Citrin Cooperman & Co., LLP v Villante
2017 NY Slip Op 31226(U)
June 6, 2017
Supreme Court, New York County
Docket Number: 157970/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C. **PART** 2
Justice

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CITRIN COOPERMAN & COMPANY, LLP,

Plaintiff,

- v -

BRIAN VILLANTE, GRACE FINANCIAL GROUP LLC, WINDMILL MANAGEMENT GROUP LLC, PORTABLE PM LLC

Defendant.

INDEX NO. 157970/2016

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 19, 20, 21, 22

were read on this application to/for Default

Upon the foregoing documents, it is

ordered that the motion is **denied with leave to renew upon proper papers**.

Plaintiff Citrin Cooperman & Company, LLP, an accounting firm, commenced this breach of contract action seeking to recover unpaid fees against defendants Brian Villante (Villante), Grace Financial Group, LLC (Grace), Windmill Management Group, LLC (Windmill), and Portable PM, LLC (Portable) on September 22, 2016. NYSCEF Doc. 1. It now moves for a default judgment against all defendants except Villante. NYSCEF Doc. 9. Plaintiff served defendants Grace, Windmill and Portable with the summons and complaint via the Secretary of State pursuant to Limited Liability Company Law (LLCL) section 303(a) on October 27, 2016.

NYSCEF Doc. 3. Plaintiff also served Grace, Windmill and Portable with a notice of supplemental mailing advising them that service was made on them pursuant to Limited Liability Company Law section 303(b). NYSCEF Doc. 21. In the notice of supplemental mailing, plaintiff's counsel further represents that "the statutory time period has elapsed since the date of mailing." Id.

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 him." 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).

Although affidavits of service filed as NYSCEF Doc. 3 reflect that defendants Grace, Windmill, and Portable were properly served pursuant to LLCL 303(a), plaintiff failed to annex the affidavits of service to its motion. However, this Court is able to, and will, take judicial notice of the affidavits of service filed with NYSCEF. *See Kinberg v Kinberg*, 85 AD3d 673, 674 (1st Dept 2011). Nevertheless, plaintiff erroneously represents in the notice of supplemental mailing that service was made pursuant to LLCL section 303(b). Thus, plaintiff has failed to establish proper proof of service of the summons and complaint.

Further, there is no proof of a default by Grace, Windmill and Portable. The representation by plaintiff's counsel that "the statutory time period has elapsed since the date of mailing"

(NYSCEF Doc. 21) does not specifically state that said defendants failed to answer the complaint. Nor does it refer to any particular mailing to which defendants Grace, Windmill, and Portable failed to respond.

Additionally, this Court denies the motion because plaintiff failed to submit sufficient "proof of the facts constituting the claim." CPLR 3215 (f); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). A complaint which is verified by counsel, such as that herein, is "purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." *Martinez v Reiner*, 103 AD3d 477, 478 (1st Dept 2013) (internal quotation marks and citation omitted). It is error to issue a default judgment "without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim." *Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d at 202; *Mejia-Ortiz v Inoa*, 71 AD3d 517 (1st Dept 2010).

Here, where the complaint is verified only by counsel, this Court may not rely on it as proof of any of the facts alleged. *See Martinez v Reiner*, 103 AD3d at 478. Additionally, since plaintiff's proffered affidavit of merit as to the underlying debt is deficient, there is simply no evidentiary basis on which to permit this Court to issue a default judgment. *See Mejia-Ortiz v Inoa*, 71AD3d at 517; *Beltre v Babu*, 32 AD3d at 723.

The purported "Affidavit of Facts Constituting the Claim, the Default and the Amount Due" (NYSCEF Doc. 20) submitted by David E. Kells, Chief Operating Officer of plaintiff, is utterly

conclusory. Although Kells represents that the monies owed to plaintiff arise from accounting services provided by plaintiff, his affidavit is devoid of any detail regarding when the work was performed and how the amounts allegedly owed were calculated. Perhaps most importantly, no invoices reflecting that this work was performed are annexed to the motion. Additionally, although plaintiff claims in the complaint that defendant Grace owes it $33,846, Kells asserts in his affidavit that it owes plaintiff $33,486.

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

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

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

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

6/6/2017
DATE

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

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE