

**Element Fin. Corp. v Knowledge Delivery Sys., Inc.**

2016 NY Slip Op 31503(U)

August 1, 2016

Supreme Court, New York County

Docket Number: 153227/16

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

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ELEMENT FINANCIAL CORP.,

Plaintiff,

-against-

**DECISION AND ORDER**  
Index No. 153227/16  
Mot. Seq. No. 001

KNOWLEDGE DELIVERY SYSTEMS, INC.,

Defendant.

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**KATHRYN E. FREED, J.S.C.**

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 (Exs. A-E)

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

In this action to recover for breach of a commercial equipment lease, plaintiff Element Financial Corp. moves, pursuant to CPLR 3215, for a default judgment against defendant Knowledge Delivery Systems, Inc. in the amount of \$22,377.00, plus, inter alia, interest, attorneys' fees, late fees, and costs and disbursements. Defendant does not oppose the motion. After a review of plaintiff's papers, and after a review of the relevant statutes and case law, the motion is **denied, with leave to renew upon proper papers.**

**FACTUAL AND PROCEDURAL BACKGROUND:**

On or about April 27, 2014, defendant Knowledge Delivery Systems, Inc., as lessee, and Element Financial Corp., as lessor, entered into a commercial lease agreement ("the lease"). Ex. D. Pursuant to the terms of the lease, defendant agreed to pay plaintiff the sum of \$31,328.01 in 63

consecutive monthly installments (“the initial term”) of \$497.27, exclusive of taxes. Ex. A, at pars. 4-7. Defendant made 18 of the 63 payments during the initial term but then defaulted under the lease by failing to make the payment due in December of 2015 and by failing to make any further payments under the lease. Id., at par. 8. As a result of defendant’s default, and at the election of plaintiff pursuant to paragraph 9 of the lease, all of the monthly obligations of defendant became due under the lease for the initial term. Id., at par. 9. Based on the 45 installment payments owed by defendant, it was indebted in the amount of \$22,377, plus interest from December 15, 2015, the date of its default. Id., at par. 10.

Pursuant to paragraph 7 of the lease, defendant agreed to pay plaintiff all taxes paid, payable or required to be collected by plaintiff by reason of the defendant’s use and/or rental of the equipment. Id., at par. 11. Such taxes amounted to \$1,985.85. Id., at par. 12. Pursuant to paragraph 1 of the lease, defendant was liable for late charges in the amount of \$298.36. Id., at pars. 14-16. Pursuant to paragraph 9 of the lease, defendant was liable to plaintiff for \$1,563.99, the fair market value of the equipment at the end of the initial term. Defendant was also liable to plaintiff pursuant to paragraph 9 of the lease for expenses incurred by plaintiff in collecting amounts due and owing under the lease and for attorneys’ fees. Id., at par. 17.

On or about April 15, 2016, plaintiff commenced the captioned action seeking to recover \$22,377 for the unpaid balance on the lease, plus interest from December 15, 2015, unpaid taxes in the sum of \$1,985.85, late charges in the sum of \$298.36, expenses and attorneys’ fees, \$1,563.99 for the fair market value of the equipment, and for the costs and disbursements of this action. Ex. B. The affidavit of service of the summons and complaint reflected that it was served on Nancy Dougherty, an “employee” of the secretary of state, pursuant to Business Corporation Law (“BCL”)

section 306, on April 21, 2016. Ex. C.

Plaintiff now moves for a default judgment against defendant pursuant to CPLR 3215. In support of the motion, plaintiff submits an attorney affirmation; an affidavit of facts executed by J. Eric Atherholt, Vice President of Legal Services/General Counsel for, and an employee of, plaintiff; the summons and complaint; an amended affidavit of service; the lease; and a legible copy of the template of the lease.<sup>1</sup>

### **POSITION OF THE PLAINTIFF:**

Plaintiff argues that it is entitled to a default judgment because defendant failed to answer, move for an extension of time to answer, or otherwise appear. It maintains that it properly served defendant via the secretary of state and that it has set forth all of the necessary elements for establishing its entitlement to a default judgment.

### **LEGAL CONCLUSIONS:**

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against [it].” 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 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be

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<sup>1</sup>The copy of the lease submitted as Exhibit D to the motion is somewhat blurry. Plaintiff’s counsel represents that this is the best copy available and annexes as Exhibit E a legible template of the lease the parties used for executing Exhibit D.

provided by plaintiff's affidavit or a verified complaint. *See* CPLR 3215(f). A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, plaintiff has failed to establish proper service of the summons and complaint. Business Corporation Law 306(b)(1) provides, in relevant part, that:

Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving *with the secretary of state or a deputy, or 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 (emphasis added).

Here, the amended affidavit of service reflects that Nancy Dougherty, an "employee" of the secretary of state, was served with process. Ex. C. The amended affidavit of service does not reflect that she was the secretary of state, a deputy of the secretary of state, or a person authorized by the secretary of state to receive service. Since service upon the secretary of state was not properly effectuated pursuant to BCL 306(b)(1), the motion is denied with leave to renew upon proper papers.

Additionally, although the affidavit of facts submitted by J. Eric Atherholdt (Ex. A), executed and notarized in Pennsylvania, is accompanied by a purported certificate of conformity (see CPLR 2309[c]), the certificate is in improper form and must be corrected should plaintiff wish to resubmit the instant motion.


Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers; and it is further,

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

Dated: August 1, 2016

ENTER:



KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**