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| <b>Trejo v Nokit Realty Corp.</b>  |
| 2018 NY Slip Op 30696(U)   |
| April 19, 2018   |
| Supreme Court, New York County   |
| Docket Number: 152745/2017   |
| 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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ANNY TREJO,

INDEX NO. 152745/2017

Plaintiff,

- v -

NOKIT REALTY CORP. and SAINT NICHOLAS ELECTRONICS,

MOTION SEQ. NO. 002

Defendant.

**DECISION AND ORDER**

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NOKIT REALTY CORP.,

Third-Party Plaintiff,

-V-

WAIL SHUJAIEH and ELEGANT  
LINEN OF NY INC.,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number 33, 34, 35, 36, 37, 38, 39, 40  
were read on this motion to/for JUDGMENT - DEFAULT

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

Third-Party Plaintiff Nokit Realty Corp (hereinafter “Nokit”) moves, pursuant  
to CPLR 3215, for an Order granting it a default judgment against Third-Party  
Defendants Wail Shujaieh (“Wail”) and Elegant Linen of NY Inc. (“Elegant”).

After a review of the motion papers, as well as consideration of the relevant statutes and case law, the motion, which is unopposed, is **denied with leave to renew upon proper papers.**

This personal injury action was commenced by plaintiff Anny Trejo (“Trejo”) on or about March 23, 2017 by filing of a Summons and Complaint (Docs. No. 1 and 36).<sup>1</sup> Trejo alleged that she was injured when she fell on the sidewalk/ramp at or near the building located at and known as 1283-85 St. Nicolas Avenue, New York, New York, on or about February 23, 2017 and that the incident occurred due to the negligence of Defendants Nokit Realty Corp. and Saint Nicholas Electronics.<sup>2</sup> Issue was joined by Defendant Nokit on or about April 19, 2017. Docs. No. 7 and 16.

On or about November 17, 2017, Nokit filed a Third-Party Complaint against Third Party Defendants Wail and Elegant. Docs. No. 33 and 34. This Court notes that both the Answer filed by Nokit and the Third-Party Complaint filed by Nokit are verified only by its attorney. In Nokit’s Affirmation in Support, its attorney, Tara A. Bonomo, an associate of Gannon, Rosenfaró & Drossman, represents that Nokit commenced the third-party action against Wail and Elegant “based on the

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<sup>1</sup> All references are to the documents filed with NYSCEF in connection with this matter.

<sup>2</sup>First-Party Defendant St. Nicholas Electronics has not yet appeared in the action.

language in the lease agreement”.<sup>3</sup> Doc. 34, at par. 5. Service was effected on Elegant by serving the Secretary of State. Doc. 31. Service was allegedly effected on Wail by serving a person of suitable age and discretion. Doc. 32. The Affidavit of Service on Wail indicates that process was served at his “dwelling house (usual place of abode) within the state.” Id. However, this Court notes that the premises where Wail was allegedly served has the same address as Elegant and the lease indicates that this is a commercial, not a residential, location. Doc. 28. Therefore, there is a discrepancy regarding Wail’s actual place of abode which must be clarified by Nokit before this Court can deem service proper.

Nokit, through its attorney, alleges that it has a meritorious cause of action against the Third-Party Defendants for both negligence and contractual liability pursuant to the lease agreement for which the Third-Party Plaintiffs will be responsible, including costs, disbursements and attorneys’ fees. Doc. 34, at par. 8. Nokit additionally alleges that Third-Party Defendants’ time to answer has not been extended and that they are now in default. Doc. 34, at par. 9.

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

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<sup>3</sup> A copy of the lease was appended to the Third-Party complaint, Doc. No. 28.

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).

Initially, this Court denies the motion because plaintiff failed to establish that Wail was properly served with the Third-Party Summons and Complaint, as discussed above. Without proof of such service, plaintiff cannot establish that Wail failed to answer or otherwise appear in this action.

Additionally, this Court denies the motion because plaintiff 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). Throughout her Affirmation in Support, Nokit’s attorney references the Third-Party

Complaint in an attempt to establish the merit of Nokit's claim. However, this is improper since the Third-Party Complaint is affirmed only by an attorney.

A complaint verified by counsel 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). Since the Third-Party Complaint is unverified by a party with personal knowledge, this Court may not rely on it as proof of any of the facts alleged. *See Martinez v Reiner*, 103 AD3d at 478. Since Nokit fails to submit an affidavit of merit by an individual with personal knowledge, there is simply no evidentiary basis to permit this Court to issue a default judgment on its claim. *See Mejia-Ortiz v Inoa*, 71AD3d at 517; *Beltre v Babu*, 32 AD3d at 723.

Moreover, this Court notes that Nokit's Affirmation in Support fails to set forth in any detail the basis for its default motion. Although Nokit refers vaguely to the lease agreement and the language contained therein, it does not specify any provision(s) on which it bases its claims. Without such specificity, Nokit clearly fails to set forth the facts which allegedly constitute its claims.

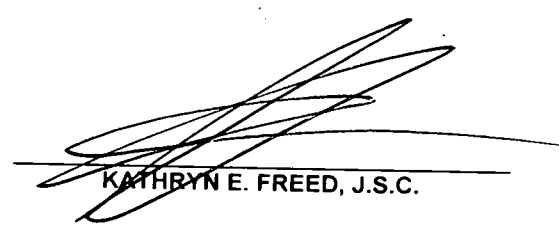
Therefore, in light of the foregoing, it is hereby:

ORDERED that Third-Party Plaintiff Nokit Realty Corp's motion is denied, with leave to renew upon proper papers; and it is further,

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

4/19/2018

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

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

DENIED

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

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: