

Broadway Sky, LLC v 53rd St. Holdings, LLC

2021 NY Slip Op 30695(U)

March 2, 2021

Supreme Court, New York County

Docket Number: 654594/2012

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 43EFM

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BROADWAY SKY, LLC,

Plaintiff,

- v -

53RD STREET HOLDINGS, LLC, CITY OUTDOOR,
INC., CLARK CUMMINS,

Defendant.

INDEX NO. 654594/2012

MOTION DATE 12/15/2020

MOTION SEQ. NO. 016

**DECISION + ORDER ON
MOTION**

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53RD STREET HOLDINGS, LLC, CLARK CUMMINS

Plaintiff,

-against-

OOS INVESTMENTS, LLC

Defendant.

Third-Party
Index No. 590405/2013

-----X

CITY OUTDOOR, INC.

Plaintiff,

-against-

OOS INVESTMENTS, LLC, 53RD STREET HOLDINGS, LLC,
CLARK A. CUMMIS

Defendant.

Second Third-Party
Index No. 595042/2017

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ROBERT R. REED, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 499, 500, 501
were read on this motion to/for JUDGMENT - DEFAULT

In this motion, sequence number 016, plaintiff Broadway Sky, LLC seeks an order,
pursuant to CPLR § 3215, granting a default judgment in its favor, as against defendant City

Outdoor, Inc. (City Outdoor), and directing that this matter be set down for an inquest as to damages.

In brief, plaintiff commenced this action on December 31, 2012, through a verified complaint, in which it alleges the breach of agreements to lease signage space for outdoor advertising.¹ City Outdoor, then represented by counsel, answered the complaint on March 4, 2014.

By order dated September 10, 2020, the motion of City Outdoor's attorney to be relieved as counsel was granted, and further proceedings in this action against City Outdoor were prohibited through and including October 5, 2020 (NYSCEF Doc. No. 476). The September 10, 2020 order also required that incoming counsel for City Outdoor and existing counsel for all other parties "shall" confer in advance of a scheduled October 13, 2020 conference and, before October 9, 2020, file with the court a joint letter setting forth the parties' positions on outstanding discovery disputes (*id.*).² The order warned that City Outdoor's failure to appear by attorney on the next scheduled court date, which was October 13, 2020, "may" result in the granting of relief by default against it (*id.*).

Prior to the October 13, 2020 conference date, this case was transferred to the Honorable Justice Carol R. Edmead who, on October 2, 2020, issued an order canceling the conference. On October 5, 2020, Justice Edmead issued orders stating that, on or before October 9, 2020, the parties must advise the Court as to whether City Outdoor had obtained new counsel

¹ The record reveals that plaintiff also filed an amended verified complaint on July 31, 2014, which plaintiff does not mention. Plaintiff also fails to adequately brief its entitlement to the attorneys' fees that it seeks.

² Plaintiff states that the September 10, 2020 order directed City Outdoor's outgoing counsel, Kreinik Associates, LLC (Kreinik), to forward a notice (the Notice) directing City Outdoor to appoint substitute counsel by the next virtual appearance date on October 13, 2020. However, while the order set the next conference date for October 13, 2020, it did not specify that the Notice should direct City Outdoor to appoint counsel by that date, but only that Kreinik should "forward a notice directing City Outdoor to appoint substitute counsel, unless written notice of substitution has been filed" (NYSCEF Doc. No. 476). Plaintiff has not submitted a copy of the notice that Kreinik served on City Outdoor, which does not appear to be filed on the NYSCEF system.

and that, if City Outdoor had done so, all of the parties were to submit a joint letter concerning outstanding discovery disputes and the status of a motion. On October 9, 2020, the parties, other than City Outdoor, submitted a joint letter, through plaintiff's counsel, stating that, as of that date, they had not received any further updates from City Outdoor concerning its retention of new counsel or otherwise. On October 14, 2020, plaintiff submitted a case status update letter on behalf of the parties in the action except City Outdoor.

Plaintiff argues that City Outdoor has defaulted because it violated the September 10, 2020 order by failing to appear by attorney, or otherwise, and has missed the deadline to retain new counsel. City Outdoor has not filed opposition.

Pursuant to CPLR 3215(a), “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.” There has been no dismissal or other sanction against City Outdoor for its neglect to proceed. Furthermore, the September 10, 2020 order, upon which plaintiff relies, did not contain a specific date as to when City Outdoor was required to have filed a substitution of counsel. That order also stated that default “may” occur if City Outdoor failed to appear at the October 13, 2020 conference, indicating only the possibility of default if City Outdoor failed to appear at the conference by counsel. In addition, as noted above, the October 13, 2020 conference was canceled and Justice Edmead's October 5, 2020 orders required only that the parties submit the joint letter if City Outdoor had obtained new counsel.³ While plaintiff contends that City Outdoor's failure to

³ Plaintiff states that the October 5, 2020 court orders required that City Outdoor advise the court of the status of its replacement counsel on or before October 13, 2020, and that, in lieu of appearing at the scheduled conference before the Court, the parties were to submit a joint letter to the court advising of any remaining discovery issues. However, those orders provide only that the parties were to advise the court of the status of City Outdoor's counsel and, as stated above,

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Motion No. 016 Page 3 of 5

substitute counsel prevents this action from going to trial, plaintiff does not indicate that it has been called to trial. Thus, on this record, plaintiff has not demonstrated entitlement to a default judgment. However, for the reasons addressed below, denial is without prejudice to plaintiff bringing another default motion if City Outdoor fails to comply with this order.

CPLR § 321 (a) requires that “corporations can appear only by attorney [and] must be represented by a licensed practitioner . . . answerable to the court and other parties for his or her own conduct in the matter” (*Matter of Sharon B.*, 72 NY2d 394, 398 [1988]; see *Center for Jud. Accountability, Inc. v Cuomo*, 167 AD3d 1406, 1409 [3d Dept 2018] [lower court’s dismissal of corporation’s claims proper where corporation was not represented by counsel]; see also *Matter of Pere v 1470-1488 U&R*, 247 AD2d 477, 478 [2d Dept 1998] [“A corporation is in default in a civil proceeding when it is not represented by an attorney. Here, the appellant corporation was in default as it did not appear by an attorney at the underlying hearings”] [citation omitted]). While the September 10, 2020 order did not contain an explicit deadline by which City Outdoor was required to substitute counsel, or a definite sanction, it indicated that substitution was expected by the October 13, 2020 conference, if not before. In any event, the law requires that City Outdoor appear in this action by counsel (*id.*). Consequently, if City Outdoor fails to appear by counsel at the next conference, as ordered below, it will be subject to default.

Accordingly, it is

ORDERED that plaintiff’s motion for a default judgment against City Outdoor, Inc. is denied without prejudice; and it is further

that if *City Outdoor had obtained new counsel* the parties should submit the joint letter updating the court on the status of both discovery disputes and of any motion on or before October 13, 2020 (NYSCEF Doc. Nos. 486-450).

ORDERED that the parties shall appear for a virtual status conference in Part 43, on April 8, 2021, at 11:00 a.m. at which City Outdoor, Inc. shall appear by a licensed attorney and if City Outdoor, Inc. fails to appear at the virtual status conference by counsel it may be deemed to be in default in this action; and it is further

ORDERED that plaintiff is to serve a copy of this order upon City Outdoor, Inc. by certified mail return receipt requested and overnight mail at its last known address within three days of the date of this order.

3/2/2021
DATE



ROBERT R. REED, J.S.C.

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