American Express Natl. Bank v Clarkstown Pharm. II, LLC
2022 NY Slip Op 30254(U)
January 14, 2022
Supreme Court, New York County
Docket Number: Index No. 655218/2020
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART 42**

Justice

----------X

AMERICAN EXPRESS NATIONAL BANK,

Plaintiff,

- v -

CLARKSTOWN PHARMACY II, LLC, PHYLLIS PINCUS

Defendants.

----------X

INDEX NO. 655218/2020

MOTION DATE 12/14/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for EXTEND TIME/DEFAULT JUDGMENT.

In this action to recover an unpaid loan balance upon theories of breach of contract and account stated, the plaintiff moves, pursuant to CPLR 306-b, for an order deeming service of the summons and complaint upon the defendants and the filing of the affidavit of service timely, *nunc pro tunc*. The plaintiff also moves, pursuant to CPLR 3215, for leave to enter a default judgment against the defendants. No opposition is submitted. The motion is granted in part.

CPLR 306-b permits the court to extend the time for service "upon good cause shown or in the interest of justice." "[W]hile 'good cause' requires a showing of reasonable diligence, 'the interest of justice' standard has a broader scope, which can encompass late service due to 'mistake, confusion or oversight, so long as there is no prejudice to the defendant." Baumann & Sons Buses, Inc. v Ossining Union Free School Dist., 121 AD3d 1110 (1st Dept. 2014) (citing Leader v Maroney, Ponzini & Spencer, 97 NY2d 95 [2001]); see Nicodene v Byblos Restaurant, Inc., 98 AD3d 445 (1st Dept. 2012); Henneberry v Borstein, 91 AD3d 493 (1st Dept. 2012).

In his affirmation, counsel for the plaintiff states that the action was commenced on October 13, 2020, by the filing of the summons and complaint. The summons and complaint were timely delivered to the process server about two days later. Counsel states that the process server was unable to serve either defendant at any of the addresses the plaintiff had on file and contends that "the affidavits of non-service suggest that [the] [d]efendants were actually

evading service." Counsel states that to be sure that the process server was attempting service at the correct address, the plaintiff asked the U.S. Postal Service to verify the targeted address. Counsel states that the U.S. Postal Service verified the defendants' addresses and thereafter counsel instructed the process server to proceed with attempting service via "nail and mail." Counsel asserts that service upon the defendants was ultimately effectuated on February 25, 2021, 15 days after the 120-day statutory period expired. See CPLR 306-b. The affidavits of service were then promptly filed, within the statutorily provided time of 20 days. The instant motion ensued. The affidavits of service were then promptly filed, within the statutorily provided time of 20 days. The instant motion ensued.

Under the circumstances, and upon consideration of the applicable law and the facts and circumstances presented, the court grants the branch of plaintiff's motion pursuant to CPLR 306-b for good cause shown. The court now turns to the branch of the plaintiff's motion seeking leave to enter a default judgment against the defendants pursuant to CPLR 3215.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720 [2nd Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have 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 [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., supra. While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, supra. As such, "[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default." Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

The papers submitted on this motion fall short of meeting that standard. The plaintiff submits the summons and complaint, verified only by counsel, which includes two causes of action – breach of contract and for an account stated. "A complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215." Feefer v Malpeso, 210 AD2d 60, 61 (1st Dept 1994). The plaintiff also submits an affidavit of Rebecca Muldoon, an Assistant Custodian of Records for the plaintiff, dated October 19, 2021, in which she states that the parties entered a credit agreement under the Working Capital Terms Program and the defendants defaulted in making payments. However, the plaintiff submits a purported agreement which is unsigned, undated, and makes no reference to the defendants, and a single "Outstanding Loan Statement" dated December 23, 2019, which references both defendants, with no address. None of the papers submitted establish the amount of the loan purportedly made and when and how funds were disbursed. The complaint itself is silent as to these facts.

The plaintiff's proof fails to establish the necessary elements of a breach of contract claim: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Nor does it sufficiently allege a claim for an account stated by showing that the defendants "received [and] retained without objection" monthly account statements sent to them. Scheichet & Davis, P.C. v Nohavicka, 93 AD3d 478 (1st Dept. 2012) (quoting Gamiel v Curtis & Reiss-Curtis, P.C., 60 AD3d 473, 474 [1st Dept. 2009)]. The proof falls far short of alleging any basis to impose individual liability. "A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation's business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." Worthy v New York City Housing Auth., 21 AD3d 284 (1st Dept. 2005). No such allegations are made here.

Thus, the plaintiff has failed to submit sufficient proof of the facts constituting its claims as required for relief under CPLR 3215(f). Since the defects may be cured, denial of the motion is without prejudice to renewal upon proper papers within 60 days of the date of this order. See CPLR 3215(c).

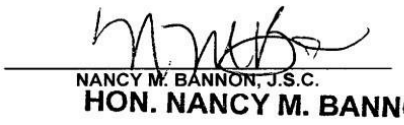
Accordingly, and upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 306-b is granted, without opposition, and the court deems the service of the summons and complaint upon the defendants and the filing of the affidavit of service to have been timely, *nunc pro tunc*; and it is further

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants is denied without prejudice to renewal upon proper papers within 60 days of the date of this order; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/14/2022
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE