

**Calva v 156 E 62nd St. LLC**

2018 NY Slip Op 30600(U)

April 6, 2018

Supreme Court, New York County

Docket Number: 152632/2015

Judge: Robert D. Kalish

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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. \_\_\_\_\_ Robert D. KALISH**  
*Justice*

**PART 29**

**WILIAN CALVA,**

**INDEX NO. 152632/2015**

**Plaintiff,**

**MOTION DATE 3/1/18**

**- v -**

**MOTION SEQ. NO. 002**

**156 E 62<sup>ND</sup> STREET LLC et al.,**

**Defendants.**

**(and two third-party actions)**

The following papers, 47-55, were read on this motion for entry of a default judgment.

Notice of Motion – Affirmation in Support – Exhibits A-F

**■ Nos. 47-55**

Motion by Second Third-Party Plaintiff 156 E 62nd Street LLC (“156”) pursuant to CPLR 3215 for an order directing the entry of a default judgment against Second Third-Party Defendant AARCO Contracting LLC (“AARCO”) is denied.

**BACKGROUND**

Plaintiff Wilian Calva (“Calva”) commenced the instant action on March 17, 2015, by e-filing a Verified Complaint against Defendants 156 and Spindle L&C Corporation (“Spindle”). Plaintiff alleges in the Verified Complaint that 156 retained AARCO and Spindle as general contractors or construction managers to perform certain work located at 156 East 62nd Street, New York, New York 10065 (the “Premises”) on February 5, 2015. Plaintiff further alleges that he was lawfully working at the Premises on February 5, 2015, when he was caused to fall from a ladder and suffer injuries due to the negligence of Defendants. Plaintiff further alleges that Defendants violated Labor Law §§ 200, 240 (1), 240 (2), 240 (3), 241 (6) and Rule 23 of the Industrial Code of the State of New York.

On June 9, 2015, 156 interposed a Verified Answer asserting affirmative defenses and cross-claims against Spindle, demanded a verified bill of particulars,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

and served certain combined demands. On May 30, 2017, Calva and 156 stipulated to discontinue the action and all cross-claims against Spindle with prejudice.

On November 17, 2015, 156 commenced a third-party action against AARCO, which 156 then discontinued without prejudice on September 20, 2017.

On November 13, 2017, 156 commenced a second third-party action against AARCO by e-filing a second third-party summons and complaint seeking indemnification and contribution. The pleadings state two addresses for AARCO—one in Manhattan and the other in Brooklyn (the “New York Addresses”). 156 submits an affidavit of service, dated November 21, 2017, that indicates AARCO was served with process in the second third-party action pursuant to Limited Liability Company Law § 303, which permits service of process upon an LLC by means of the secretary of state. 156 submits an additional affidavit of service, dated December 24, 2017, which purports to have served AARCO pursuant to CPLR 308 (4) at 525 4th Street, East Northport, New York 11731 (the “East Northport Address”).

156 further submits an affidavit of service, dated February 1, 2018, averring that a “notice of motion for default” was served on AARCO by mailing it to the New York Addresses.

As AARCO has not answered or appeared in this action, 156 now moves for an order directing the entry of a default judgment against it.

### DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

On the instant motion, 156 presents proof of adequate service of process pursuant to Limited Liability Company Law § 303 by means of the November 21, 2017 affidavit of service.

While the November 21, 2017, affidavit of service is a sufficient showing that process was served on AARCO, the Court notes that the December 24, 2017 affidavit of service purports to have effectuated service of process upon AARCO pursuant to CPLR 308 (4). CPLR 311-a, personal service on limited liability companies, permits serving process on an LLC by serving any person enumerated in CPLR 311-a (a) using any method enumerated in CPLR 308. (*See Tetteh v Infinite Beauty NYC, LLC*, 2017 NY Slip Op 32452[U], 2017 WL 5668418, \*8 [Sup Ct, NY County 2017, Kalish, J.]) Here, the December 24, 2017 affidavit is silent as to whether an enumerated person was to be served at the East Northport Address, as to the times of day when service was attempted prior to affixing the summons to the door, and as to whether the East Northport Address is AARCO's actual place of business. Given these omissions and given that the East Northport Address does not appear as an address for AARCO in any of the pleadings, the purpose of 156's inclusion of the December 24, 2017 affidavit of service in the instant motion is unclear to the Court.

Nevertheless, 156 has sufficiently demonstrated that AARCO has not answered or appeared in the instant action and its time to do so has expired. As such, 156 would be entitled to an order directing the entry of a default judgment against AARCO provided that 156 submitted proof of the facts constituting its claim and provided that 156 complied with the notice requirements pursuant to CPLR 3215 (g) (4). In the instant motion, 156 has failed in both respects.

156 has failed to submit adequate proof of the facts constituting its claim. CPLR 3215 (f) provides, in relevant part, that “[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party’s attorney.” Further, “a complaint verified by counsel amounts to no more than an attorney’s affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215.” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994], citing *Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987].) Further, “[i]n the absence of either a verified complaint or an affidavit by the party, the entry of judgment by default is erroneous and deemed a nullity.” (*Mullins v DiLorenzo*, 199 AD2d 218, 220 [1st Dept 1993]; see also *Wolf v 3540 Rochambeau Assoc.*, 234 AD2d 6, 6–7 [1st Dept 1996]; *St. Paul Fire & Marine Ins. Co. v A.L. Eastmond &*

*Sons, Inc.*, 244 AD2d 294 [1st Dept 1997].) Here, 156's sole submission regarding the facts constituting its claim is an unverified second third-party complaint that is signed by 156's counsel. As such, 156 has failed to submit adequate proof of the facts constituting its claim.

156 has further failed to send an additional mailing of the second third-party summons and complaint to AARCO pursuant to CPLR 3215 (g) (4), which provides, in relevant part, that:

“(i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.”

The Appellate Division, First Department has held that the additional mailing requirement of CPLR 3215 (g) (4) also applies to LLCs. (*See Crespo v A.D.A. Management*, 292 AD2d 5, 7 [1st Dept 2002]; *see also Foster Const. Mgt. v Seerattan*, 2013 NY Slip Op 31609[U] [Sup Ct, NY County 2013, Sherwood, J.].) The Appellate Division, Second Department has applied CPLR 3215 (g) (4) to an LLC and held that a motion court erred in granting leave to enter a default judgment where the plaintiff failed to send an additional mailing of the summons and complaint to the LLC. (*Bank of New York v Willis*, 150 AD3d 652, 654 [2d Dept 2017].)

Here, AARCO is an LLC which was served pursuant to Limited Liability Company Law § 303. As such, 156 was required to notice AARCO pursuant to CPLR 3215 (g) (4). 156 has not submitted an affidavit in the instant motion showing that additional service of the summons by first class mail has been made upon AARCO at its last known address. Although the December 24, 2017 affidavit of service does indicate that a copy of the second third-party summons and complaint was mailed to the East Northport Address, there is no indication in the instant motion that the East Northport Address was AARCO's last known address at the time of service.

Further, the February 1, 2018 affidavit of service of the instant motion states only that it included the notice of motion. 156 does not provide a sworn statement

in an affidavit that the exhibits to the instant motion, including the second third-party summons and complaint, were mailed by first class mail to AARCO at its last known address. It is therefore unclear to the court whether all the moving papers were served upon AARCO.

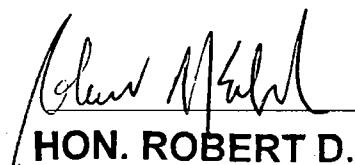
**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Second Third-Party Plaintiff 156 E 62nd Street LLC ("156") pursuant to CPLR 3215 for an order directing the entry of a default judgment against Second Third-Party Defendant AARCO Contracting LLC ("AARCO") is denied.

The foregoing constitutes the decision and order of the Court.

Dated: April 6, 2018  
New York, New York

 J.S.C.  
**HON. ROBERT D. KALISH**

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED                       NON-FINAL DISPOSITION
- GRANTED     DENIED             GRANTED IN PART     OTHER
- SETTLE ORDER                       SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE