

24 E. 12th St. Assoc., LLC v Nadelson

2017 NY Slip Op 31555(U)

July 24, 2017

Supreme Court, New York County

Docket Number: 151783/2016

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

-----X

24 EAST 12TH STREET ASSOCIATES, LLC,
Plaintiff,

INDEX NO. 151783/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

ELLIOT NADELSON,

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12
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.**

In this action to collect on a promissory note, plaintiff 24 East 12th Street Associates, LLC moves, pursuant to CPLR 3215, for a default judgment against defendant Elliot Nadelson. Defendant does not oppose the motion. After a review of plaintiff's motion, as well as the relevant statutes and case law, the motion is **denied with leave to renew upon proper papers.**

In January of 1996, plaintiff 24 East 12th Street Associates, LLC, as landlord, entered into a ten-year lease with Elliot Nadelson, as tenant, for Suite 2-1 at 88 University Place in Manhattan. Ex. D. In September of 2006, the lease was extended for an additional 10-year period. Id.

On March 20, 2014, defendant executed a promissory note pursuant to which he agreed to repay plaintiff the sum of \$60,549.54 in 60 monthly installments of \$1,088.00. Ex. E. Plaintiff's counsel represents that defendant executed the note as a result of his debt on his lease.

On March 2, 2016, plaintiff commenced this action by filing a summons with notice against defendant alleging that he owed \$41,083.92 plus interest of 16%, costs and legal fees on the note, as well as \$44,196.48 plus interest, costs and legal fees for breaching the lease. Ex. A. Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendant, claiming that defendant owes plaintiff \$43,209.98 as a result of defendant's default on the note, plus interest and attorneys' fees.¹

¹ Plaintiff's counsel represents in his affirmation in support of the motion that defendant owes plaintiff \$43,209.98 for amounts due under the note; \$44,196.48 for amounts due pursuant to the lease; and \$2,375.00 for attorneys' fees. Thus, counsel does not specifically set forth the sum certain sought in this action.

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 plaintiff’s counsel has established proper service of the summons and complaint and defendant’s default in answering or otherwise appearing, the motion is denied because counsel 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). 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, there was no complaint served, but only a summons with notice. It was thus incumbent on plaintiff’s counsel to submit an affidavit of merit from one with

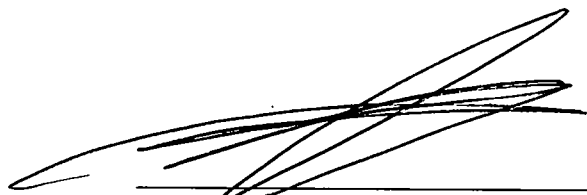
personal knowledge of the alleged debt to establish the facts giving rise to the claim. Since counsel has not done so, there is no evidentiary basis on which to permit this Court to issue a default judgment. See *Mejia-Ortiz v Inoa*, 71AD3d at 517; *Beltre v Babu*, 32 AD3d at 723. Since plaintiff seeks a judgment for a sum certain, it is necessary for an individual with knowledge to specifically delineate what debt is owed and why.

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.

7/24/2017
DATE


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

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE