

**Goldman v All Counties Snow Removal Corp.**

2017 NY Slip Op 32329(U)

November 1, 2017

Supreme Court, New York County

Docket Number: 155108/2016

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

PART 2

Justice

-----X

MICHAEL GOLDMAN, SJOERD GOLDMAN,

INDEX NO. 155108/2016

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

ALL COUNTIES SNOW REMOVAL CORP.,

MOTION SEQ. NO. 002

Defendant.

DECISION AND ORDER

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ALL COUNTIES SNOW REMOVAL CORP.,

Third-Party Plaintiff,

-v-

UNITED RECONSTRUCTION SERVICES,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered that the motion is granted without opposition.

In this personal injury action, third-party plaintiff All Counties Snow Removal Corp. (“ACSR”) moves, pursuant to CPLR 3215, for a default judgment against third-party defendant United Reconstruction Services, Inc. (“URS”). URS does not oppose the motion. After a review of the motion papers, as well as the relevant statutes and case law, the motion is **granted**.

### FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on January 22, 2014 in which plaintiff Michael Goldman was allegedly injured when he slipped and fell on premises allegedly owned and/or operated by defendant/third-party plaintiff ACSR. NYSCEF Doc. 1.<sup>1</sup> Plaintiff Sjoerd Doting, Goldman's wife, asserts a claim for loss of consortium. ACSR joined issue by service of its answer, filed on August 15, 2016. Doc. 3.

On March 10, 2017, ACSR filed a third-party complaint with this Court asserting claims against URS for contribution, contractual and common-law indemnification, and breach of contract to procure insurance. Doc. 4. Although URS was properly served with the third-party summons and complaint via the Secretary of State (Doc. 7), it failed to answer.

On or about May 16, 2017, ACSR moved this Court for a default judgment against URS on the third-party complaint. In a decision and order dated August 17, 2017, this Court denied the motion with leave to renew upon proper papers because

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<sup>1</sup> Unless otherwise noted, all references are to documents filed with NYSCEF in connection with this matter.

ACSR failed to submit sufficient “proof of the facts constituting the claim.” Specifically, ACSR did not include in its papers an affidavit from someone with personal knowledge 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).

ACSR now moves to renew its motion for a default judgment against third-party defendant URS pursuant to CPLR 3215(a)(b). In support of the motion, ACSR submits the affidavit of Lynne Lyons, its President and CEO, annexed to its papers as Exhibit “H”. Ms Lyons avers that ACSR entered into a written agreement with URS for snow removal services at various Chase Bank locations, including the location of the alleged incident. A copy of that agreement is annexed to Ms. Lyons’ affidavit as Exhibit “1.” Ms. Lyons represents that the agreement was in full force and effect on January 22, 2014, the date of the alleged accident. Lyons aff. ¶4. Additionally, pursuant to said agreement, URS was required to name plaintiff ACSR as an additional insured on liability insurance policies as required by sections 7-10 of the written agreement. Lyons aff. ¶6. Lyons further avers that section 13 of the

written agreement URS was required to indemnify and hold harmless plaintiff ACSR from all claims arising out of or related to any bodily injury. Lyons aff. ¶7. Lyons also avers that, to date, URS has failed to provide insurance coverage and has further failed to indemnify or defend plaintiff ACSR in this action. Lyons aff. ¶¶ 8,9.

Through its attorney, Patrick C. Magee, Esq., of the firm of Ahmuty, Demers & McManus Esq., ACSR avers that it has been more than 30 days since service of the third-party complaint has been effectuated pursuant to CPLR 3215 and that URS has failed to answer or appear. Thus, ACSR urges that it is entitled to the entry of a default judgment against URS and that its motion thus be granted in its entirety.

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). Since ACSR has now satisfied the foregoing criteria, it is entitled to a default judgment against URS.

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

**ORDERED** that the motion by third-party plaintiff All Counties Snow Removal Corp. for a default judgment against third-party defendant United Reconstruction Services, Inc. is granted; and it is further,

**ORDERED** that this matter is to be set down for an inquest in favor of third-party plaintiff All Counties Snow Removal Corp. against third-party defendant United Reconstruction Services, Inc. immediately following the trial of the main action of this matter, or other final settlement of the main action herein, in order to ascertain the amount of damages to be awarded third-party plaintiff All Counties Snow Removal Corp. on its claims against United Reconstruction Services, Inc., including but not limited to, indemnification, contribution, contractual indemnity and failure to purchase insurance; and it is further,

**ORDERED** that a Special Referee shall be designated to hear and report the amount of monetary damages due to plaintiff; and it is further

**ORDERED** that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the

earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

**ORDERED** that third-party plaintiff's counsel shall serve a copy of this order with notice of entry on all parties and the Trial Support Office at 60 Centre Street, Room 158 within twenty days after this order is uploaded to NYSCEF and third-party plaintiff's counsel shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further


**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may

seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

**ORDERED** that, except as otherwise directed by the assigned Special Referee for good cause shown, the inquest shall proceed from day to day until completion; and it is further

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

11/1/2017  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

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