SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

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MERCURY PUBLIC AFFAIRS, LLC

Plaintiff,

- v -

PERCH MOBILITY, INC.,

Defendant.

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INDEX NO. 655540/2024

MOTION DATE 06/05/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for JUDGMENT - DEFAULT.

APPEARANCES:

Lippes Mathias LLP, Albany, NY (Conor Eric Brownell, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this breach of contract and account stated action, plaintiff MERCURY PUBLIC AFFAIRS, LLC moves, by notice of motion (seq. no. 001), for entry of a default judgment against defendant PERCH MOBILITY, INC., pursuant to CPLR § 3215, in the amount of $52,500.00. Defendant does not appear or submit opposition.

As explained below, the Court dismisses the motion.

BACKGROUND

Plaintiff MERCURY PUBLIC AFFAIRS, LLC (consultant) and defendant PERCH MOBILITY, INC. (client) entered into a Consulting Services Agreement (Agreement) on May 01, 2024, amended on May 28, 2024, wherein consultant agreed to provide lobbying services to client (see New York State Courts Electronic Filing System [NYSCEF] Doc. No. 02, Consulting Services Agreement, dated May 01, 2024, and signed by both parties; see also NYSCEF Doc. No. 02, Amendment No. 1 to Consulting Services Agreement [Amendment], attached to Agreement, dated May 28, 2024, and signed by both parties).

The Agreement provides that client shall pay consultant "$17,500.00 per month retainer that include lobbying services" (NYSCEF Doc. No. 02, Amendment). The Agreement also provides that any time client installs a "portal" at a new location, consultant will engage in marketing activity to further interest in such location -- and, "in exchange for these non-lobbying services, consultant will be paid $1,500 per location" (id., Amendment at ¶ 1). Consultant agreed to invoice client monthly, and client agreed to pay said invoices within thirty days of receipt (id., Amendment at ¶ 2).

Consultant invoiced client on July 16, 2024 for "Lobbying in New York City and Government relations for the month of July

2024" in the amount of "$17,500.00"; on August 20, 2024 for the same, in the amount of "$17,500.00"; and on September 10, 2024, for "General Business Consulting Services for the month of September 2024" in the amount of "$17,500.00" (NYSCEF Doc. No. 03, Invoices, dated July 16, 2024, August 20, 2024, and September 10, 2024). Consultant alleges that despite performing the services described therein, client failed to pay all three invoices (see NYSCEF Doc. No. 01, Verified Complaint; see also NYSCEF Doc. No. 03, Invoices).

Thereafter, on October 18, 2024, consultant commenced the instant action against client, asserting two causes of action sounding in breach of contract and account stated (see NYSCEF Doc. No. 01, Verified Complaint). Therein, Yaron seeks damages in the amount of $52,500.00, plus costs and statutory interest (id.).

Client has not appeared, answered, or otherwise moved against the complaint. Now, consultant moves, by notice of motion (seq. no. 001), pursuant to CPLR § 3215, for an order granting it a default judgment against client.

ANALYSIS

Pursuant to CPLR § 3215 (a), a plaintiff may seek a default judgment where a defendant fails to appear, plead, or

proceed to trial. On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see generally CPLR § 3215; see also Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2d Dept 2008]).

"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]; Joosten v Gale, 129 AD2d 531, 535 [1st Dept 1987]). While the standard of proof necessary to support an application for a default judgment is not stringent, some firsthand confirmation of the facts forming the basis of the claim is necessary (see Feffer v Malpeso, 210 AD2d 60, 61 [1st Dept 1994]; see also Resnick v Lebovitz, 28 AD3d 533 [2d Dept 2006]).

To prevail on a breach of contract claim, a plaintiff must establish that (1) a contract exists between the parties; that (2) plaintiff performed in accordance with the contract; that (3) defendants breached their contractual obligations; and that (4) defendant's breach resulted in damages (see generally 34-06

73, LLC v Seneca Ins. Co., 39 NY3d 44, 51 [2022] [quotations and citations omitted] [discussing the standard for a breach of contract in the context of a pleading]).

Though consultant submits the verified complaint (NYSCEF Doc. No. 01) and affidavit of Thomas Doherty, partner of consultant (NYSCEF Doc. No. 11), neither attest to consultant's own performance under the Agreement, or defendant's breach thereof. Instead, the complaint and affidavit state, conclusorily, that "[consultant] provided the services required of it under the Agreement" (NYSCEF Doc. No. 01, Verified Complaint, and Doc. No. 11, Affirmation of Thomas Doherty). These conclusory assertions are insufficient to warrant a default judgment against client on a breach of contract cause of action.

The court next addresses consultant's claim sounding in account stated. "An account stated claim is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance" (TH Fashion Ltd. v Vince Holding Corp., 230 AD3d 1079, 1079-1080 [1st Dept 2024], quoting Aronson Mayefsky & Sloan, LLP v Praeger, 228 AD3d 182, 185 [1st Dept 2024] [internal quotation marks omitted]). Such assent may be "implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial

payment on the account" (Stardom Brands, LLC v S.K.I. Wholesale Beer Corp., 172 AD3d 1266, 1268 [2d Dept 2019]; Aronson Mayefsky & Sloan, LLP, 228 AD3d at 185). However, a plaintiff "must establish that it sent invoices to defendant and that those invoices were received and retained by defendant without objection made in a reasonable period of time" (23rd St. Berk, LLC v Journey Flatiron LLC, 2024 NY Misc LEXIS 6707, *4, [Sup Ct New York County] [G. Lebovits, J.S.C.], citing Morrison Cohen Singer & Weinstein, LLP v Brophy, 19 AD3d 161, 161-162 [1st Dept 2005]).

Here, consultant offers no evidence demonstrating that the invoices were ever mailed to, received by, or retained by client. Instead, the affirmation of Thomas Doherty provides that the invoices sent by consultant to client were "made and kept in the ordinary course of [consultant's business]" (NYSCEF Doc. No. 11, Affirmation of Thomas Doherty; see generally Stephanie R. Cooper, P.C. v Robert, 78 AD3d 572, 573 [1st Dept 2010] [to recover on account stated, plaintiff must show "that it generated detailed monthly invoices and mailed them to defendant on a regular basis in the course of its business"]). Further, consultant does not offer any evidence demonstrating partial payments of said invoices (cf. Garr Siple, P.C. v Weir, 208 AD3d 1098, 1099 [1st Dept 2022] [noting that plaintiff, on its account stated cause of action, submitted

evidence that partial payments had been made]). Therefore, consultant has not sufficiently demonstrated prima facie validity of the account stated cause of action.

In addition to defects addressed above, consultant provides insufficient proof of compliance with the additional mailing requirement of CPLR § 3215 (g) (4) (ii). Where a default judgment is sought, as here, against a corporation served pursuant to BCL § 306 (b), the proponent must also submit proof that -- either simultaneous with service or after such service -- they executed "additional service of the summons [on the corporation] by first class mail" at the corporation's "last known address", accompanied by a notice that service had been made pursuant to BCL § 306 (CPLR § 3215 [g] [4] [i]-[ii] [emphasis added]; BCL § 306 [b][2]). The affidavit does not provide an attestation that the address the additional mailing was effectuated upon is client's last known address, nor does it provide that the required notice pursuant to BCL § 306 accompanied the mailing (see NYSCEF Doc. No. 05, Affidavit).

Accordingly, it is hereby

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

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendant, within 30 days of this order; it is further

ORDERED that plaintiff shall bring a renewed default judgment motion, supported by appropriate documentation, within 90 days of this order; and it is further

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

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

10/6/2025
DATE

EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE