

McGraw-Hill Global Educ. Holdings, LLC v NetWork Group, LLC
2018 NY Slip Op 32355(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 153121/2018
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

Justice

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INDEX NO.

153121/2018

MCGRAW-HILL GLOBAL EDUCATION HOLDINGS, LLC,

Plaintiff,

MOTION SEQ. NO.

001

- v -

NETWORK GROUP, LLC,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12

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.**

The underlying action was commenced on or about April 7, 2018, by service of the Summons and Complaint (Doc. No.3) by plaintiff, McGraw-Hill Global Education Holdings, LLC, (hereinafter "MHE") for breach of contract or, in the alternative, for money had and received, against defendant NetWork Group, LLP ("NetWork"). Plaintiff alleges that in 2016 MHE was searching for office space and entered into a sublease with defendant. In consideration for the sublease, MHE "provided Network with a \$75,000 security deposit and \$150,000 in prepaid sublease fees." See Complaint, ¶ 3, Doc No. 2. Plaintiff alleges that defendant failed to fulfill its obligations under the sublease and subsequently defaulted on the master lease and was unable to deliver the space to MHE but failed to return the fees. Plaintiff further alleges that

NetWork's CEO and managing member, Frank Bistran, has "repeatedly acknowledged NetWork's debt to MHE and repeatedly promised that payment would be forthcoming." Id at ¶ 5.

Plaintiff now moves, pursuant to CPLR 3215, for an order granting it a default judgment against defendant. Plaintiff, through its attorney, Saul B. Shipiro, Esq., a member of the law firm of Patterson Belknap Webb & Tyler LLP, affirms that the summons and complaint were properly served on defendant (Doc. No. 3) and that the time for defendant to answer has expired without defendant answering or otherwise moving in any manner with respect to said complaint.

Plaintiff also submits an affidavit in support of the instant motion signed by its Vice President, Real Estate, Thomas Rooney. Doc. No. 9. Rooney avers that he has reviewed the complaint and that he is familiar with the facts and circumstances detailed therein, and that the allegations in the complaint are true and accurate to the best of his knowledge. Id.

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).

This Court notes that, although plaintiff submits an affidavit in support of the instant motion sworn to by Rooney, this, alone, is insufficient to establish its entitlement to a default judgment against defendant given its failure to annex the Sublease, the Letter Agreement between the parties allegedly terminating the sublease, including MHE's reservation of "Subtenants rights or remedies available at law or in equity" Id at ¶ 5. Likewise, plaintiff has failed to annex copies of the numerous acknowledgements of the debt by NetWork. Plaintiff also fails to annex proof of actual payment of the monies allegedly owed to it. Thus, plaintiff has 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).

Finally, plaintiff has failed to show compliance with CPLR 3215 (g) in that the Affidavit of Service for the within motion only attests to service of the Notice of Motion for Default Judgment, Affirmation of Saul Shapiro in Support, Affidavit of Thomas Rooney in Support, Proposed Order and Affirmation of Non-Military Service. It is not clear that an actual letter warning of defendant's default in answering the Summons and Complaint or a second copy of these documents were ever served on defendant NetWork Group, LLP.

In light of the foregoing, it is hereby:

ORDERED that plaintiff'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.

9/20/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

☐

GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE