

Philadelphia Indem. Ins. Co. v David Bldr., Inc.

2017 NY Slip Op 31473(U)

July 11, 2017

Supreme Court, New York County

Docket Number: 154262/2016

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
NEW YORK COUNTY

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

PART 2

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PHILADELPHIA INDEMNITY INSURANCE COMPANY A/S/O
NYKC SUBSIDIARY HOLDINGS, LLC,

Plaintiff,

INDEX NO. 154262/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

DAVID BUILDER, INC. A/K/A AMKO DESIGN BUILDER CORP.,
PETER PLUMBING ASSOC., INC., SYNDICATE
ARCHITECTURE, PLLC, TAN ENGINEERING P.C., AMKO
DESIGN BUILDER CORP.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document numbers 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this application to/for Default Judgment

Upon the foregoing documents, it is
ordered that the motion is denied with leave to renew upon proper papers.

Plaintiff Philadelphia Indemnity Insurance Company ("PIC"), as subrogee of NYKC Subsidiary Holdings, LLC ("NYKC"), commenced this property damage action against defendants David Builder, Inc. ("Builder") a/k/a Amko Design Builder Corp, Peter Plumbing Assoc., Inc. ("PPA"), Syndicate Architecture, PLLC ("Syndicate"), Tan Engineering P.C. ("Tan") and Amko Design Builder Corp. ("Amko") seeking to recover monies which it paid to its insured NYKC pursuant to a policy of insurance. PIC alleges that it seeks to recover \$86,824.04 which it paid to NYKC arising from water damage caused by a leak in a sprinkler system improperly installed by

the defendants. The leak occurred in a portion of a building leased by NYKC at 2 Northside Piers, Brooklyn, New York.

PIC commenced this action, sounding in negligence, as against Builder, PPA, and Syndicate on May 19, 2016. Ex. 1. The initial complaint sought damages of \$57,000. On July 22, 2016, PIC filed a supplemental summons and amended complaint as against Builder, PPA, Syndicate, and Tan alleging negligence and claiming damages in the amount of \$106,824.04. Ex. 1.

On October 7, 2016, plaintiff moved to amend the complaint to change the name of defendant David Builder, Inc. to "David Builder, Inc. a/k/a Amko Design Builder Corp." The motion was resolved by so-ordered stipulation dated January 24, 2017. NYSCEF Doc. 35. The second amended complaint again asserted negligence against the defendants and sought damages of \$106,824.04. Ex. 1. The summons and complaint, supplemental summons and amended complaint and amended summons and second amended complaint were served on Builder via the Secretary of State pursuant to Business Corporation Law 306 on May 26 and August 1, 2016 and January 30, 2017, respectively. Ex. 1. PIC made an additional mailing of the second amended complaint on Builder pursuant to CPLR 3215(g)(4) on March 8, 2017. Ex. 5; Lambert Aff., at par. 9. To date, Builder has failed to answer or otherwise appear in this matter. Lambert Aff., at pars. 7-8.

PIC now moves for an order, pursuant to CPLR 3215(a), directing the Clerk of this Court to enter a default judgment against Builder in the amount of \$86,825.04, plus interest from February 15, 2016, and severing and continuing this action against defendants PPA, Syndicate, Tan and Amko.

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).

PIC has established proper service of process and Builder’s default. However, plaintiff fails 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). 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, neither the complaint, amended complaint, nor the second amended complaint is verified. Ex. 1. Although PIC submits the affidavit of Rebecca Wilson-Williams of PIC in an attempt to set forth the facts constituting the claim, this Court finds that the said affidavit is insufficient to entitle PIC to a default judgment.

Specifically, in her affidavit, Ms. Wilson-Williams states that “[p]ursuant to a policy of insurance then in full force and effect, plaintiff was compelled to and did pay NYKC the sum of \$86,825.04, less a \$5,000 deductible, in connection with the aforesaid loss and plaintiff thereby became subrogated and/or assigned to all rights, claims and causes of action arising out of the aforesaid loss.” *Wilson-Williams Aff.*, at par. 5. *Wilson-Williams* represents that documentation establishing that PIC is entitled to a judgment in the foregoing amount is annexed to the motion as Exhibit 4. *Id.* However, Exhibit 4 contains copies of three checks drafted by PIC to NYKC and

Deerpath Funding, LP (“Deerpath”) totaling \$81,825.04. While this Court notes that this appears to be the amount paid by PIC to NYKC less the \$5,000 deductible, Wilson-Williams nevertheless states in the “wherefore” clause of her affidavit that PIC is entitled to a judgment in the amount of \$86,825.04. Further, Wilson-Williams does not state why PIC seeks the sum of \$86,825.04 upon this motion but sought the amount of \$106,824.04 in the amended complaint and second amended complaint. Ex. 1. Additionally, Wilson-Williams does not set forth any explanation regarding the relationship, if any, of Deerpath to NYKC.

Finally, Wilson-Williams’ affidavit, executed in the Commonwealth of Pennsylvania, does not contain a certificate of conformity as required by CPLR 2309(c).

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

ORDERED that the motion by plaintiff 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.

7/11/2017

DATE

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

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE