

**Town of Southold v Basso Motors Mfg. & Equip.
Repair, LLC.**

2019 NY Slip Op 30839(U)

March 26, 2019

Supreme Court, Suffolk County

Docket Number: 22689/2013

Judge: William G. Ford

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT
_____ X
TOWN OF SOUTHOLD & TOWN BOARD
OF THE TOWN OF SOUTHOLD,

Plaintiffs,

-against-

BASSO MOTORS MANUFACTURING &
EQUIPMENT REPAIR, LLC.,

Defendant.

_____ X

Motion Submit Date: 09/20/18
Mot Seq 002 MG; CASE DISP

PLAINTIFF'S COUNSEL:
WILLIAM M. DUFFY, ESQ.
Southold Town Attorney
By: Damon A. Hagan, Esq.
Town Hall Annex
54375 Route 25, P.O. Box 1179
Southold, New York 11971

DEFENDANT PRO SE:
BASSO MOTORS MANUFACTURING
EQUIPMENT REPAIR, LLC.
156 West Main Street
Riverhead, New York 11901

On plaintiff's unopposed motion for entry of default judgment & striking of defendant's answer pursuant to CPLR 3215(a) & 22 NYCRR § 202.7, the Court considered the following:

1. Notice of Motion & Affirmation in Support and supporting papers;
2. Affirmation in Opposition;
3. Reply Affirmation in Further Support; and upon due deliberation and full consideration of the same; it is

ORDERED that plaintiff's motion seeking to strike defendant's answer and enter judgment on their default under CPLR 3215(a) for their failure to appear is **granted** as follows; and it is further

ORDERED that counsel for plaintiff serve a copy of this decision and order with notice of entry personally on defendant forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that plaintiff's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

Plaintiff Town of Southold as well as its town board commenced this action filing summons with notice on August 22, 2013 against defendant Basso Motors Manufacturing & Equipment Repair, LLC. A complaint was subsequently filed on January 21, 2014 alleging causes of action of breach of contract, breach of warranty, fraudulent misrepresentation and negligence against defendant. The dispute arises from the Town's hiring defendant to repair a

certain piece of heavy equipment at a fixed cost. The Town paid defendant an agreed upon price, but alleges that defendant's repairs were shoddy, as confirmed by independent inspection. The Town then further expended monies as costs to cover, and now seeks recovery of the original repair price plus additional costs.

Defendant joined issue serving an answer with affirmative defenses dated February 12, 2014. Since then, defendant's counsel withdrew with leave of this Court by order dated April 19, 2018. The matter was stayed 30 days to afford defendant a reasonable time to obtain substitutionary counsel. To date, no such counsel has appeared on defendant's behalf. Presently, plaintiff now moves this Court unopposed for entry of default judgment against defendant striking its answer for its failure to provide demanded pretrial disclosure and its failure to appear at scheduled court proceedings.

As an initial matter, the Court notes the plainly obvious: defendant is an LLC. It was previously represented by legal counsel which withdrew with leave of court. Since then, the LLC has not retained substitute counsel and has apparently sought to continue to defend this matter in a *pro se* fashion. However, this alone violates the law and is grounds for entry of default judgment against it. Settled law within the Second Department holds that "[a]n LLC, like a corporation or voluntary association, is created to shield its members from liability and once formed is a legal entity distinct from its members" and that "like a corporation or a voluntary association, the LLC may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the State of New York (*see Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593-94, 835 NYS2d 640, 641 [2d Dept 2007]; *accord Seidler v Knopf*, 153 AD3d 874, 875, 61 NYS3d 94, 96 [2d Dept 2017])[individual defendants' unsuccessful attempt to appear on behalf of the defendant limited liability companies in violation of CPLR 321(a) constituted grounds for entry of default]).

As noted above, in the prior order, this Court stayed this matter for 30 days to afford defendant sufficient time to retain or obtain substitutionary counsel. To date, defendant has either not either done so, or if it has, it has not apprised plaintiff or the Court of this development. Given this, plaintiff's application is **granted**, and default shall be entered against the defendant (*see e.g. Mail Boxes Etc. USA, Inc. v Higgins*, 281 AD2d 176, 721 NYS2d 524 [1st Dept 2001])[ruling where motion court previously directed the corporate defendant to appear by attorney, as required by CPLR 321(a), within 30 days, or face default, and having failed to do so, the default judgment against it determined as properly granted]; *see also World on Columbus, Inc. v L.C.K. Rest. Group, Inc.*, 260 AD2d 323, 324, 689 NYS2d 64, 65 [1st Dept 1999])[construing CPLR 321 and holding corporate defendant was properly held in default on the motion for failure to appear by attorney]).

Generally speaking "[a] party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215' " (*U.S. Bank, N.A. v Razon*, 115 AD3d 739, 740, 981 NYS2d 571, *quoting Beaton v. Transit Facility Corp.*, 14 AD3d 637, 637, 789 NYS2d 314; *see Todd v. Green*, 122 AD3d 831, 831-832, 997 NYS2d 155). Entitlement to the entry of default judgment, requires submission of proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default in answering or appearing (*Roy v 81E98th KH Gym, LLC*, 142 AD3d 985, 985, 37 NYS3d 337, 338-39 [2d Dept 2016]). It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's

claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, *Cleary v East Syracuse-Minoa Cent. School Dist.*, 248 AD2d 1005; *Lichtman v Sears, Roebuck & Co.*, 236 AD2d 373).

Generally, a process server's affidavit of service constitutes prima facie evidence of proper service” (*Scarano v. Scarano*, 63 AD3d 716, 716, 880 NYS2d 682; see *NYCTL 2009–A Trust v. Tsafatinos*, 101 AD3d 1092, 1093, 956 NYS2d 571; *Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983, 984, 912 NYS2d 96). Bare and unsubstantiated denials are insufficient to rebut the presumption of proper service (see *Wachovia Bank N.A. v. Greenberg*, 138 AD3d 984, 985, 31 NYS3d 110; *Wells Fargo Bank, N.A. v. Christie*, 83 AD3d 824, 825, 921 N.Y.S.2d 127; *Wachovia Mtge. Corp. v Toussaint*, 144 AD3d 1132, 1133, 43 NYS3d 373, 374 [2d Dept 2016]).

Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits” (see *Edwards, Angell, Palmer & Dodge, LLP v. Gerschman*, 116 AD3d 824, 825, 984 NYS2d 392; *Simonds v. Grobman*, 277 AD2d 369, 370, 716 NYS2d 692; *Mtge. Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733, 733, 5 NYS3d 112, 113 [2d Dept 2015]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (*Ennis v. Lema*, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (see *McHenry v. San Miguel*, 54 AD3d 912, 864 NYS2d 541; *Thompson v. Steuben Realty Corp.*, 18 AD3d 864, 795 NYS2d 470; *Gambardella v. Ortov Lighting, Inc.*, 278 A.D.2d 494, 495, 717 N.Y.S.2d 923 [2d Dept. 2000]).

In determining whether a party has a viable cause of action, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff (see *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156; *Feffer v. Malpeso*, 210 A.D.2d 60, 619 N.Y.S.2d 46), *Beaton v. Transit Facility Corp.*, 14 A.D.3d 637, 637, 789 N.Y.S.2d 314, 315 (2005). Judgment by default further requires “proof by affidavit made by the party of the facts constituting the claim, the default and the amount due”, or at least a verified complaint (*Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 A.D.2d 227, 228, 662 N.Y.S.2d 19, 19 [1997]).

