

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

2017 NY Slip Op 30106(U)

January 17, 2017

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. 002

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-G)

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 **granted**.

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.

On or about June 1, 2016, plaintiff initially moved for a default in the captioned action. Ex

F. This Court denied that motion in its decision dated August 1, 2016, with leave to renew. Ex G. Plaintiff now moves to renew its motion for a default.

The within affidavit of service of the summons and complaint reflected that it was served on Nancy Dougherty, and reflects that she is “both an employee of the secretary of state and authorized to accept service of process on behalf of the secretary of state” pursuant to Business Corporation Law (“BCL”) section 306, on April 21, 2016. Ex. C.

Plaintiff again 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,¹ copies of the prior motion and this Court’s decision, an Affirmation of mailing of a copy of the summons, pursuant to CPLR 306, and an Affirmation of Service of the within notice of motion.

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 has 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.

¹The 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.

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 established proper service of the summons and complaint pursuant to Business Corporation Law 306(b)(1).

Additionally, the affidavit of facts as submitted by J. Eric Atherholdt (Ex. A), executed and notarized in Pennsylvania, is accompanied by a certificate of conformity, which is in proper form pursuant to CPLR 2309(c).

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

ORDERED that the motion by the plaintiff Element Financial Corp. for a default judgment against defendant Knowledge Delivery Systems, Inc. is granted in the amount of \$22,377.00, plus interest from December 15, 2015 the date of defendant’s default, as calculated by the Clerk; plus

taxes in the sum of \$1,985.85; plus late charges in the sum of \$298.36; plus the fair market value of the Equipment in the sum of \$1,563.99; plus reasonable attorneys' fees in the sum of \$1,995.00; plus the costs and disbursements of this action; and it is further,

ORDERED that plaintiff Element Financial Corp., shall serve a copy of this order on defendant Knowledge Delivery Systems, Inc., and the Trial Support Office at 60 Centre Street, Room 158; and it is further,

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

Dated: January 17, 2017

ENTER:



KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT