

Turbo Dynamics Corp. v Deutsche Bank AG
2021 NY Slip Op 32192(U)
November 5, 2021
Supreme Court, New York County
Docket Number: Index No. 651846/2014
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART **23**

Justice

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TURBO DYNAMICS CORPORATION,

Plaintiff,

INDEX NO. 651846/2014

MOTION DATE N/A

MOTION SEQ. NO. 005

- v -

DEUTSCHE BANK AG, SOCIETE DE MAINTENANCE DES
EQUIPEMENTS INDUSTRIELS, SPA A/K/A INDUSTRIAL
EQUIPMENT MAINTENANCE OF SONELGAZA GROUP
A/K/A MEI

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for

JUDGMENT - DEFAULT

In motion sequence 005, Plaintiff Turbo Dynamics Corporation moves, for the entry of a default judgment against Defendant Societe De Maintenance Des Equipements Industriels, SPA A/K/A Industrial Equipment Maintenance of Sonelgaza Group A/K/A "MEI". MEI, an Algerian corporation, is the sole remaining defendant, as Deutsche Bank AG was dismissed from the case via decision and order dated January 7, 2015. (NYSCEF Doc No. 46.) The instant motion is submitted unopposed.

Background

The facts of this case are recited at length in this court's decisions and orders dated August 5, 2014 (NYSCEF Doc No. 32, denying Plaintiff's ms001 for a TRO); January 7, 2015 (NYSCEF Doc No. 45, denying Plaintiff's ms002 for a default judgment, "Ms002 D&O"); and January 7, 2015 (NYSCEF Doc No. 46, granting Defendant Deutsche AG's ms003 to dismiss).

In denying Plaintiff's ms002 without prejudice, the Hon. Peter H. Moulton held that it was unclear whether the court had jurisdiction over MEI, as the only jurisdictional allegation, that MEI had ordered goods from Plaintiff to be shipped from New York, was insufficient standing alone. (Ms002 D&O at 4-5.) In addition, the court ruled that the submitted affidavit of service of the summons and complaint upon MEI, executed in Algeria, was unaccompanied by a certificate of conformity pursuant to CPLR 2309[c] and thus was insufficient to establish personal service. (*Id.*, see NYSCEF Doc No. 24, "June 23, 2014 AoS.") Justice Moulton permitted Plaintiff to refile the motion "with proof that this court has personal jurisdiction over defendant MEI."

Over two years later, on June 6, 2017, the Hon. Jennifer Schecter administratively marked the case disposed due to prolonged inactivity, but stated that if any further action were required, the parties could contact the Trial Support Clerk to have the marking changed. (NYSCEF Doc No. 50.)

Plaintiff changed attorneys on January 16, 2018 (NYSCEF Doc No. 51) and, a year later, moved to restore the case to active status and to renew its motion for default judgment, or, in the alternative, to amend the complaint. (NYSCEF Doc No. 52.) In support, Plaintiff submitted, inter alia, an affidavit of Abdel Hakim Mouda, an alleged lawyer based in Algeria (NYSCEF Doc No. 54, "Mouda Aff."), and a copy of the proposed amended complaint. (NYSCEF Doc No. 65; later corrected as NYSCEF Doc No. 69, "Am. Cmplt.") Notably, Plaintiff's counsel submitted one purported affidavit of service dated February 2, 2019, where Plaintiff's counsel stated that he served "the within plaintiff's motion to restore, renew motion for default judgment, or to amend complaint, with supporting papers" on Defendant MEI by mail. (NYSCEF Doc No. 67, "Feb. 2, 2019 AoS.") Plaintiff submitted another purported affidavit of service relating to the corrected

proposed amended complaint, demonstrating service in an identical fashion. (NYSCEF Doc No. 70, “Feb. 3, 2019 AoS.”)

The court granted Plaintiff’s motion sequence 004 in part by decision and order dated June 7, 2019, restoring the case to active status and directing Plaintiff to serve and file the proposed amended complaint “except to the extent the proposed amended complaint seeks punitive damages.” (NYSCEF Doc No. 74, “Ms004 D&O.”) Plaintiff then filed a proposed judgment to the clerk of the court, which was returned for correction on November 6, 2019. (NYSCEF Doc Nos. 77-92.) Plaintiff filed the instant motion on July 21, 2020. (NYSCEF Doc Nos. 93-116.)

Discussion

On a motion for leave to enter a default judgment, “the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party[.]” (CPLR 3215 [f]; *see also SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) “Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists.” (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

1. Service

In its June 7, 2019 order, this court granted Plaintiff’s motion to amend the complaint in part, directing Plaintiff to serve and file the proposed amended complaint “except to the extent that the proposed amended complaint seeks punitive damages.” (Ms004 D&O at 3.)

In support of the current motion, Plaintiff submits a February 3, 2019 affidavit stating that it mailed “the within plaintiff’s supplemental affirmation in support of motion to restore, renew motion for default judgment, or to amend complaint, with exhibit” to Defendant at its Algerian address by “Priority Mail Express International postage[.]” (NYSCEF Doc No. 113.) However, the February 3, 2019 affidavit of mailing only indicates that the proposed amended complaint was mailed to Defendant as an exhibit to the motion papers (NYSCEF Doc No. 69), prior to this court granting the motion to amend the complaint and to redact the portion thereof regarding punitive damages. Thus, Plaintiff fails to demonstrate proper service of the amended complaint.

Additionally, the February 3, 2019 affidavit fails to comply with any method of service of papers permitted under CPLR 2103[c]. That provision states that “mailing” means “the deposit of a paper enclosed in a *first class* postpaid wrapper[.]” Here, Plaintiff sent the motion papers via Priority Mail Express International. (*See SeaCube Containers LLC v Compass Containers & Shipping Services Ltda.*, 427 F Supp 3d 497, 500 [SD NY 2019].)

2. Proof

While a defendant in default is deemed to have admitted all traversable allegations in the complaint (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Brownly Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), “CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action.” (*Feffer v Malpeso*, 210 AD2d 60, 60 [1st Dept 1994].) As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exists (*Woodson, supra* at 70-72).

(*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].)

“Proof that the plaintiff has submitted ‘enough facts to enable [the] court to determine that a viable’ cause of action exists may be established by an affidavit of a party or someone with knowledge,

authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability.” (*Perney v Medical One New York, P.C.*, 2020 WL 4604812, at *4 [Sup Ct, NY County 2020] [internal citations omitted].)

Plaintiff fails to state sufficient factual allegations to enable the court to determine whether a viable cause of action exists. Plaintiff’s claim that it is entitled to the reimbursement of \$126,548.10, the remaining collateral submitted in connection with a performance bond, is premised upon an undated, unsigned document which reads in its entirety as follows:

To whom it may concern.
Our Company industrial Equipment Maintenance of SONELGAZ group, placed an order with Turbo Dynamics Corporation in 2010 covering the hot section parts for the Mitsubishi power plants. TDC has completed this order in a timely manner to our best satisfaction with high quality of service.

(NYSCEF Doc No. 98.)

Plaintiff has failed to provide “[s]ome proof of liability” to satisfy the court as to the prima facie validity of the uncontested cause of action.” (*Feffer v Malpeso*, 210 AD2d 60, 60 [1st Dept 1994].) and is therefore, not entitled to the relief it seeks. Plaintiff’s moving papers fail to allege any other basis for relief. As such, it is hereby

ORDERED that Plaintiff’s motion sequence 005 for default judgment against Defendant MEI is denied.

WILLIAM PERRY, J.S.C.

11/5/2021
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE