

**Barretto St. Realty Corp. v Bathily**

2025 NY Slip Op 35364(U)

February 5, 2025

Supreme Court, Bronx County

Docket Number: Index No. 812259/2024E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 20

-----X  
BARRETTO STREET REALTY CORP.,

Plaintiff,

-against-

Index No. 812259/2024E  
Motion Seq. 2

MAMADOU BATHILY and BRONX IRON & STEEL  
FABRICATORS, INC.,

Defendants.

-----X  
HON. VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all of the papers filed in NYSCEF in connection with the motion of plaintiff BARRETTO STREET REALTY CORP. (Mot. Seq. 2), made pursuant to CPLR 3213 and CPLR 3215, seeking an order granting plaintiff a default judgment as against defendant MAMADOU BATHILY on the first and third causes of action based on money allegedly due only pursuant to a settlement agreement executed by plaintiff and defendants Bathily and BRONX IRON & STEEL FABRICATORS, INC. on May 12, 2023, in Civil Court, Bronx County (“the Settlement Agreement”) in the amount of \$244,033.64 plus interest from July 20, 2023, costs and counsel fees. The motion is unopposed.

Plaintiff again moves by motion seeking to collect money allegedly owed pursuant to the Settlement Agreement. The Settlement Agreement provides in relevant part that defendants were to pay \$60,000 by July 20,2023. In the event that defendants failed to submit the payment, plaintiff is “entitled to a judgment in the amount of \$244,033.64”. The Settlement Agreement does not provide for costs or attorneys’ fees. Plaintiff alleges that only \$30,000 was paid and therefore defendants are in breach of the Settlement Agreement.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to submit proof of service of the summons and complaint, the facts constituting the cause of action, and the defendant's default in answering or appearing (see CPLR 3215; *Clarke v. Liberty Mut. Fire Ins. Co.*, 15 A.D.3d 1192 [2d Dep't 2017]). To demonstrate the facts constituting the cause of action, the plaintiff must submit sufficient proof to enable a court to determine if the cause of action is viable (see *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 [2003]). The court may consider the complaint, affidavits, and affirmations submitted by the plaintiff (*Id.*). As the proponent of an unopposed motion for default judgment, plaintiff also bears the burden of establishing, *inter alia*, that the defendant was properly served with the motion for default judgment (see CPLR 2103; CPLR 306; CPLR 3215[f]).

In addition, in an action based on contract against an individual, plaintiff must satisfy CPLR 3215 (g)(3). CPLR 3215 (g) (3) provides:

3. (i) *When a default judgment based upon nonappearance is sought 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 twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt...*

(ii) *The additional notice may be mailed simultaneously with or after service of the summons on the defendant. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the notice and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant to receive the additional notice shall not preclude the entry of default judgment.*

By decision dated November 4, 2024, the Court granted plaintiff a default judgment as against co-defendant Bronx Iron in the amount of \$244,033.64 plus interest from July 20, 2023, on the cause of action based on the Settlement Agreement and severed the remaining causes of action ("the Prior Decision"). As part of the decision, the demand for a default judgment on the claim for attorneys' fees and costs based on the Settlement Agreement was denied and the claim was severed. For the reasons set forth in the Prior Decision, the

identical demand for a default judgment as to attorneys' fees and costs based on the Settlement Agreement as against defendant Bathily is also denied and severed.

In the Prior Decision, the Court found that plaintiff demonstrated that defendant Bathily was served process and was in default in the action and on the motion. Plaintiff also demonstrated a meritorious cause of action based on the claim of breach of the Settlement Agreement against both defendants. The Court denied the motion as against defendant Bathily, however, because there was no proof submitted of compliance with CPLR 3215[g][3].

Now on renewal, plaintiff establishes that defendant Bathily was served with the required CPLR 3215 Notice, is not in military service, and was served with this motion. Defendant Bathily has not opposed the motion. Accordingly, the motion for a default judgment against the non-appearing defendant is granted without opposition based on the breach of Settlement Agreement only. For the reasons set forth in the Prior Decision, however, that part of the motion for a default judgment that seeks attorneys' fees and costs based on Settlement Agreement is denied and that demand for fees and costs and the remaining causes of action are severed.

Of note, this proceeding was commenced under CPLR 3213. CPLR 3213 specifically provides that "[i]f the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively." In other words, the parties may then litigate the action from there as if it had been commenced in the usual way. (*See generally, Piccarilli v Benjamin*, 196 A.D.3d 895 [3rd Dep't 2021]; *Bronson v Jacobs*, 195 A.D.3d 550 [1st Dep't 2021]; *Mahne v Cell Source*, 203 A.D.3d 436 [1st Dep't 2022]; *Rogers McCarron & Habas, P. C. v Acker*, 189 A.D.3d 1487 [2d Dep't 2020]); *see Schulz v Barrows*, 94 N.Y.2d 624 [2000]). Here there are no answering papers to be deemed an answer (*see Rogers McCarron & Habas, P.C., v Acker, supra*). Hence the proceeding shall proceed with the motion papers serving as the complaint.

*Accordingly, it is hereby*

**ORDERED** that the motion of plaintiff BARRETTO STREET REALTY CORP. (Mot.

