

Estupinan v 1516 Park Ave. Partners LLC
2024 NY Slip Op 35141(U)
June 15, 2024
Supreme Court, Bronx County
Docket Number: Index No. 810505-2021E
Judge: Myrna Socorro
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#2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART IA-9

-----X
Alejandro Estupinan and Maria Claudia Sanchez,
Plaintiffs,

Index No. 810505-2021E

Motion seq #2

-against-

1516 Park Avenue Partners LLC
and Foremost Contracting & Building LLC,
Defendants

DECISION & ORDER

-----X
1516 Park Avenue Partners LLC
and Foremost Contracting & Building LLC,
Third Party Plaintiffs

Hon. Myrna Socorro, J.S.C.

-against-

Defalco Construction Inc.,
and Bove Industries Inc.,
Third Party Defendants

-----X
Defalco Construction Inc.,
Second Third Party Plaintiff

-against-

Salvatore Borgia and Daniel Fama
Second Third Party Defendants

-----X

Recitation as required by CPLR §2219 of the papers filed by Third-Party Defendants/Second Third-Party Plaintiff, Defalco Construction Inc., in the above captioned matter, for default judgment against Second Third-Party Defendants, Salvatore Borgia and Daniel Fama, filed on October 17, 2023 and marked submitted on November 20, 2023

Papers	NYSCEF Doc. No.
Notice of Motion, Affirmation in Support, Affidavit of Merit and Exhibits	82-93

Based upon the foregoing papers, and there being no opposition, and after due deliberation it is ordered that default judgment motion in favor of Third-party Defendants/Second-Third Party Plaintiff, Defalco Construction Inc. and as against Second Third-Party Defendants, Salvatore Borgia and Daniel Fama is DENIED WITH LEAVE TO RENEW.

Plaintiffs commenced this action upon the filing of the Summons and Complaint on August 3, 2021 (NYSCEF Doc. #1). On November 12, 2021, the Defendants appeared and answered (NYSCEF Doc. #3). On May 18, 2022, the defendants filed their Third-Party Summons and Complaint against Defalco Construction Inc and Bove Industries Inc. seeking indemnification and contribution (NYSCEF Doc. #14). On September 2, 2022, Bove Industries appeared and answered the Third-Party Summons and Complaint (NYSCEF Doc. #21). On June 9, 2023, Defalco Construction Inc. appeared and answered the Third Party Summons and Complaint (NYSCEF Doc. #44). On August 23, 2023, Third Party Defendant/Second Third Party Plaintiff, Defalco Construction Inc., filed its Third-Party Summons and Complaint against Second Third-Party Defendants, Salvatore Borgia and Daniel Fama (NYSCEF Doc. #65). Said claim by Third-Party Defendant/Second Third Party Defendants seeks indemnification, breach of contract and contribution. On September 12, 2023, Affidavits of Service were filed (NYSCEF Doc. #73 and #74), which state that the Third-Party Summons and Complaint were served on the Second Third-Party defendants, Salvatore Borgia and Daniel Fama.

Based on motion seq #2, Third-Party Defendant/Second Third-Party Plaintiff, Defalco Construction Inc. moves for a default judgment against Second Third-Party Defendants, Salvatore Borgia and Daniel Fama by motion filed October 17, 2023. It would appear that the motion is filed timely as it is filed prior to the expiration of one (1) year from date of service.

However, in order to obtain a default judgment, Third Party Defendant/Second Third-Party Plaintiff must show compliance with the following: (1) movant shall file proof of service of the summons and complaint; and (2) proof of the facts constituting the claim, the default and the amount due by affidavit made by the party or if verified complaint has been served, it may be used as the affidavit of facts constituting the claim and the amount due [both based on CPLR §3215(f)]. It also states in CPLR§3215(f) that "Proof of mailing the notice required by subdivision (g) of this section, where applicable shall also be filed." Second Third-Party Plaintiffs have entered as exhibits the underlying Summons and Complaint, Answer, Third-Party Summons and Complaint, Affidavits of Service; Bove Answer; Defalco Answer, Second Third-Party Complaint, and affidavits of service (Exhibits

A through J) (NYSCEF Documents #84 to 93). It does not appear that the Third Party Defendant/Second Third-Party Plaintiff filed an Affidavit of Merit in support of their motion for default judgment against Second Third-Party Defendant. Further a review of the Second Third-Party Complaint reflects that the attorney for Third-Party Defendant/Second Third Party Plaintiff verified the complaint.

The Verification attached to the Second Third-Party Complaint indicates that the Complaint is verified by the attorney for the Second Third-Party Plaintiff based on “reports and investigation in file, conversations with client”. Further said Verification indicates that the reason it is verified by the attorney and not a principal or officer of the Second Third Party Plaintiff is because the “Second Third-Party Plaintiff maintains its offices in a county other than the county wherein your deponent maintains offices”

In Mullins v DiLorenzo, 199 A.D. 218, 606 N.Y.S.2d 161 (1st Dept. 1993), the First Department held that “a complaint verified by counsel amounts to no more than an attorney’s affidavit and is therefore insufficient to support entry of a judgment pursuant to CPLR §3215”. Additionally, in Wolf v 3540 Rochambeau Assocs. 234 AD 2d 6; 650 N.Y.S. 2d 161 (1st Dept. 1996), the First Department has held that an “IAS Court erred when it entered judgment by default against defendants as plaintiffs, in support of their motion, failed to provide a complaint verified by the party plaintiffs, rather than plaintiffs attorney, or an affidavit in support of the motion executed by a party with personal knowledge of the merits of plaintiffs’ claims”.

Therefore, as to establishing the merits of the claim, the moving party, in order to comply with CPLR §3215(f), must submit to the court with the motion an affidavit of merit by, as in this case, an officer or principal of the corporate Second Third-Party Plaintiff, or the Verified complaint that was verified by an officer or principal of the corporate Second Third Party Plaintiff (see, Spring Bank v 2467 Realty Corp., 2024 N.Y. Misc. Lexis 2345 (Supreme Court, Bronx County May 31, 2024)

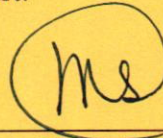
As the Second Third-Party Plaintiff has not provided the Court with an Affidavit of Merit by an officer or principal of the corporate moving party, nor provided a Verified Complaint by an officer or principal of the corporate moving party, the Second Third-Party Plaintiff has not complied with CPLR §3215(f).

Accordingly, the motion filed by Third Party Defendant/Second Third-Party Plaintiff, DeFalco

Construction Inc., for a default judgment against Salvatore Borgia and Daniel Fama (Second Third-Party Defendants), is **DENIED WITH LEAVE TO RENEW**.

This constitutes the Decision and Order of the Court.

Dated: June 15, 2024



HON. MYRNA SOCORRO, J.S.C.