

**Avant Guard Props., LLC v New York City Indus.
Dev. Agency**

2013 NY Slip Op 30276(U)

January 31, 2013

Supreme Court, New York County

Docket Number: 115209/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED

PRESENT: JUSTICE OF SUPREME COURT

PART 5

Justice

Index Number : 115209/2010
AVANT GUARD PROPERTIES, LLC
vs
NYC INDUSTRIAL DEVELOPMENT
Sequence Number : 007
DEFAULT JUDGMENT *LAB: # 5*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**


FILED

FEB 05 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1-31-13
JAN 31 2013


_____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
AVANT GUARD PROPERTIES, LLC,

Plaintiff,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT
AGENCY,

Defendant/Counterclaimant

AVANT GUARD, INC., BARRY BORGAN, PAUL
ROUHANI, and ZAKOK ZVI,

Additional Counterclaim Defendants.

DECISION/ORDER

Index No.: 115209/2010

Seq. No.: 001

PRESENT:

Hon. Kathryn E. Freed

J.S.C.

FILED

FEB 05 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS..... 3-7.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant/Counterclaimant New York City Industrial Development Agency, (hereinafter,
“NYCIDA”), moves for an order of default against counterclaim defendant Paul Rouhani, pursuant
to CPLR§ 3215. No opposition has been submitted.

* 3]

After a review of the instant motion, all relevant statutes and caselaw, the Court grants the motion.

Factual and procedural background:

Plaintiff commenced the instant action with the filing of a Notice of Petition and Verified Petition and Complaint on November 19, 2010. On January 14, 2011, NYCIDA filed its Answer and served it on plaintiff via mail. Additionally, NYCIDA also filed a Summons against four additional counterclaim defendants: Avant Guard, Inc., Barry Borgen, Paul Rouhani and Zadok Zvi. NYCIDA asserted verified counterclaims for breach of contract jointly and severally against plaintiff and the additional counterclaim defendants. Said counterclaim defendants are corporate entities and individuals who are obligated to NYCIDA pursuant to certain agreements related to an economic development project. Said agreements include a Lease Agreement between NYCIDA and plaintiff; a Sublease Agreement between plaintiff and Avant Guard, Inc.; a Guaranty Agreement executed by Avant Guard, Inc.; and a Guaranty Agreement executed by plaintiff and the three individual counterclaim defendants, guaranteeing the corporate entities' obligations under the respective Lease and Sub-Lease Agreements.

As of May 12, 2011, NYCIDA had not yet served the Summons and Answer and Counterclaims on Rouhani, and moved via O.S.C. to extend the time for service. Subsequently, on May 26, 2011, NYCIDA personally served Rouhani in Miami, Florida. NYCIDA then informed Hon. Barbara Jaffe, via letter dated June 14, 2011, that service had been successfully effectuated. In response, by Order dated June 29, 2011, Justice Jaffe granted NYCIDA's motion for an extension of time for service, and ordered that the service made on May 26, 2011, be deemed to have been timely.

The time for Rouhani to respond to NYCIDA's counterclaims expired on June 27, 2011, and his time to plead has not been extended. Additionally, he has failed to serve any pleading and as a result, has been in default since June 27, 2011. On July 11, 2011, an additional copy of the Summons was mailed to Rouhani. When no response was forthcoming, NYCIDA moved for a default judgment against him on January 19, 2012, serving him with copies of the default judgment motion papers via over night mail. Rohani did not oppose the motion. By Order dated October 22, 2012, Hon. Barbara Jafee denied said motion without prejudice to renew. Said Order states in pertinent part "NYCIDA has demonstrated that it properly served Rouhani with its verified answer with counterclaims and that Rouhani failed to appear or answer timely. However, an investigation as to Rouhani's military status was conducted before the default, and thus, the motion for a default judgment may not be granted absent a military affidavit reflecting a post-default investigation as to his military status."

In response to the issuance of this Order, NYCIDA has since conducted the requisite investigation into Rouhani's military status and has determined that he is not currently in military service. NYCIDA specifically performed a search of the U.S. Department of Defense's official Manpower Data Center, available at <http://www.defense.gov/faq/pis/pc09sldr.html>, which confirmed that no individual named Paul Rouhani, Parvis Rouhani or Parviz Rouhani, with the birth date of January 4, 1953, was in military service in the 368 days prior to and including November 19, 2012. As its Exhibit "H," appended to its moving papers, NYCIDA appends the documents affiliated with this search. Indeed, with regard to Rouhani's military status, it is important to note that this a review of the aforementioned affidavit of service dated May 26, 2011, and appended to the motion, contains a section entitled "MILITARY SERVICE." Underneath this heading, it states "[d]eponent asked the

person spoken to whether the recipient is currently on active duty in the US military service or dependant on someone who is currently on active duty in the US military service and was informed that he was not.”

Conclusions of law:

It is well settled that “[o]n 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 the claim, and proof of the defaulting party’s default in answering or appearing” (Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc., 89 A.D.3d 649, 651 [2d Dept. 2011]). Moreover, a default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (*see* Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]).

In the case at bar, NYCIDA has provided due proof of service of its Summons and Answer and Counterclaims on Rouhani on May 26, 2011. Rouhani has clearly failed to respond. Moreover, this motion for entry of a default judgment is brought within one year of the default and more than twenty days prior to the entry of judgment. Such service sufficiently complies with the additional notice requirement of CPLR§ 3215[g][4][i].

In accordance with the foregoing, it is hereby

ORDERED that defendant/counterclaimant NYCIDA’s motion for a default judgment is granted against additional counterclaim/defendant Paul Rouhani; and it is further

ORDERED that an untimely answer that may be served on his behalf will be rejected; and it is further

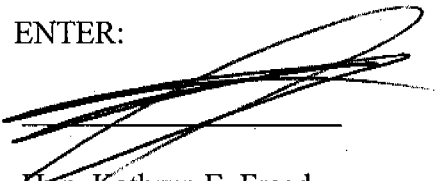
ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial

Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the appropriate fees, if any, to place this action on the appropriate trial calendar for an assessment herein directed and it is further

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

DATED: January 31, 2013

JAN 31 2013

ENTER:


Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED
FEB 05 2013
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NEW YORK