

Sofia Bros., Inc. v Goldberg

2019 NY Slip Op 32309(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 160349/2018

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. 160349/2018

SOFIA BROS., INC.

Plaintiff,

MOTION SEQ. NO. 001

- v -

LISSA DEUTSCH GOLDBERG,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for JUDGMENT - DEFAULT

In this action seeking money damages for, inter alia, breach of contract, account stated and attorney's fees, plaintiff Sofia Bros. Inc. moves, pursuant to CPLR 3215, for a default judgment against defendant Lissa Deutsch Goldberg. The motion is unopposed. After a review of the motion papers, as well as the relevant statutes and case law, the motion is denied with leave to renew upon proper papers.

The underlying action was commenced on or about November 7, 2018, by filing the Summons and Complaint on the Court. Doc. 1. Plaintiff served the Summons and Complaint on defendant on or about December 6, 2018. Doc. 2. An Amended Complaint (Doc. 4) was served on defendant by mail on February 5, 2019. Doc. 5.

In an affidavit in support, Leonard Sofia, the vice president of Sofia Bros, Inc., alleges that, on or about, December 1, 1985, plaintiff and defendant entered into a lease agreement

pursuant to which defendant leased certain rooms at plaintiff's facility at 475 Amsterdam Avenue, New York, NY. Doc. No. 12. Sofia alleges that defendant made periodic payments and annexes a copy of her payment history. Doc. No. 13. The payment ledger reflects that the last payment made was on 3/7/17 in the amount of \$3,315.00, which left a balance due at that time of \$7,105.00. The last date of entry on the ledger is 10/16/2017. As of that date, the amount of rent charged bi-monthly, was \$355, plus a \$20.00 late fee. The total amount of back rent due as of that date was \$9,750.00.

Plaintiff additionally annexes a copy of an Invoice, dated October 22, 2018, reflecting the amount due as of November 1, 2018, as \$33,170.00. The Invoice indicates that it was mailed to Lisa Goldberg at 711a Cedar Lane, Teaneck, NJ, 07666. Doc. 14. Sofia represents that the total amount due and owing from plaintiff, as stated in the amended complaint, is \$32,295.00, which does not reflect additional rent of \$875.00 per month owed from 11/1/2018. Plaintiff claims that the additional rent of \$875.00 per month is payable until this matter is adjudicated. Doc. No. 8, ¶5.

Plaintiff now moves, pursuant to CPLR 3215, for an order granting it a default judgment against defendant. Plaintiff, by affirmation of David W. Chefec, Esq., of law firm of David W. Chefec, PC, affirms that the summons and complaint were properly served on defendant (Doc. No. 7) and that the time for defendant to answer has expired without defendant answering or otherwise moving in any manner with respect to said complaint. Id at 7. Chefec further avers that an additional notice of the Summons and Complaint in compliance with CPLR 3215(g)(4)(i), was also served on defendant. Doc. 11. Finally, plaintiff submits proof of service

of the motion on defendant. Doc. 15. Finally, Chefec states that he is owed legal fees of \$2,500.00; sets forth his hours expended in connection with this law suit; his qualifications; and avers that his legal fees are fair and reasonable in relation to the services rendered.

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 Sofia, this alone is insufficient to establish its entitlement to a default judgment against defendant given its failure to annex a copy of a contemporaneous Lease Agreement or Rider between the parties reflecting the most recent rental amount. Nor does the Lease Agreement provided contain copies of Articles #1 thru #15 which are referenced as part of the original agreement. Likewise, plaintiff has failed to annex copies of any monthly invoices it sent to defendant except for the invoice of November 1, 2018. Nor has plaintiff explained to the Court’s satisfaction how the amount owed was raised from \$9,750.00 as of 10/16/2017, to \$33,170.00 due as of November 1, 2018. Finally, the Court is especially disturbed by the inference in Leonard Sofia’s Affidavit that the bi-weekly rent will continue to accrue until this matter is adjudicated. In its motion, plaintiff fails to indicate a termination date, and, since plaintiff is only suing for back rent and not to terminate the lease for non-payment, plaintiff

could, arguably, continue to charge defendant. This also leaves the Court to speculate as to whether defendant is still utilizing the space or not.

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).

In light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied, with leave to renew upon proper papers within 30 days, upon penalty of dismissal; and it is further,

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

7/31/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	