

**Legum v Russo**

2015 NY Slip Op 32508(U)

November 30, 2015

Supreme Court, Nassau County

Docket Number: 9204-2012

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 40 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack  
Acting Justice of the Supreme Court

\_\_\_\_\_ x  
STEVEN LEGUM a/a/o LEN LOMBARDO,

Plaintiff(s),

Index No. 9204-2012

-against-

Motion Seq. No.: 007

Motion Submitted: 10/28/15

JOE RUSSO, KEVIN MORRISON, ROBERT  
CORLEY and RKJ GROUP, INC,  
Defendant(s).

\_\_\_\_\_ x  
JOE RUSSO, KEVIN MORRISON and RKJ  
GROUP, INC.,

Third-Party Plaintiff(s)

-against-

LEONARDO LOMBARDO a/k/a LEN  
LOMBARDO,

Third-Party Defendant

\_\_\_\_\_ x

The following papers read on this motion:

Order to Show Cause/Supporting Exhibits.....X  
Affidavit.....X

Third-Party Plaintiffs, Joe Russo, Kevin Morrison and RKJ Group, Inc.  
(collectively as RKJ) move, pursuant to CPLR §3215, for an order granting them a

[\* 2]

default judgment against Third-Party Defendant Leonardo Lombardo a/ka/ Len Lombardo. RKJ further moves for leave to reargue this court's August 14, 2014 order denying their request for an extension of time to serve Lombardo and denying their request to order Plaintiff to divulge certain information about Third-Party Defendant. Lombardo does not oppose the motion. Plaintiff submits an affidavit indicating he takes no position on the motion, but pointing out that, via interrogatories, Plaintiff has responded to a demand for the information RKJ wanted the court to order Plaintiff to turn over.

### **MOTION FOR DEFAULT**

According to CPLR § 3215 a motion for default judgment can be made once a defendant has failed to appear.

According to CPLR 3215(f):

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney.

Once the movants submit proof of service and an affidavit constituting the merits of their claim, the application for a default judgment must be granted (*see Pampalone v. Giant Building Maintenance, Inc.*, 17 AD3d 556 [2<sup>nd</sup> Dept. 2005]; *Andrade v. Ranginwala*, 297 AD2d 691 [2<sup>nd</sup> Dept. 2002]). Moreover, once the requisite showing has been made and the requisite proof proffered, said motion shall be granted unless the defendant can establish that it has a meritorious defense to the claims made, a reasonable excuse for the delay in interposing its answer, and that the delay in interposing an answer has in no way prejudiced the movants in the prosecution of their case (*see Buywise Holding, LLC v. Harris*, 31 AD3d 681 [2d Dept. 2006]; *Giovanelli v. Rivera*, 23 AD3d 616 [2d Dept. 2005]; *Mjandi v. Maguire*, 21 AD3d 1067 [2d Dept. 2005]; *Thompson v. Steuben Realty Corp.*, 18 AD3d 864 [2d Dept. 2005]).

RKJ annexes to their moving papers an affidavit of service indicating that Lombardo was served by nail and mail service on November 14, 2014. The affidavit of service indicates attempts were made to serve Lombardo at his address on October 29, 2014, November 3, 2014, November 10, 2014 and November 30, 2014. As the affidavit of service is signed and notarized on November 18, 2014, the November 30, 2014 attempted service is clearly an error. However, the prior three attempts suffice. A process server's affidavit of service creates a presumption of proper service. (*Machovec v. Svoboda*, 120 A.D.3d 772 [2<sup>nd</sup> Dept. 2014]). In light of the affidavit of service and the annexed complaint establishing the merits of the claim, the court finds RKJ has met the

burden necessary for entitlement to a default judgment.

### REARGUMENT

Pursuant to CPLR 2221(d)(3) a motion for reargument “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry”. The prior order was issued 14 months prior to the motion to reargue being made. While there is no indication when the order was served with notice of entry, there is also no explanation made for the 14 month delay. Even if the timing were not an issue, RKJ also failed to provide the court with copies of the papers on the prior motion. This alone renders the motion defective. (*Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158 [2<sup>nd</sup> Dept. 2012]). Supreme Court Justices do not retain motion papers following the rendering of a decision on same and should not be compelled to retrieve the County Clerk’s file to determine a present motion. (*Sheedy v Pataki*, 236 A.D.2d 92 [3<sup>rd</sup> Dept. 1997]). Without the prior motion papers, this court is unable to determine whether RKJ is correct in claiming the court miscalculated the statute of limitations. Further, without the prior papers, this court is unable to determine whether it wrongly concluded that it lacked the authority to grant the order RKJ was seeking directing Plaintiff to provide RKJ with certain personal information regarding Lombardo. However, Plaintiff did submit answers to interrogatories which addresses the information sought by RKJ and which does seem to render that issue moot.

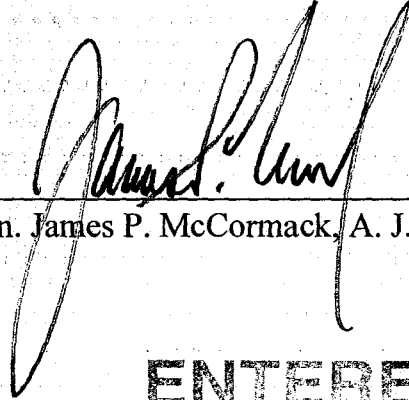
Accordingly, it is hereby

**ORDERED**, that RKJ's request for an order granting a default judgment is  
GRANTED; and it is further

**ORDERED**, that RKJ's to reargue this court's August 18, 2014 is DENIED.

This constitutes the decision and order of the court.

Dated: November 30, 2015  
Mineola, New York



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

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE