

<b>Montoya v Chelsea Operating, Inc.</b>
2018 NY Slip Op 30174(U)
January 31, 2018
Supreme Court, New York County
Docket Number: 158694/2016
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. Robert D. KALISH**  
*Justice*

**PART 29**

**FRANCISCO MONTOYA,**

**INDEX NO. 158694/2016**

**Plaintiff,**

**MOTION DATE 1/12/18**

**- v -**

**MOTION SEQ. NO. 001**

**CHELSEA OPERATING, INC.,**

**Defendant. (and two third-party actions)**

The following papers, numbered 24–31, were read on this motion for entry of a default judgment.

Notice of Motion – Affirmation in Support – Exhibits A–E – Aff of Service | Nos. 24–31

Motion by Third-Party Defendant/Second Third-Party Plaintiff Tina Kim Fine Art, LLC (“Tina Kim”) pursuant to CPLR 3215 for entry of a default judgment against Second Third-Party Defendant AJ Greenwich Contracting, Inc. (“AJ Greenwich”) is denied. Movant fails to file sufficient proof of the facts constituting its claim.

**BACKGROUND**

Plaintiff Francisco Montoya (“Montoya”) commenced the instant action against Chelsea Operating, Inc. (“Chelsea”) on October 17, 2016, by e-filing a summons and verified complaint. Montoya was allegedly employed by AJ Greenwich and was engaged in construction work at 525 West 21st Street, New York, New York 10011 (the “Premises”) on March 5, 2015. Montoya alleges that Chelsea maintained the Premises. Montoya further alleges that he was injured on March 5, 2015, when he fell from a ladder while plastering a wall within the Premises due to the negligence of Chelsea.

Chelsea e-filed a verified answer on November 11, 2016. On December 16, 2016, Chelsea e-filed an unverified summons and third-party complaint against Tina Kim asserting, among other things, its rights to indemnification for damages relating to Montoya’s alleged personal injuries. Tina Kim e-filed its unverified answer to the third-party complaint on March 9, 2017.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On August 1, 2017, Tina Kim e-filed an unverified second third-party complaint against AJ Greenwich asserting, among other things, its rights to indemnification relating to Montoya's accident. AJ Greenwich was allegedly served with process on August 1, 2017, through the secretary of state pursuant to Business Corporation Law § 306 (b).

As AJ Greenwich has not answered or appeared in this action, Tina Kim now moves for entry of a default judgment against it.

### DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Ave. I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Here, Tina Kim has established presumptively valid proof of service of process on AJ Greenwich. Tina Kim has also established that AJ Greenwich has not answered or appeared. But Tina Kim has not provided proof of the facts constituting its claim for the purposes of the instant motion.

As the Appellate Division, First Department has stated, it has:

“consistently held that a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215. Indeed, a judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim renders that judgment a nullity. This defect cannot be cured by testimony at an inquest.”

(*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006].) On the instant motion, Tina Kim submits an unverified second third-party complaint and no affidavit of merit. As such, any judgment entered on default on this motion would be a nullity.

Further, CPLR 3215 (g) (4) provides as follows:

(i) When 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.

(ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.

Here, Tina Kim has not shown prima facie for the purposes of the instant motion that it noticed AJ Greenwich pursuant to CPLR 3215 (g) (4). (*See Burlington Ins. Co. v Aisyrk Co. Inc.*, 153 AD3d 777, 778 [2d Dept 2017].) As such, even if Tina Kim had submitted proof of the facts constituting its claim, this Court could not on the instant motion grant an order directing entry of a default judgment against AJ Greenwich.


**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Third-Party Defendant/Second Third-Party Plaintiff Tina Kim Fine Art, LLC pursuant to CPLR 3215 for entry of a default judgment against Second Third-Party Defendant AJ Greenwich Contracting, Inc. is denied.

The foregoing constitutes the decision and order of the Court.

Dated: January 31, 2018  
New York, New York

  
J.S.C.  
**HON. ROBERT D. KALISH**  
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED       NON-FINAL DISPOSITION
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER       SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE