

Consolidated Edison Co. of N.Y., Inc. v James
2018 NY Slip Op 30683(U)
April 16, 2018
Supreme Court, New York County
Docket Number: 161790/2013
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

INDEX NO. 161790/2013

Plaintiff,

- v -

FITZROY JAMES,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DEFAULT JUDGMENT

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

FACTUAL AND PROCEDURAL BACKGROUND:

This action, arising from a consumer credit transaction, was commenced by plaintiff Consolidated Edison Company of New York, Inc. on December 23, 2013. In its complaint, verified by counsel, plaintiff alleged that defendant Fitzroy James owed it \$28,701.32, plus interest in the amount of \$8,005.27 since 2011, for a total of \$36,706.59. Doc. 1.¹ Plaintiff alleged in its complaint that defendant's debt arose from his failure to pay for certain unspecified services provided by plaintiff. Id. An affidavit of service submitted by plaintiff reflected that service was effectuated on defendant by service on "JOHN DOE, REFUSED TRUE NAME, a person of

¹ All references are to the documents filed with NYSCEF in connection with this matter.

suitable age and discretion” (*emphasis provided*), at 244 Lenox Avenue, Box 15, New York, New York 10027, on February 19, 2014. Doc. 2.

On or about July 14, 2014, plaintiff’s counsel, evidently seeking to obtain a Clerk’s judgment for a sum certain, submitted a proposed judgment in the amount of \$36,306.23 to the Clerk of this Court for entry. Doc. 3. The Clerk’s office returned the proposed judgment to plaintiff’s counsel for correction. Doc. 3. The Clerk directed plaintiff’s counsel to amend the affidavit of the process server to set forth the name of the person served or, in the absence of the name of that individual, plaintiff would be required to obtain an order of this Court in order to enter the judgment. Doc. 9. The Clerk further instructed plaintiff that it could not enter judgment without a statement of account establishing that defendant in fact owed plaintiff \$28,701.32. *Id.*

On March 29, 2018, plaintiff’s counsel moved for a default judgment against defendant.² Specifically, plaintiff moved “for an [o]rder awarding plaintiff judgment against defendant as sought in the complaint . . .” Doc. 14. In support of the motion, plaintiff’s counsel submitted, inter alia, his own affidavit (Doc. 15) attesting, inter alia, to the fact that this Court directed Thomas Stevens, Esq., who allegedly had appeared in court on behalf of plaintiff, to move for a default judgment; an affidavit of service reflecting that defendant was served at Box 15 at 244 Lenox Avenue Box 15, New York, New York 10027, on February 19, 2014 (Doc. 19); and a statement of account for “tenants of 244 Lenox Avenue”. Doc. 21.

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

² Although the notice of motion does not reflect that plaintiff seeks a default, the affidavit of plaintiff’s counsel in support of the motion specifies that this is the relief sought.

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).

Plaintiff’s motion for a default must be denied. Initially, plaintiff has failed to establish valid service of the summons and complaint on defendant. Although the affidavit of service reflects that service on defendant was made by leaving the summons and complaint with an individual of suitable age and discretion, this is completely inconsistent with the fact that the affidavit of service reflects that service was made on a post office box at the building. Since plaintiff failed to establish that proper service of process was made, plaintiff cannot prove defendant’s default in answering.

Further, plaintiff has failed to establish the facts constituting the claim. Plaintiff’s counsel attempts to establish such facts by means of the complaint, which he verified, as well as his own affidavit. However, since facts constituting the claim must be provided by one with personal knowledge of the facts giving rise to the claim, neither of these documents can be considered by this Court. A complaint verified by counsel, such as that 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). Furthermore, 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).

Additionally, as noted above, the statement submitted by defendant in support of the motion is for the "tenants of 244 Lenox Avenue" and not just for defendant's account. Doc. 21. Although the statement reflects that the "balance due" plaintiff is \$28,701.32 (Doc. 21), the amount alleged in the complaint, there is no explanation by one with personal knowledge as to whether defendant owes this entire amount or a portion thereof.


Finally, this Court notes that plaintiff has submitted no evidence in support of its contention that this Court directed Thomas Stevens, Esq. to take any action on behalf of plaintiff.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion seeking a default judgment is denied, with leave to renew upon proper papers; and it is further

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

4/16/2018
DATE


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:	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE