

**A&P Coat v Medical First N.Y., P.C.**

2018 NY Slip Op 30803(U)

April 30, 2018

Supreme Court, New York County

Docket Number: 159904/2017

Judge: Robert D. Kalish

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

**PART 29**

**A&P COAT, APRON & LINEN SUPPLY LLC,**

**INDEX NO. 159904/2017**

**Plaintiff,**

**MOTION DATE 3/26/18**

- v -

**MOTION SEQ. NO. 001**

**MEDICAL FIRST NEW YORK, P.C.,**

**Defendant.**

**NYSCEF Doc Nos. 3-11 were read on this motion for an order directing the entry of a default judgment.**

Motion by Plaintiff A&P Coat, Apron & Linen Supply LLC (“A&P”) pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of A&P and against Defendant Medical First New York, P.C. (“Medical First”) is denied, with leave to renew.

**BACKGROUND**

A&P commenced the instant action on November 7, 2017, by e-filing a summons and complaint. (NYSCEF Doc No. 8, at 5-7 [Complaint].) The Complaint alleges that A&P is a successor in interest to Unitex Textile Rental Services Inc. (“Unitex”). (Complaint ¶ 4.) The Complaint further alleges that, on March 17, 2017, Unitex entered a judgment (the “Judgment”) against Medical One New York, P.C. (“Medical One”) in the amount of \$23,948.78, in the Civil Court of the City of New York, County of New York under index no. 2461/16. (*Id.*) The Complaint further alleges that the Judgment balance was \$25,260.46 as of October 25, 2017. (*Id.*) The Complaint, upon information and belief, further alleges that Medical One and Defendant, Medical First, operate out of the same location, at 20 East 46th Street, Ninth Floor, New York, NY 10017 (the “Address”), and have been operating simultaneously since at least 2014. (*Id.* ¶¶ 2, 5.) The Complaint, upon information and belief, further alleges that Medical One and Medical First are involved in the same type of business and have the same principals. (*Id.* ¶¶ 7, 8.)

The Complaint then alleges, in sum and substance, that Medical One transferred its assets to Medical First to evade the Judgment by means of a fraudulent transfer, in violation of the Debtor and Creditor Law. The Complaint demands a judgment in favor of A&P and against Medical First in the amount of \$25,260.46, with interest from October 25, 2017, together with attorney’s fees, and a judgment declaring the transfer of assets from Medical One to Medical First null and void. (*Id.* ¶¶ 9-13.)

A&P now moves for an order directing the entry of a default judgment in favor of A&P and against Medical First for the relief demanded in the Complaint. A&P attaches to its moving papers a notice of motion that refers to “the annexed affirmation of Eric J. Canals dated February 21, 2018 and the Affidavit of Judi Berkowitz sworn to on the 15<sup>th</sup> day of January, 2018.” (NYSCEF Doc No. 3 [Notice of Motion].) Plaintiff has also e-filed a document titled “Affidavit or Affirmation in Support of Motion.” (NYSCEF Doc No. 4.) This document, rather than appearing to be an affidavit or an affirmation, is identical to the Notice of Motion. Plaintiff furnished the Court with a working copy of its motion papers which does include what appears to be a copy of the Canals affirmation. Nevertheless, Plaintiff has failed to e-file the affirmation. As such, it is not properly before the Court and will not be considered with Plaintiff’s submission.

Plaintiff properly submits the affidavit of Ms. Berkowitz. (NYSCEF Doc No. 5. [Affidavit of Merit].) Ms. Berkowitz avers that she is the Unitex accounts receivable manager. The Affidavit of Merit states that Medical First is a New York professional corporation with offices at the Address. The Affidavit of Merit further states that A&P is a successor in interest to Unitex. The Affidavit of Merit further states that Unitex provided goods and services at the request of Medical One and issued related invoices under the Unitex name. The Affidavit of Merit further states that Unitex entered the Judgment as described in the Complaint. The Affidavit of Merit further states that Medical First is a successor in interest to Medical One as described in the Complaint. The Affidavit of Merit, upon information and belief, further states that the assets of Medical One were transferred to Medical First. (Affidavit of Merit ¶ 8.) The Affidavit of Merit indicates that no portion of the Judgment had been paid as of January 15, 2018. (*Id.* ¶ 11.)

Plaintiff also submits a certificate of merger supporting the successor-in-interest relationship between Unitex and A&P along with a copy of the Judgment. (NYSCEF Doc Nos. 6, 7.) The Judgment bears index no. CV-002461-16/NY and states that it was entered in favor of Unitex and against Medical One in the amount of \$23,948.78 on March 17, 2017, at 12:33 p.m., by Carol Alt, Chief Clerk, “[a]fter [c]alendar [d]efault.”

Plaintiff submits an affidavit of service dated November 27, 2017, and e-filed November 29, 2017. (NYSCEF Doc No. 8, at 2. [Affidavit of Service].) The affiant, Ms. Sandy Seibert, avers that she served “a [s]ummons [and] [c]omplaint” on Medical First by leaving “a true copy thereof” with an agent of the secretary of state pursuant to Business Corporation Law § 306. Plaintiff also submits an affirmation of mailing, dated February 23, 2018, indicating that Medical First was noticed pursuant to CPLR 3215 (g) (4) (i) with an additional mailing of the summons and complaint<sup>1</sup> to the Address on November 30, 2017.

### **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)

---

<sup>1</sup> The affirmation refers to the Complaint as the “Verified Complaint.”

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 Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

“Strict compliance with all of the service dictates of CPLR 308 and 311 is required in order to obtain jurisdiction.” (*Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351 [1st Dept 2002].) CPLR 311, personal service upon a corporation or governmental subdivision, provides that “[a] business corporation may [] be served pursuant to [Business Corporation Law § 306].” Business Corporation Law § 306 (b) (1) provides, in relevant part, that

“Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a 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, *duplicate copies* of such process together with the statutory fee, which fee shall be a taxable disbursement. *Service of process on such corporation shall be complete when the secretary of state is so served.*”

(Emphases added.)

In *JP Morgan Chase Bank, NA v Adventure Corp.*, the Appellate Division, Second Department reversed an order of the motion court, which had improperly denied a defendant’s motion pursuant to CPLR 317 and 5015 (a) to vacate an order directing the entry of a default judgment and a judgment of foreclosure and sale and pursuant to CPLR 3211 (a) (8) to dismiss. (155 AD3d 1013, 1014 [2d Dept 2017].) The court found that “questions of fact exist[ed] as to whether proper service was effected upon the Secretary of State . . . pursuant to Business Corporation Law § 306 (b) (1). In particular, the process server’s affidavit was ambiguous as to whether ‘duplicate copies’ of process were delivered to the Secretary of State as required . . . .” (*Id.*) As a result of the ambiguity, the court remanded the matter for a traverse hearing.

Where plaintiffs have moved pursuant to CPLR 3215 for a default judgment and submitted affidavits averring that only one copy of process was delivered to the secretary of state, courts have denied the motion with leave to renew upon proper papers. (See *PNC Bank, N.A. v RLMcCall Capital Partners, LLC*, 2018 WL 1863860 [Sup Ct, NY County, Apr. 13, 2018, Bannon, J.] [denying with leave to renew upon proper papers]; *Living Arts, Inc. v PAB Theatre, Inc.*, 2016 NY Slip Op 31707[U] [Sup Ct, NY County, July 29, 2016, Freed, J.] [holding that service was “clearly improper” where the affiant stated that “a true copy” of the summons and complaint was served on the secretary of state and denying with leave to renew upon proper papers]; see also *Living Arts, Inc. v PAB Theatre, Inc.*, 2016 NY Slip Op 32584[U] [Sup Ct, NY County, Dec. 22, 2016, Freed, J.] [granting on renewal based upon submission of “an affidavit from the process server establishing that the initial affidavit of service contained an error and that the Secretary of State was indeed served with two copies of the summons and complaint in compliance with [Business Corporation Law § 306 (b) (1)].”]; cf. *Marine Midland*

*Realty Credit Corp. v Welbilt Corp.*, 145 AD2d 84, 88 [3d Dept 1989] [holding that “while the persons and place designated for service on the Secretary of State in [Business Corporation Law §§ 306 and 307] may be viewed as jurisdictional requirements with which there must be strict compliance, mistakes or omissions with respect to the other requirements should be viewed as mere irregularities that, in the absence of prejudice to the defendant corporation, do not deprive the court of jurisdiction over the defendant and can be disregarded, pursuant to CPLR 2001”] [internal citation omitted]; *but cf. Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57 [1990] [holding that “strict compliance with the procedures of Business Corporation Law § 307 is required to effect service on an unauthorized foreign corporation” yet implying that following such procedures as “[i]n *Marine Midland*, unlike the case at bar,” might validly effect service on a defendant corporation that was “authorized to do business in the State and [that] had filed an actual designation of the secretary of state as agent for service of process.”] [internal emphases omitted]).

In the instant motion, A&P fails to show prima facie proof of service of process on Defendant Medical First. Business Corporation Law § 306 (b) (1) requires that two copies of the documents constituting process—the summons and Complaint, in the instant action—be served on the secretary of state to complete service of process on a corporation successfully under the section. Here, the Affidavit of Service states that Ms. Seibert served “a summons and complaint” on Medical First by serving “a true copy thereof” on the secretary of state. The Court finds that the Affidavit of Service unambiguously indicates that Ms. Seibert served the secretary of state with only one copy of the summons and complaint, not the two copies required by Business Corporation Law § 306 (b) (1).

The case at bar is distinguishable from *JP Morgan Chase Bank* in that the Affidavit of Service is unambiguous and Defendant has not appeared to contest service of process. Assuming for the sake of argument that Defendant had appeared, Plaintiff still would have failed to establish by a preponderance of the evidence that the alleged service upon Defendant was effectuated, and the burden would never have shifted to Defendant. (*See Gil-Soo Cha v David*, 137 AD3d 497, 498 [1st Dept 2016].) As such, the Court finds that A&P has failed to show prima facie that service of process on Defendant Medical First was completed pursuant to Business Corporation Law § 306 (b) (1).


**CONCLUSION**

Accordingly, it is

ORDERED that motion by Plaintiff A&P Coat, Apron & Linen Supply LLC pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of A&P and against Defendant Medical First New York, P.C. is denied, with leave to renew.

The foregoing constitutes the decision and order of the Court.

Dated: April 30, 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