

Avila v Alianthus Props., LLC
2020 NY Slip Op 33762(U)
November 12, 2020
Supreme Court, New York County
Docket Number: 152738/2019
Judge: Robert D. 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

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INDEX NO. 152738/2019

CARLOS AVILA,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

ALIANTHUS PROPERTIES, LLC, SMOOTH RENOVATIONS, INC.,

DECISION + ORDER ON MOTION

Defendant.

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ALIANTHUS PROPERTIES, LLC

Third-Party Index No. 595285/2020

Plaintiff,

-against-

SMOOTH RENOVATIONS INC., DVS IRON & ALUMINUM WORKS, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

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

Motion by Plaintiff Carlos Avila ("Plaintiff") for an order pursuant to CPLR 3215 directing the entry of judgment as against defendant Smooth Renovations, Inc., and further directing an assessment of damages by this Court at the time of trial, on the ground that said defendant has defaulted in appearing, that the time within which to appear or otherwise move has expired, and that judgment may not be entered by the clerk since this is a tort action, and for such other and further relief as to this Court may seem just and proper is DENIED for the reasons below.

The background facts of the case are set forth in the decision and order dated September 04, 2019, (NYSCEF Doc No 27), and referenced in the decision and order dated July 1, 2020 (NYSCEF Doc No 45).

DISCUSSION

CPLR 3215 (a) provides, in relevant part:

“When 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,
- (3) proof of the defendant’s default in answering or appearing, and
- (4) proof of the amount due by an affidavit made by the party.

(See CPLR 3215 [f]; *Gantt v N. Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016].)

“Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and amount due[.]” (CPLR 3215 [f].) 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].)

CPLR 3215 (g)(4) provides, in relevant part:

“(i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted 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.”

The Appellate Division, First Department has held that the additional mailing requirements of CPLR 3215 (g) (4) also applies to LLCs. (See *Crespo v A.D.A. Management*, 292 AD2d 5, 7 [1st Dept 2002]; see also *Foster Const. Mgt. v Seerattan*, 2013 NY Slip Op 31609[U] [Sup Ct, NY County 2013, Sherwood, J.].) The Appellate Division, Second Department has applied CPLR 3215 (g) (4) to an LLC and held that a motion court erred in granting leave to enter a default judgment where the plaintiff failed to send an additional mailing of the summons and complaint to the LLC. (*Bank of New York v Willis*, 150 AD3d 652, 654 [2d Dept 2017].)

Further, the “affidavit of mailing” shall be executed by the person mailing the summons. (CPLR 3215 [g][4][i] & [ii].)

On the instant motion, Plaintiff presents proof of adequate service of process by means of the March 18, 2019 affidavit of service. (Ex D.)

Plaintiff has also sufficiently demonstrated that the defaulting party Smooth has not answered or appeared in the instant action and its time to do so has expired.

Plaintiff has further submitted an affidavit of merit. This affidavit has been translated in English with the facts constituting the claim. (Ex G, Ex H.)

Further, in order to obtain a default judgment against a corporation which has been served pursuant to Business Corporation Law § 306(b), “an affidavit shall be submitted 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 [20] days before the entry of judgment.” (CPLR 3215[g][4][i].) This “affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment.” (CPLR 3215 [g][4] [ii].)

Here, there is no affidavit that has been submitted stating that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address. Submitted into the record is an affirmation of plaintiff’s counsel on the motion stating that on May 10, 2019, plaintiff caused an additional copy of the summons and complaint to be delivered by first class mail upon defendant Smooth at the address designated by defendant for purposes of service of process as listed on the New York State Department of State Division of Corporations, Entity Information log, as well as at the subject accident location. (See Affirm in Supp. & Ex E.) The affirmation in support of the motion references a letter dated May 10, 2019 that was allegedly sent to the defaulting party Smooth via regular mail along with a copy of the summons and verified complaint. (See Affirm in Supp. & Ex E.)

The Court finds that the attorney’s affirmation and letter do not comply with the requirements of the statute under CPLR 3215 [g][4] [ii] as the affidavit (in this case, the affirmation) and the letter were not written by the same person. (See CPLR 3215 [g][4] [i]; CPLR 3215 [g][4] [ii]; *compare Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1237-38 [3d Dept 2010] [“[T]he affidavit of plaintiff’s counsel on the motion, together with a copy of his May 19, 2009 letter, reflect that plaintiff substantially complied with the requirements of the statute[.]”].) In the instant case, the plaintiff’s attorney’s affirmation in support of the motion was signed by Michael T. Kusz, Esq., whereas the May 10, 2019 letter was signed by a different attorney by the name of Michael Levitz, Esq.

As such, the Court finds that there has been not been compliance with CPLR 3215 and, therefore, the motion is denied.

CONCLUSION

Motion by Plaintiff Carlos Avila ("Plaintiff") for an order pursuant to CPLR 3215 directing the entry of judgment as against defendant Smooth Renovations, Inc., and further directing an assessment of damages by this Court at the time of trial, on the ground that said defendant has defaulted in appearing, that the time within which to appear or otherwise move has expired, and that judgment may not be entered by the clerk since this is a tort action, and for such other and further relief as to this Court may seem just and proper, is DENIED.

The foregoing constitutes the decision and order of this Court.

11/12/2020
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"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>