, numbered 1 to 1 were read on this motion for a default judgment:

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED

JAN 09 2012

NEW YORK COUNTY CLERK'S OFFICE

RECEIVED

JAN 09 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
 Answering Affidavits - Exhibits _____
 Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>
1

FILED

JAN 09 2012

Cross-Motion: Yes No

Upon the foregoing papers,
 Third third party plaintiff **NEW YORK COUNTY CLERK'S OFFICE** ENTERPRISE ARCHITECTURAL SALES,

INC. moves for a default judgment based upon the failure of third third party defendant BIERZO CONSTRUCTION CORP. to answer the third party complaint in this action. Third party plaintiff has submitted proof of service of the summons and complaint and proof of service of this motion upon BIERZO CONSTRUCTION CORP. Third third party defendant BIERZO CONSTRUCTION CORP. has defaulted in appearance on this motion. Third party plaintiff has submitted an attorney affirmation as to defendant's default pursuant to CPLR 3215 (f). However, third party plaintiff has not submitted proof of the additional mailing required by CPLR 3215 (g)(4) upon the corporate defendant. In addition, the third party plaintiff has not submitted an affidavit of facts.

CPLR 3215 (g)(4)(i) states that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been

made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." The rule is that "[a] default judgment may not be granted against a non-appearing corporate defendant without proof of compliance with the additional service requirement set forth in CPLR § 3215(g) (4) (i)." Carus & Manniello, P.C. v MLG Capital Assets LLC, 2003 NY Slip Op 50598(U), 2003 WL 1093402 (City Ct, White Plains, March 4, 2003) citing Rafa Enterprises, Inc. v Pigand Management Corp., 184 AD2d 329, 330 (1st Dept 1992) ("moving papers were deficient, having failed to set forth an affidavit of service by mail upon the last known address of the corporation, as required pursuant to CPLR 3215 (f) (4) (i)"). See, D & D Asphalt Construction Corp v Corealty, LLC, 296 AD2d 432 (2nd Dept 2002). Therefore, third party plaintiff's motion must be denied without prejudice.

In addition, the motion must be denied because the plaintiff has not submitted an affidavit of facts in support of the motion pursuant to CPLR 3215 (f), but instead has submitted only an attorney affirmation which is insufficient to support the entry of a default judgment. In the absence of either a verified complaint (of the third party complaint) or an affidavit by the party, the entry of judgment by default is erroneous and deemed a nullity. Georgia Pacific Corp. v Bailey, 77 AD2d 682 (3d Dept 1980).

Accordingly, it is

ORDERED that third third party plaintiff ENTERPRISE ARCHITECTURAL SALES, INC.'s motion for a default judgment against BIERZO CONSTRUCTION CORP. is DENIED WITHOUT PREJUDICE to move again upon proper proofs in accordance with the foregoing.

This is the decision and order of the court.

Dated: January 6, 2012

ENTER:

M. de la Cruz
DEBRA A. JAMES J.S.C.
J.S.C.

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE