

Living Arts, Inc. v PAB Theatre, Inc.

2016 NY Slip Op 31707(U)

July 29, 2016

Supreme Court, New York County

Docket Number: 652892/15

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

-----X
LIVING ARTS, INC.,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 652892/15
Mot. Seq. No. 001

PAB THEATRE, INC.,

Defendants.

-----X
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	1-3 (Exs. A-D)

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

In this action to recover on a promissory note, plaintiff Living Arts, Inc. moves, pursuant to CPLR 3215(a), for a default judgment against defendant PAB Theatre, Inc. in the amount of \$1.3 million, plus interest. 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 November 3, 2009, plaintiff Living Arts, Inc. extended a secured promissory note ("the note") to defendant PAB Theatre, Inc. in the amount of \$1,325,000. Ex. A. The maturity date of the note was November 2, 2016. Id. Paragraph 2(g)(iv) of the note obligated defendant to make certain payments to plaintiff. Id. Paragraph 7(a) of the note defined circumstances under which an "Event

of Note Default” would occur. Id. This included a failure to “observe or perform in any material respect any of the . . . covenants, agreements, terms or provisions of this [n]ote . . .” Id. Paragraph 7(b) of the note provided that, upon the occurrence of an event of note default, plaintiff could, inter alia, “by written notice to [defendant], declare the unpaid principal amount of this [n]ote and all other amounts payable hereunder to be immediately due and payable, whereupon the unpaid principal amount of this [n]ote and all such other amounts shall become immediately due and payable . . . Id. Additionally, a security agreement dated November 3, 2009 provided that, if defendant defaulted on its payment obligation, it would owe plaintiff \$4,000 in attorneys’ fees. Ex. C, at par. 7(f).

By correspondence dated May 21, 2015, Peter Klein, President of plaintiff wrote to defendant to advise that an event of note default had occurred. Ex. B. Specifically, Klein wrote that defendant “ha[d] failed to make full payment to [plaintiff] [pursuant to the terms of paragraph 2(g)(iv)] [of the note] . . .” Id. Plaintiff advised defendant that it had 30 days to cure the default. Id.

Defendant failed to pay plaintiff and, on August 20, 2015, plaintiff commenced the captioned action seeking to recover \$1.3 million on the note, plus interest and attorneys’ fees. Ex. D.¹ According to the affidavit of service, the secretary of state was served with “a true copy” of the summons and complaint pursuant to Business Corporation Law 306(b) on September 17, 2015 (NYSCEF Doc. No. 2).

¹Although plaintiff initially sought \$1,325,000, defendant made one payment of \$25,000. Klein Aff., at par. 3.

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 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 submitted proof of the facts constituting the claim in the form of the verified complaint (Ex. D) and the affidavit of Peter Klein. The affidavit of Elliott M. Portman, Esq. in support of the motion establishes defendant’s default in answering or otherwise appearing. However, although plaintiff has submitted an affidavit of service purporting to establish proper proof of the summons and complaint (NYSCEF Doc. No. 2), the said affidavit of service is deficient.

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).

Since the affidavit of service reflects that the secretary of state was served with only one copy of the summons and complaint (NYSCEF Doc. No. 2), service was clearly improper.


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: July 29, 2016

ENTER:



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