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| New York Mar. & Gen. Ins. v WWML96, LLC |
| 2021 NY Slip Op 30382(U) |
| February 9, 2021 |
| Supreme Court, New York County |
| Docket Number: 157218/2018 |
| Judge: J. Mabelle Sweeting |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING

PART

IAS MOTION 62

Justice

-----X

INDEX NO. 157218/2018

NEW YORK MARINE & GENERAL INSURANCE A/S/O 96
& SECOND, LLC,

MOTION DATE 12/16/2020

Plaintiff,

MOTION SEQ. NO. 009

- v -

WWML96, LLC, WONDER WORKS CONSTRUCTION
CORP.; GILSANZ MURRAY STEFICEK, LLP, RA
CONSULTANTS, LLC, MT GROUP, LLC, FORTHILL
CONSTRUCTION CORP., FORTHILL CONTRACTOR
CORP., 1850 SECOND AVENUE SERVICES
CORPORATION, NEW YORK FOUNDATION FOR SENIOR
CITIZENS, INC., CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, 96 & SECOND
LLC, WALTER & SAMUELS INCORPORATED, WALTER &
SAMUELS CAPITAL GROUP LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

96 & SECOND LLC, WALTER & SAMUELS INCORPORATED

Third-Party
Index No. 565709/2019

Plaintiff,

-against-

WWML96, LLC, WONDER WORKS CONSTRUCTION CORP.,
GILSANZ MURRAY STEFICEK, LLP, RA CONSULTANTS,
LLC, MT GROUP, LLC, FORTHILL CONSTRUCTION CORP.,
FORTHILL CONTRACTOR CORP., 1850 SECOND AVENUE
SERVICES CORPORATION, NEW YORK FOUNDATION FOR
SENIOR CITIZENS, INC., JOHN DOES 1-10

Defendant.

-----X

1850 SECOND AVENUE SERVICES CORPORATION, NEW
YORK FOUNDATION FOR SENIOR CITIZENS, INC.

Second Third-Party
Index No. 595419/2020

Plaintiff,

-against-

BRITTANY DEVELOPMENT CORP.

Defendant.
-----X

MT GROUP, LLC

Third Third-Party
Index No. 595621/2020

Plaintiff,

-against-

GEO INSTRUMENTS, INC.

Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 009) 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 323, 324

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

This motion has been granted pursuant to the attached order dated February 9, 2021.

2/9/2021
DATE



J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

-----X
 NEW YORK MARINE & GENERAL INSURANCE,
 COMPANY a/s/o 96 & SECOND, LLC,

Plaintiff,

-against-

WWML96, LLC, WONDER WORKS CONSTRUCTION
 CORP., GILSANZ MURRAY STEFICEK, LLP, RA
 CONSULTANTS, LLC, MT GROUP, LLC, FORTHILL
 CONSTRUCTION CORP., FORTHILL CONTRACTOR
 CORP., 1850 SECOND AVENUE SERVICES
 CORPORATION, NEW YORK FOUNDATION FOR
 SENIOR CITIZENS, INC., CITY OF NEW YORK,
 NEW YORK CITY TRANSIT AUTHORITY, and
 METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

-----X
 NEW YORK CITY TRANSIT AUTHORITY, and
 METROPOLITAN TRANSPORTATION AUTHORITY,

Third-Party Plaintiffs,

-against-

96 & SECOND LLC, WALTER & SAMUELS
 INCORPORATED, and WALTER & SAMUELS
 CAPITAL GROUP LLC,

Third-Party Defendants.

-----X
 96 & SECOND LLC, WALTER & SAMUELS
 INCORPORATED,

Second Third-Party Plaintiffs,

-against-

WWML96, LLC, WONDER WORKS CONSTRUCTION
 CORP., GILSANZ MURRAY STEFICEK, LLP, RA
 CONSULTANTS, LLC, MT GROUP, LLC, FORTHILL

Index No. 157218/2018

DECISION & ORDER

Motion Sequence #009

CONSTRUCTION CORP., FORTHILL CONTRACTOR
CORP., 1850 SECOND AVENUE SERVICES
CORPORATION, NEW YORK FOUNDATION FOR
SENIOR CITIZENS, INC., and JOHN DOES 1-10,

Second Third-Party Defendants.

-----X
1850 SECOND AVENUE SERVICES CORPORATION, and
NEW YORK FOUNDATION FOR SENIOR CITIZENS, INC.,

Third Third-Party Plaintiffs,

-against-

BRITTANY DEVELOPMENT CORP.,

Third Third-Party Defendant.

-----X
MT GROUP, LLC,

Fourth Third-Party Plaintiff,

-against-

GEO INSTRUMENTS, INC.,

Fourth Third-Party Defendant.

-----X

The papers numbered EF 291-301, 323 found on NYSCEF were read and considered on this motion by Defendants/Second Third-Party Defendants/Third Third-Party Plaintiffs 1850 SECOND AVENUE SERVICES CORPORATION, and NEW YORK FOUNDATION FOR SENIOR CITIZENS, INC. (collectively, the "1850 DEFENDANTS") seeking an Order pursuant to CPLR 3215 entering a default against non-answering Third Third-Party Defendant BRITTANY DEVELOPMENT CORP. ("BRITTANY DEVELOPMENT") for their failure to answer the Third Third-Party Complaint.

Upon the foregoing papers, it is hereby:

ORDERED that the motion is granted to the extent that BRITTANY DEVELOPMENT is liable to the 1850 DEFENDANTS for any judgment Plaintiff NEW YORK MARINE & GENERAL INSURANCE COMPANY a/s/o 96 & SECOND, LLC ("PLAINTIFF") ,and/or Second Third-Party Plaintiffs 96 & SECOND LLC and WALTER & SAMUELS INCORPORATED (collectively, the "SECOND THIRD-PARTY PLAINTIFFS") receive against the 1850 DEFENDANTS pursuant to common law indemnification and contribution; and it is further

ORDERED that the issue of damages, if any, and the apportionment of damages is reserved for trial.

Factual Background / Procedural History

On February 1, 2019, PLAINTIFF filed an Amended Complaint alleging, in relevant part, that in the course of undertaking construction project, the 1850 DEFENDANTS and/or their agents negligently damaged a party wall shared between PLAINTIFF's insured's premises (the "96 & Second Premises") and the 1850 DEFENDANTS' premises. The alleged damage to the shared party wall then allegedly resulted in damage to the 96 & Second Premises. As a result of the alleged damage to 96 & Second Premises, PLAINTIFF paid insurance claims to its assignor, owner of the 96 & Second Premises; PLAINTIFF now seeks reimbursement for these insurance claims. On or about May 9, 2019, the 1850 DEFENDANTS filed an Amended Verified Answer to the Amended Complaint.

On August 16, 2019 the SECOND THIRD-PARTY PLAINTIFFS filed a Second Third-Party Summons and Verified Second Third-Party Complaint, making substantially the same allegations as PLAINTIFF does in its Amended Complaint. It is alleged that in the course of a construction project, the 1850 DEFENDANTS and/or their agents damaged the party wall; it is further alleged that the damage to the shared party wall caused significant damage to the 96 & Second Premises, which resulted in significant damages to the SECOND THIRD-PARTY PLAINTIFFS. On or about November 21, 2019, the 1850 DEFENDANTS filed an Answer to the Verified Second Third Party Complaint.

On June 10, 2020, the 1850 DEFENDANTS filed a Third Third-Party Complaint against BRITTANY DEVELOPMENT, alleging BRITTANY DEVELOPMENT, not the 1850 DEFENDANTS, owned, operated, managed, maintained, supervised and/or developed the construction project referenced in PLAINTIFF's Amended Complaint. The Third Third-Party Complaint further alleges that any demolition and/or construction of a party wall was conducted by BRITTANY DEVELOPMENT, and thus any damage to the 96 & Second Premises, was caused by the conduct of BRITTANY DEVELOPMENT, not the 1850 DEFENDANTS. Similarly, to the extent that SECOND THIRD-PARTY PLAINTIFFS suffered damages as a result of the damage to the 96 & Second Premises, such damage was caused by the conduct of BRITTANY DEVELOPMENT.

On June 22, 2020, pursuant to New York Business Corporation Law § 306, the 1850 DEFENDANTS served the Third Third-Party Summons and Complaint along with a Notice Pursuant to CPLR 3402(b) and a full set of prior pleadings upon BRITTANY DEVELOPMENT via the New York Secretary of State. On November 10, 2020, pursuant to CPLR 3215(g)(4), copies of the Third Third-Party Summons and Complaint, along with the original affidavit of service for same, were served on the last-known addresses of BRITTANY DEVELOPMENT.

Despite proper service, BRITTANY DEVELOPMENT has not appeared, answered, or sought an extension of its time to do so. Based upon the forgoing, the 1850 DEFENDANTS now move for a default judgment against BRITTANY DEVELOPMENT. The application is granted.

Discussion / Legal Analysis

In order to be entitled to the entry of a default judgment pursuant to CPLR 3215, it is incumbent upon the moving party to establish the following: (1) proof of service of the summons and verified complaint; (2) proof of the underlying facts constituting the claim; and (3) proof of the opposing party's default in answering and appearing. See Ostroy v. Six Sq. LLC, 74 A.D.3d 693, 693 (1st Dep't 2010) ("It is well established that where service is proper and a plaintiff makes out the facts of its entitlement to judgment, a plaintiff is entitled to a default judgment when defendant fails to appear."). Here, the 1850 DEFENDANTS have established, *prima facie*, all of the requisite elements entitling them to the entry of a default judgment against BRITTANY DEVELOPMENT.

On the record presented, the evidence reveals that BRITTANY DEVELOPMENT was served with the Third Third-Party Summons and Complaint on June 22, 2020 by service upon the Secretary of State, pursuant to Section 306 of the Business Corporation Law; service was established by the affidavit of service filed by the 1850 DEFENDANTS. See, e.g., Fisher v. Lewis Constr. NYC Inc., 179 A.D.3d 407, 408 (1st Dep't 2020) ("Service of process was complete when plaintiff served the Secretary of State."); Supplemental service pursuant to CPLR 3215(g)(4) was thereafter effectuated on BRITTANY DEVELOPMENT on November 10, 2020 by sending copies of the Third Third-Party Summons and Complaint to BRITTANY DEVELOPMENT's last known addresses.

Notwithstanding the foregoing, BRITTANY DEVELOPMENT has failed to appear, interpose an answer, or seek an extension of its time to do so, nor has it appeared in connection with, or responded to, the instant motion. BRITTANY DEVELOPMENT therefore remains in default. Moreover, by the submission of the Verified Third-Party Complaint and the supporting affidavit of Linda Hoffman, a representative of the 1850 DEFENDANTS, the 1850 DEFENDANTS have established, *prima facie*, the merits of their claim. As such, the 1850 DEFENDANTS are entitled to the default judgment that they seek. The issue of damages will be bifurcated and reserved for trial. Accordingly, and in conformity with the foregoing and for the reasons cited in this decision and order, it is hereby

ORDERED that the motion is granted to the extent that BRITTANY DEVELOPMENT is liable to the 1850 DEFENDANTS for any judgment Plaintiff NEW YORK MARINE & GENERAL INSURANCE COMPANY a/s/o 96 & SECOND, LLC ("PLAINTIFF"), and/or Second Third-Party Plaintiffs 96 & SECOND LLC and WALTER & SAMUELS INCORPORATED (collectively, the "SECOND THIRD-PARTY PLAINTIFFS") receive against the 1850 DEFENDANTS pursuant to common law indemnification and contribution; and it is further

ORDERED that the issue of damages, if any, and the apportionment of damages is reserved for trial.

This constitutes the decision and order of the Court.

DATED: ~~January~~, 2021
February 9th 2021

By: _____


Hon. J. Machel Sweeting