

**Great Am. Ins. Co. of N.Y. v Gold Duct New Begin,
LLC**

2020 NY Slip Op 30138(U)

January 21, 2020

Supreme Court, New York County

Docket Number: 154809/2019

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 2EFM

Justice

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INDEX NO. 154809/2019

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK A/S/O 214 EAST 49TH BUILDING LLC, LIBERTY INSURANCE CORPORATION A/S/O MEGHAN COUNTRYMAN AND LEONARDO SILVIA,

MOTION SEQ. NO. 001

Plaintiffs,

- v -

GOLD DUCT NEW BEGIN, LLC, MASTER FIRE SYSTEMS, INC., and CARCAMAN, INC. D/B/A DA NOI ITALIAN RESTAURANT,

DECISION + ORDER ON MOTION

Defendants.

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

were read on this motion to/for JUDGMENT - DEFAULT.

This is a subrogation action by plaintiffs Great American Insurance Company of New York (“Great American”) a/s/o 214 East 49th Building LLC (“214”) and Liberty Insurance Corporation (“Liberty”) a/s/o Meghan Countryman (“Countryman”) and Leonardo Silvia (“Silvia”) against defendants Gold Duct New Begin, LLC (“Gold Duct”), Master Fire Systems, Inc. (“Master”), and Carcaman, Inc. d/b/a Da Noi Italian Restaurant (“Carcaman”). Plaintiffs move, pursuant to CPLR 3215, for a default judgment against Gold Duct and Master.¹ After a review of the motion, and after a review of the relevant statutes and case law, the application, which is unopposed, is decided as follows.

¹ That branch of the motion seeking a default as against Master was withdrawn by stipulation filed December 17, 2019 (Doc. 13) and Master filed its answer on December 31, 2019. Doc. 15.

Plaintiff 214, the owner of the premises located at 214 East 49th Street, New York, New York (“the premises”), entered into a lease with Carcaman, which operated a restaurant in the building. On March 5, 2018, a fire occurred at the premises causing 214, Great American’s subrogor, damages in excess of \$491,242. Doc. 2. The fire also caused Liberty’s subrogors, Countryman and Silvia, damages of \$12,677 and \$18,391, respectively. Doc. 2. Great American and Liberty reimbursed their respective subrogors for the damages alleged and now seek to recover those sums from Carcaman as well as, Master, which Carcaman hired to design and install a ventilation system in the kitchen of the restaurant, and Gold Duct, which Carcaman hired to clean the ventilation ductwork. Doc. 2.

In the first and second causes of action in the complaint, plaintiffs allege negligence and gross negligence, respectively, as against all of the defendants. Doc. 2. As a third cause of action, alleged against Carcaman only, plaintiffs claimed that said defendant breached its lease by failing to properly maintain the kitchen ventilation system. Doc. 2.

Although defendants Carcaman and Master have answered the complaint, Gold Duct, despite being served with the same, has not. Doc. 3; Doc. 6 at par. 8.

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

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

Here, plaintiff has established service of process on Gold Duct, as well as its failure to answer or otherwise appear in this case. Thus, the sole issue remaining is whether plaintiffs have set forth the facts constituting the claim against Gold Duct.

In order to establish the facts constituting the claim in a motion for a 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). Nor will a complaint verified by counsel, which “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). Since plaintiffs have submitted neither a complaint verified by, nor an affidavit executed by, an individual with personal knowledge of the facts constituting the alleged claims, they have failed to establish their entitlement to a default judgment against Gold Duct.

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

ORDERED that the branch of the motion by plaintiffs Great American Insurance Company of New York a/s/o 214 East 49th Building LLC and Liberty Insurance Corporation a/s/o Meghan Countryman and Leonardo Silvia against defendant Master Fire Systems, Inc. is denied as moot; and it is further

ORDERED that the branch of the motion by plaintiffs Great American Insurance Company of New York a/s/o 214 East 49th Building LLC and Liberty Insurance Corporation a/s/o Meghan Countryman and Leonardo Silvia seeking a default judgment against defendant Gold Duct New Begin, LLC is denied with leave to renew upon proper papers within 60 days of entry of this order, upon penalty of dismissal of the complaint against said defendant; and it is further

ORDERED that, within 20 days hereof, plaintiffs shall serve a copy of this order, with notice of entry, on all parties to this action; and it is further

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

1/21/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<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