

Bordonaro v E.C. Provini Co., Inc.
2023 NY Slip Op 30195(U)
January 18, 2023
Supreme Court, New York County
Docket Number: Index No. 157409/2020
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO

PART 33M

Justice

-----X
STEVEN BORDONARO,

Plaintiff,

- v -

E.C. PROVINI CO., INC., BATH & BODY WORKS, LLC, L
BRANDS, INC, 441 LEXINGTON AVENUE CO. LIMITED
PARTNERSHIP, L BRANDS STORE DESIGN &
CONSTRUCTION, INC., ELITE DELIVERY SYSTEMS, LLC,

Defendant.

-----X
E.C. PROVINI CO., INC.

Plaintiff,

-against-

CBI DRYWALL, CORP., ELITE DELIVERY SYSTEMS

Defendant.

INDEX NO. 157409/2020
MOTION DATE 05/27/2022
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596019/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for

CONTEMPT

Upon the foregoing documents, there being no opposition, and after oral argument, which took place on January 17, 2023, where Michael Nashak, Esq. appeared for Defendant/Third-Party Plaintiff E.C. Provini Co., Inc., ("Provini") Matthew Cueter, Esq. appeared for Third-Party Defendant CBI Drywall Corp. ("Drywall") and Robert Colin, Esq. appeared for 441 Lexington Avenue Co., Third-Party Defendant Drywall's motion seeking to hold Chris Olivera ("Olivera"), principal of Defendant/Third-Party Defendant Elite Delivery Systems ("Elite"), in contempt is

conditionally granted, and Defendant/Third-Party Plaintiff Provini's cross-motion seeking default judgment against Elite is denied without prejudice.

A. Drywall's motion for contempt

A party seeking civil contempt arising out of noncompliance with a subpoena bears the burden of establishing, by clear and convincing evidence, that the subpoena has been violated and that the party from whom discovery is sought can produce them (*Tener v Cremer*, 89 AD3d 75 [1st Dept 2011]). On December 16, 2021, Hon. Alexander M. Tisch so-ordered a subpoena directing Olivera to appear for a deposition on January 20, 2022 at 2:00 p.m. (NYSCEF Doc. 88). An affidavit of service, which appears valid on its face and has not been contested, states that the so-ordered subpoena was served on Elite Delivery Systems on December 23, 2021 (NYSCEF Doc. 89). Multiple e-mails and letters were also sent to Elite during March of 2022 (NYSCEF Docs. 90-91).

On May 9, 2022, after Elite and Olivera failed to comply with the so-ordered subpoena, Third-Party Defendant Drywall moved to hold Olivera in civil contempt (NYSCEF Doc. 83). Elite and Olivera have failed to respond to any legal papers in the instant action despite over a year passing since they were ordered to appear for a deposition. As an affidavit of services and forms of correspondence show that Elite knew about the subpoena, but has not complied with it to date, Drywall has met its burden of showing that Olivera and Elite have violated the so-ordered subpoena. Therefore, if Elite and Olivera do not comply with the so-ordered subpoena on or before February 18, 2023, this Court shall hold Olivera in contempt.

However, as the address for service for Elite and Olivera is in New Jersey, it appears Drywall seeks to compel an out of state witness to appear for an in-state deposition. Both New York and New Jersey have adopted the Uniform Interstate Depositions Discovery Act to deal with

issues precisely similar to the one in the case at bar (*see* CPLR 3119; *see also Catalina Marketing Corporation v Hudyman*, 459 NJ Super 613 [App. Div. 2019]). Therefore, prior to the Court holding Elite and Olivera in contempt for failure to comply with a subpoena, the Court will require proof that Drywall has complied with New Jersey's procedure for serving an out of state subpoena on a witness in New Jersey.

B. Provini's Cross-Motion for Default Judgment

An applicant for default judgment against a defendant must submit: (i) proof of service of the summons and complaint, (ii) proof of the facts constituting the claim, and (iii) proof of the defaulter's failure to appear (*PV Holding Corp v AB Quality Health Supply Corp*, 189 AD3d 645[1st Dept 2020]). Affidavits submitted in support of a motion for default judgment only need to allege enough facts to allow a court to assess where a viable cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The Court is mindful that "defaulters are deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them (*Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007]).

Provini's cross-motion seeking default judgment against Defendant/Third-Party Defendant Elite has failed to comply with CPLR § 3215(f), which requires either a Complaint verified by the party seeking default judgment or an affidavit in support of the motion executed by a party with personal knowledge of the merits of a movant's claims (*Beltre v Babu*, 32 AD3d 722 [1st Dept 2006]). Here, the Third-Party Complaint is not verified by anyone from Provini, nor is there any affidavit from an individual at Provini who has personal knowledge of the merits of Provini's claims. Thus, Provini has not met the statutory requirements of CPLR § 3215(f) and default judgment is inappropriate. As this cross-motion is being denied on procedural grounds, it is denied without prejudice with leave to renew.

Accordingly, it is hereby,

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion seeking to hold Chris Olivera, principal of Defendant/Third-Party Defendant Elite Delivery Systems in contempt for failure to comply with a so-ordered subpoena dated December 16, 2021 (NYSCEF Doc. 89) is conditionally granted; and it is further

ORDERED that Chris Olivera, principal of Defendant/Third-Party Defendant Elite Delivery Systems appear for a deposition pursuant to the subpoena dated December 16, 2021, assuming the proper procedures have been followed, within 30 days of this Decision and Order, and/or move to quash the subpoena; and it is further

ORDERED that Third-Party Defendant CBI Drywall shall, on or before February 22, 2023, upload to NYSCEF compliance with the Uniform Interstate Depositions and Discovery Act; and it is further

ORDERED that the Court will hold in abeyance Third-Party Defendant CBI Drywall Corp.'s request for costs; and it is further

ORDERED that Defendant/Third-Party Plaintiff E.C. Provini Co., Inc.'s motion seeking default judgment against Defendant/Third-Party Defendant Elite Delivery Systems is denied without prejudice with leave to renew within 60 days of this Decision and Order; and it is further

[The remainder of this page is intentionally left blank.]

ORDERED that within seven (7) days of entry, counsel for Third-Party Defendant CBI Drywall Corp. shall serve a copy of this Decision and Order upon Chris Olivera and Defendant/Third-Party Defendant Elite Delivery Systems at their last known business address via first-class mail and process server and shall upload to NYSCEF an affidavit of service showing compliance with this directive.

This constitutes the Decision and Order of the court.

1/18/2023

DATE

Mary V Rosado

HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE