

**Choice Logistics, Inc. v Fulfillco, Inc.**

2022 NY Slip Op 33674(U)

October 24, 2022

Supreme Court, New York County

Docket Number: Index No. 650458/2022

Judge: Arlene P. Bluth

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. ARLENE P. BLUTH PART 14**

*Justice*

-----X

CHOICE LOGISTICS, INC.,  
Plaintiff,

- v -

FULLILCO, INC., 8X LOGISTICS, INC.  
Defendant.

-----X

INDEX NO. 650458/2022

MOTION DATE 10/21/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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

Plaintiff’s motion to strike defendant 8X Logistics, Inc.’s answer and for a default judgment against both defendants is granted in part and denied in part. The cross-motion by defendant 8X Logistics, Inc. to dismiss plaintiff’s third cause of action is denied.

**Background**

Plaintiff brings this case for breach of contract, indemnification and successor liability relating to a Master Services Agreement between plaintiff and defendant Fulfillco (“Fulfillco”). Plaintiff contends that Fulfillco agreed to provide warehouse storage and related services to plaintiff but that this defendant failed to pay rent and was subsequently evicted from the subject warehouse located in Union City, California. Plaintiff contends that it was sued by Fulfillco’s landlord. It maintains that defendant 8X Logistics, Inc. (“8X”) is Fulfillco’s successor and is therefore liable for Fulfillco’s outstanding obligations.

In this motion, plaintiff moves for a default judgment against both defendants. It claims that it served defendant Fulfillco in accordance with an ex parte order it obtained, which

permitted service via alternative means. And it claims that 8X filed its answer nearly four months late.

Defendant 8X cross-moves to dismiss plaintiff's third cause of action and opposes the default judgment motion. It claims that when its counsel was hired (in June 2022), it requested an extension of time to respond to the complaint but that counsel for plaintiff never responded to the request so an answer was uploaded on June 30, 2022. 8X claims that plaintiff's cause of action for successor liability should be dismissed because it fails to state a cause of action. It claims that under New York law, successor liability is not a separate cause of action. 8X also disputes plaintiff's contention that it is a successor, for purposes of plaintiff's claims against Fulfillco, to Fulfillco.

In reply, plaintiff emphasizes that 8X's answer is untimely and that Fulfillco is also in default. It claims that 8X failed to offer a reasonable excuse for its untimely answer and that it failed to raise a meritorious defense.

### **Discussion**

As an initial matter, the Court grants the branch of the motion that seeks a default judgment against defendant Fulfillco on default. This defendant did not oppose plaintiff's application nor has it appeared in this action.

With respect to the branch of the motion that seeks a default against 8X, the Court denies that request. The affidavit of service contends that plaintiff effectuated service by giving the papers to a "Michael Chung" but 8X claims that the purported service against it was insufficient and attaches an affidavit from an employee, Mario Ibarra, who asserts that no one named Michael Chung has ever worked for 8X (NYSCEF Doc. No. 39, ¶ 3). In any event, plaintiff did not suffer any prejudice by 8X's untimely answer, which was only filed a few months after this

defendant's time to answer had expired and plaintiff had not tried to move its case against 8X during that time.

“[D]efendants were not required to set forth a meritorious defense because no default judgment had been entered” (*Hirsch v New York City Dept. of Educ.*, 105 AD3d 522, 522, 961 NYS2d 923 (Mem) [1st Dept 2013]). Therefore, 8X needed only to cite a reasonable excuse for not timely answering. As stated above, 8X cited a reasonable excuse for not answering by arguing that the person who was allegedly served with the papers did not actually work for 8X and could not accept service on behalf of this corporate entity. And this Court prefers that cases be decided on the merits.

Although 8X is correct that successor liability is not an independent cause of action (*see e.g., Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480, 11 NYS3d 548 [1st Dept 2015]), the Court finds that the third cause of action states a cognizable cause of action against 8X for breach of contract and contractual indemnification against 8X. In other words, the Court finds that plaintiff may pursue the same claims against Fulfillco *and* 8X (the claims against 8X are based upon a successor liability theory). While the complaint could have been pled differently (it could have just pursued both the first and second causes of action against both defendants), this oversight is not fatal. The complaint is clear about the basis for liability against 8X even though the third cause of action is titled “Successor Liability.” Moreover, this result fosters efficiency. Rather than dismiss this cause of action and make plaintiff make a future motion, the parties can proceed on the merits. And there is no dispute about what plaintiff's theory of recovery is against defendant 8X. While 8X may dispute plaintiff's allegations, plaintiff has asserted a cognizable theory of recovery against 8X.

Accordingly, it is hereby


ORDERED that plaintiff’s motion is granted to the extent that it is awarded a default judgment against defendant Fulfillco, Inc. on default and an inquest shall be held with respect to this defendant to determine the amount of damages to be awarded to plaintiff at the time of trial or, if the matter is resolved with respect to defendant 8X prior to trial, then plaintiff shall file a note of issue for an inquest; and it is further

ORDERED that the branch of plaintiff’s motion for a default judgment against defendant 8X is denied and 8X’s answer is deemed timely *nunc pro tunc*; and it is further

ORDERED that 8X’s cross-motion to dismiss the third cause of action is denied.

Conference: December 7, 2022 at 10:30 a.m. By November 30, 2022, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that highlights the areas in dispute or 3) letters explaining the reason why no agreement about discovery could be reached. The Court will then assess whether an in-person conference is required (if a fully-executed stipulation is timely submitted, then a conference may not be necessary). The failure to upload anything by November 30, 2022 will result in an adjournment of the conference.

10/24/2022  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" 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