

**Jamestown Hospitality and Mgt. v SW Equities**

2019 NY Slip Op 30363(U)

February 13, 2019

Supreme Court, New York County

Docket Number: 156295/2016

Judge: Robert D. Kalish

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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. ROBERT DAVID KALISH PART IAS MOTION 29EFM**

*Justice*

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**INDEX NO. 156295/2016**

JAMESTOWN HOSPITALITY AND MANAGEMENT

**MOTION DATE 02/13/2019**

Plaintiff,

**MOTION SEQ. NO. 003**

- v -

SW EQUITIES,

**DECISION AND ORDER**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

JUDGMENT - DEFAULT

Motion by Plaintiff Jamestown Hospitality and Management pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant SW Equities is denied. Request by Defendant pursuant to CPLR 2004 for leave to file an answer to the complaint is denied without prejudice to Defendant's submission of a properly formatted motion on notice pursuant to CPLR 3012 (d) for the appropriate relief.

**BACKGROUND**

Plaintiff commenced the instant action on July 27, 2016, by e-filing a summons with notice. The summons indicated that it would be accompanied by a motion for summary judgment on Plaintiff's breach of contract claim seeking a sum of at least \$36,000.00. On August 31, 2016, Plaintiff filed motion seq. 001 pursuant to CPLR 3213 for summary judgment in lieu of complaint, and the motion was fully submitted without opposition. On March 31, 2017, the prior motion court signed a decision and order denying motion seq. 001 "for failure to set forth entitlement to the relief sought." (Czik affirmation, exhibit C.) The court directed that "plaintiff shall serve a formal complaint upon defendant within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service thereof, if applicable." (*Id.*) The case was nevertheless marked "CASE DISPOSED" on the gray sheet. (*Id.*)

On October 11, 2017, Plaintiff filed motion seq. 002, its second motion pursuant to CPLR 3213 for summary judgment in lieu of complaint. The motion sought the same relief as the prior motion. Counsel for Defendant e-filed a letter, dated November 17, 2017, regarding the motion, arguing that "this action should already be **deemed dismissed** based upon the plaintiff's failure to comply with the Court's prior order that directed 'that plaintiff shall serve a formal complaint upon defendant within 20 days . . . .'" (NYSCEF Doc No. 19.)

On January 19, 2018, this Court signed an order denying motion seq. 002. The Court noted that motion seq. 001 was “nearly identical” to and “duplicative” of seq. 002. (Czik affirmation, exhibit D, at 1.) The Court noted that Plaintiff had not moved for leave to renew or reargue and that 256 days had passed from the time the prior motion court signed its decision and order on seq. 001 and when seq. 002 was fully submitted. The Court also noted that Plaintiff had been ordered to serve Defendant with a complaint and that this had not been done. The Court again marked the case disposed.

On October 8, 2018, fully 263 days from the date of this Court’s decision and order on motion seq. 002, Plaintiff e-filed a complaint verified by Plaintiff’s counsel and an affidavit of service indicating that Defendant was served with the complaint on September 11, 2018, pursuant to Business Corporation Law § 306. The complaint alleges causes of action for breach of contract, unjust enrichment, and attorney’s fees pursuant to a promissory note on which Plaintiff alleges that the principal amount of \$36,000.00, plus interest, court costs, and attorney’s fees, is due and owing to Plaintiff from Defendant.

On January 2, 2019, Plaintiff filed the instant motion seq. 003 pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant in the sum certain of \$36,000.00 plus costs and statutory interest. The motion was noticed as returnable on January 28, 2019. The notice of motion stated that “pursuant to CPLR 2214 (b), answering papers, if any, are required to be served upon the undersigned at least seven (7) days before the return date of this Motion.” (NYSCEF Doc No. 23.)

Plaintiff argues in its affirmation in support that it has served Defendant with the complaint “pursuant to Court Order,” that Defendant has failed to answer or move in response, and that Defendant’s time to do so has expired. (Affirmation of Czik ¶ 8.) Plaintiff states in its moving papers that it attached to the instant motion “the Affidavit of Frederick Wyatt, sworn to on September 5, 2017, that is hereby submitted for purposes of attesting to the underlying facts upon which the claim is based.” (*Id.* ¶ 3.) The Court notes that no such affidavit is annexed to the moving papers. Plaintiff has annexed a copy of a “Promissory Note,” dated January 6, 2016, purportedly between Plaintiff and Defendant, where Plaintiff has promised to pay Defendant the \$36,000.00.

On January 24, 2019, counsel for Defendant e-filed an affirmation in opposition to the motion. Defendant’s counsel argues that Plaintiff was “drastically out of compliance” with the prior motion court’s order in seq. 001 in that it “never requested an extension of time to serve the complaint” and “failed to file or serve a formal complaint in this action until October 8, 2018, more than a year and a half after the Order was signed.” (Affirmation of Grubea ¶¶ 8–9.) Defendant’s counsel further argues that “Defendant (at the time unrepresented by counsel) assumed the case was dismissed, and treated the late filed summons and complaint as a nullity.” (*Id.* ¶ 9.) Defendant requests that the motion be denied, and the case dismissed, for failure to comply with the prior motion court’s order, or, in the alternative, that the Court grant Defendant leave to file an answer to the complaint pursuant to CPLR 2004.

Plaintiff has not filed reply papers.

### DISCUSSION

In the first instance, the Court notes that Defendant was required to file its opposition papers no later than January 21, 2018, that it failed to do so, and that Plaintiff has not submitted reply papers. Defendant has offered no excuse for the late service of its opposition papers. While it is unclear whether Plaintiff had an opportunity to serve reply papers, the fact is that Plaintiff has not. The Court finds that the risk of prejudice to Plaintiff in considering Defendant's untimely served opposition papers is paramount. As such, the Court, in its discretion, declines to consider according any relief to Defendant requested in its late affirmation in opposition, but the Court has read the affirmation in opposition and will address some of the issues it raises.

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 pursuant to CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) 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].)

It is the law of the case dating back to Plaintiff's first motion for summary judgment in lieu of complaint that Defendant was properly served with the summons with notice and that the Court acquired personal jurisdiction over Defendant. For the purposes of the instant motion, Plaintiff has shown prima facie that Defendant was served with the complaint pursuant to Business Corporation Law § 306. Plaintiff has further shown prima facie that Defendant's time to answer or move in response to the complaint has expired and that Defendant is in default.

Nevertheless, Plaintiff has failed to submit adequate proof of the facts constituting its claims. The Appellate Division, First Department has "consistently held that a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215" and that "a judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim renders that judgment a nullity." (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006].) Here, Plaintiff submits a complaint verified by counsel and no affidavit of merit. Plaintiff refers in its affirmation in support to an affidavit from Frederick Wyatt and indicates that it was annexed to this motion, but Plaintiff has in fact failed to annex the affidavit. Moreover, because the prior motion court already evaluated a partially executed version of the annexed promissory note and identifying certain issues with it, the Court declines to consider the promissory note as self-authenticating or otherwise adequate proof of the facts constituting Plaintiff's claims in the absence of an affidavit of merit that, at minimum, authenticates the document and addresses the issues raised previously. As such, any judgment entered on default on this motion as submitted would be a nullity.

Assuming for the sake of argument that Plaintiff had submitted adequate proof of the facts constituting its claims for the purposes of this motion, Plaintiff has failed to show prima

facie for the purposes of this motion that it noticed Defendant pursuant to CPLR 3215 (g) (4). (*See Burlington Ins. Co. v Aisyrk Co. Inc.*, 153 AD3d 777, 778 [2d Dept 2017].) Under such circumstances, and as is the case here, motions for leave to enter a default judgment are properly denied.

As to Defendant's argument that the matter should be dismissed because Plaintiff is out of compliance with the March 31, 2017 decision and order on motion seq. 001, the Court finds that Plaintiff has in fact complied with the letter of the order. The order provided that Plaintiff was to serve a complaint on Defendant "within 20 days of service on plaintiff's counsel of a copy of th[e] order with notice of entry." "Notice of entry" is a term of art in New York courts that is typically associated with notices of appeal. (*See, e.g., Williams v Forbes*, 157 AD2d 837 [2d Dept 1990].) "Service" of copies of orders with "notice of entry" is effected by parties to litigation, not the court itself. When a copy of the March 31, 2017 order was uploaded to NYSCEF by the county clerk, a notification to the parties may have been generated by email. This was not notice of entry. (*See* 22 NYCRR § 202.5-b (h) (2).) Here, Defendant has made no showing, nor has it ever argued, that it served Plaintiff with a copy of the March 31, 2017 order with notice of entry. As such, Plaintiff's time in which it was required to serve Defendant with the complaint never began to run, and any argument that Plaintiff was out of compliance with the order is without merit. Now that Plaintiff has served the complaint, the matter shall be restored to active status.

As to Defendant's application which is, in effect, for an extension of time to answer the complaint, counsel's bare affirmation that Defendant assumed the case was dismissed and treated the pleadings as a nullity "is without evidentiary value and thus unavailing." (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980].) CPLR 3012 (d) permits a court to extend a party's time to appear or plead "upon a showing of reasonable excuse for delay or default." Based upon the Defendant's submission, the Court finds that such a showing has not been made here. Of course, even if Defendant had made such a showing, the Court would have declined to extend the time, because the application was made in late opposition papers. Defendant remains free to move pursuant to CPLR 3012 (d) for the appropriate relief. And, as always, the parties remain free to resolve some or all the issues discussed herein among themselves without need for further judicial intervention as to them.

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**CONCLUSION**

Accordingly, it is


ORDERED that the motion by Plaintiff Jamestown Hospitality and Management pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant SW Equities is denied; and it is further

ORDERED that the request by Defendant pursuant to CPLR 2004 for leave to file an answer to the complaint is denied without prejudice to Defendant's submission of a properly formatted motion on notice pursuant to CPLR 3012 (d) for the appropriate relief; and it is further

ORDERED that movant shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on the clerk, who is directed to change the status of this case from "Disposed" to "Active" or "Restored."

The foregoing constitutes the decision and order of the Court.

2/13/2019  
DATE

  
**HON. ROBERT D. KALISH**

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE