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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WILLIAM DITTMER,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSIT AUTHORITY, SILVERITE CONSTRUCTION,

Defendant.

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INDEX NO. 154171/2014

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this application to/for Default Judgment

Upon the foregoing documents, it is ordered that the motion is denied.

Factual and Procedural Background:

This personal injury action, sounding in negligence and violations of Labor Law sections 200, 240(1), and 241(6), was commenced by plaintiff William Dittmer against defendants The New York City Transit Authority ("the NYCTA"), The Metropolitan Transit Authority ("the MTA"), and Silverite Construction ("Silverite") on April 14, 2014. On November 12, 2015, the NYCTA, the MTA and Silverite commenced a third party action against Providence Construction Corp. ("Providence") claiming contractual and common-law indemnification, contribution, and breach of contract to procure insurance.

On February 9, 2016, the NYCTA, the MTA and Silverite moved, pursuant to CPLR 3215, for a default judgment against Providence due to its failure to answer or otherwise appear in this matter. NYSCEF Doc. 16. By order dated May 13, 2016 and entered May 16, 2016, this Court (Stallman, J.) denied the motion without prejudice on the grounds that the movants failed: 1) to submit an affidavit of merit; 2) to submit any "firsthand confirmation of the facts or evidence that would support Providence's liability under theories of contractual indemnification, common law indemnification, contribution or breach of contract"; 3) to submit a copy of the alleged contract between them and Providence; and 4) to explain the nature of their relationship to Providence. NYSCEF Doc. 25. Justice Stallman specifically directed that "[i]f third-party defendants make a renewed motion for a default judgment, they must address these deficiencies in their affidavit(s) of merit." Id.

The NYCTA, the MTA and Silverite ("the movants") now move, pursuant to CPLR 3215, for a default judgment against third party defendant Providence. In support of their motion, the movants submit an attorney affirmation; the complaint, the answer, and the third-party complaint, which was verified by counsel for the movants; an affidavit of service of the third-party complaint; a subcontract between Silverite and Providence; an MTA/NYCTA incident report; and the transcript of plaintiff's deposition testimony.

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 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).

The instant motion is denied since the NYCTA, the MTA, and Silverite have 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 the third-party complaint 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).

As noted above, Justice Stallman's order denying the movants' initial motion for default specifically directed them to include with any renewed motion for the same relief an affidavit of merit addressing the deficiencies in the prior application. However, no affidavit of merit is annexed to their papers. This, in and of itself, warrants the denial of the instant motion. Although an attorney affirmation is submitted, it is not sufficient to entitle the movants to a default judgment. *Martinez*, 103 AD3d, at 478.

Additional grounds exist for the denial of the motion as well. The movants submit the deposition transcript of the plaintiff in a purported attempt to establish that he testified that he was injured on debris which consisted of cement block, and that Providence was the only entity at the location of the alleged accident which used such block. However, this contention is without merit. Although plaintiff testified that cement block was "involved" in his accident (Ex. F, at pp. 18-19),

he stated that he was not aware whether an entity other than Providence worked with cement block (Id., at pp. 19-20), and not that it was the only entity which worked with cement block at the site.

Further, although the movants annex to their motion a copy of a subcontract between Silverite and Providence, Article 12 of which requires Providence to indemnify the owner, identified as "MTA New York City Transit Authority", a single entity, and the contractor, Silverite (Ex. E), for, inter alia, any damages for personal injuries caused or alleged to be caused by Providence, the agreement does not differentiate between the NYCTA and the MTA, which were sued as two separate entities in this action. Thus, the NYCTA and the MTA fail to adequately "explain the nature of their relationship to Providence", which deficiency Justice Stallman attributed to each of the movants in denying their initial application. NYSCEF Doc. 25.

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

ORDERED that the motion by plaintiffs is denied; and it is further

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

6/28/2017
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

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT