

Perez v Batiz

2019 NY Slip Op 32866(U)

September 26, 2019

Supreme Court, New York County

Docket Number: 651888/2018

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 651888/2018

ANGEL PEREZ and B & A RESTORATION
CONTRACTORS INC.,

MOTION DATE 09/24/2019

Plaintiffs,

MOTION SEQ. NO. 001

- v -

EDWIN BATIZ, BAR 13, INC., and ZOE REALTY CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiffs for a default judgment against defendants Edwin Batiz, Bar 13, Inc. and Zoe Realty Corp. is granted, and the inquest for an assessment of damages against such the defendants is referred to a Special Referee to hear and determine; and it is further

ORDERED that this matter having come on before this court on September 24, 2019, on motion of the plaintiffs for a default judgment and the plaintiffs having been represented in connection therewith by Tamir Young, Esq., the defendant Edwin Batiz having been represented in connection therewith by Louis Klieger, Esq., and the defendants Bar 13, Inc. and Zoe Realty

Corp. having defaulted in answering or otherwise appearing and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, the issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) an assessment of damages on the first cause of action of the complaint against defendants Bar 13, Inc. and Zoe Realty, Inc.;
- (2) an assessment of damages on the second and third causes of action of the complaint against defendant Bar 13, Inc.;
- (3) an assessment of damages on the fourth cause of action of the complaint against all defendants;
- (4) an assessment on the fifth and sixth causes of action of the complaint against defendants Batiz and Bar 13, Inc.;
and
- (5) an assessment of damages on the seventh cause of action as against defendant Batiz; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail, with proof of service by regular first class mail upon defendants Bar 13, Inc. and Zoe Realty Corp. at each such corporate defendants last known address[es], an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the plaintiff, counsel for defendant Edwin Batiz, and the corporate defendants by regular first class mail to such corporate defendants' last known address[es], of the date

fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties, accompanied by their counsel, shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED and ADJUDGED that pursuant to CPLR 3215(b), the Clerk is directed to enter judgment in favor of plaintiffs and against the defendants Edwin Batiz, Bar 13, Inc. and Zoe Realty Corp., in

accordance with the Report of the aforementioned Special Referee, without any further application.

DECISION

Distinguishable on its facts from Sterk-Kirch v Uptown Communications & Elec., Inc., 124 AD3d 413, 413-414 (1st Dept. 2015), where plaintiffs failed to demonstrate that they additionally served the corporate defendant by first class mail at its last known address, as required by CPLR 3215(g)(4), plaintiffs at bar submit affidavits of service of the herein motion papers, to which copies of the summons and complaint are attached, which affidavits aver that such supporting papers were served by regular first class mail at the last known address(es) of the corporate defendants herein. See Aydin v New Super Gujrat Auto Repair, Inc., 34 Misc3d 1221(A), *1 (Sup Ct, Kings County 2012).

The proposed Answer that defendant Batiz appends to his opposition papers, is verified by his attorney only and therefore is inadequate to demonstrate that such defendant has a meritorious defense to the complaint. See Grinshpun v Borokhovich, 100 AD3d 551 (1st Dept. 2012). However, a default judgment has yet been entered, defendant need not demonstrate a meritorious defense, but only need establish a reasonable excuse for his failure to timely answer the complaint. See Nabel Elec. V Triton Structural Concrete, Inc., 160 AD3d 507, 508 (1st Dept.

2018). However doubling down on the omission of any affidavit of the individual defendant, defense counsel asserts in his opposing affirmation that "on information and belief, at all times mentioned in the affirmation of Tamar Young, Esq., good faith negotiations were continuing between the Plaintiff's and all the Defendants". As defense counsel admits that he has no personal knowledge of the facts of the reasons for defendant Batiz's failure to answer until almost a year after his answer was due, proffering a proposed answer with counterclaim only upon receipt of plaintiffs' motion for default, defendant Batiz has failed to demonstrate a reasonable excuse. See Stellato v Petrillo, 95 AD2d 704 (1st Dept. 1983).

9/26/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

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