

New Era Lending LLC v Cheap Embroidery, LLC

2018 NY Slip Op 32878(U)

November 8, 2018

Supreme Court, New York County

Docket Number: 151881/2016

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 IAS MOTION 2

Justice

-----X INDEX NO. 151881/2016

NEW ERA LENDING LLC,

Plaintiff,

MOTION SEQ. NO. 003

- v -

CHEAP EMBROIDERY, LLC d/b/a CHEAP EMBROIDERY and
MICHAEL LEWIS,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39
were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action by plaintiff New Era Lending LLC seeking damages for, inter alia, breach of contract, plaintiff moves, pursuant to CPLR 3215, for a default judgment against defendant Cheap Embroidery, LLC d/b/a Cheap Embroidery (the corporation) and defendant Michael Lewis (Lewis) (collectively defendants). After oral argument and a review of plaintiff's motion papers and the relevant statutes and case law, the application, which is unopposed, is decided as set forth below.

In November 2015, plaintiff and the corporation entered into a contract (the agreement) pursuant to which plaintiff agreed to purchase all rights to the corporation's future receivables, which had an agreed value of \$118,915. Ex. A to Doc. 38.¹ Pursuant to the agreement, the corporation agreed to have a bank account, approved by plaintiff, from which the corporation

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

authorized plaintiff to make daily withdrawals until \$118,915 was fully paid to plaintiff. Lewis agreed to guarantee all amounts owed to plaintiff by the corporation. *Id.* The corporation initially performed pursuant to the agreement but, after paying plaintiff \$29,479, it stopped making payments and prevented plaintiff from making any further withdrawals from its bank account.² This left the corporation owing a balance of \$89,436, plus a blocked account fee of \$5,000, for a total of \$94,436.00.

On March 4, 2016, plaintiff commenced the instant action against defendants sounding, *inter alia*, in breach of contract, seeking payment of the outstanding balance of \$94,436. Although both defendants were served with process on March 16, 2016, only Lewis answered the complaint. Docs. 2, 3 and 4.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against both defendants on the ground that they failed to appear on June 19, 2018 for a mediation conference scheduled by this Court.

As noted previously, the corporation was served on March 16, 2016. Since it failed to answer, it was in default as of April 2016. Since plaintiff “fail[ed] to take proceedings for the entry of judgment within one year after the [corporation’s] default” in answering, the complaint is dismissed as against the corporation. CPLR 3215 (c).

Additionally, plaintiff has failed to establish its entitlement to a default judgment against Lewis. Although Lewis failed to appear for a court ordered conference on June 19, 2018, plaintiff failed to submit “requisite proof” of the amount allegedly owed by said defendant. CPLR 3215 (a). 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

² Plaintiff does not specify the date on which the corporation stopped making the required payments.

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). Here, since the complaint is not verified and no affidavit of an individual with personal knowledge of the claim has been submitted, this Court cannot enter a default judgment against Lewis in the amount demanded. Moreover, plaintiff has failed to submit proof that a notice of default was served on Lewis in accordance with CPLR 3215(g)(3). Nor does plaintiff submit a non-military affidavit pertaining to Lewis. Finally, plaintiff submitted all exhibits to the instant motion as a single efiled document, instead of separating the separate exhibits in accordance with the part rules issued by the undersigned.

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

ORDERED that the complaint is dismissed as against defendant Cheap Embroidery, LLC d/b/a Cheap Embroidery, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of defendant Cheap Embroidery, LLC d/b/a Cheap Embroidery, and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that the claims against defendant Cheap Embroidery, LLC d/b/a Cheap Embroidery are severed and the remaining claims shall continue; and it is further

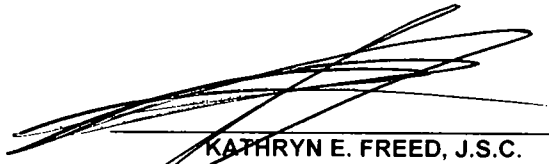
ORDERED that the branch of plaintiff's motion seeking a default judgment against defendant Michael Lewis is denied with leave to renew upon proper papers within 60 days of the entry of this order, upon penalty of dismissal; and it is further

ORDERED that plaintiff's motion for default is otherwise denied; and it is further

ORDERED that, within 20 days hereof, counsel for the moving party shall serve a copy of this order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are hereby directed to mark the court's records to reflect the change of the caption herein; and it is further

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

11/8/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

OTHER

APPLICATION:

GRANTED

GRANTED IN PART

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT