

<b>Ramos v 49-51 Chambers LLC</b>
2022 NY Slip Op 32858(U)
August 24, 2022
Supreme Court, New York County
Docket Number: Index No. 157721/2020
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*

-----X

DANIEL TORRES RAMOS,

Plaintiff,

- v -

49-51 CHAMBERS LLC, NY DEVELOPERS &  
MANAGEMENT LLC, PILKU CONSTRUCTION SERVICES  
INC.,

Defendant.

-----X

49-51 CHAMBERS LLC, NY DEVELOPERS & MANAGEMENT  
LLC

Plaintiff,

-against-

CORE SCAFFOLD SYSTEMS INC., PILKU CONSTRUCTION  
SERVICES INC.

Defendant.

-----X

49-51 CHAMBERS LLC

Plaintiff,

-against-

M&A PROJECTS INC., ZNKO CONSTRUCTION, INC.,  
HORIZON INTERIORS INC.

Defendant.

-----X

49-51 CHAMBERS LLC

Plaintiff,

-against-

K&V GARCIA CORP.

**INDEX NO. 157721/2020**

**MOTION DATE 02/03/2022**

**MOTION SEQ. NO. 002**

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595027/2021

Second Third-Party  
Index No. 595271/2021

Third Third-Party  
Index No. 595573/2021

Defendant.

-----X

NY DEVELOPERS & MANAGEMENT LLC

Fourth Third-Party  
Index No. 595816/2021

Plaintiff,

-against-

K&V GARCIA CORP., JUAN CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119

were read on this motion to/for JUDGMENT - DEFAULT.

Defendant/third-party plaintiff/second third-party plaintiff/third third-party plaintiff 49-51 Chambers LLC (49-51) moves for default judgment against, third third-party defendant/ fourth third-party defendant K & V Garcia Corp. (K & V).<sup>1</sup> K & V did not file opposition papers.

Default Judgment

On a motion for leave to enter a default judgment, “the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due . . . by affidavit made by the party . . . ” (CPLR 3215 [f]). “Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due” (*id.*). A defendant who has defaulted is “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]).

“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

<sup>1</sup> By stipulation dated January 31, 2022, 49-51 withdrew that part of this motion which sought a default judgment against second third-party defendant Znko Construction, Inc. (Znko) (NYSCEF Doc. No. 119). Znko filed its answer to the second third-party complaint on February 11, 2022 (NYSCEF Doc. No. 120).

satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1<sup>st</sup> Dept 1994] [internal quotation marks and citation omitted]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*id.*). “Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action, but the standard of proof is minimal” (*Petty v Law Office of Robert P. Santoriella, P.C.*, 200 AD3d 621, 621 [1<sup>st</sup> Dept 2021] [internal citation and quotation marks omitted]). “This minimal requirement is necessary to assure that the action has a jurisdictional basis” (*Zelnik v Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1<sup>st</sup> Dept 1997] [internal citation omitted]). “Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default” (*Green v Dolphy Constr. Co., Inc.*, 187 AD2d 635, 636 [2d Dept 1992]).

Where the complaint is not verified, plaintiff’s affidavit of merit is deficient where “it is wholly on information and belief, without the slightest reference to the source of the information or the grounds for the belief” (*Zelnik*, 242 AD2d at 228). Thus, for example, plaintiff’s submission in a contract action is insufficient for the entry of default judgment where plaintiff’s motion papers fail to include the underlying contract and the affidavit of merit fails to provide the particulars of the contract (*Giordano v Berisha*, 45 AD3d 416 [1<sup>st</sup> Dept 2007]). So too a complaint verified by the attorney and plaintiff’s “affidavit of merit, which incorporated conclusory statements alleging negligence based on information provided by her attorney and which failed to set forth the facts constituting the alleged negligence, were insufficient to support a default judgment pursuant to CPLR 3215 (f)” (*Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005] [internal citations omitted]). “Indeed, a judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of

the merits of the claim renders that judgment a nullity” (*Beltre v Babu*, 32 AD3d 722, 723 [1<sup>st</sup> Dept 2006] [internal citation omitted]).

### The Third Third-Party Complaint and Affidavit of Merit

Both the third third-party complaint, which is not verified and the affidavit of merit, are based on information and belief, are conclusory in nature, and fail to sufficiently meet even the minimal requirement of proof for entry of default judgment pursuant to CPLR 3215 (f).

As relevant herein, the third third-party complaint arises from a labor law action instituted by plaintiff Daniel Torres Ramos (Ramos). In plaintiff Ramos’s verified complaint, he asserts three causes of action against defendants 49-51 and NY Developers & Management LLC (NY Developers) for personal injuries he alleges to have sustained in the course of his employment while he was working on a scaffold and engaged in the performance of construction, renovation, demolition, painting, repair and/or alterations at premises located at 49 Chambers Street, New York, New York (the premises). The complaint does not name or reference K & V. 49-51 and NY Developers instituted a third-party complaint against Core Scaffold Systems, Inc. and Pilku Construction Services, Inc..49-51 instituted a second third-party complaint against M & A Projects, Inc., Znko Construction, Inc., and Horizon Interiors, Inc.

By third third-party summons and unverified third third-party complaint dated June 16, 2021, 49-51 asserts four causes of action against K & V. As it is not verified, the third third-party complaint is not sufficient to meet the requirements of CPLR 3215 (f). Additionally, the pleading is conclusory in nature and its allegations against K & V appear to be based in their entirety on information and belief.

The third third-party complaint begins by stating that 49-51, by its attorneys, “respectfully alleges upon information and belief as follows” (NYSCEF Doc. No. 111 at page

numbered 8 of 14). In paragraphs 1 through 10, 49-51 makes various allegations regarding K & V's identity, the basis for jurisdiction, and, without admitting the allegations, attaches and incorporates plaintiff Ramos's complaint (*id.* at pages numbered 8 and 9 of 14). Paragraphs 1 through 10 do not include an allegation that K & V performed worked at or near the premises, was involved in Ramos's employment or work at the premises or was a subcontractor for 49-51 or another named defendant who performed work at the premises. The third third-party complaint then repeats and realleges these allegations and asserts four causes of action against K & V: common law indemnification (first cause of action); contribution (second cause of action); contractual indemnification (third cause of action); and breach of contract (fourth cause of action).

In its claim for common law indemnification, 49-51 does not allege a factual basis for, particularize, or identify K & V's intentional conduct or negligence that forms the basis for 49-51's claim. Similarly, in its claim for contribution, 49-51 does not assert a factual basis for, particularize, or identify K & V's conduct that forms the basis for the second cause of action.

In its cause of action for contractual indemnification, 49-51 similarly does not provide any facts regarding the alleged contract between 49-51 and K & V that obligated K & V to indemnify 49-51. For example, there are no allegations as to the date of the contract, the paragraph(s) of the contract that provided for indemnification, the location of the work allegedly performed by K & V, or the date(s) of performance of such work or contract. 49-51 alleges only the following. 49-51 "entered into a contract with Third Third-Party Defendant" K & V for 49-51's "benefit" (*id.* at ¶ 17). "Pursuant to the aforesaid contract and/or as extended," K & V "was obligated to undertake the defense, indemnify and hold harmless" 49-51 "from any claims for personal injury, such as those asserted by" Ramos and any resulting cross claim, counterclaim, or

third-party claim (*id.* at ¶ 18). 49-51 then alleges that K & V “has failed to provide defense and indemnity” to 49-51 “in violation of [K & V’s] contractual obligations” (*id.* at ¶ 19), and that “[u]pon information and belief,” 49-51 “is entitled to a defense and to contractual indemnification from” K & V (*id.* at ¶ 20]).

Similarly, in its cause of action for breach of contract, 49-51 does not provide a factual basis for or particulars to support its allegation that K & V “also contracted to provide insurance coverage” for 49-51 (*id.* ¶ 22). 49-51 does not identify the contract or the contract’s provision. 49-51. 49-51 then alleges, “[i]n the alternative, despite having obtained insurance coverage for” 49-51, “as required by its contractual obligations to indemnify and defend” 49-51, K & V “has failed to make the necessary claims to its insurance carrier” (*id.* ¶ 24).

The affidavit of merit is based on information and belief and asserts only conclusory statements. While the affidavit begins with a recital of the affiant’s position and source of knowledge, the affidavit does set forth any factual basis for 49-51’s claims. The affidavit begins with the recitations that the affiant is 49-51’s principal and is familiar with the properties that 49-51 performs work at, including the premises, and with the contracts and agreements entered into by 49-51 with respect to the premises. The affiant further attests that he submits the affidavit based on his personal knowledge and a review of the records maintained in the regular course of business.

The affidavit, however, does not provide some proof of liability. It is based entirely upon information and belief and fails to set forth even minimum proof as to the prima facie validity of 49-51’s uncontested causes of action. With respect to 49-51’s causes of action against K & V, the affidavit states only: “Upon information and belief, Third Third-Party Defendant, K & V GARCIA CORP., also performed work at the premises where Plaintiff sustained his accident”

(NYSCEF Doc No. 102 at ¶ 5). The affidavit does not set forth any first-hand confirmation of the third third-party complaint's conclusory allegations regarding, or attach any document supporting, the claims for common law indemnification, contribution, contractual indemnification, and breach of contract. The affidavit fails to identify or provide any facts regarding the alleged contract between 49-51 and K & V, fails to attach the alleged contract, and fails to set forth any fact as to K & V's alleged negligence or conduct that forms the basis for the claims of common law indemnification and contribution.

For the foregoing reasons, 49-51's motion for a default judgment against K & V is denied. The court does not reach or address whether 49-51 otherwise has made the requisite showing for the relief it seeks.

Accordingly, it is


ORDERED that the motion of third third-party plaintiff 49-51 Chambers LLC for a default judgment against third third-party defendant/ fourth third-party defendant K & V Garcia Corp. for default judgment, pursuant to CPLR 3215, is denied with leave to renew; and it is further

ORDERED that, within 60 days of the posting of this decision and order on NYSCEF, third third-party plaintiff 49-51 Chambers LLC may renew its motion for a default judgment against third third-party defendant/ fourth third-party defendant K & V Garcia Corp., or the third third-party action will be dismissed; and it is further

ORDERED that third third-party plaintiff 49-51 Chambers LLC, within 20 days of the posting of this decision and order on NYSCEF, shall serve a copy of this decision and order with

notice of its entry upon third third-party defendant/ fourth third-party defendant K & V Garcia Corp., the other parties who have appeared in the action, and upon the Clerk of the Court (60 Centre Street, Room 141B); and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

<u>8/24/2022</u> DATE		 WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<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"/> REFERENCE