

Cordova v 27E79 Prop. LLC
2018 NY Slip Op 33005(U)
November 27, 2018
Supreme Court, New York County
Docket Number: 160748/2017
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****IAS MOTION 2***Justice*

-----X

INDEX NO.160748/2017

EFRAIN CORDOVA,

Plaintiff,

MOTION SEQ. NO.001

- v -

27E79 PROPERTY LLC, ALBA SERVICES INC.,

Defendants.

DECISION AND ORDER

-----X

27E79 PROPERTY LLC, ALBA SERVICES INC.,

Defendants/Third-Party Plaintiffs'

-v-

DN CALLAHAN, INC.,

Third- Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19
were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered that the motion is denied with leave to renew upon
proper papers.

In this personal injury action commenced by plaintiff Efrain Cordova, defendants/third-party plaintiffs 27E79 Property, LLC and Alba Services, Inc. move, pursuant to CPLR 3215, for a default judgment against third-party defendant DN Callahan, Inc. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is denied with leave to renew upon proper papers.

Plaintiff commenced the captioned action on December 5, 2017 by filing a summons and complaint, verified by his attorney, in which he alleged that he was injured on November 16, 2017 while doing construction work due to the negligence, recklessness or carelessness of defendants or their agents or employees on the premises located at 27 East 79th Street in New York County. Doc. 1. Defendants joined issue by their answers filed April 12, 2018. Doc.7.¹

On or about April 17, 2018, defendants commenced a third-party action against third-party defendant DN Callahan by filing a third-party summons and complaint. Doc. 10. In their third-party complaint, verified by their attorney, defendants set forth claims against DN Callahan for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 10. Defendants served the third-party summons and complaint on DN Callahan via the Secretary of State on May 18, 2018 (Doc. 13) and their attorney states in an affirmation that DN Callahan has failed to answer or otherwise appear in the third-party action. Doc. 16, at par. 7.

Defendants/third-party plaintiffs 27E79 Property, LLC and Alba Services, Inc. now move, pursuant to CPLR 3215, for a default judgment against DN Callahan. Doc. 15.

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 a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default

¹ All references are to the documents filed with NYSCEF in connection with this action.

in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016).

In order to set forth the facts constituting the claim in a motion for default judgment pursuant to CPLR 3215, a party must submit either a complaint verified by a party with personal knowledge of the facts of the case, or an affidavit by such an individual. *See Mullins v DiLorenzo*, 199 AD2d 218, 219–20 (1st Dept 1993). An attorney affirmation will not suffice for this purpose. *See Mattera v Capric*, 54 AD3d 827, 828 (2d Dept 2008). It is well settled “that a complaint verified by counsel amounts to no more than an attorney’s affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215.” *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994).

Here, although defendant/third-party plaintiffs submit proof of service of the third-party summons and complaint on DN Callahan, as well as proof that DN Callahan failed to respond to the third-party complaint, a default judgment cannot be entered on the papers submitted because defendant/third-party plaintiffs have not properly submitted facts constituting the claim. Other than the allegations contained in the complaint and third-party complaint verified by plaintiff’s counsel, as well as in the attorney affirmation in support of the instant motion, there are no facts constituting the claim given by plaintiff himself or by defendant/third-party plaintiffs or by someone else with personal knowledge of the same.

Additionally, defendant/third-party plaintiffs failed to comply with CPLR 3215(g)(4).

In light of the foregoing, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers within 30 days of the entry of this order, upon penalty of dismissal, and it is further

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

11/27/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

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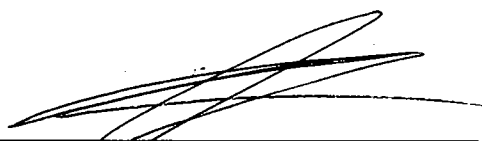
FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE


KATHRYN E. FREED, J.S.C.