

**Signature Bank v Atlas Race LLC**

2016 NY Slip Op 32366(U)

November 28, 2016

Supreme Court, New York County

Docket Number: 162985/15

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X  
SIGNATURE BANK,

Plaintiff,

-against-

**DECISION AND ORDER**  
Index No.: 162985/15

Mot. Seq. No.: 001

ATLAS RACE LLC D/B/A ATLAS RACE, LLC,

Defendant.

-----X  
**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

MOT. SEQ. 001

PAPERS

NUMBERED

PLTFS.' NOTICE OF MOTION AND AFFIDAVITS ANNEXED

1-2 (Exs. A-C)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action by plaintiff Signature Bank to recover for an overdraft which it made on behalf of defendant Atlas Race LLC d/b/a Atlas Race, LLC, plaintiff moves, pursuant to CPLR 3215, for a default judgment against defendant. The motion is unopposed. After a review of plaintiff's papers and a review of the relevant statutes and case law, **the motion is denied with leave to renew upon proper papers.**

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff bank commenced the captioned action on December 23, 2015. NYSCEF Doc. No.

1. In its verified complaint, plaintiff alleged that defendant, a foreign corporation established

pursuant to the laws of Oregon, but having a principal place of business at 275 Madison Avenue, New York, New York, created an overdraft on an account it had with plaintiff bank in the amount of \$42,737.45. Ex. A. Plaintiff asserts that, pursuant to a bank deposit agreement between the parties, defendant owes it \$42,737.45, plus interest from March 15, 2015 until the date of entry of judgment as a result of the overdraft. Ex. A. Plaintiff waived its request for attorneys' fees, to which it had initially claimed it was entitled, pursuant to the agreement.

On March 16, 2016, plaintiff's process server purported to serve process on defendant by personally serving the Secretary of State of Oregon. Ex. A.

On April 26, 2016, plaintiff served an additional copy of the summons and complaint on defendant pursuant to CPLR 3215(g)(4) and Business Corporation Law 306(b) at defendant's last-known business address in New York City. Ex. B.

On July 29, 2016, plaintiff filed the instant motion seeking a default judgment against defendant based on the latter's failure to answer or otherwise appear herein. NYSCEF Doc. No. 6.

#### **POSITION OF THE PLAINTIFF:**

Plaintiff argues that it is entitled to a default judgment against defendant since it served the Secretary of State of Oregon and subsequently served defendant with process at its last-known business address pursuant to Business Corporation Law ("BCL") 306(b) and CPLR 3215(g)(4) and defendant has failed to answer or otherwise appear in this action.

### LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n 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.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be provided by plaintiff’s affidavit. *See* CPLR 3215(f). Where a verified complaint has been served, it may be used as the affidavit of facts constituting the claim and, in such case, the affidavit of default may be made by the party or the party’s attorney. *Id.*

Here, plaintiff has failed to establish the elements entitling it to a default judgment. Although the verified complaint annexed to the motion purports to set forth the facts giving rise to the claim, it lacks any specificity, such as the location of the branch in which defendant’s account was allegedly opened, when the alleged overdraft occurred, when plaintiff sought repayment of the overdraft, or who plaintiff contacted in an attempt to have the overdraft repaid.

Plaintiff has also failed to establish that it properly effectuated service on defendant. Therefore, the representation by plaintiff’s counsel that defendant has failed to answer or otherwise respond to the complaint is irrelevant.

Plaintiff alleges that defendant is a foreign limited liability corporation. Although plaintiff does not specify whether defendant is authorized to conduct business in the State of New York, a

search of the New York Corporations website reflects that it is not.<sup>1</sup> BCL 307 addresses service upon unauthorized foreign corporations. Although BCL 307, like BCL 306 (which addresses service on New York and authorized foreign corporations), requires initial service on the New York Secretary of State (*see* BCL 307 [a]), it also requires compliance with additional provisions set forth in section 307. Specifically, BCL 307(b) provides that:

b) Service of process upon the secretary of state shall be made by personally delivering to and leaving with him or his 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, a copy of such process together with the statutory fee, which shall be a taxable disbursement. Such service shall be sufficient if notice thereof and a copy of the process are:

1) Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made, or

2) Sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff.

Additionally, BCL 307 (c) and (d) require that an “affidavit of compliance” and accompanying documentation be filed with the clerk of the court in which plaintiff’s action is pending within 30 days after such service.

Here, plaintiff has clearly failed to meet the necessary elements for proper service pursuant

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<sup>1</sup>Curiously, the summons reflects that the this matter in venued in Supreme Court, New York County based on “[d]efendant’s place of business”, although this Court’s internet search reflects that the company is located in Medford, Oregon.

to CPLR 307. In fact, plaintiff's follow up mailing to defendant, which refers to CPLR 306(b) and CPLR 3215(g)(4) (Ex. B), pertains to service on a domestic or authorized foreign corporation, thus strongly suggesting that it was not even aware of the requirements of BCL 307. See *Breer v Sears Roebuck & Co.*, 184 Misc2d 916, 921 (Sup Ct Bronx County 2000). Here, there is no indication of any service upon the New York Secretary of State. Nor is there any indication that defendant was served personally or by registered mail. Thus, plaintiff clearly failed to properly serve process upon defendant pursuant to BCL 307. Even if there had been service pursuant to BCL 307, it would have been "fatally defective due to plaintiff's failure to file a certificate of compliance." *Breer v Sears Roebuck & Co.*, 184 Misc2d at 921 citing *Flannery v General Motors Corp.*, 214 AD2d 497 (1<sup>st</sup> Dept 1995, *affd* 86 NY2d 771 (1995)).

This Court notes, however, that since BCL 307 "does not purport to establish an exclusive mechanism for service on unauthorized, foreign corporations", "if the service through the Secretary of State of [Oregon] was consistent with service under a New York statute other than [BCL] 307, then personal jurisdiction was validly obtained over defendant." *Breer v Sears Roebuck & Co.*, 184 Misc2d at 921. CPLR 311(a)(1) permits service upon a foreign corporation by delivery to an "agent authorized by appointment or law to receive service." Additionally, CPLR 313 provides that one "may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state or by any person authorized to make service by the laws of the state . . ." Thus, one subject to long-arm jurisdiction in New York may be served outside of New York State in a manner consistent with New York law. *Id.* at 922.

In *Breer v Sears Roebuck & Co.*, a case of first impression addressing the same issues raised herein, the court addressed whether service on the unauthorized foreign corporation was made in a

manner consistent with New York law, which it stated was dependent upon 1) whether the Secretary of State of the foreign jurisdiction, there Ohio, was actually designated by defendant as an agent for service of process, or whether such agency existed by operation of the law of the foreign jurisdiction; and 2) if the Secretary of State of the foreign jurisdiction was indeed a duly authorized agent, whether it was served in a manner consistent with New York law. *Id.*, at 922.

This Court notes that section 60.121 of the Oregon Code “provides a predicate to the appointment of the Secretary of State as an agent for service of process; and that the Code does not provide that service may be made in the first instance on the [Oregon] Secretary of State. Rather, as is clear from the language of the [Oregon Code], some attempt at service on the corporation’s statutory agent must be accomplished before resort to service on the Secretary of State may be undertaken (citation omitted). In the case at bar, plaintiff has not established the necessary prerequisites triggering the appointment of the [Oregon] Secretary of State as an agent for the service of process. The statutory predicate triggering the effectiveness of the designation by law of the [Oregon] Secretary of State cannot be assumed, on a silent record, from the fact that the [Oregon] Secretary of State in fact accepted service of process.” *Id.*, at 922-923.

There is no indication whatsoever in plaintiff’s papers regarding whether any individual was registered as an agent for service of process for defendant in Oregon. *Id.* “Absent proof that [defendant] had failed to maintain a designated agent, the Secretary of State of [Oregon] does not become an agent appointed by law for the service of process.” *Id.* Since plaintiff failed to establish that the statutory predicate was met, service on the Secretary of State of Oregon was a nullity, and therefore insufficient to confer jurisdiction over defendant. *Id.* Given that plaintiff failed to establish proper service upon defendant, the instant motion must be denied.

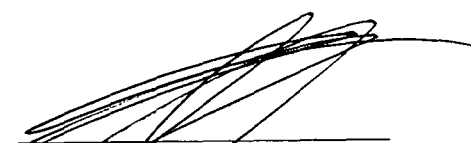
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Signature Bank for a default judgment against defendant Atlas Race LLC d/b/a Atlas Race, LLC is denied with leave to renew upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: November 28, 2016

ENTER:



KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT