

PIRS Capital, LLC v Moving Mtns. Group, LLC
2019 NY Slip Op 33598(U)
November 25, 2019
Supreme Court, New York County
Docket Number: 150081/2019
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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PIRS CAPITAL, LLC,

Plaintiff,

- v -

MOVING MOUNTAINS GROUP, LLC d/b/a FISH-O-
LICIOUS, DANA JOHNSON and LISA NGUYEN a/k/a
LISA NGUYEN JOHNSON

Defendants.

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INDEX NO. 150081/2019

MOTION DATE 9/11/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for

JUDGMENT - DEFAULT

In this action to recover damages for breach of contract, the plaintiff moves (1) pursuant to CPLR 308(2) for an order deeming the filing of an affidavit of service upon defendant Lisa Nguyen a/k/a Lisa Nguyen Johnson to be timely filed, *nunc pro tunc*, and (2) pursuant to CPLR 3215 for leave to enter a default judgment against the defendants. No opposition is submitted. The motion is granted in its entirety.

The plaintiff's counsel asserts that, while defendant Lisa Nguyen a/k/a Lisa Nguyen Johnson was served with the summons and complaint on February 11, 2019, by service upon a person of suitable age and discretion, *i.e.* defendant Dana Johnson, and that that affidavit of service was timely filed with the court, an additional affirmation of service by mail was not filed until August 28, 2019, well after the 20 days prescribed by CPLR 308(2), due to a clerical error.

CPLR 308(2) mandates the filing of proof of service with the Clerk within 20 days after delivering the summons to a person of suitable age and discretion and mailing the summons in accordance with that section, whichever is effected later. However, "[t]he failure to file proof of service...is a mere irregularity (see Hausknecht v Ackerman, 242 AD2d 604 [2nd Dept. 1997]);

Weininger v Sassower, 204 AD2d 715 [2nd Dept. 1994]) which may be cured by motion “if, under the facts, the court in the exercise of discretion deems it best.” Koslowski v Koslowski, 251 AD2d 294, 294 (2nd Dept. 1998) *quoting* Reporter Co. Inc. v Tomicki, 60 AD2d 947, 947 (3rd Dept. 1978); *see* CPLR 2001. “The purpose of requiring the filing of proof of service pertains to the time within which the defendant must answer and does not relate to the jurisdiction acquired by the court upon the service of the summons.” Reporter Co. Inc. v Tomicki, *supra* at 947; *see* Lancaster v Kindor, 98 AD2d 300 (1st Dept. 1984). Furthermore, CPLR 2001 authorizes the court to correct any “mistake in the filing process, to be corrected, upon terms as may be just” or disregard the mistake “if a substantial right of a party is not prejudiced.” Similarly, CPLR 2004 provides that “the court may extend the time fixed by any statute rule or order from doing any act, upon such terms as may be just and upon good cause shown.” For these reasons, the court deems the filing of an affidavit of service upon defendant Lisa Nguyen a/k/a Lisa Nguyen Johnson to be timely filed, *nunc pro tunc*.

In regard to the second branch of the motion, the plaintiff has submitted proof of service of the summons and complaint upon the defendants, proof of the facts constituting its claims, and proof of the defendants’ failure to answer the complaint or otherwise appear in this action (*see* CPLR 3215[f]; Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 [2nd Dept 2011]). While the “quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. *See* Guzetti v City of New York, *supra*; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

The plaintiff’s submissions include the summons and complaint, an affidavit of Eric Mallinger, the plaintiff’s Director of Customer Service and Retention, dated July 31, 2019, and a Merchant Agreement for the purchase and sale of future receivables of defendant Moving Mountains Group, LLC, d/b/a Fish-O-Licious, which includes a guaranty agreement, dated April 6, 2018 and signed by the individual defendants, Dana Johnson and Lisa Nguyen, who each signed the documents twice - on behalf of the corporate defendant and as owner/guarantor. The plaintiff also submitted an amendment to the agreement, dated April 6, 2018, and signed by the individual defendants, which sets a daily weekday payment of \$188.95, subject to periodic

adjustments. This proof demonstrates that the defendants entered into an agreement with the plaintiff on April 6, 2018, pursuant to which they agreed to sell the plaintiff \$40,750.00 of their future receivables in consideration of a present cash payment of \$32,500.00. In his affidavit, Mallinger explains that, in accordance with the agreement, the defendants initially made daily payments via debits from their depository bank account, but stopped all payments as of July 6, 2018, leaving an unpaid balance of \$28,974.05, inclusive of a subsequent payment of \$8,250.00, as of December 17, 2018. No further payments were made, although demanded.

The plaintiff's proof establishes, *prima facie*, the necessary elements of the first cause of action of the complaint, breach of contract: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). The proof also establishes the third cause of action, breach of guaranty. "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional and, having defaulted in this action, the defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreement. There is no dispute that upon the corporate defendant's default, the individual defendants/guarantors failed to perform under the guaranty. See 4 USS, LLC v DSW MS, LLC, 120 AD3d 1049 (1st Dept. 2014). Indeed, having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

In its second cause of action, the plaintiff seeks contractual attorney's fees, and has submitted an attorney's affirmation supporting such fees in the amount of \$2,800.00.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, without opposition, and the court deems the filing of the affidavit of service dated August 28, 2019, to have been timely, *nunc pro tunc*, and it is further,

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against defendants is granted, without opposition; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of \$28,974.05, plus costs and statutory interest from December 17, 2018, and contractual attorney's fees in the sum of \$2,800.00, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendants within 30 days of the date of this order.

This constitutes the Decision and Order of the court.

11/25/2019
DATE


NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

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