

<b>Martinez v Autopart Intl., Inc.</b>
2021 NY Slip Op 31145(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 154102/2017
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM**

*Justice*

-----X

LUIS MARTINEZ,

Plaintiff,

- v -

AUTOPART INTERNATIONAL, INC., ROCKY & BROTHERS  
REALTY, LLC, ROCK GROUP NY CORP., MAGA  
CONTRACTING CORP.,

Defendant.

-----X

ROCKY & BROTHERS REALTY, LLC

Plaintiff,

-against-

ROCK GROUP NY CORP., MAGA CONTRACTING CORP.

Defendant.

-----X

ROCK GROUP NY CORP.

Plaintiff,

-against-

MAGA CONTRACTING CORP.

Defendant.

-----X

INDEX NO. 154102/2017

MOTION DATE 03/14/2021,  
03/14/2021,  
03/30/2021

MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595204/2019

Second Third-Party  
Index No. 595288/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 131, 132, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, certain parties move for leave to enter default judgment against Maga Contracting Inc. (Maga).

In motion sequence no. 4, defendant/second third-party plaintiff Rock Group NY Corp. (Rock Group) moves for leave to enter default judgment against Maga for its failure in answering the second third-party complaint (STPC). In motion sequence no. 5, plaintiff moves for leave to enter default judgment against Maga for its failure in answering the amended complaint. In motion sequence no. 6, defendant/third-party plaintiff Rocky & Brothers Realty LLC (R&B) moves for leave to enter default judgment against Maga for its failure in answering the third-party complaint (TPC). The TPC and STPC assert claims against Maga for common law indemnification, contribution, contractual indemnification, breach of contract, and failure to procure insurance (see NYSCEF Doc. Nos. 28 and 81).<sup>1</sup>

The motions are all denied based on the failure to provide an affidavit of merit as is required by CPLR 3215 (f). Although plaintiff appeared to have attempted to submit one, the document submitted failed to include the English translated version (see NYSCEF Doc. No. 128). While a verified pleading may be used in lieu of a party affidavit (Woodson v Mendon Leasing Corp., 100 NY2d 62, 70 [2003]), the plaintiff's complaint(s), the TPC, and STPC here were verified by counsel and are "insufficient to support entry of judgment" (Feffer v Malpeso, 210 AD2d 60, 61 [1st Dept 1994]; see Ritzer v 6 E. 43rd St. Corp., 47 AD3d 464, 464 [1st Dept 2008]).

CPLR 3215 (g)(4) requires an application for default judgment to include "an affidavit" from "the person mailing the summons" and additional notice, stating that the same was served

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<sup>1</sup> The attorneys' affirmation in support of the motions refer to a contract with Maga, but no contract was submitted.

upon the defaulting party “by first class mail” “at its last known address at least twenty days before the entry of judgment.”

Rock Group and R&B failed to submit one, requiring denial of their motions (see Balaguer v 1854 Monroe Ave. Hous. Dev. Fund Corp., 71 AD3d 407, 407 [1st Dept 2010]; Admiral Ins. Co. v Marriott Intl., Inc., 67 AD3d 526, 526 [1st Dept 2009]).

Plaintiff’s additional notice itself appears to be compliant with the statute (see NYSCEF Doc. No. 127), however there is no affidavit of service. The attorney’s affirmation would be sufficient if it stated that Mr. Katz himself mailed the notice and summons, and if it included the date it was mailed (see NYSCEF Doc. No. 124 at ¶ 5). The notice itself is dated December 15, 2020, but the Court cannot assume it was mailed the same date. If it was, that is the same date the motion was served (see NYSCEF Doc. No. 129 [affidavit of service of motion]), which would be defective under the statute (see Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C3215:19B [“The affidavit must show that it was made at least 20 days before the plaintiff’s *application* for the default judgment” [emphasis added]; id. [“literal compliance would have been to do the mailing -- and let the 20 days pass -- before any submission to the court, so that the affidavit establishing satisfaction of CPLR 3215(g) would be among the original batch of papers submitted for the default”]).

Accordingly, it is hereby ORDERED that the motions are denied without prejudice; and it is further

ORDERED that plaintiff has leave to renew within one year from entry of this order; and it is further

ORDERED that Rocky Group and R&B are permitted to renew their motions up to one year after liability is established respectively against them in the main action (see IMP Plumbing & Heating Corp. v 317 E. 34th St., LLC, 89 AD3d 593, 594 [1st Dept 2011]).

This constitutes the decision and order of the Court.

4/7/2021  
DATE

\_\_\_\_\_  
ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: