Elite Stone Fabricators, Inc. v Fahey
2024 NY Slip Op 35114(U)
August 28, 2024
Supreme Court, Westchester County
Docket Number: Index No. 62062/2023
Judge: David F. Everett
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Elite Stone Fabricators, Inc.,

Plaintiff,

-against-

Alan Fahey,

Defendant.

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INDEX NO. 62062/2023

DECISION/ORDER
Motion Seq. 1

EVERETT, J.

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 3-10, relative to the motion by plaintiff for a default judgment in the sum of $106,000 for non-appearance, the Court determines as follows:

Background

In the affirmation in support (NYSCEF Doc No. 9) to show a meritorious claim, Avni Ahmetaj, the president of plaintiff, states the following:

> 3. In or about March, 2020, plaintiff and defendant entered into an agreement whereby plaintiff was to perform services in connection with installing countertops and island and installing porcelain slabs in bathrooms on floors and walls and supplying labor and materials at defendant's home at 19 Galton Place, Montauk, New York,
> 4. The fair value of the foregoing was $120,000 no part of which has been paid although payment has been duly demanded except for $14,000 leaving a balance due and owing of $106,000. Copy of the final invoice is attached. (Exh. 1)
> 5. Defendant has breached the agreement while plaintiff has duly performed all services and supplied all materials as required under the agreement and there have been no objections, complaints or protests made by defendant to plaintiff in connection therewith.

6. By reason of the foregoing, defendant has violated the agreement and plaintiff is entitled to a judgment against this defendant for breach of contract for $106,000 with interest from June 1, 2022.
7, Heretofore, regularly and periodically thereafter, plaintiff duly rendered statements of account to defendant showing the amount due and owing to plaintiff.
8. Said statements of account were duly received by defendant without challenge, complaint, offset, rejection or objection.

In support of the claim, plaintiff submits an invoice (NYSCEF Doc No. 10). The affidavit of service (NYSCEF Doc No. 6) states that service was made on June 10, 2023, by substituted service on a co-tenant who refused to give her name.

Default (CPLR 3215)

CPLR 3215 (a) provides: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." In a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default (*Bank of N.Y. Mellon v Van Roten*, 181 AD3d 549, 550 [2d Dept 2020]).

CPLR 3215 (f) requires the applicant for a judgment by default to submit proof "by affidavit made by the party" of the facts constituting the claim, and provides that "[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney." (*See DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015].)

Service on an individual may be made pursuant to CPLR 308 (2). In *Everbank v Kelly* (203 AD3d 138, 143 [2d Dept 2022]), the Court explained: "Service of process under CPLR 308 (2) … requires that the summons be delivered within the state to a person of suitable age and

discretion at the defendant's 'actual place of business, dwelling place or usual place of abode,' along with a mailing of the summons to the defendant's last known residence or actual place of business."

CPLR 3215 (g) (3) requires an additional notice of a default judgment application when the defendant is a natural person, who has not appeared, and the action is one for money due under a contractual obligation (CPLR 3215 [g] [3] [i], [ii]).

Before a default judgment can be entered against a natural person who has otherwise not answered or appeared in an action or proceeding, the party seeking to enter the default judgment must submit an affidavit to the court showing that the defaulting party is neither in active military service nor dependent on anyone else who is (50 USC Appendix § 520 [1]; § 536; Military Law § 303 [1]; § 306) (*see Citibank v McGarvey*, 196 Misc 2d 292, 298 [Civil Ct, Richmond County 2003]).

Uniform Rules for Trial Courts (22 NYCRR) §202.5-bb (b) (3) states that personal service of initiating documents in an action commenced electronically "shall be accompanied by a notice, in a form approved by the Chief Administrator, advising the recipient that the action is subject to electronic filing pursuant to this section."

CPLR 2214 provides: "A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." If a movant fails to give requisite notice of motion, the Court is deprived of jurisdiction to entertain the motion, which is invalidated (*see Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 124-125 [2d Dept 2015]; *Morabito v Champion Swimming Pool Corp.*, 18 AD2d 706, 707 [2d Dept 1962]).

Here, in the affirmation in support (NYSCEF Doc No. 4), plaintiff's attorney states that the summons and complaint was served with the notice of electronic filing and, as noted in the affidavit of service, defendant is not in active military service (NYSCEF Doc No:6); that an

additional notice was sent (CPLR 3215 [g] [3] [i]; NYSCEF Doc No. 7 [blank]); that the time to appear has expired and no extension was requested or granted; and that application is being made and no inquest is required as the claim is for a sum certain.

However, as NYSCEF Doc No. 7 is blank, plaintiff does not show that an additional notice was sent (CPLR 3215 [g] [3] [i]). Plaintiff does not show a meritorious claim as plaintiff does not submit a contract or other document showing that defendant agreed to the charges, or the work performed. There is no affidavit of service showing that defendant was served with the notice of motion for default judgment and supporting affidavits.

Accordingly, it is,

ORDERED that plaintiff's motion for a default judgment is denied, without prejudice to renew on proper papers.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 28, 2024

ENTER:

HON. DAVID F. EVERETT, J.S.C.

To: All parties appearing via NYSCEF