

<b>S &amp; P Assoc. of N.Y., LLC v Lincoln 63 Parking LLC</b>
2022 NY Slip Op 30443(U)
February 7, 2022
Supreme Court, New York County
Docket Number: Index No. 656159/2020
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

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S & P ASSOCIATES OF NEW YORK, LLC, a/k/a S&P  
ASSOCIATES OF NEW YORK LLC,

Plaintiff,

**INDEX NO.** 656159/2020

**MOTION DATE** 03/05/2021

**MOTION SEQ. NO.** 001

- v -

LINCOLN 63 PARKING LLC, d/b/a ICON PARKING, a/k/a  
ICON PARKING SYSTEMS, a/k/a ICON PARKING  
SYSTEMS, LLC; TMO PARENT LLC; TMO II LLC; TMO III  
LLC; TMO IV LLC; TMO V, LLC, a/k/a TMO V LLC; TMO VI,  
LLC, a/k/a TMO VI LLC,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, and 44

were read on this motion for DEFAULT JUDGMENT (& CROSS-MOTION).

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that plaintiff's motion for a default judgment, and defendants' cross-motion for acceptance of their answer (NYSCEF Doc. No. 13), are determined as follows.

Background

Plaintiff is the owner of commercial space leased by it to defendant Lincoln 63 Parking LLC, d/b/a Icon Parking, *etc.* ("Tenant"), as a parking garage. The verified complaint, served in November 12, 2020, alleges that rent arrears are due and owing from the Tenant in a principal amount of \$263,623.38. The verified complaint further alleges that the remaining defendants are limited guarantors of said lease, and that they owe plaintiff a principal sum of \$112,500 on their guarantees. The verified complaint seeks judgments on the aforesaid claims, as well as

injunctive relief requiring Tenant to turn over parking garage income to plaintiff, and also for plaintiff's attorneys' fees.

Long before plaintiff moved for a default judgment on March 5, 2021 (NYCEF Doc. No. 15), defendants filed an answer on December 7, 2020 (NYSCEF Doc. No. 11); but that answer was rejected by the plaintiff because it was not verified (*see*, NYSCEF Doc. No. 12). Very shortly after that rejection, defendants filed the same answer in attempted verified form on December 11, 2020 (NYSCEF Doc. No. 13).

Thus, the entire span of time between service of the verified complaint on November 12, 2020, and defendants' filing of their said verified answer on December 11, 2020, is short of a month.

Plaintiff now moves for a default judgment on the notion that the answer is still technically unverified. Plaintiff explains its position by noting that the verifier of that answer is Spencer Stiefel, Esq., "General Counsel of Icon Parking Holdings, LLC" (NYSCEF Doc. No. 13 at 6 of 6). Plaintiff's counsel notes that although there are several iterations of "Icon" entities identified in the caption (Icon Parking; Icon Parking Systems; and Icon Parking Systems, LLC), none of them perfectly align with Counsel Stiefel's affiliation to "Icon Parking Holdings, LLC."

The court prefatorily notes that the New York State Department of State's records identify Icon Parking Holdings, LLC, and Icon Parking Systems, LLC (plus additional "Icon" entities which *do not* include Icon Parking or Icon Parking Systems of plaintiff's caption).<sup>1</sup>

Defendants have cross-moved for acceptance of their verified pleading.

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<sup>1</sup> *See*, [Public Inquiry \(ny.gov\)](https://www.ny.gov)

### Discussion

Section 3020 (a) of the Civil Practice Law and Rules, titled “Verification,” provides, “[g]enerally,” that “[a] verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true.” (Emphasis added.) Here, the witness who verified the answer – Spencer Stiefel, Esq., General Counsel for Icon Parking Holdings, LLC – satisfies those criteria insofar as he expressly states that he has “read the foregoing answer and know[s] the contents thereof” and that “[t]he same are true to [his] knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters [he] believe[s] them to be true” (NYSCEF Doc. No. 13 at 6 of 6). Subsection (d) (3) of the aforesaid CPLR section permits a foreign corporation (which Icon Parking Holdings, LLC, and Icon Parking Systems, LLC, are [*see supra*, note 1]) to verify its pleadings through “an agent or attorney” as long as that agent or attorney possesses knowledge of the pleading’s allegations – exactly what Mr. Stiefel has attempted to do.

Under these circumstances, this court finds it unjustified to accept plaintiff’s insistence that the verified answer is so infirmly made as to constitute no verification at all or, at least, a verification so defective as to justify granting plaintiff immediate final judgment on the theory of an outright and unequivocal “default.” That said, though: this court *is* willing to require Mr. Steifel to amend his verification by either adding the affirmation language of “under the penalties of perjury” (CPLR 2106) or by re-executing in the demonstrated presence of a notary public.<sup>2</sup>

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<sup>2</sup> The verification, as it currently exists, is couched in terms of having been “duly sworn,” although no execution is made before a notary public. Nor does the verification include the affirmation language indicating that it is made under the penalties of perjury.

Speaking again to plaintiff’s overall position that these circumstances justify entry of a “default” judgment, the court again notes that the time span between service of process and filing of the verified answer comes to under a month; and the court’s discretion here ought to be more centered around what the Appellate Division, First Department, has recognized as “the strong public policy favoring resolution of cases on their merits” (*Arrington v Bronx Jean Co.*, 76 AD3d 461, 462 [1st Dept 2010]. *See also*, *HSBC Bank USA, N.A. v Donaldson*, 181 AD3d 464, 465 [1st Dept 2020] [“Plaintiff’s excuse for its delay in replying to defendant’s counterclaim . . . is reasonable, in view of the shortness of the delay and the absence of evidence of willfulness or of prejudice to defendant.”]; *Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013] [same]).

Rule 2101 (f) of the Civil Practice Law and Rules allows “[a] defect in the form of a paper” to “be disregarded by the court,” as long as “a substantial right of a party is not prejudiced,” “and leave to correct shall be freely given.” (*See also*, 5 Weinstein-Korn-Miller, NY Civ Prac ¶ 3022.04 [2d ed 2014] [“Irregularities in the verification will rarely result in prejudice to a party or affect the substance of the litigation”].) It is in the spirit of that policy that this court denies the plaintiff’s motion for a default judgment and grants defendants’ cross-motion to the extent that, in order to prevent a default, an amended answer will be filed no later than 20 days from the date of filing hereof bearing a verification in the proper form of an attorney’s affirmation stated to be affirmed under the penalties of perjury or in the proper form of an affidavit sworn under oath before an officer authorized to administer oaths.<sup>3</sup>

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<sup>3</sup> Plaintiff’s counsel has made this court aware of a different type of disposition issued by a learned justice of this court, of concurrent jurisdiction with the undersigned, which granted a default judgment under similar circumstances (*P&S 95<sup>th</sup> St. Assocs. LLC v Gallant Parking LLC*, index No. 655309/2020 [Sup Ct NY County] [cited in said counsel’s letter to this court, NYSCEF Doc. No. 47]). The undersigned respectfully declines to adopt the reasoning and conclusion of that disposition, favoring, instead, an opportunity for correction of insubstantial pleading defects and more commensurate with the virtue of litigation on the merits that has figured so prominently in our jurisprudence.

Accordingly, it is

ORDERED that plaintiff’s motion for a default judgment is denied; and it is further

ORDERED that defendants’ cross-motion for acceptance of their verified answer is granted to the extent that, in order to prevent a default, an amended answer will be filed no later than 20 days from the date of filing hereof bearing a verification in the proper form of an attorney’s affirmation stated to be affirmed under the penalties of perjury or in the proper form of an affidavit sworn under oath before an officer authorized to administer oaths; and it is further

ORDERED that plaintiff may again move for the relief sought on its above-treated motion in the event that defendants fail to comply with the immediately preceding order to correct their answer’s verification.

This will constitute the decision and order of the court.

ENTER:

<u>2/7/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE