

501 Advance, LLC v Rushway Logistics LLC

2025 NY Slip Op 33415(U)

September 8, 2025

Supreme Court, New York County

Docket Number: Index No. 650221/2024

Judge: James G. Clynes

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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. JAMES G. CLYNES PART 39M

Justice

-----X

501 ADVANCE, LLC,

Plaintiff,

- v -

RUSHWAY LOGISTICS LLC, KENNETH ALLEN RUSH JR
A/K/A KENNETH A. RUSH,

Defendants.

-----X

INDEX NO. 650221/2024
MOTION DATE 04/08/2025
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

JUDGMENT - DEFAULT

In this action for breach of contract and breach of a guaranty, plaintiff 501 Advance, LLC moves, pursuant to CPLR 3215, for entry of a default judgment against defendants Rushway Logistics LLC (Rushway) and Kenneth Allen Rush, Jr. a/k/ Kenneth A. Rush (Rush) (together, defendants). Defendants have submitted no opposition.

Plaintiff and Rushway, as "Merchant," entered into a Merchant and Security Agreement dated June 1, 2021 (the Agreement) under which plaintiff purchased certain of Rushway's future receivables in the purchase amount of \$26,100 for a purchase price of \$18,000 (NY St Cts Elec Filing [NYSCEF] Doc No. 17, Missick affirmation, exhibit B at 1). Rushway agreed to remit payment to plaintiff by allowing plaintiff to debit \$217.50 daily from its bank account until the entire purchase amount was paid (id. at 1-2). The Agreement details 12 occurrences that constitute an "Event of Default," including a violation of any term or covenant in the Agreement (id. at 4). If an Event of Default occurs, Rushway shall pay plaintiff "all reasonable costs associated with (a) an Event or [sic] Default; (b) breach by Merchant of the Covenants in this Agreement and the enforcement thereof; and (c) the enforcement of [plaintiff's] remedies set forth in this Agreement, including but not limited to court costs and attorneys' fees" (id. at 5). Rush executed the Agreement as Rushway's owner (id. at 1).

Rush, as “Guarantor,” separately executed a Guaranty of Performance (the Guaranty) on June 1, 2021 “[a]s an additional inducement for [plaintiff] to enter into this Agreement” (*id.* at 7). Rush agreed that plaintiff could recover the losses and damages it incurred in enforcing its rights under the Agreement, and that he would be jointly and severally liable for all amounts Rushway owed to plaintiff if an Event of Default occurred (*id.*).

Rushway defaulted on the Agreement, and plaintiff commenced this action pleading two causes of action for: (1) breach of the Agreement against Rushway and (2) breach of the Guaranty against Rush (NYSCEF Doc No. 16, Missick affirmation, exhibit A). Plaintiff now moves for a default judgment against defendants for their failure to answer or appear in this action.

A motion for a default judgment must be supported with “proof of service of the summons and the complaint[,] ... proof of the facts constituting the claim, the default and the amount due” (CPLR 3215 [f]; *see also Gordon Law Firm, P.C. v Premier DNA Corp.*, 205 AD3d 416, 416 [1st Dept 2022]). The plaintiff must also offer “some proof of liability ... to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*id.*). A party in default “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damages” (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730, [1984]).

The motion insofar as it seeks a default judgment against Rushway is denied. Uniform Rules for Trial Courts (22 NYCRR) 202.5-bb (b) (3) provides, in relevant part, that personal service of initiating documents in an action that must be 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.” New York County is a mandatory e-filing jurisdiction (*see Admin Order of Chief Admin Judge of Cts AO/040/19*). The affidavit for service of process upon Rushway shows that on January 20, 2024, plaintiff’s process server delivered the summons and complaint to Rush, a corporate officer, at 445 Dutchview Dr., Atlanta, Georgia 30349 (NYSCEF Doc No. 20, affirmation, exhibit E). The affidavit, though, fails to state whether service of process had been accompanied by the mandatory e-filing notice (*see Pollack, Pollack Isaac & De Cicco LLP v Brack*, 2022 NY Slip Op 30755[U], *3 (Sup Ct, NY County 2022); *Maynard v Quick Stop Grocery*, 2019 NY Misc LEXIS 24802, *2 [Sup Ct, Queens County, Aug. 2, 2019]).

As against Rush, plaintiff has demonstrated its entitlement to entry of a default judgment. An affidavit sworn to on March 23, 2024 reveals that on March 22, 2024, plaintiff served Rush with the summons and complaint, affidavit of facts, and notice of electronic filing by certified mail at 445 Dutchview Drive, Atlanta, Georgia 30349 (NYSCEF Doc No. 22, Missick affirmation, exhibit F). Plaintiff then filed proof of service with the Clerk on March 25, 2024 (*id.*). Because Rush had consented to service by mail (NYSCEF Doc No. 17 at 5 and 7), service by mail was proper (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140-141 [1st Dept 2010]). Plaintiff has demonstrated that Rush has failed to answer or otherwise appear in this action within the time prescribed in CPLR 320 (a).

An affidavit stating that an additional copy of the summons and complaint had been mailed to Rush on May 7, 2024 (NYSCEF Doc No. 22, Missick affirmation, exhibit G) demonstrates plaintiff's compliance with CPLR 3215 (g) (3) (i).

Plaintiff has also demonstrated its compliance with Military Law § 303 (3) and 50 USC § 3931 (*see Matter of Petre v Lucia*, 205 AD3d 438, 438 [1st Dept 2022]; *Unitrin Advantage Ins. Co. v 21st Century Pharm.*, 158 AD3d 450, 451 [1st Dept 2018]). A status report dated April 7, 2025 states that a search of the Department of Defense Manpower Data Center for Rush's name and social security number shows that Rush was not on active duty in any branch of the Uniformed Services as of that date (NYSCEF Doc No. 23, Missick affirmation, exhibit H).

In addition, plaintiff has furnished proof of the facts constituting the claim (*see AB Commercial Real Estate Debt-B2 S.A.R.L. v Holtzman*, 236 AD3d 506, 507 [1st Dept 2025]). The complaint, which was verified by a partner in plaintiff, together with that partner's affidavit, demonstrates that Rushway defaulted on the Agreement on August 3, 2021 and has paid only \$17,550 of the purchase amount (NYSCEF Doc No. 16, ¶¶ 19-21; NYSCEF Doc No. 19, Missick affirmation, exhibit D, Hurwitz aff ¶¶ 1, 6-7). Plaintiff is also entitled to prejudgment interest from August 3, 2021 (*see CPLR 5001[b]*).

Although plaintiff is entitled to its reasonable attorneys' fees (*see 228 W 72 LLC v 228A W. 72 LLC*, 213 AD3d 608, 609-610 [1st Dept 2023]), it has waived its request for attorneys' fees for the purpose of entry of judgment (NYSCEF Doc No. 15, Missick affirmation, ¶ 29).

Accordingly, it is

ORDERED that the branch of the motion brought by plaintiff 501 Advance, LLC for a default judgment against defendant Rushway Logistics LLC is denied with leave to renew within

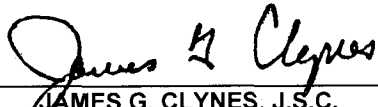
60 days after the date of this decision and order upon proof of its compliance with Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb (b) (3); and it is further

ORDERED that the branch of the motion brought by plaintiff 501 Advance, LLC for a default judgment against defendant Kenneth Allen Rush, Jr. a/k/a Kenneth A. Rush is granted, without opposition; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Kenneth Allen Rush, Jr. a/k/a Kenneth A. Rush in the sum of \$8,450, with interest at the statutory rate from August 3, 2021, until the date of entry of judgment, and at the statutory rate thereafter, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

9/8/2025
DATE


JAMES G. CLYNES, J.S.C.

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