

**Kobax Corp. v Townhouse Renovations Inc.**

2019 NY Slip Op 32119(U)

July 16, 2019

Supreme Court, New York County

Docket Number: 159085/2017

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 2EFM**

*Justice*

-----X **INDEX NO.** 159085/2017

KOBAX CORP.,

Plaintiff,

**MOTION SEQ. NO.** 003

- v -

TOWNHOUSE RENOVATIONS INC. and MKB FAMILY LLC,

**DECISION AND ORDER**

Defendants.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for RENEW/DEFAULT JUDGMENT

In this action by plaintiff Kobax Corp. (“Kobax”) against Townhouse Renovations Inc. (“TRI”) and MKB Family LLC (“MKB”) (collectively “defendants”) seeking, inter alia, to foreclose on a mechanic’s lien, Kobax moves (mot. seq. 001): 1) pursuant to CPLR 2221 (a) and (e), for leave to renew; and 2) pursuant to CPLR 3215, for a default judgment against TRI. TRI does not oppose Kobax’s motion. After a review of the motion papers and the relevant statutes and case law, the motion is granted.

**FACTUAL AND PROCEDURAL BACKGROUND:**

In or about August of 2016, TRI and MKB entered into an agreement pursuant to which TRI agreed to renovate a property owned by MKB located at 109 East 81<sup>st</sup> Street, New York, New York (“the premises”). In or about September 2016, Kobax and TRI entered into a subcontract pursuant to which Kobax agreed, inter alia, to perform significant construction and demolition

work at the premises. The agreed value of the labor and materials under the contract was \$219,670. Kobax claims that, although it fully performed its obligations under the contract by January 2017, it has only been paid in part for its work and the materials and it is still owed \$72,982.

On April 17, 2017, Kobax filed a notice of mechanic's lien against the premises claiming that it was owed \$72,982 under the contract. Doc. 3 at par. 7. Kobax commenced the captioned action against TRI and MKB by filing a summons and verified complaint on October 11, 2017. Doc. 2. On or about the same date, Kobax filed a notice of pendency stating that it had commenced litigation to foreclose on the mechanic's lien. Doc. 21. In its complaint, Kobax sought to foreclose on its mechanic's lien and set forth claims for an account stated, breach of contract, and unjust enrichment. Doc. 2. Kobax also alleged conversion and violations of Labor Law §§ 76 and 77 as against TRI only. Doc. 2. On November 7, 2017, TRI and MKB were served with process via the Secretary of State pursuant to Business Corporation Law § 306 and Limited Liability Company Law § 303, respectively. Doc. 7.

On March 5, 2018, Kobax moved (motion sequence 001) for a default judgment as against TRI *inter alia*. Doc. 9. In support of the motion, Kobax submitted an attorney affirmation attesting, *inter alia*, to the fact that defendants failed to answer; the notice of mechanic's lien; the summons and verified complaint; and the affidavits of service of the summons and complaint.

By order entered April 18, 2019, this Court denied plaintiff's motion for a default judgment against TRI, with leave to renew upon proper papers. Doc. 33.

**LEGAL CONCLUSIONS:****Kobax's Motion for a Default Judgment**

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 in order to establish its entitlement to a default judgment pursuant to CPLR 3215, a party must 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. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1<sup>st</sup> Dept 2016). A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

In motion sequence 001, Kobax submitted proof of service of the summons and complaint on TRI and established the default by representing that TRI failed to answer or otherwise appear. However, Kobax failed to establish the facts constituting the claim, because it failed to submit either a complaint verified by a party with personal knowledge of the facts of the case, or an affidavit by such an individual. *See Mullins v DiLorenzo*, 199 AD2d 218, 219–20 (1st Dept 1993). The Court pointed out that an attorney affirmation does not suffice for this purpose. *See Mattera v Capric*, 54 AD3d 827, 828 (2d Dept 2008). Nor will a complaint verified by counsel, which “amounts to no more than an attorney’s affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215.” *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994). Since Kobax submitted neither a complaint verified by, nor an affidavit executed by, an individual with personal knowledge of the facts constituting the alleged claim, it failed to establish its entitlement to a default judgment against TRI.

In support of the instant motion to renew, plaintiff submits an affidavit by Thomasz Kobriera, the president of plaintiff Kobax. Doc. No. 42. Kobriera attests to his personal knowledge of the facts, including that he authorized the subcontract between plaintiff and TRI. He further states that he agrees with the claims as set forward by plaintiff's counsel in this motion for a default judgment. He avers that plaintiff performed the work pursuant to the contract and was only partially paid for its work and materials. Finally, he avers that Kobax is still owed the amount of \$72,982.00 for labor and materials. Thus, plaintiff has set forth the facts constituting its claim.

Therefore, in light of the foregoing, it is hereby

**ORDERED** that plaintiff's motion to renew is granted and, upon renewal, Kobax Corp.'s motion for a default judgment against defendant Townhouse Renovations Inc. is granted; and it is further

**ORDERED** that the Clerk is directed to enter judgment in favor of plaintiff Kobax Corp. and against defendant Townhouse Renovations Inc. in the amount of \$72,982.00, plus interest from January 1, 2017, as well as costs and disbursements, all of which are to be calculated by the Clerk; and it is further

**ORDERED** that plaintiff Kobax Corp. shall serve a copy of this order on defendants Townhouse Renovations Inc. and MKB Family Inc., as well as on the Clerk of the Court at 60 Centre Street, Room 119 and the Trial Support Office at 60 Centre Street, Room 158; and it is further,

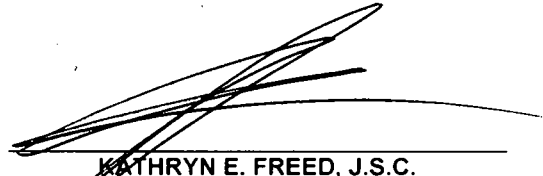
**ORDERED** that the judgment against Townhouse Renovations Inc. is hereby severed and the action shall continue against the remaining defendant; and it is further

**ORDERED** that the remaining parties are to appear for a preliminary conference in this matter, currently set for August 6, 2019 at 2:15 p.m. in IAS Part 2, 80 Centre Street, Room 280; and it is further

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

7/16/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE