

Ventura v 560 W. 180th St.

2018 NY Slip Op 31138(U)

June 5, 2018

Supreme Court, New York County

Docket Number: 156435/15

Judge: Debra A. James

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: DEBRA A. JAMES
Justice

PART 59

ANA CAMACHO VENTURA,
Plaintiff,

Index No.: 156435/15

- v -

Motion Date: 04/19/18

560 West 180TH ST., NYC LLC and SOUTH BEACH
RESTAURANT AND LOUNGE, LLC,

Motion Seq. No.: 01

Motion Cal. No.: _____

Defendants.

SOUTH BEACH RESTAURANT AND LOUNGE, LLC,
Third Party Plaintiff,

- v -

WAI KEE CONSTRUCTION INC.,
Third Party Defendant.

The following papers, numbered 1 to 1 were read on this motion for a default judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>
1

Cross-Motion: Yes No

Upon the foregoing papers,

In this breach of contract action, defendant/third party plaintiff SOUTH BEACH RESTAURANT AND LOUNGE, LLC moves for a default judgment based upon the failure of third party defendant WAI KEE CONSTRUCTION INC. to answer or appear. Third party plaintiff has submitted proof of service of the summons and complaint and proof of service of this motion upon third party

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

defendant. Third party plaintiff has also submitted an affirmation as to third party defendant's default pursuant to CPLR 3215 (f).

However, the motion must be denied because the third party plaintiff has not submitted an affidavit of facts in support of the motion pursuant to CPLR 3215 (f), but instead has submitted only an affirmation which is 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, third party plaintiff has not submitted proof of the additional mailing of the third party summons required by CPLR 3215 (g)(4) upon the corporate third party 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, third party plaintiff's motion must be denied without prejudice.


Accordingly, it is hereby

ORDERED that third party plaintiff's motion for a default judgment against third party defendant WAI KEE CONSTRUCTION INC. is DENIED WITHOUT PREJUDICE to move again upon proper proofs in accordance with the foregoing.

This is the decision and order of the court.

Dated: JUN 05 2018

ENTER:



DEBRA A. JAMES S.C.