

**Commissioner of the State Ins. Fund v Atlantic Constr.
Co. Inc.**

2025 NY Slip Op 33208(U)

August 26, 2025

Supreme Court, New York County

Docket Number: Index No. 451076/2024

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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COMMISSIONER OF THE STATE INSURANCE FUND

Plaintiff,

- v -

ATLANTIC CONSTRUCTION COMPANY INC.,

Defendant.

-----X

INDEX NO. 451076/2024
MOTION DATE 02/26/2025
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for JUDGMENT - DEFAULT

Appearances:

New York State Insurance Fund, New York, NY -- 10007
(Michael D. Totaro, Esq.) for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this breach of contract action, plaintiff COMMISSIONER OF THE STATE INSURANCE FUND (SIF) moves, by notice of motion (mot. seq. no. 001), for entry of a default judgment against defendant ATLANTIC CONSTRUCTION COMPANY INC. (ACC), pursuant to CPLR § 3215, in the amount of \$608,439.88, together with interest at 9% per annum from the date of cancellation, August 9, 2023. ACC does not appear or submit opposition.

As explained below, the court dismisses the motion.

ANALYSIS

CPLR § 3215 (a) authorizes the Court to grant a default judgment where 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." To obtain such relief, the moving party must establish three elements: (1) proof of service of the summons and complaint upon the defendant, typically by affidavit of service executed by the process server; (2) proof of the facts constituting the claim, by way of an affidavit from a party with personal knowledge; and (3) proof of the default and the amount due, which may be established through an attorney's affirmation (see CPLR § 3215 [f]).

CPLR § 3215 (g) (4) (ii) mandates that, in cases involving service upon an authorized foreign corporation under Business Corporation Law (BCL) § 306, plaintiff must mail an additional copy of the initiating papers to defendant's last known address before a court can grant it a default judgment. These requirements are designed to ensure that the defendant receives actual notice of the litigation (see generally Taylor v Behavioral Sols. NY, Inc., 194 AD3d 662 [1st Dept 2021]).

With respect to service of process, where defendant is an unauthorized foreign corporation, service must be effectuated in

accordance with BCL § 307(a). It permits service of process upon the New York Secretary of State as agent for the corporation, but mandates that, within ten days, plaintiff must also mail a copy of the summons and complaint to the corporation by registered mail, return receipt requested to the "last address of such foreign corporation known to the plaintiff" (BCL § 307[a][2]). This dual-service mechanism is required to ensure that the court has jurisdiction of such corporation (see BCL § 307[a]).

BCL § 307 sets forth a strict statutory framework governing service of process upon unauthorized foreign corporations. These procedures are "requirements of a jurisdictional nature which must be strictly satisfied" (Stewart v Volkswagen of Am., Inc., 81 NY2d 203, 207 [1993], quoting Flick v Stewart-Warner Corp., 76 NY2d 50, 54 [1990]). Where general jurisdiction is otherwise available under CPLR Article 3, service may be made by delivery to the Secretary of State as statutory agent (Stewart, 81 NY2d at 209; see also BCL § 307 [a]). However, "because the appointment of the Secretary of State as agent is a constructive rather than an actual designation, the statute contains procedures calculated to assure that the foreign corporation, in fact, receives a copy of the process" (see Flick, 76 NY2d at 56; see also Stewart, 81 NY2d at 209). Therefore, failure to comply with BCL § 307 constitutes a jurisdictional defect warranting

dismissal of the action.

Since mailing and filing requirements under BCL § 307 and CPLR § 3215 (g) (4) are jurisdictional in nature, a plaintiff who fails to strictly follow these procedures cannot obtain a valid default judgment against an unauthorized foreign corporation (see VanNorden v Mann Edge Tool Co., 77 AD3d 1157, 1157 [3d Dept 2010]; Stewart, 81 NY2d at 207; Flick, 76 NY2d at 54).

Further, a conclusory statement that service was made to a "last known address," without identifying or substantiating that address, is insufficient (see Deutsche Bank Nat'l Tr. Co. v Ferguson, 156 AD3d 460, 461 [1st Dept 2017] [holding that an affidavit of service is insufficient where it merely states that the summons and complaint were mailed to defendant's 'last known address' without identifying that address]; see also Roc-Lafayette Assocs., LLC v Reuter, 183 AD3d 465, 466 [1st Dept 2020] [holding that service was improper where no showing was made that the address is valid, reiterating that failure to satisfy the requirements of CPLR § 308(4)¹ rendered the affidavit

¹While CPLR § 308(4) is not directly applicable to service under BCL § 307, the Court relies on the First Department's reasoning in Roc-Lafayette Assocs., LLC, 183 AD3d at 465 and Deutsche Bank Nat'l Tr. Co., 156 AD3d at 460, which, although addressing original service of process under CPLR § 308, underscore the necessity of particularized proof when invoking a "last known address" as the basis for service. The Court finds this reasoning instructive in evaluating whether an affidavit of service under BCL § 307 is facially sufficient.

defective]; see also Feinstein v Bergner, 48 NY2d 234 [1979]).

Therefore, it is reasonable for Courts to require the affidavit of service or any other supporting affirmation to not only specify the service address, but also establish a good faith basis for its designation as the party's last known address.

Lastly, "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" (Welz v Brown, 228 AD3d 416, 418 [1st Dept 2024]; see also Joosten v Gale, 129 AD2d 531, 535 [1st Dept 1987]).

Here, ACC is an unauthorized foreign business corporation incorporated in the State of New Jersey. SIF has served process through the Secretary of State in accordance with BCL § 307 (see NYSCEF Doc. 014, Affirmation of Mailing of Summons and Complaint). Further, SIF has mailed an additional copy of the summons and complaint to 73 BAY 22ND STREET #D2, BROOKLYN, NEW YORK in accordance with CPLR § 3215(g)(4) (see NYSCEF Doc. No. 25, Affirmation of Mailing Motion). However, SIF has not provided any factual or evidentiary support to establish the basis on why this is the ACC's "last known address."

Moreover, this address appears to be residential in nature.

While an attached insurance policy reflects that the Brooklyn address is associated with an insured individual, SIF offers no factual showing that this address was utilized by or linked to ACC during the operative period of the policy and fails to provide a sworn explanation justifying its selection as the corporation's last known address for service purposes.

Therefore, SIF's statement is merely conclusory (see NYSCEF Doc. No. 19). The burden rests on SIF to make such a showing, and here that burden remains unmet (see Green 333 Corp. v RNL Life Science Inc., 191 AD3d 506 [1st Dept 2021] [affirming denial of default judgment where plaintiff failed to demonstrate proper service under BCL § 307]). The mailing fails to satisfy CPLR § 3215 and BCL § 307, and therefore jurisdiction has not been obtained.

Accordingly, it is hereby

ORDERED that plaintiff's motion (seq. no. 001), pursuant to CPLR § 3215, for a default judgment, is dismissed without prejudice; and it is further

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

8/26/2025

DATE

Emily Morales-Minerva

EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: