

La Frieda Meats, Inc. v Hilmar LLC

2025 NY Slip Op 34382(U)

November 10, 2025

Supreme Court, New York County

Docket Number: Index No. 652601/2024

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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LA FRIEDA MEATS, INC.,

Plaintiff,

- v -

HILMAR LLC, MARK MENDAROS

Defendants.

INDEX NO. 652601/2024

MOTION DATE 06/13/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for JUDGMENT - DEFAULT

APPEARANCES:

Katz Law, P.C., Nyack, NY (David M. Katz, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this action sounding in account stated and breach of a personal guaranty, plaintiff LA FRIEDA MEATS, INC. moves, by notice of motion (seq. no. 01), pursuant to CPLR § 3215, for a default judgment against defendants HILMAR LLC (defendant Hilmar) and MARK MENDAROS (defendant Mendaros). Defendants make no appearance.

Now, upon review of the application and supporting materials, the Court denies the motion entirely.

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 must provide 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]; see also Woodson v Mendon Leasing Corp., 100 NY2d 62, 70 [2003]; Gordon Law Firm, P.C. v Premier DNA Corp., 205 AD3d 416, 416 [1st Dept 2022])).

As a defaulting defendant fails to appear and "the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists" (Woodson, 100 NY2d at 70-71). Indeed, it is well settled that "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (id., citing Rokina Opt. Co. v Camera King, 63 NY2d 728, 730 [1984]; see also Martino v Chenel Capital, LLC, 235 AD3d 498, 499 [1st Dept 2025] [applying the same principle])).

Proof of service on a natural person includes an affidavit of service attesting to delivery of the summons in compliance with CPLR § 308. Proof of service on a limited liability company, shall include an affidavit of service, pursuant to

Limited Liability Company Law § 303, providing for, among other things, service of process on the secretary of state as an agent of the limited liability company.¹

Further:

"When a default judgment based on nonappearance is sought [as here] against a natural person in an action based upon nonpayment of a contractual obligation, an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least 20 days before the entry of judgment, by mailing a copy of the summons by first-class mail to the defendant at [their] place of residence in an envelope bearing the legend 'personal and confidential' and not indicating on the outside that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence"

¹ Section 303 of the Limited Liability Company Law provides, as relevant here: "(a) Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made in the manner provided by paragraph one or two of this subdivision. . . . (1) Personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose. . . ."

(CPLR § 3215 [g] [3] [i] [emphasis added]).

Similarly, where a default judgment is sought, as here, against a limited liability company, the proponent must also submit proof that either -- simultaneous with service or after such service -- they executed "additional service of the summons [on the limited liability company] by first class mail" at the limited liability company's "last known address" (CPLR § 3215 [g] [4] [emphasis added]).

Here, plaintiff submits proof of personal service upon defendant Mendaros (see NYSCEF Doc. No. 03, affidavit of service, dated July 25, 2024). However, plaintiff's affirmation of mailing of the additional copy of the summons and complaint does not comply with CPLR § 3215 [g] [3] [i], which is required as this case involves the nonpayment of a contractual obligation. Said affirmation states only that that the summons and complaint were mailed to defendant Mendaros via first class mail "to his actual place of business" (see NYSCEF Doc. No. 06, affirmation of mailing additional copy of summons, dated July 30, 2024). CPLR § 3215 [g] [3] [i] makes clear that a copy of the summons and complaint may only be mailed to a defendant's place of employment if the defendant's place of residence is unknown. The affirmation is silent as to defendant Mendaros'

"place of residence" or whether his "place of residence" is, in fact, unknown.

Additionally, the Federal Servicemembers Civil Relief Act and New York State Soldiers' and Sailor's Civil Relief Act requires a party seeking a default judgment against an individual defendant to submit proof that the defendant was not in military service at the time of the default (see 50 USC § 3931 [b] [1]; see also Military Law § 309 [1]).

"A proper affidavit of nonmilitary service should include the date and location of the investigation and the facts gleaned from the investigation" (Benabi Realty Mgt. Co. v Van Doorne, 190 Misc2d 37, 38 [Sup Ct NY Cnty 2001]). Documentation provided directly from the Department of Defense Manpower Data Center -- "the official source of data on eligibility for military" -- is sufficient to enable the court to conclude that a respondent is not currently on active military duty, or was at the time of the default (363 Assoc. v Sharhan, 2 Misc3d 928, 930 [Civ Ct NY Cnty 2003]).

Plaintiff's affidavit of service does not include an adequate non-military affidavit (see NYSCEF Doc. No. 03, affidavit of service). The process server's inquiry of "Arly Lopez" as to defendant Mendaros' military status at the time of service of process does not constitute an investigation into defendant's military status at the time of default (see MB v

Precise Mgt., Inc., 2018 WL 2415953, *1 [Sup Ct NY Cnty 2018] [holding that "a default judgment motion must be accompanied by an investigation into the military status of the defendant and an affidavit detailing the investigation, which cannot be cursory"], citing Unitrin Advantage Ins. Co. v 21st Century Pharm., 158 AD3d 450, 451 [1st Dept 2018]; see also Nedeltcheva v MTE Transp. Corp., 2016 WL 4256556, *1 [Sup Ct NY Cnty 2016], affd sub nom. Nedeltcheva v MTE Transportation Corp. 157 AD3d 423 [1st Dept 2018]).

Next, while plaintiff submits an affirmation of additional service on defendant Hilmar, said affirmation does not comply with CPLR § 3215 (g) (4) (ii). The affirmation of additional mailing provides:

"I enclosed a copy of the Summons and Verified Complaint [] with a notice that service was being made pursuant to Section 306(b) of the Business Corporation law in a first class mail post-paid sealed envelope properly addressed to the named defendant HILMAR LLC t/a SMASHED at defendant's address at 516 Hudson Street, New York, NY 10014"

(NYSCEF Doc. No. 08, affirmation of additional mailing). The deponent does not attest to having mailed the summons and complaint to defendant limited liability company's "last known address" (id.). In any event, a conclusory statement of a limited liability company's "last known address" would be

insufficient absent language substantiating the source of that knowledge.

Notwithstanding these defects, CPLR § 3215 (f) also requires an affidavit by a person with knowledge setting forth "proof of the facts constituting the claim", or a verified complaint. "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 Feffer v Malpeso, 210 AD2d 60, 61 [1st Dept 1994] [providing that 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]). And, "if [the] factual allegations do not state a valid cause of action, the party moving for a default judgment is not entitled to the requested relief, even on default" (Nationstar Mortgage, LLC v Hilpertshauser, 156 AD3d 1052, 1053 [3d Dept 2017]).

Here, plaintiff relies on the affirmation of Rosa Gomez, Controller of plaintiff (see NYSCEF Doc. No. 11, affirmation of Rosa Gomez, dated May 27, 2025). However, Gomez does not attest to having independent, first-hand knowledge of plaintiff's mailing practices in order to establish that plaintiff mailed

the invoices to defendant Hilman, or that defendant Hilman received and retained said invoices (see 23rd St. Berk, LLC v Journey Flatiron LLC, 2024 NY Slip Op 51276 [U], **2 [Sup Ct NY Cnty] [G. Lebovits, J.S.C.] [holding that "a party suing on an account stated 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"], citing Morrison Cohen Singer & Weinstein, LLP v Brophy, 19 AD3d 161, 161-162 [1st Dept 2005]).

Similarly, Gomez does not attest to whether defendant Hilman made partial payment on the invoices, nor does Gomez provide the amounts paid (see Garr Siple, P.C. v Weir, 208 AD3d 1098, 1099 [1st Dept 2022] [holding that plaintiff submitted proof that defendant made partial payments on the account, supporting its claim for account stated]). These submissions are insufficient to demonstrate prima facie validity of an account stated cause of action.

Accordingly, it is hereby

ORDERED that plaintiff's motion (seq. no. 01) is denied, without prejudice; it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on defendant within 15 days of such entry, and shall file proof of such with the Court; and it is further

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

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/10/2025
DATE

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

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE