

Burlington Ins. Co. v MJR Constr. Servs. Corp.

2017 NY Slip Op 32729(U)

December 21, 2017

Supreme Court, New York County

Docket Number: 653129/16

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

York County Supreme Court under the Index Number 150020/2016.

Plaintiff has submitted proof of service of the summons and complaint and proof of service of this motion upon defendants. Plaintiff has also submitted an attorney affirmation and an affirmation of the Plaintiff's Regional Claim Manager as to defendants' default pursuant to CPLR 3215 (f).

However, the motion must be denied because the plaintiff has not submitted an affidavit of facts in support of the motion pursuant to CPLR 3215 (f), but instead has submitted only affirmations which are insufficient to support the entry of a default judgment. Nor has the plaintiff included in its moving papers a copy of a sufficiently verified complaint that pursuant to CPLR 3215 (f) could act as an affidavit of facts. See Mullins v DiLorenzo, 199 AD2d 218, 219-220 (1st Dept 1993) ("This Court has held that a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215. In the absence of either a verified complaint or an affidavit by the party, the entry of judgment by default is erroneous and deemed a nullity." [citations omitted]; Georgia Pacific Corp. v Bailey, 77 AD2d 682 (3d Dept 1980).

Moreover, plaintiff has not submitted proof of the additional mailing of the summons required by CPLR 3215 (g)(4) upon the corporate defendant.

CPLR 3215 (g) (4) (I) states that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." The rule is that "[a] default judgment may not be granted against a non-appearing corporate defendant without proof of compliance with the additional service requirement set forth in CPLR § 3215(g) (4) (i)." Carus & Manniello, P.C. v MLG Capital Assets LLC., 2003 NY Slip Op 50598(U), 2003 WL 1093402 (City Ct, White Plains, March 4, 2003) citing Rafa Enterprises, Inc. v Pigand Management Corp., 184 AD2d 329, 330 (1st Dept 1992) ("moving papers were deficient, having failed to set forth an affidavit of service by mail upon the last known address of the corporation, as required pursuant to CPLR 3215 (f) (4) (i)"). See, D & D Asphalt Construction Corp v Corealty, LLC, 296 AD2d 432 (2nd Dept 2002). Therefore, plaintiff's motion must be denied without prejudice.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment against defendant MJR CONSTRUCTION SERVICES CORP. is DENIED

WITHOUT PREJUDICE to move again upon proper proofs in accordance with the foregoing; and it is further

ORDERED that the parties shall appear in IAS Part 59, 60 Centre Street, Room 331, New York, New York 10013, on January 30, 2018, 10:00 AM for a preliminary conference.

This is the decision and order of the court.

Dated: DEC 21 2017

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.