

Prandi v 207 E. 34th Acquisition, LLC

2020 NY Slip Op 30616(U)

March 2, 2020

Supreme Court, New York County

Docket Number: 159561/2018

Judge: W. Franc Perry

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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. W. FRANC PERRY

PART IAS MOTION 23EFM

Justice

-----X
JEANMARIE PRANDI,

INDEX NO. 159561/2018

MOTION DATE 12/17/2019

MOTION SEQ. NO. 001

Plaintiff,

- v -

207 EAST 34TH ACQUISITION, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X
207 EAST 34TH ACQUISITION, LLC

Third-Party
Index No. 595622/2019

Plaintiff,

-against-

LAKHI GENERAL CONTRACTOR, INC.

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - DEFAULT

This is an action by Plaintiff Jeanmarie Prandi against Defendant 207 East 34th Acquisition, LLC ("207 East 34th"), for personal injuries sustained by Ms. Prandi on or near a sidewalk abutting and adjacent to a premises owned by the Defendant. Defendant 207 East 34th filed its Verified Third-Party Complaint against Lakhi General Contractor, Inc., ("Lakhi") on July 22, 2019. (NYSCEF Doc No. 9.) Defendant/Third-Party Plaintiff now moves for default judgment against Lakhi on its claims for breach of contract, contractual and common law indemnification, contribution, and breach of contract for failure to procure insurance. (NYSCEF Doc Nos. 13-14.) The motion has been submitted unopposed.

DEFAULT JUDGMENT

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the Defendant's default in answering or appearing. (*SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912, at *1 [Sup Ct, New York County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

In support of its motion, 207 East 34th provides proof that Lakhi was properly served, under Section 306 of the Business Corporation Law, on July 26, 2019, when the process server delivered a copy of the Verified Third-Party Complaint to the New York Secretary of State. Service on Lakhi was completed on November 14, 2019, when a true copy of the Verified Third-Party Complaint was mailed, in a post-paid wrapper, to Lakhi's actual place of business. An affidavit of service was filed with the court on the same day. (NYSCEF Doc No. 21.)

In lieu of an affidavit of merit, 207 East 34th submits the Verified Third-Party Complaint. (*See e.g., Celnick v Freitag*, 242 AD2d 436, 437 [1st Dept 1997] ["a verified pleading may be used in lieu of an affidavit of merit in default judgment cases"].) To date, Lakhi has not answered the Verified Third-Party Complaint or otherwise appeared.

Despite Lakhi's failure to appear, the court finds that the Verified Third-Party Complaint is insufficient to support entry of default judgment on 207 East 34th's claims for breach of contract, contractual and common law indemnification, contribution, and breach of contract for failure to procure insurance.

While a defendant in default is deemed to have admitted all traversable allegations in the complaint (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Brown v Rosedale Nurseries, Inc.*, 259 AD2d [1st Dept 1999]); “CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60 (1st Dept 1994). As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exist (*Woodson, supra* at 70-72).

(*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].)


Here, the Verified Third-Party Complaint contains only boilerplate recitals directed at Lakhi unsupported by any specific factual allegations. Most importantly, 207 East 34th fails to provide the “written subcontract agreement” described in its Verified Third-Party Complaint. (*See, e.g., Celnick v Freitag*, 242 AD2d 436, 437 [1st Dept 1997] [in default judgment cases, a verified pleading “will not be sufficient if it fails to set forth evidentiary facts”].) Accordingly, Plaintiff’s motion for default judgment is granted only to the extent that Lakhi General Contractor, Inc.’s default to appear in this action is noted. All issues regarding Lakhi’s liability and damages are to be decided at an inquest held at the time of trial.

Thus, it is hereby

ORDERED that Defendant/Third-Party Plaintiff’s motion for default judgment on the Verified Third-Party Complaint herein against Lakhi General Contractor, Inc., is hereby granted, without opposition, to the extent that Lakhi’s failure to appear is noted; and it is further

ORDERED that the degree of liability of Lakhi and 207 East 34th Acquisition, LLC, and Plaintiff's damages attributable to the Defendants are to be decided at an inquest which will be held at the time of trial.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

03/02/20					
DATE			W. FRANC PERRY, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<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 type="checkbox"/> REFERENCE