

EEMA Indus. Inc. v Clarity Light. Tech.

2018 NY Slip Op 31986(U)

August 15, 2018

Supreme Court, New York County

Docket Number: 150775/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 150775/2017

EEMA INDUSTRIES INC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CLARITY LIGHTING TECHNOLOGIES and EZRA SIMON,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DEFAULT JUDGMENT

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

In this breach of contract action, plaintiff EEMA Industries Inc. moves: 1) pursuant to CPLR 3025, to amend the caption; 2) pursuant to CPLR 3215, for a default judgment against defendant Ezra Simon; and 3) for such other and further relief as this Court deems just and proper. The motion is unopposed. After a review of the motion papers, as well as the relevant statutes and case law, the motion is granted to the extent indicated below.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from a contractual dispute between defendant Clarity Lighting Technologies ("CLT") and plaintiff EEMA Industries Inc. ("EEMA"), a California corporation which was a member of EEMA Lighting Group and which did business as Liton and Liton

Lighting. Doc. 10, Doc. 11.¹ On or about December 29, 2015, CLT, the full name of which was Clarity Lighting Technologies LLC (“CLTLLC”), and which operated under the name “Clarity Lights”, submitted a \$56,244 purchase order to Liton on behalf of EEMA. Doc. 9, at pars. 3, 4; Doc. 11; Doc. 12. Pursuant to the agreement, Liton was to purchase certain electronic manufacturing components, including indoor and outdoor lighting equipment. Doc. 1, at par. 6.

On or about December 30, 2015, CLTLLC submitted a credit application to EEMA (Doc. 9, at par. 5; Doc. 12). The application contained an Agreement for Extension of Credit (“the credit agreement”) signed on behalf of CLTLLC by its owner, Ezra Simon, as well as a personal guaranty of CLTLLC’s debts to EEMA executed by Simon in his personal capacity. Doc. 9, at par. 5; Doc. 12. The credit agreement provided, inter alia, that CLTLLC was to “make payment in full to EEMA Lighting Group (Liton Lighting, Lumenton Lighting, or Dalumne) for all purchases in accordance with EEMA invoice(s)”, along with additional finance charges and late charges “on any amounts in default at the rate of 1.5% per month [18% per annum], but not to exceed the maximum rate permitted by law.” Doc. 9, at par. 5; Doc. 12, at p. 3.

Page 4 of the application, initialed by Simon, set forth a list of “Liton Terms and Conditions” which related to transactions between EEMA and its customers. Doc. 9, at par. 6; Doc. 12, at p. 4. The Liton Terms and Conditions provided, inter alia, that payment was due 30 days from the date of the invoice, that “[a]ny balance unpaid [on the due date] will bear interest at a rate of 1.5% per month with any annual percentage rate of 18%”, and that EEMA agreed to pay any costs incurred by Liton to enforce the agreement. Doc. 12, p. 4, at par. 4.

On or about December 31, 2015, CLTLLC provided Liton with a deposit check in the amount of \$28,122 to cover half the price of its order. Doc. 13. In addition to its initial order,

¹ Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

CLTLLC submitted three subsequent purchase orders, totaling \$8,111.40, to EEMA on February 5 and 17, 2016 and March 10, 2016. Doc. 14. EEMA began to deliver the goods ordered by CLTLLC and applied CLTLLC's deposit to its first invoices. However, CLTLLC did not make any additional payments to EEMA after the initial deposit was applied. Doc. 9, at par. 9. From on or about January 11 through March 16, 2016, EEMA sent invoices to CLTLLC totaling \$37,577.67 but CLTLLC neither paid nor objected to the same. Doc. 9, at par. 11; Doc. 15. Additionally, between March and September, 2016, EEMA sent a monthly statement of account to CLTLLC listing the unpaid invoices totaling \$37,577.67. Doc. 9, at par. 12; Doc. 16. As a result of the foregoing, CLTLLC and Simon became indebted to EEMA in the amount of \$37,577.67. Doc. 9, at par. 15.

On January 27, 2017, EEMA commenced the captioned action by filing a summons and complaint against CLT and Simon.² As a first cause of action, EEMA claimed that CLTLLC and Simon breached the credit agreement and owed it \$37,577.67. Doc. 1, at par. 10. As a second cause of action, EEMA claimed that it was owed \$37,577.67 based on an account stated. Doc. 1, at par. 15. As a third cause of action, EEMA claimed that CLTLLC and Simon owed it \$37,577.67 because they had failed to pay EEMA for goods worth that amount which they had retained without payment therefor. Doc. 1, at pars. 17-19. In the complaint, EEMA thus demanded the amount of \$37,577.67, plus pre-judgment interest at the rate of 18%, together with collection costs and attorneys' fees. Doc. 1, at par. 16.

The summons and complaint were served on Simon by substituted service pursuant to CPLR 308(2) on February 14, 2017. Doc. 2. Additional copies of the summons and complaint were mailed to Simon pursuant to CPLR 3215(g) on February 21, 2017. Doc. 5.

² Although the summons named as a defendant "Clarity Lighting Technologies", the complaint referred to that defendant as "Clarity Lighting Technologies, LLC." Doc. 1.

On April 6, 2017, EEMA attempted to have the Clerk enter a default judgment against defendants. Doc. 3. The proposed judgment was marked "Return For Correction" and the Clerk's minutes reflect that:

Clerk cannot enter judgment because action was commenced between Eema Industries [Inc.] and Clarity Lighting Technologies and Ezra Simon, and contract was signed between Eema Lighting Group and Clarity Lighting Technologies LLC. Judgment cannot be entered as to individual for the same reason. The guaranty signed by Ezra Simon is as to Eema Lighting Group, which is not named as a plaintiff in the case. Corrected affidavit of service is needed. The last [name] of co-tenant has to be provided. Please file motion to the court for default judgment.

Doc. 3.

On February 14, 2018, EEMA filed the instant motion, pursuant to CPLR 3215, for a default judgment against Simon; to amend the caption of this action pursuant to CPLR 3025; and for such other and further relief as this Court deems just and proper. In support of the motion, EEMA submits the summons and complaint, affidavit of service; proof of additional service of the summons and complaint; attorney affirmation of Stuart L. Sanders, Esq.; the affidavit of Rouhollah Esmailzadeh, president of EEMA attesting, inter alia, to the fact that CLTLLC did business as "Clarity Lights"; a fictitious name statement signed by Esmailzadeh reflecting that EEMA did business as Liton and Lighton Lighting; purchase orders; the credit application; cancelled checks; invoices; a non-military affidavit; and a statement of account. In support of its motion, EEMA represents that, if the instant motion is granted, it is willing to waive interest above the statutory rate of 9% (CPLR 5004), and will not pursue attorneys' fees against Simon. Doc. 8, at par. 17.

PLAINTIFF'S CONTENTIONS:

EEMA asserts that the caption should be amended to reflect that plaintiff is EEMA Industries Inc. d/b/a Liton and d/b/a Liton Lighting, a member of EEMA Lighting Group, and that the defendants are Clarity Lighting Technologies LLC d/b/a Clarity Lights and Ezra Simon. It further argues that it is entitled to a default judgment against Simon pursuant to the terms of the guaranty.³

LEGAL CONCLUSIONS:Motion to Amend Caption

A party may amend a pleading, or supplement it at any time by leave of court, and such leave shall be freely given upon such terms as may be just. CPLR 3025(b). Pursuant to CPLR 305(c), "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced." The amendment of a summons is justified "where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it." *Medina v. City of New York*, 167 A.D.2d 268, 269-70 (1st Dept. 1990). A motion to amend the caption to reflect the true name of the defendant should be granted where the designated entity was the intended subject of the lawsuit, knew or should have known of the existence of the litigation against it, and will not be prejudiced thereby. *See, Rodriguez v. Dixie N.Y.C., Inc.*, 26 A.D.3d 199

³ EEMA concedes that CLTLLC "has not been served because its business address turned out to be a mailbox rather than an actual office, and because it is not a known entity to the New York Department of State." Doc. 9, at par. 16.

(1st Dept. 2006); *National Refund and Utility Services, Inc. v. Plummer Realty Corp.*, 22 A.D.3d 430 (1st Dept. 2005).

Here, plaintiff seeks to amend the caption to reflect that it is known as EEMA Industries Inc. d/b/a Liton and d/b/a Liton Lighting, a member of EEMA Lighting Group, and that defendants are Clarity Lighting Technologies LLC d/b/a Clarity Lights and Ezra Simon. EEMA's amendment of the caption to name the proper plaintiffs is not prejudicial, since Simon executed the guaranty requiring him to pay EEMA Lighting Group and/or Liton Lighting in full and, thus, Simon knew that he could be sued by any of those entities. *See Hung v Harlington Realty Co. LLC*, 2016 NY Misc LEXIS 2508 (Sup Ct New York County 2016).

Plaintiff may not, however, amend the caption to name as a defendant Clarity Lighting Technologies LLC d/b/a Clarity Lights since, as noted above, CLTLLC has not been served with process. *See n. 3, supra*. The amendment of a summons and complaint to reflect the proper name of a defendant is not permitted where, as here, said defendant was not properly served. *See Achtziger v Fuji Copian Corp.*, 299 AD2d 946 (4th Dept 2002).⁴ Thus, the motion to amend the complaint is granted to the extent set forth above.

Motion for Default

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

⁴ Nevertheless, the affidavit of Esmailzadeh establishes that Simon, the sole defendant against whom a default is sought, and who was properly served with process, guaranteed the payments to be made by CLTLLC, which did business as Clarity Lights. Doc. 9; Doc. 12.

the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, plaintiff has submitted proof of service of the summons and complaint pursuant to CPLR 308(2) (Doc. 2) and the affirmation of plaintiff's attorney establishes that Simon failed to answer or otherwise appear in this action. Doc. 8, at par. 5.⁵ Further, the affidavit of Esmailzadeh (Doc. 9) and the documents submitted in support of said affidavit set forth the facts constituting the claim.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff EEMA Industries Inc. seeking to amend the caption is granted only to the extent of amending the name of plaintiff from EEMA Industries Inc. to EEMA Industries Inc. d/b/a Liton and d/b/a Liton Lighting, a member of EEMA Lighting Group; and it is further

ORDERED that the caption of this action will hereinafter read as follows:

⁵ Contrary to the Clerk's minutes, service on Simon pursuant to CPLR 308(2) was not improper merely because the individual served on his behalf refused to provide his name.

EEMA INDUSTRIES INC., d/b/a Liton and d/b/a Liton Lighting,
a member of EEMA Lighting Group,

Plaintiff,

Ind. No.150775/17

against

CLARITY LIGHTING TECHNOLOGIES and EZRA SIMON,

Defendants.

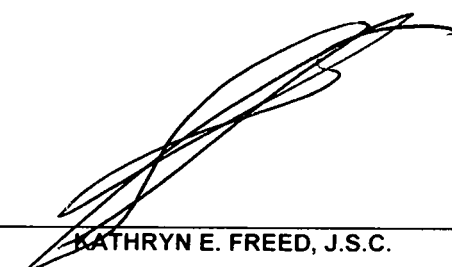
and it is further

ORDERED that the branch of the motion by plaintiff EEMA Industries Inc. d/b/a Liton and d/b/a Liton Lighting, a member of EEMA Lighting Group seeking an order directing the entry of a default judgment against defendant Ezra Simon is granted; and it is further

ORDERED that plaintiff EEMA Industries Inc. d/b/a Liton and d/b/a Liton Lighting, a member of EEMA Lighting Group shall, within 20 days of the entry of this order, serve a copy of this order with notice of entry upon defendant Ezra Simon and upon the Clerk, who is directed to enter judgment in favor of plaintiff and against defendant Ezra Simon in the sum of \$37,577.67, plus interest at the rate of 9% per annum from March 16, 2016, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

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

8/15/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE