

**Romero v WIP Lennar OHB, LLC**

2019 NY Slip Op 33437(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 153556/2018

Judge: Robert D. Kalish

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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. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

-----X

FRANKLIN ROMERO,
Plaintiff,

INDEX NO. 153556/2018

MOTION DATE 10/04/2019

MOTION SEQ. NO. 001

- v -

WIP LENNAR OHB, LLC, LENNAR OHB, LLC, and
LENNAR NEW YORK, LLC,

DECISION + ORDER ON
MOTION

Defendants.

-----X

WIP LENNAR OHB, LLC, LENNAR OHB, LLC, and
LENNAR NEW YORK, LLC,

Third-Party
Index No. 595764/2018

Third-Party Plaintiffs,

-against-

TRI-CON CONSTRUCTION LTD.,

Third-Party Defendant.

-----X

NYSCEF Doc Nos. 18-28 were read on this motion for an order directing the entry of a default judgment.

Motion by Defendants/Third-Party Plaintiffs WIP Lennar OHB, LLC, Lennar OHB, LLC, and
Lennar New York, LLC pursuant to CPLR 3215 for an order directing the entry of a default
judgment in favor of Third-Party Plaintiffs and against Third-Party Defendant Tri-Con
Construction, Ltd. ("Tri-Con") on the issue of liability is granted, there being no opposition
submitted.

BACKGROUND

On July 9, 2019, this Court issued an order directing the entry of a default judgment in a
related case, commenced on January 22, 2019, under index number 150693/2019 ("Action 2"),
in favor of Plaintiff Franklin Romero and against defendant Tri-Con Construction Ltd. on the
issue of liability and setting the matter down for a trial of the issues regarding damages. Both
actions arise out of the allegations of Plaintiff as to an injury he sustained while working at 1
Sage Court, Middletown, New York 10940 on January 28, 2016, and are memorialized in
complaints alleging general negligence and violations of the labor law.

The instant action ("Action 1" and, together with Action 2, the "Actions") was
commenced on April 18, 2018, while the instant third-party action for indemnification and
contribution was commenced on September 25, 2018. On October 2, 2018, Third-Party Plaintiffs

e-filed an affidavit of service indicating that Tri-Con was served with process by personal service on a manager authorized to accept service pursuant to CPLR 310-a. (NYSCEF Doc No. 11.) On September 23, 2019, Third-Party Plaintiffs filed the instant motion pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Third-Party Plaintiffs and against Tri-Con. Movants argue that Tri-Con was properly served with process, that it has failed to answer, appear, or otherwise respond to the third-party complaint, and that its time to do so has expired. Movants further argue by means of their affidavit of merit that Tri-Con, as subcontractor, agreed to defend and indemnify Third-Party Plaintiffs in the underlying action based on contract. (NYSCEF Doc Nos. 25, 27.)

### DISCUSSION

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.” On a motion for a default judgment pursuant to CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (See CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; see also *Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

This Court has previously found that Tri-Con is in default in the related action. Here, as there, the Court finds based on the papers submitted that movants have shown prima facie that a timely motion for a default judgment has been made by a party, Tri-Con was properly served with process, Tri-Con has failed to appear, answer, or move timely in response to the complaint, and that Tri-Con is now in default. Further, movants have submitted adequate proof of the facts constituting their claims by means of the agreement and affidavit of merit. As such, movants are entitled to the relief sought in the instant motion.

Moreover, at the November 19, 2019 compliance conference, Plaintiff and Defendants/Third-Party Plaintiffs stipulated and agreed to consolidate the related 2019 action under the instant 2018 action as memorialized in the signed compliance conference order.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendants/Third-Party Plaintiffs WIP Lennar OHB, LLC, Lennar OHB, LLC, and Lennar New York, LLC pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Third-Party Plaintiffs and against Third-Party Defendant Tri-Con Construction, Ltd. on the issue of liability is granted, there being no opposition submitted; and it is further

ORDERED that pursuant to CPLR 602 (a) Action 2 shall be consolidated under Action 1 and shall bear the following caption:

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FRANKLIN ROMERO,

Plaintiff,

Index No.:  
153556/2018

- against -

WIP LENNAR OHB, LLC, LENNAR OHB, LLC, LENNAR  
NEW YORK, LLC, and TRI-CON CONSTRUCTION LTD.,

Defendants.

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WIP LENNAR OHB, LLC, LENNAR OHB, LLC, and  
LENNAR NEW YORK, LLC,

Third-Party Plaintiffs,

Third-Party Index No.:  
595764/2018

- against -

TRI-CON CONSTRUCTION LTD.,

Third-Party Defendant.

-----X

And it is further

ORDERED that Action 2 shall be marked disposed, and any note of issue filed thereunder shall be moot; and it is further

ORDERED that the pleadings in the Actions shall stand as the pleadings in the newly consolidated matter; and it is further

ORDERED that movants shall serve a copy of this order with notice of entry on all parties in the Actions, on the Clerk of the Trial Support Office (Room 158M), and on the County Clerk—along with a completed “EF-22, Notice to County Clerk – CPLR § 8019(c),” e-filed under category “Non-Motion Documents>Documents not related to a motion/petition/OSC” with a “Document Type” of “Notice to County Clerk CPLR 8019(C)”—within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that the County Clerk shall consolidate the papers in the Actions and shall mark his records accordingly to reflect the consolidation and change in caption, and the Clerk of the Trial Support Office shall mark the court's records accordingly to reflect the consolidation and change in caption; and it is further

ORDERED that all parties in the newly consolidated matter are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, February 18, 2020, at 9:30 a.m., for a status conference.

The foregoing constitutes the decision and order of the Court.

11/19/2019  
DATE

*Robert D. Kalish*  
HON. ROBERT D. KALISH  
ROBERT DAVID KALISH, J.S.C.  
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