

**Pollack, Pollack Isaac & De Cicco LLP v Brach**

2022 NY Slip Op 30755(U)

March 30, 2022

Supreme Court, New York County

Docket Number: Index No. 160205/2020

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*

-----X

POLLACK, POLLACK ISAAC & DE CICCIO LLP,

Plaintiff,

- v -

ANNA BRACH,

Defendant.

INDEX NO. 160205/2020

MOTION DATE 10/21/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35

were read on this motion for DEFAULT JUDGMENT.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for entry of a default judgment pursuant to CPLR 3215 is denied, based upon the following memorandum decision.

In this action to recover unpaid attorney's fees, plaintiff Pollack, Pollack Isaac & De Cicco LLP ("plaintiff") asserts causes of action for breach of contract and account stated against defendant Anna Brach, also identified in plaintiff's records as Chanie Brach ("defendant"). There is no opposition to the motion.

Pursuant to a retainer agreement dated September 1, 2016 (NYSCEF Doc. No. 27), defendant retained plaintiff to act as appellate counsel on her appeal of an order appointing a guardian of the person and of the property of nonparty Rachel Zyman (NYSCEF Doc. No. 28). Plaintiff filed a notice of appeal, perfected the appeal, submitted briefing, and argued the appeal before the Appellate Division, Second Department (NYSCEF Doc. No. 24, ¶ 7; NYSCEF Doc. No. 29). The total cost of plaintiff's services, according to plaintiff's final statement of account, was \$33,703.16, of which \$23,703.16 remains outstanding (NYSCEF Doc. No. 30).

Plaintiff commenced this action by filing a summons and complaint on November 24, 2020 (NYSCEF Doc. No. 1). Affidavits of service filed on January 5, 2021 and February 16, 2021 attest to service on defendant by delivery to persons of suitable age and discretion at 4 Barbara Lane, Monsey, New York on December 30, 2020, and at 26 First Avenue, Monroe, New York on February 2, 2021, with follow-up mailings thereafter, pursuant to CPLR 303(2) (NYSCEF Doc. Nos. 2-3). An affirmation of mailing filed on October 21, 2021 attests to additional service of the summons and complaint by mail to 26 First Avenue, Monroe, New York on February 17, 2021, pursuant to CPLR 3215(g) (NYSCEF Doc. No. 32). To date, defendant has not answered the complaint or otherwise appeared in this action.

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 not met its burden on the motion, as its service of the summons and complaint on defendant was defective. CPLR 308(2) provides that service may be had upon a person by leaving it with "a person of suitable age and discretion at the actual place of business,

dwelling place or usual abode of the person to be served.” Plaintiff concedes that 4 Barbara Place, Monsey, New York was not her dwelling place or usual abode (NYSCEF Doc No. 23, ¶ 3), and accordingly service upon defendant at that address is defective (*e.g. Cuomo v Cuomo*, 144 AD2d 331, 332 [2d Dept 1988]). Plaintiff’s subsequent service at 26 First Avenue, Monroe, New York, appears to be proper on the record before the Court, but the affidavit of service attests to service at that address of only the summons and complaint. The Uniform Rules for Trial Courts provide that where an action is commenced by electronic filing, such as the instant action, service of the initiating papers must be accompanied by “a notice, in a form approved by the Chief Administrator, advising the recipient that the action is subject to electronic filing pursuant to this section” (Uniform Rule § 202.5-bb[b][3]). Absent proof of service of such notice, service is not complete. Since service of the summons and complaint was defective, plaintiff cannot satisfy its burden to submit proof of service before entry of a default judgment (CPLR 3215).

Accordingly, it is hereby

ORDERED that plaintiff’s motion for entry of a default judgment is denied, without prejudice to renew, due to the lack of proof of service of Notice of Electronic Filing (Uniform Rule § 202.5-bb); and it is further

ORDERED that in the event of such renewal, plaintiff’s counsel may make reference to filings presently on the docket instead of re-filing same in support of a renewed motion.

This constitutes the Decision and Order of the court.

*Louis L. Nock*

<u>3/30/2022</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 checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE