

**Noah Bank v Park**

2022 NY Slip Op 30682(U)

March 1, 2022

Supreme Court, New York County

Docket Number: Index No. 654609/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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NOAH BANK,

Plaintiff,

- v -

PETER PARK and JONG MEE PARK,

Defendants.

INDEX NO. 654609/2020

MOTION DATE 03/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON  
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for entry of a default judgment pursuant to CPLR 3215 is granted, on default and without opposition, based upon the following memorandum opinion.

Background

In this action for breach of personal guarantees, plaintiff Noah Bank ("plaintiff") seeks entry of a default judgment against defendants Peter and Jong Mee Park ("defendants").

Pursuant to separate promissory notes and loan agreements, plaintiff agreed to loan \$2,000,000 to nonparty Bistro Marketplace 17 Inc. ("Bistro") on September 26, 2016 (NYSCEF Doc. Nos. 3-4), and \$2,200,000 to nonparty 52 JP Park Corp. ("52 JP Park") on January 25, 2017 (NYSCEF Doc. Nos 8-9). The loan amounts were to be paid back in monthly installments, with the outstanding principal bearing interest as calculated pursuant to the terms of the promissory notes (NYSCEF Doc. Nos. 3, 8). Failure to make any payment when due constituted an "Event of Default," allowing plaintiff to accelerate and demand payment of the entire outstanding balance (NYSCEF Doc. No. 4 at 4; NYSCEF Doc. No. 9 at 4). Defendants each individually

guaranteed both loans, agreeing to “absolutely and unconditionally guarantee full and punctual payment and satisfaction” of the loan amounts (NYSCEF Doc. Nos. 5-6, 10-11). The guarantees provided that plaintiff was entitled to recover “such sum as the court may adjudge reasonable” in the event of any litigation to enforce the guarantees (*id.*).

Plaintiff asserts that both of the underlying loans are now in default. Specifically, the total of outstanding principal, interest, late fees, and termination fees, as calculated by plaintiff as of August 12, 2020, is \$2,467,887.09 for Bistro, and \$2,563,056.21 for 52 JP Park (NYSCEF Doc. No. 32, ¶¶ 14-16). Plaintiff seeks a total of \$5,030,943.30 from defendants as guarantors of the underlying loans (*id.*, ¶ 16).

Plaintiff commenced this action by filing a summons and complaint on September 22, 2020 (NYSCEF Doc. Nos. 1-2). Affidavits of Service filed on December 16, 2020 attest to service on defendants by in hand-delivery to defendant Jong Mee Park at defendant’s residence on October 7, 2020 pursuant to CPLR 308(1), and by leaving a copy with her for defendant Peter Park at the same address with a follow-up mailing on October 9, 2020 pursuant to CPLR 308(2). An affirmation of additional service filed with the motion papers attest to service of an additional copy of the summons by first-class mail to defendants’ residence pursuant to CPLR 3215(g) on October 20, 2020 (NYSCEF Doc. No. 30). Subsequent to making the instant motion, plaintiff belatedly served a copy of the Notice of Electronic Filing by mail on September 21, 2021 (NYSCEF Doc. No. 35). Defendants have neither answered the complaint nor otherwise appeared in this action, and there is no opposition to the motion.

#### Discussion

A plaintiff that seeks entry of a default judgment for a defendant’s failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts

constituting the claim, and proof of the defendant's default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “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” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff has failed to meet its burden on the motion. Plaintiff served defendants with the notice of electronic filing almost a year after commencing the action. The applicable regulations require that the notice be served contemporaneously with the commencement documents (22 NYCRR 202.5-bb[b][3]). While this defect is theoretically correctible by plaintiff's belated service of the notice, plaintiff's papers suffer from other defects.

Plaintiff served defendant Peter Park by delivery and mail, pursuant to CPLR 308(2). The statute provides that proof of such service must be filed with the Clerk of the Court within 20 days of the later of the delivery or mailing, and that service is not complete without such filing (CPLR 308[2]). The failure to timely file proof of service is not a jurisdictional defect, but it precludes a grant of a default judgment (*First Fed. Sav. & Loan Assn. of Charleston v Tezzi*, 164 AD3d 758, 759-60 [2d Dept 2018]). Plaintiff filed its proof of service on December 16, 2020, well beyond 20 days after the mailing portion of delivery and mail service was effectuated on Mr. Park (NYSCEF Doc. No. 13). Accordingly, he is not in default.

Additionally, where a default judgment is sought against a natural person for breach of contract, “an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence” (CPLR 3215[g][3][i]). A plaintiff’s failure to comply with the statutory requirements and submit proof of such compliance with its motion warrants denial of the motion (*Schilling v Maren Enters*, 302 AD2d 375, 376 [2d Dept 2003]). Here, plaintiff submits an affirmation of additional mailing stating that a copy of the summons was sent by first-class mail to defendants at their residence (NYSCEF Doc. No. 30). The affirmation, however, does not specify the manner in which the mailing was made, i.e., whether the envelope was deposited within a postal box maintained by the United States Postal Service, within a Post Office, or by some other means.

CPLR 2103 provides that a mailing is specifically defined as “the deposit of a paper enclosed in a first class postpaid wrapper, addressed to . . . that person’s last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States” (CPLR 2103[f][1]; *Watt v New York City Tr. Auth.*, 97 AD2d 466, 467 [2d Dept 1983]). As plaintiff’s description of its efforts to make the additional service required by CPLR 3215(g) does not conform to the description set forth in the statute, the Court lacks sufficient proof of additional mailing to grant a default judgment (*see Leheup v Direct Realty, LLC*, 2009 NY Slip Op. 30087[U] [Sup Ct, New York County 2009]).

Accordingly, it is hereby

ORDERED that the motion is denied.

This constitutes the Decision and Order of the Court.

*Louis L. Nock*

3/1/2022  
DATE

LOUIS L. NOCK, J.S.C.

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