

EBF Holdings, LLC v Prime Indus. Inc.

2025 NY Slip Op 32865(U)

July 16, 2025

Supreme Court, New York County

Docket Number: Index No. 451200/2024

Judge: Emily Morales-Minerva

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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. EMILY MORALES-MINERVA PART 42M

Justice

-----X

EBF HOLDINGS, LLC,

Plaintiff,

- v -

PRIME INDUSTRIES INC., RICARDO LOPEZ

Defendants.

-----X

INDEX NO. 451200/2024

MOTION DATE 05/30/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for JUDGMENT - DEFAULT

APPEARANCES:

Berkovitch & Bouskila, PLLC, Pomona, NY (Ariel Bouskila, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this action for breach of contract and breach of a personal guaranty, plaintiff EBF HOLDINGS, LLC, moves, by notice of motion (sequence no. 001), for an order, pursuant to CPLR § 3215, granting it a default judgment against defendants PRIME INDUSTRIES INC. and RICARDO LOPEZ, for defendants' failure to appear or answer. Defendants do not appear or submit opposition.

As explained below, the Court dismisses the motion.

Preliminarily, this court notes that the instant matter originated in Supreme Court, Washington County, pursuant to

Index No. EC2023-35372 (see NYSCEF Doc. No. 001, Complaint, dated May 30, 2023). The Court (J. Muller, J.S.C., Sup Ct, Washington Cnty) granted defendants' motion to change venue from Washington County to New York County, and the matter was transferred to New York County on April 25, 2024 (see NYSCEF Doc. No. 42, Decision and Order, dated April 24, 2024, and NYSCEF Doc. No. 43, Court Notice of Venue Transfer, dated April 25, 2024). However, the matter was not assigned to the undersigned until March 13, 2025.

When a defendant fails "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 [the defendant]" (CPLR § 3215 [a]). Generally, the proponent of a default judgment shall file proof of (1) service of the summons and complaint, of (2) the facts constituting the claim, and of (3) the default and the amount due (see CPLR § 3215 [f]).

"Contracting parties may agree to means of service alternative to the statutorily required means" (People by Schneiderman v Northern Leasing Sys., Inc., 60 Misc3d 867, 879 [Sup Ct, NY Cnty 2017], affd 169 AD3d 527 [1st Dept 2019]). "Alternative means of service which contracting parties freely agree are also enforceable" (id., citing Knopf v Sanford, 150 AD3d 608, 610 [1st Dept 2017], Clovine Assoc. Ltd. v Kindlund,

211 AD2d 572, 573 [1st Dept 1995], and Credit Car Leasing Corp. v Elan Group Corp., 185 AD2d 109 [1st Dept 1992]). "[S]uch waivers render inapplicable the statutes that normally direct and limit the acceptable means of serving process on a defendant" (Alfred E. Mann Living Trust v ETIRC Aviation S.a.r.l., 78 AD3d 137, 140 [1st Dept 2010]).

Plaintiff submits a contract entitled "Revenue Based Financing Agreement" (Agreement) dated September 14, 2022 (see NYSCEF Doc. No. 002, Agreement, dated September 14, 2022). It purports to constitute an agreement between plaintiffs and defendant PRIME INDUSTRIES INC. (Prime) to purchase Prime's future receivables (see NYSCEF Doc. No. 001, Complaint). Included in the body of the Agreement is a "Performance Guaranty" in which defendant RICARDO LOPEZ (guarantor) purportedly agreed to guarantee the amounts owed to plaintiff from Prime (see id.; see generally NYSCEF Doc. No. 002, Agreement). The Agreement is electronically signed by guarantor (see NYSCEF Doc. No. 002, Agreement).

Here, plaintiff served the summons and complaint upon defendants "via Certified mail with return receipt requested" (NYSCEF Doc. No. 003, Affirmation of Service, dated May 31, 2023). Plaintiff relies on paragraph 4.5 of the September 14, 2022 Agreement as the contractual predicate for service of process by certified mail, return receipt requested (see NYSCEF

Doc. No. 002, Agreement). Paragraph 4.5 of the Agreement provides, as relevant here:

"SELLER AND GUARANTOR AGREE THAT ANY SUMMONS AND/OR COMPLAINT OR OTHER PROCESS TO COMMENCE ANY LITIGATION BY PURCHASER WILL BE PROPERLY SERVED IF MAILED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE MAILING ADDRESS(ES) LISTED ON PAGE 1 OF THIS AGREEMENT"

(emphasis in original) (id.).

However, plaintiff does not submit an affidavit by a person with personal knowledge setting forth proof of the facts to establish that the Agreement is an authentic and valid contract between it and defendants, and that defendants waived the traditional means of serving process (see CPLR § 3215 [f] [requiring an affidavit by a person with knowledge setting forth "proof of the facts constituting the claim", or a verified complaint]). For this, plaintiff relies on the complaint, which is verified by Tracy Parks, identified only as "an authorized representative of plaintiff [EBF HOLDINGS, LLC]" (NYSCEF Doc. No. 001, Verified Complaint).

Specifically, Tracy Parks does not identify her role in plaintiff's business, does not indicate whether she was present at the time the Agreement was signed, nor does she establish the authenticity of guarantor's electronic signature (see id.; see also Andreyeva v Haym Solomon Home for the Aged, LLC, 190 AD3d 801, 802 [2d Dept 2021]). Although "contracting parties may

agree to means of service alternative to the statutorily required means" (People by Schneiderman, 60 Misc3d at 879), without the requisite proof as to the authenticity and validity of the Agreement, the court can not determine whether defendants agreed to this alternative method of service. And, because certified mail, return receipt requested is not a method of service permitted by any of the provisions of the CPLR or the Business Corporation Law, plaintiff fails to establish that it is entitled to a default judgment against either defendant (see Diaz v Perez, 113 AD3d 421, 421 [1st Dept 2014]).

Notwithstanding, plaintiff does not proffer the certified mail return receipts, as provided for in paragraph 4.5 of the Agreement. Without them, plaintiff cannot establish when and if defendants received service of the summons and complaint (see Reserve Funding Group LLP v JL Capital Holdings LLC, 77 Misc3d 1221[A] [Sup Ct, Kings Cnty 2022]).

Despite the lack of proper service of the summons and complaint upon defendants, a review of the file reveals that on June 29, 2023, defendants moved, pre-answer, to dismiss plaintiff's complaint before the Honorable Robert J. Muller (Supreme Court, Washington County), (see NYSCEF Doc. No. 004, Motion to Dismiss). This motion remains pending -- but not before the undersigned -- despite the order of Justice R.

Muller, J.S.C., purporting¹ to "refer" it to a Supreme Court Justice in New York County (see NYSCEF Doc. No. 42, Decision and Order, dated April 24, 2024).² Therefore, plaintiff's instant motion for a default judgment is improper, as defendants have not failed to answer or appear. They timely filed a pre-answer motion to dismiss, which was submitted to a justice in Supreme Court, Washington County, and defendants appear to be awaiting a decision on said motion.

ORDERED that plaintiff's motion (seq. no. 001), pursuant to CPLR § 3215, for a default judgment, is dismissed; it is further

¹ The Uniform Rules for the New York State Trial Court [22 NYCRR] § 202.3, governing the individual assignment system, is explicit: "Assignments shall be made by the clerk of the court pursuant to random selection authorized by the Chief Administrator. The judge thereby assigned shall be known as the 'assigned judge' with respect to that matter and except as otherwise provided in subdivision (c) of this section, shall conduct all further proceedings herein." Among other things not applicable here, subdivision (c) (5) of 22 NYCRR § 202.3 is plainly clear: "The Chief Administrator may authorize transfer of any action or proceeding or any matter relating to an action or proceeding from one judge to another in accordance with the needs of the court."

Further, the Uniform Rules for the New York State Trial Court [22 NYCRR] § 202.8, governing motion procedure, provides in black letter: "(a) All motions shall be returnable before the assigned judge, and all papers shall be filed with the court on or before the return date." Here, the pre-answer motion to dismiss was returnable to Honorable Robert J. Muller and assigned to said justice. Justice Muller's subsequent decision and order, granting plaintiff's motion to change venue, cannot function as an independent reassignment of a motion already submitted to that justice and cannot override the Uniform Rules for the New York State Trial Court, including sections 202.3 and 202.8, quoted above.

Indeed, defendant's pre-answer motion to dismiss -- which apparently was filed on June 29, 2023, years before this case was transferred to the undersigned -- was not and is not submitted before this court.

² The decision and order states, "this Court finds that it would be improper to decide the motion to dismiss previously filed by defendants. As such, the motion is referred to the assigned Justice of the Supreme Court, New York County, for a decision on the relief sought in Motion sequence 001" (NYSCEF Doc. No. 42, Decision and Order, dated April 24, 2024).

ORDERED that the Clerk of Court shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

7/16/2025
DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>			