

**16 W. 12 Holding, LLC v 18 W. 12th St. Apt. Corp.**

2024 NY Slip Op 32918(U)

August 16, 2024

Supreme Court, New York County

Docket Number: Index No. 159274/2017

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 61M**

*Justice*

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16 WEST 12 HOLDING, LLC,  
Plaintiff,

- v -

18 WEST 12TH STREET APT. CORP.,  
Defendant.

-----X

16 WEST 12 HOLDING, LLC  
Plaintiff,

-against-

XHEMA OF N.Y., INC.  
Defendant.

-----X

XHEMA OF N.Y., INC.  
Plaintiff,

-against-

M&A PROJECTS RESTORATION, INC., WEST NEW YORK  
RESTORATION OF CT, INC., ROSE DEMOLITION &  
CARTING, INC., NY IRON, INC., EVEREST SCAFFOLDING  
INC., LOUGH CONN INC., PRECISE CONSTRUCTION  
CONTRACTING, INC.

Defendant.

-----X

INDEX NO. 159274/2017  
MOTION DATE 05/31/2024  
MOTION SEQ. NO. 008 009 010

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595563/2018

Second Third-Party  
Index No. 595666/2024

The following e-filed documents, listed by NYSCEF document number (Motion 008) 307, 308, 309, 310, 311, 312, 313, 330, 337, 338, 345, 354, 360  
were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 314, 315, 316, 317, 318, 319, 320, 331, 339, 340, 346, 355, 361

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 321, 322, 323, 324, 325, 326, 327, 332, 341, 342, 347, 356, 362

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

This is a second third-party action in which the plaintiff, Xhema of N.Y., Inc. (“Xhema”), a construction contractor, moves pursuant to CPLR 3215 for leave to enter a default judgment against three defendants, all subcontractors on a townhouse project.

As way of background, the matter was commenced in 2017 by the petitioner and third-party plaintiff 16 West 12 Holding, LLC (“16 West”) as a petition pursuant to RPAPL § 881 for a license to gain access to an adjacent property to complete renovations on a Manhattan townhouse. The adjacent townhouse is owned by respondent 18 West 12<sup>th</sup> Street Apt. Corp. (“18 West”), which asserted counterclaims alleging, in essence, that property damage was caused by 16 West’s construction project. 16 West’s petition was withdrawn by a so-ordered stipulation dated June 21, 2018, upon the parties’ representations that the RPAPL § 881 matter was settled. The counterclaims were effectively severed and continued.

On July 11, 2028, 16 West filed a third-party action against third-party defendant/second third-party plaintiff Xhema, the general contractor on the construction project, alleging causes of action for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance. Xhema asserted 15 affirmative defenses and two counterclaims against 16 West.

On November 2, 2022, Xhema filed this second third-party complaint against several of its subcontractors for indemnification, contribution and breach of contract. Four defendants timely answered. One of them, Precise Contracting, Inc. (“Precise”), asserted crossclaims against another, Everest Scaffolding, Inc. (“Everest”). Lough Conn. Inc. (“Lough Conn”) filed an answer with crossclaims on March 20, 2024, over one year after the second third-party complaint was served. See CPLR 320(a). By order dated March 6, 2023, the court severed this action (MOT SEQ 005). By a stipulation dated February 13, 2024, Precise discontinued its crossclaims against Everest.

On December 6, 2023, Xhema filed three separate motions for leave to enter a default judgment pursuant to CPLR 3215 as against three second third-party defendants - N.Y. Iron, Inc., Everest and Lough Conn Inc. (collectively, the “Non-Answering Parties”) (MOT SEQ 008, 009, 010). No opposition is submitted.

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2<sup>nd</sup> Dept. 2008]).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649, 651 (2<sup>nd</sup> Dept. 2011). “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 [see 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22–3215.27].” Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept. 1987); see Martinez v Reiner, 104 AD3d 477, 478 (1<sup>st</sup> Dept. 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co., supra. “As such, “[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default.” Green v Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2<sup>nd</sup> Dept. 1992). Xhema fails to meet its burden on the motions.

Xhema submits proof that it filed its second third-party complaint on November 11, 2022, and that N.Y. Irons, Lough Conn, and Everest Scaffolding were served through the Secretary of State on December 9, 2022<sup>1</sup>, March 2, 2023, and February 27, 2023, respectively, within the one hundred twenty-day timeframe set by CPLR 306-b. Xhema’s evidence also establishes that the Non-Answering Parties failed to timely answer. However, Xhema’s submissions are insufficient to establish, *prima facie*, proof of the facts constituting its claims against the Non-Answering Parties, which sound in common law and contractual indemnification, contribution, and breach of contract for failure to procure additional insured coverage for Xhema. Xhema submits the second-third party complaint, verified only by an attorney, which states that each of the Non-Answering Parties performed construction work at the project as subcontractors. However, a “complaint verified by counsel amounts to no more than an attorney’s affidavit and

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<sup>1</sup> The court notes that Xhema omitted the affidavit of service for NY Irons in its motion papers for MOT SEQ 008. However, Xhema had previously filed this affidavit of service on December 16, 2022, as NYSCEF Doc. No. 171.

is therefore insufficient to support entry of judgment pursuant to CPLR 3215.” Mullins v DiLorenzo, 199 AD2d 218, 219 (1<sup>st</sup> Dept. 1993); see also Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006). Moreover, as previously stated, since the attorney lacks personal knowledge of the underlying facts, his affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., supra; Thelen LLP v Omni Contracting Co. Inc., supra. The attorney purports to have personal knowledge of the facts by way of review of a law office file. Xhema also submits the affidavit of one of its officers, Pier Giorgetti, but Giorgetti merely states that the Non-Answering Parties failed to timely answer and provides no proof of the facts constituting Xhema’s claims. Nothing more is submitted. This is insufficient to establish any cause of action *prima facie*.

Since the defects can be cured, denial of the motions is without prejudice to renewal on proper papers within 30 days of this date of this order. See CPLR 3215(c).

Accordingly, upon the foregoing papers, it is

ORDERED that MOT SEQ 008, MOT SEQ 009 and MOT SEQ 010 are denied without prejudice to renewal on proper papers within 30 days of this date of this order, and it is further

ORDERED that the third-party plaintiff and answering third-party defendants shall appear for a preliminary conference on October 31, 2024, at 12:00 p.m.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

8/16/2024

DATE

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