

Marcum LLP v 5BARZ Intl. Inc.
2022 NY Slip Op 33978(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 653600/2021
Judge: Louis L. Nock
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a contingent fee of 25% of all sums recovered . . . under the parties' agreement" The sixth cause of action seeks an award of "a finance charge of 1% per month" "pursuant to the signed engagement letter and provisions incorporated therein."

Service of Process and Defendant's Default

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). By decision and order filed June 24, 2022 (NYSCEF Doc. No. 16), this court granted plaintiff's application for an extension of time to serve the summons and complaint, to six months from entry of that order. After discovering defendant's status as Nevada corporation (*see*, NYSCEF Doc. Nos. 10, 26), plaintiff served defendant on its Nevada-filed registered agent – Nevada Business Services – on July 18, 2022 (*see*, NYSCEF Doc. Nos. 17, 26), which was compliant with the timeframe set forth in this court's aforesaid decision and order. No answer is found in the docket of this action. Thus, the court concludes that plaintiff has satisfied its initial burden to submit proof of service of process and defendant's default in answering.

Proof of the Facts Constituting the Claim

Plaintiff has failed to submit the threshold level of proof of facts constituting its claim that is required even within the context of this motion for a default judgment.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of the facts constituting the claim (CPLR 3215). "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” (*e.g.*, *Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]).

Plaintiff submits the affidavit of its officer, Leslie Adler (NYSCEF Doc. No. 23), which merely restates the allegations of the complaint. No written contract is exhibited; nor is there any detail regarding any possible oral contract. Instead, Ms. Adler references what she refers to as “appended invoices.” That appendage consists of a letter from plaintiff’s counsel, dated April 11, 2022 (NYSCEF Doc. No. 28) – which is subsequent to the date of commencement of this action – making some sort of reference to an “unpaid premium due and owing” for “Workers’ Compensation coverage,” seemingly unrelated to the general claim for breach of any agreement to pay for plaintiff’s professional services that are the subject of the complaint, and in an entirely different, and decreased, sum of money (*compare* Complaint [seeking \$129,568.59 plus additional charges] *with* NYSCEF Doc. No. 28 [\$14,389.27]). Most importantly, that letter is not even addressed to the defendant; but rather, to an entirely different corporation – “Installation, Service & Repair, Inc.” of “Freeport, NY.” No explanation is offered as to any conceivable relation between that corporation and the defendant. Therefore, the motion is denied for failure of any proof in support of the claims asserted in this action.

Accordingly, it is

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

ORDERED that a preliminary conference shall go forward in this action on January 11, 2022, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York; and it is further

ORDERED that plaintiff’s counsel will serve a copy of this decision and order on the defendant, by United States first class mail, no later than November 30, 2022, and will file proof of said service on or before December 3, 2022.

This will constitute the decision and order of the court.

ENTER:



<u>11/22/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE

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