Pursuant to CPLR 3215(f), plaintiff is required to submit for judicial review the viability of the facts underlying movant’s claims, either by affidavit or verification of the pleadings (see e.g. CPLR 3215[f]; *Giovanelli v. Rivera*, 23 AD3d 616, 804 NYS2d 817; *599 Ralph Ave. Dev., LLC v. 799 Sterling Inc.*, 34 AD3d 726, 726, 825 NYS2d 129, 129-30 [2d Dept. 2006]) [Supreme Court properly granted the plaintiff's motion for leave to enter judgment against the defendant upon the plaintiff's submissions of proof of service of the summons and complaint, a factually-detailed verified complaint, and an affirmation from its attorney regarding the defendant's default in appearing and answering]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003][CPLR 3215(f) requires that an applicant for a default judgment file “proof by affidavit made by the party of the facts constituting the claim.” A verified complaint may be

submitted instead of the affidavit when the complaint has been properly served]).

On review, plaintiff has adequately carried its burden of demonstration compliance with CPLR 3215. Moreover, analyzing separately and independently, defendant's party's failure to appear before the Court for a scheduled conference, the New York State Uniform Rules for the Trial Courts provides that:

At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

(a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.

22 NYCRR 202.27 [McKinney's 2017]

A default judgment entered on application pursuant to 22 NYCRR 202.27(a) based upon a defendant's default in appearing at a conference, may be vacated only if the defendant can demonstrate both a reasonable excuse for the default in appearing and a meritorious defense (*see Bloom v. Primus Automotive Fin. Servs.*, 292 AD2d 410, 738 NYS2d 861; *Lopez v. Imperial Delivery Serv.*, 282 AD2d 190, 197, 725 NYS2d 57; *Tragni v Tragni*, 21 AD3d 1084, 1085, 803 NYS2d 617, 618 [2d Dept 2005]).

The Court is mindful as plaintiff concedes that defendant has joined issue in this action, asserting affirmative defenses to plaintiff's complaint (*see e.g. M.S. Hi-Tech, Inc. v Thompson*, 23 AD3d 442, 443, 808 NYS2d 122, 122 [2d Dept 2005])[on review of motion court's consideration of motion for default for nonappearance of a party under CPLR 3215(a), Appellate Division found that a verified pleading containing defenses could constitute a meritorious defense to the action). It is well settled that the determination as to what constitutes a reasonable excuse for a default is generally within the sound discretion of the trial court (*Levy Williams Const. Corp. v U.S. Fire Ins. Co.*, 280 AD2d 650, 651, 721 NYS2d 376, 377 [2d Dept 2001]).

Again, here defendant was on notice that its attorney withdrew both by receipt of the application and service of the prior order with notice of entry. By this Court's order, this litigation was stayed for 30 days, and after the stay lifted, appeared on several instances before this Court in 2018 with no appearance by defendant. Thus, plaintiff was given leave to make the instant application. Since then each time this matter has appeared on the Court's calendar, it has adjourned with no appearance by defendant. Further and more importantly, defendant has not opposed plaintiff's instant motion. Thus, this Court determines that plaintiff is entitled to the requested relief.

Accordingly, plaintiff's motion is **granted** in its entirety without opposition. Thus, defendant's answer is stricken, and default is entered as to defendant.

Thus, it is

ORDERED that defendant shall be deemed in default for his failure to appear at the conference scheduled for December 13, 2018 and for failure to comply with prior orders of this Court.

Accordingly, it is hereby **ORDERED, ADJUDGED AND DECREED** that plaintiff's application for a default judgment is **granted** as against the defendant in the aggregate sum of \$ 67,500.00, plus interest from August 22, 2013, plus costs, fees and disbursements, as well as attorneys' fees in the amount of \$ 1,575.00, the reasonableness of which has been adequately established to this Court's satisfaction (*Prince v Schacher*, 125 AD3d 626, 628, 2 NYS3d 585, 587 [2d Dept 2015]).

The foregoing constitutes the decision, order and judgment of this Court.

Dated: March 26, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION