

Chelsea Light. NYC, LLC v IBEX Constr. Co., LLC

2017 NY Slip Op 31293(U)

June 12, 2017

Supreme Court, New York County

Docket Number: 650775/2017

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
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

-----X

CHELSEA LIGHTING NYC, LLC
Plaintiff,

INDEX NO. 650775/2017

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

IBEX CONSTRUCTION COMPANY, LLC,
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10
were read on this application to/for Default Judgment

**Upon the foregoing documents, it is
ordered that the motion is denied with leave to renew upon proper papers.**

This action, sounding in breach of contract and an account stated, by plaintiff Chelsea Lighting NYC, LLC, a lighting subcontractor, as against defendant IBEX Construction Company, LLC, was commenced on February 13, 2017. Ex. C. Pursuant to an alleged contract between the parties, plaintiff allegedly sold and delivered to defendant lighting fixtures and equipment to be used at the Chapin School in New York, New York. The value of the items sold was allegedly \$449,756.56 and defendant failed to pay plaintiff \$33,244.14 of that sum.

Plaintiff now alleges that defendant owes it the sum of \$33,244.14 and that it is entitled to a clerk's judgment of default against defendant in that amount, plus interest and attorneys' fees it incurred in bringing this action.

Defendant was purportedly served with the summons and complaint on February 15, 2017. Ex. D. According to the affidavit of service, plaintiff's process server served the summons and complaint on "Nora Dindyal, Process Specialist, who informed [the process server] that she [was] an agent authorized by appointment to receive service at that address." Ex. D.

Plaintiff now moves for a default judgment against defendant. In support of its motion, plaintiff submits an affidavit of Eric Martin, Chief Financial Officer and General Counsel for plaintiff; the purported contract between the parties (Ex. A); a payment summary (Ex. B); the summons and complaint (Ex. C); the affidavit of service of the summons and complaint (Ex. D); and a notice of supplemental mailing pursuant to CPLR 3215 (Ex. E).

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). Application for such judgment may be before the court (CPLR 3215[b]) or on application to the clerk if "for a sum certain or for a sum which can by computation be made certain." CPLR 3215(a). However, a judgment by the clerk can only be entered "upon submission of the requisite proof." CPLR 3215(a). This includes "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due . . ." CPLR 3215(e).

Although plaintiff submits an affidavit of service purporting to reflect that defendant was properly served, the affidavit of service is silent with respect to the entity on behalf of which Dindyal was allegedly authorized to accept service. *Id.* It is thus defective and plaintiff has failed to establish proper service of the summons and complaint.

Additionally, this Court denies the motion because plaintiff failed to submit sufficient “proof of the facts constituting the claim.” CPLR 3215 (f); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). A complaint which is verified by counsel, such as that herein, is “purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215.” *Martinez v Reiner*, 103 AD3d 477, 478 (1st Dept 2013) (internal quotation marks and citation omitted). It is error to issue a default judgment “without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim.” *Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d at 202; *Mejia-Ortiz v Inoa*, 71 AD3d 517 (1st Dept 2010).

Here, where the complaint is verified only by counsel, this Court may not rely on it as proof of any of the facts alleged. *See Martinez v Reiner*, 103 AD3d at 478. Additionally, since Martin’s proffered affidavit of merit as to the alleged debt is deficient, there is simply no evidentiary basis on which to permit this Court to issue a default judgment. *See Mejia-Ortiz v Inoa*, 71AD3d at 517; *Beltre v Babu*, 32 AD3d at 723.

The affidavit submitted by Martin lacks the requisite detail necessary to enable this Court to direct the clerk to enter judgment. Although Martin represents that defendant owes plaintiff \$33,244.14, he fails to explain how he calculated this amount. Additionally, despite annexing a purported vendor agreement to his affidavit, he does not represent that the agreement is a true

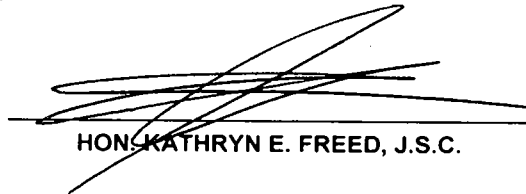
and accurate copy of the agreement between the parties. Further, paragraph "R" of the portions of the agreement dated April 15, 2015 and July 15, 2015, which set forth the procedures for payment of the contract, are missing terms and Martin does not attempt to rectify these deficiencies. Ex. A. Moreover, Martin does not state who compiled the payment summary annexed to the motion as Ex. B, whether the amounts set forth therein are accurate, or annex any proof that the alleged work performed was completed. Finally, Martin fails to explain how or why plaintiff is entitled to recover attorneys' fees from defendant.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiffs is denied with leave to renew upon the submission of proper papers; and it is further,

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

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT



HON. KATHRYN E. FREED, J.S.C.

6/12/2017
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE