

Myers v One Penn Plaza, LLC
2020 NY Slip Op 31178(U)
April 14, 2020
Supreme Court, New York County
Docket Number: 156355/2017
Judge: Robert David Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH

PART IAS MOTION 29EFM

Justice

-----X

INDEX NO. 156355/2017

ROBERT KYLE MYERS,
Plaintiff,

MOTION DATE 03/13/2020

MOTION SEQ. NO. 001

- v -

ONE PENN PLAZA, LLC, VORNADO OFFICE
MANAGEMENT, LLC, RED ONE PLAZA, LLC, LUCY'S
CANTINA ROYALE, and RED ONE PLAZA LLC TRADING
AS LUCY'S CANTINA ROYALE,

DECISION + ORDER ON
MOTION

Defendant.

-----X

RED ONE PLAZA, LLC
Third-Party Plaintiff,

Third-Party
Index No. 595311/2018

-against-

R.I.P. CONSTRUCTION CONSULTANTS, INC.
Third-Party Defendant.

-----X

RED ONE PLAZA, LLC
Second Third-Party Plaintiff,

Second Third-Party
Index No. 595531/2018

-against-

STRUCTURAL ENGINEERING TECHNOLOGIES,
Second Third-Party Defendant.

-----X

RED ONE PLAZA, LLC
Third Third-Party Plaintiff,

Third Third-Party
Index No. 595934/2018

-against-

JACK GREEN ASSOCIATES, PAGO ATLANTIC, LLC, and
LEE & COMPANY OF NY, INC.
Third Third-Party Defendant.

-----X

STRUCTURAL ENGINEERING TECHNOLOGIES,
Fourth Third-Party Plaintiff,

Fourth Third-Party
Index No. 595646/2019

-against-

SRON INC., LEE & COMPANY OF NY, INC., and PAGO
ATLANTIC LLC

Fourth Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for JUDGMENT - DEFAULT.

Motion by the second third-party defendant/fourth third-party plaintiff Structural Engineering Technologies (“Structural”) pursuant to CPLR 3215 (a), for a default judgment against the fourth third-party defendant, SRON Inc., (“SRON”) and for such other and further relief as this Court may deem just, proper, and equitable, is denied.

BACKGROUND

On July 14, 2017, plaintiff Robert Kyle Myers filed his Verified Complaint against defendants One Penn Plaza, LLC, Vornado Office Management, LLC, Red One Plaza, LLC, Lucy’s Cantina Royale, and Red One Plaza LLC trading as Lucy’s Cantina Royale (collectively “defendants”), alleging that on September 19, 2016, Plaintiff sustained injuries when he slipped and fell down a staircase at defendants’ premises located at 1 Pennsylvania Plaza, New York, New York. (Affirm in Supp, Ex A ¶ 94 [Summons & Verified Complaint].) Plaintiff alleged that the accident was caused, *inter alia*, by an improperly designed and constructed staircase. (*Id.* ¶ 95.)

On July 2, 2018, defendant Red One Plaza, LLC, commenced a second third-party action against Structural. (Affirm in Supp, Ex B [Second Third-Party Complaint].)

On August 14, 2018, Structural filed an answer to the Second Third-Party Complaint. (Affirm in Supp, Ex C [Verified Answer to the Second Third-Party Action with Cross-Claims and Counterclaims].)

On July 26, 2019, Structural commenced a fourth third-party action against PAGO Atlantic LLC, Lee & Company of NY, Inc., and SRON. (Affirm in Supp, Ex D [Fourth Third-Party Summons and Complaint].)

Structural submits an Affidavit of Service showing that on July 31, 2019 at 11:50 AM, Structural, via deponent Samuel McClosky, has served SRON with the Fourth Third-party Summons and Complaint by delivering and leaving two copies with Nancy Dougherty who is

authorized by the Secretary of State to receive service at the Department of State pursuant to Business Corporation Law § 306 (b)(1) and has tendered the required fee. (Affirm in Supp, Ex E, 1 [Affidavit of Service].)

Structural alleges that on December 3, 2019, it, through its attorney Leigh H. Sutton (“Sutton”), sent a notice of default, via certified mail, to SRON at its last known address at 32-43 104th Street, Corona, New York, 11369, and provided a courtesy copy of the Fourth Third-Party Summons and Complaint pursuant to CPLR 3215 (g)(4). (Affirm in Supp, Ex F [Notice of Default].)

Structural alleges that more than twenty days have passed since SRON was served, and, to date, no appearance, answer, request for an extension, or motion has been forthcoming from either SRON or its representatives. (Affirm in Supp ¶¶ 9, 11; *see also* Cambourakis Affidavit of Merit ¶ 5 [same].)

Structural alleges that SRON is liable to Structural for the reasons set forth in the Fourth Third-Party Complaint. (Affirm in Supp ¶ 12 [citing Fourth Third-Party Summons and Complaint].) Further, Structural’s President George Cambourakis (“Cambourakis”), in his affidavit, alleges that “SRON is the entity that designed and/or constructed the subject staircase.” (Affirm in Supp, Ex G ¶ 6 [Cambourakis’s Affidavit of Merit].) Cambourakis further alleges that the “alleged accident arose out of the work performed by SRON.” (*Id.* ¶ 7.)

On February 21, 2020, Structural filed the instant motion pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Structural and against SRON. Structural argues that SRON has been served with process and has failed to appear. Cambourakis’s Affidavit of Merit indicates that Cambourakis supports the action against SRON based on his personal knowledge.

Structural has submitted an Affidavit of Service of the instant motion by Deborah DeRenzis stating that service was effectuated on February 21, 2020 upon SRON, via first class mail, at 32-43 104th Street, Corona, New York, 11369. (NYSCEF Doc No. 89.)

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. If the plaintiff’s claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default.” On a motion for a default judgment under 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].)

“Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and amount due.” (*Id.*) On the other hand, it has been consistently held that “a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215.” (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006] [internal citations omitted].)

In addition to service of process, to obtain a default judgment against a corporation which has been served with process pursuant to Business Corporation Law § 306, a plaintiff shall submit “an affidavit [stating] that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.” (CPLR 3215 [g][4][i]; *see also Guillot v Ru Ming Zhu*, 24 Misc 3d 1236[A] [Sup Ct 2009]; *Schilling v Maren Enterprises, Inc.*, 302 AD2d 375, 376 [2d Dept 2003].) “The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to [Business Corporation Law § 306], and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision.” (CPLR 3215[g][4][ii]; *see also Guillot*, 24 Misc 3d 1236[A].) Further, “[a]n affidavit of mailing . . . shall be executed by the person mailing the summons and shall be filed with the judgment.” (CPLR 3215[g][4][ii]; *see also Guillot*, 24 Misc 3d 1236[A].)

In the instant motion, Structural has failed to satisfy the additional requirements of CPLR 3215 (g)(4) and is, therefore, not entitled to a default judgment against SRON.

Initially, Structural alleges that SRON is a domestic corporation authorized to do business in the State of New York and/or a foreign corporation authorized to do business within the State of New York,¹ (Fourth Third-Party Summons and Complaint ¶¶ 19, 20.), and argues that SRON was properly served pursuant to Business Corporation Law § 306. In support, Structural’s Affidavit of Service demonstrates that service was effectuated upon SRON, on July 31, 2019, by personally delivering and leaving two copies of commencement papers with Nancy Dougherty who is authorized by the Secretary of State to receive service at the Department of State pursuant to Business Corporation Law § 306 (b)(1). Service of process on a corporation is deemed to be complete upon service to the Secretary of State. (*See Business Corporation Law § 306.*) Accordingly, Structural has demonstrated proper service upon SRON.

However, Structural must also satisfy CPLR 3215 (g)(4) to be granted a default judgment against SRON. (*See CPLR 3215 [g][4]; see also Business Corporation Law 306 [b][2].*) Under the circumstances herein, the Court finds that Structural fails to establish compliance with CPLR 3215(g)(4)(i) and (ii). The proof submitted by Structural is insufficient to establish that it has sent to SRON an additional service of the summons by first class mail. Further, Structural has not submitted a proper affidavit of mailing of the additional service of the third-party summons and complaint by the person mailing the summons. (*See CPLR 3215 [g][4]; see also Guillot*, 24 Misc 3d 1236[A]; *cf. Wells Fargo Bank, N.A. v Edward Thorp Gallery, Inc.*, 2017 WL 2303859, *3 [NY Sup Ct, New York County, May 26, 2017] [finding that the affidavit satisfied CPLR 3215 (g)(4)(i) because it averred that an additional summons and complaint were served on the

¹ According to the New York State Division of Corporations Entity Information database, SRON is an inactive domestic corporation with a dissolution date of January 9, 2015.

defendant "by depositing a true copy of same enclosed in a postpaid properly addressed wrapper(s), in -a post office- official depository under the exclusive care and custody of the United States Postal Service within New York State."].)

Such deficiencies under somewhat similar circumstances have been overlooked in granting a default judgment. (See, e.g., *Zuniga v WWI Contracting, Corp.*, NY Slip Op 30283 (U) (NY Sup Ct, New York County, Feb. 20, 2018.)

However, in the instant case, in addition to the aforesaid deficiencies, the letter of default dated December 3, 2019 that was allegedly sent by Structural's attorney Leigh H. Sutton to SRON contained an incorrect date of the service of the third-party summons and complaint. (Affirm in Supp, Ex F [Notice of Default]; see also Affirm in Supp, Ex E, 1 [Affidavit of Service].) Such date could be read as significant as to the entry of a judgment on default. (See CPLR 3215 [c].) Under the circumstances at hand, the Court finds that there has not been substantive compliance with CPLR 3215(g)(4) and as such the motion is denied. (See *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 10 [1st Dept 2002].)

CONCLUSION

Accordingly, it is

ORDERED that Structural's motion for an order pursuant to CPLR 3215 (a) granting a default judgment against defendant SRON is denied; and it is further

ORDERED that compliance with this order is subject to the Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 (AO/71/20; AO/78/20).

The foregoing constitutes the decision and order of this Court.

4/14/2020
DATE


ROBERT DAVID KALISH, J.S.C.

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