

**Avenue A Realty Corp. v Mandu LLC**

2020 NY Slip Op 30759(U)

March 12, 2020

Supreme Court, New York County

Docket Number: 159377/2018

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

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AVENUE A REALTY CORP.,
Plaintiff,

INDEX NO. 159377/2018
MOTION DATE 11/19/2019
MOTION SEQ. NO. 002

- v -

MANDU LLC, TRI-STAR EQUITIES, INC., CRAWFORD
FLICK INC. D/B/A THE LIBRARY

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for JUDGMENT - DEFAULT

In motion sequence 002, Plaintiff Avenue A Realty Corporation ("Plaintiff") moves for default judgment against Defendant Crawford Flick, Inc., ("Crawford") only, which, unlike Defendants Mandu LLC ("Mandu") and Tri-Star Equities, Inc., ("Tri-Star"), has not appeared in this action. The motion has been submitted unopposed.

Plaintiff is the owner of the building located at 5 Avenue A, New York, NY 10009. Mandu is the owner of the neighboring building located at 7 Avenue A, New York, NY 10009, while Tri-Star is the managing agent of the property and Crawford is the tenant that currently operates a bar known as "The Library" on the property.

Plaintiff brings claims against Defendants for trespass, nuisance, and injunctive relief stemming from Defendants' placement and use of air conditioning compressors that hung over the Plaintiff's property line. (NYSCEF Doc Nos. 1, 10.) After this Court granted Plaintiff a preliminary injunction and related relief on November 27, 2018 (NYSCEF Doc No. 24),

Defendants Mandu and Tri-Star filed a Verified Answer that included cross-claims against Crawford for contractual and common law indemnification. (NYSCEF Doc No. 27 at 5-6.)

Plaintiff submitted this motion for default against Crawford and supporting affirmations on October 28, 2019, alleging that the Court's November 27, 2018 Order has not been fully complied with. In support, Plaintiff submitted a photograph depicting what appears to be a handful of wires running from the roof of Defendants' building into a hole drilled in the wall a few feet below. (NYSCEF Doc No. 41.)

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, Plaintiff provides proof that Crawford was properly served under Section 306 of the Business Corporation Law on November 1, 2018, when a process server delivered a copy of the Verified Complaint to the New York Secretary of State. (NYSCEF Doc No. 42.) Service on Crawford was completed on October 28, 2019, when a true copy of the Verified Complaint was mailed, in a post-paid wrapper, to Crawford's actual place of business. An affidavit of service was filed with the court on the same day. (NYSCEF Doc No. 43.)

Plaintiff also submits a verified affidavit of merit of Angela Wong, its President. (NYSCEF Doc No. 31.) To date, Crawford has not filed an answer or otherwise appeared.

Despite Crawford's failure to appear, the court finds that the Wong affidavit is insufficient to support entry of default judgment on Plaintiff's claims.

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 affidavit contains only boilerplate recitals directed at Crawford and unsupported by any specific factual allegations. (*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"].) For instance, Ms. Wong alleges that "the Defendants have completely ignored Plaintiff's demands to remove the Compressors," but, based on the evidence submitted, it appears that the compressors have already been removed. (NYSCEF Doc No. 41.) Ms. Wong further alleges that the overhanging wires pose a risk of irreparable injury but fails to identify what that injury would be.

Accordingly, Plaintiff's motion for default judgment is granted only to the extent that Crawford's default to appear in this action is noted. All issues regarding Crawford's liability and damages are to be decided at an inquest held at the time of trial. Thus, it is hereby

ORDERED that Plaintiff's motion for default judgment on the Verified Complaint herein against Crawford Flick, Inc., is hereby granted, without opposition, to the extent that Crawford's failure to appear is noted; and it is further

ORDERED that the degree of liability of Crawford, Mandu, and Tri-Star, Plaintiff's damages attributable to the Defendants, and the merits of Mandu and Tri-Star's cross-claims 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.

03/12/20  
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"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE