

Gati v SVF Park N.Y., LLC
2018 NY Slip Op 31406(U)
January 24, 2018
Supreme Court, New York County
Docket Number: 159662/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X-----

GREGORY GATI,

INDEX NO. 159662/2015

Plaintiff,

MOTION DATE _____

- V -

SVF PARK NEW YORK, LLC, CLUNE CONSTRUCTION
COMPANY,

MOTION SEQ. NO. 002

Defendant.

DECISION AND ORDER

-----X-----

The following e-filed documents, listed by NYSCEF document number 67, 68, 69, 70, 71, 72, 73, 74
were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, it is ordered that the motion is granted.

Third-Party Plaintiffs SVF Park New York, LLC ("SVF") and Clune Construction Company ("Clune"), move, pursuant to CPLR 3215(a), for an order granting them a default judgment against Third-Party Defendant Mistral Architectural Metal + Glass, Inc. ("Mistral"), due to its failure to answer or appear, and further setting this matter down for inquest to determine the amount of damages and the judgment to be awarded at the time of trial. The motion is unopposed. After a review of plaintiff's motion papers, as well as a review of the relevant statutes and case law, the motion is **granted**.

The underlying action was commenced by plaintiff Gregory Gate to recover for personal injuries allegedly sustained during his employment by Mistral at a job site located at 499 Park Avenue. That action was commenced against defendant SVF by the filing of a summons and

complaint on or about August 18, 2015. A supplemental summons and complaint were served and filed to include defendant Clune on March 6, 2017. See Doc. No. 68. Issue was joined by defendants on or about April 6, 2017. See Doc. No. 69. On or about April 11, 2017, SVF and Clune served a third-party summons and complaint against third-party defendant Mistral. See Doc. No. 70.

Clune alleges that it had entered into a written contract with Mistral wherein Mistral agreed to indemnify Clune and to name Clune as an additional insured on its insurance policy, thereby procuring insurance for the benefit of Clune and SVF for work on the project on which plaintiff Gati was injured. See Exhibit Doc. No. 71.

Third-Party Plaintiffs, through the affirmation of their attorney Sana Suhail, a partner at the firm of Lewis Brisbois Bisgaard & Smith, avers that, to date, Mistral has failed to respond to the third-party summons and complaint in any way, nor has it requested an extension of time to answer. She further avers that SVF and Clune have complied with CPLR 3215 (f), in that they have annexed an Affidavit of Merit from Ben Walker, Executive Managing Director and Regional President of Clune. See Doc. No. 72. Walker affirms that, at the time of Gati's accident, a subcontract between Clune and Mistral was in effect and, pursuant to its terms, Mistral was required to direct and supervise Gati's work, as well as indemnify and hold harmless Clune and SVF for any claims arising out of or related to injuries incurred at the jobsite. Additionally, annexed to the motion papers are affidavits of service for the motion for default on Mistral including the Affidavit of Merit. Third-Party Plaintiffs now move, pursuant to CPLR 3215, for a default judgment against Third-Party Defendant Mistral Architectural Metal + Glass, Inc. to be awarded to third-party plaintiffs SVF Park New York, LLC and Clune Construction Company and further move for an order setting this matter down for inquest to determine the

amount of damages and the judgment to be awarded at the time of trial. For the reasons set forth below, **the motion is granted.**

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 R JN J Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, the affidavits of service reflects that Mistral was served with the third-party summons and complaint by service on the Secretary of State. The affirmation of third-party plaintiff’s counsel submitted in support of the motion establishes that Mistral failed to appear or otherwise answer in this matter. Further, third party plaintiffs submit an affidavit of merit from Ben Walker, Executive Managing Director and Regional President of Clune, with personal knowledge that a subcontract existed between Clune and Mistral which was in effect and pursuant to its terms, Mistral was required to direct and supervise Gati’s work, as well as indemnify and hold harmless Clune and SVF for any claims arising out of or related to injuries incurred at the jobsite. Additionally, a copy of that contract was annexed to the motion. See Doc. No. 71. Third Party Plaintiffs have therefore established the facts constituting the claim. Thus, third-party plaintiffs are entitled to a default judgment against third-party defendant.

In light of the foregoing, it is hereby:

ORDERED that the motion by Third-Party Plaintiffs SVF Park New York, LLC and Clune Construction Company seeking a default judgment against Third-Party Defendant Mistral Architectural Metal + Glass, Inc. is granted; and it is further,

ORDERED that, following the filing of the note of issue, this matter is to be set down for an inquest in favor of Third-Party Plaintiffs SVF Park New York, LLC and Clune Construction Company assessing damages against Third-Party Defendant Mistral Architectural Metal + Glass, Inc., with said inquest and assessment of damages to take place at the time of trial, or other disposition, of the remaining portion of the action; and it is further,

ORDERED that Third Party Plaintiffs shall serve a copy of this order on all parties to this action, and on the Trial Support Office at 60 Centre Street, Room 158; and it is further,

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

1/24/2018

DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED
<input checked="" type="checkbox"/>	GRANTED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	DO NOT POST

DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: