

Aropunk, LLC v XDS, LLC
2020 NY Slip Op 32146(U)
May 12, 2020
Supreme Court, Kings County
Docket Number: 523248/2018
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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AFROPUNK, LLC.,

Plaintiff(s),

-against-

XDS, LLC., ROLICK LLC and ROHIT KAPOOR,

Defendant(s).

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Decision and Order

Index No. 523248/2018

Mot. Seq.: 1

The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Plaintiff’s Notice of Motion for Default Judgment dated June 19, 2019; Attorney Affirmation of Peter Shapiro, Esq., affirmed on June 19, 2019; and Exhibits A-B.....	1
Plaintiff’s Affidavit of Merit of Allen Lamb, sworn to on August 30, 2019.....	2
Defendant Kapoor’s Attorney Affirmation in Opposition of Stacey Richman, Esq., affirmed on January 20, 2020; Affidavit of Rohit Kapoor, sworn to on January 20, 2020; and Exhibits A-E.....	3
Plaintiff’s Attorney Affirmation in Reply of Brian Pete, Esq., affirmed on February 3, 2020; and Exhibit 1.....	4

MONTELIONE, RICHARD J., J.

In this action for damages based upon a breach of contract, plaintiff moves to enter a default judgment against defendants XDS, LLC., Rolick, LLC. and Rohit Kapoor based upon their failures to interpose an answer. Defendants oppose.

Plaintiff’s summons and complaint was filed on November 16, 2018. The corporate defendants, XDS, LLC. and Rolick, LLC. were served pursuant to Limited Liability Company

Law 303. The individual defendant, Rohit Kapoor, was served personally. No answers were interposed and plaintiff moves for default judgment against the defaulting defendants herein.

Defendants oppose and argues, *inter alia*, that defendant Rohit Kapoor had been in contact with an associate of plaintiff's firm when he was notified of this action and he believed that the communication between them resolved the issues in this lawsuit. Further, defendant Kapoor contends that the instant motion was mailed to the wrong address for the corporate co-defendants and none of the other defendants nor himself received a copy of the instant motion until it was redirected by the recipient, a neighbor, as the building numbers as addressed was inverted by plaintiff.

Plaintiff argues, *inter alia*, that both the summons and complaint and the motion for default judgment were served to the corporate defendants via the Secretary of State and that plaintiff's attorney's apparent error in mailing a courtesy copy of the motion to the incorrect address is unavailing as to defendants' argument of non-receipt. Plaintiff contends that nevertheless, individual defendant, Kapoor, concedes that he became aware of the motion. Further, defendants have not demonstrated "excusable default" in failing to appear or respond to the summons and complaint and defendant's reliance upon conversations with plaintiff's firm in attempting to resolve the action do not constitute excusable default.

On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the claim by an affidavit made by the party, and proof of the defendant's default (*see* CPLR 3215[f]; *Mercury Cas. Co. v. Surgical Ctr. at Milburn, LLC*, 65 A.D.3d 1102, 885 N.Y.S.2d 218; *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202). While a verified complaint may be used as the affidavit of the facts constituting the claim (*see* CPLR

3215[f]; *Woodson v. Mendon Leasing Corp.*, 100 N.Y.S.2d 62, 70, 760 N.Y.S.2d 727, 790 N.E.2d 1156), it must allege “enough facts to enable a court to determine that a viable cause of action exists” (*Woodson*, 100 N.Y.S.2d 62, at 71; *see Neuman v. Zurich N.A.*, 36 A.D.3d 601, 602, 828 NY.S.2d 169).

To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action (*see Atl. Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 A.D.3d 649, 932 N.Y.S.2d 109 [2nd Dept. 2011]; *Juseinoski v. Board of Education*, 15 A.D.3d 353, 790 N.Y.S.2d 162 [2nd Dept. 2005]). Furthermore, in absence of a motion to request an extension of time to answer or appear and where defendant’s motion to dismiss, in essence, fails to set for a reasonable excuse for the default along with a showing of a potentially meritorious defense, the court may not consider the same (*see McGee v. Dunn*, 75 A.D.3d 624 [2nd Dept. 2010][where the Court held that the Supreme Court improvidently exercised its discretion in granting the defendant’s untimely motion to dismiss the complaint, “as it, in effect excused the defendant’s default in the absence of a request for such relief.”]).

Even if the court were to accept defendant Kapoor’s belief that the matter was resolved and that such reason constituted a reasonable excuse for his delay in responding to this matter, he has not proffered a potentially meritorious defense other than to state that such defenses exist. Parenthetically, a good faith belief in settlement must be supported by “substantial evidence” in order to constitute a reasonable excuse for default (*Armstrong Trading, Ltd. v. MBM Enterprises*, 29 A.D.3d 835, 815 N.Y.S.2d 689 [2nd Dept. 2006]). Moreover, defendants have not proffered a proposed answer. The corporate defendants have not challenged the service of the summons and complaint or the motion for default judgment as they were served through the Secretary of State.

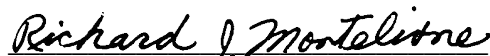
Additionally, defendants have not affirmatively moved for an extension of time to answer or appear and in absence of the same, the court declines to grant such relief.

Upon review, plaintiff submitted proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defendants' default (*see* CPLR 3215[f]). As such, plaintiff demonstrated its entitlement to default judgment as to the defaulting defendants.

Therefore, based on the foregoing, plaintiff's motion for default judgment against defaulting defendants XDS LLC., Rolick LLC. and Rohit Kapoor is granted. Plaintiff shall file a note of issue on or before August 12, 2020 and the inquest is hereby scheduled for September 8, 2020.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY
May 12, 2020


Richard J. Montelione, A.J.S.C.

Digitally signed 5/12/2020 1:08:07 PM by Hon. Richard J. Montelione,
E=rmonteli@nycourts.gov, also authorized to file twu@nycourts.gov,
location Bklyn NY 11205, FoxitPhantomPDF Version 10.0, pursuant to
Administrative Order 86/20 dated 4/20/2020.