

<b>Ray v Metroplex on the Atl., LLC</b>
2020 NY Slip Op 30427(U)
January 17, 2020
Supreme Court, Kings County
Docket Number: 514056/2018
Judge: Richard J. Montelione
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KINGS COUNTY CLERK

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2020 FEB -3 AM 10:24

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

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HERBERT RAY,

Plaintiff,

-against-

METROPLEX ON THE ATLANTIC, LLC.,  
120 BEACH 26th STREET, LLC., WALTER &  
SAMUELS, INC. and WALTER & SAMUELS  
CAPITAL GROUP, LLC.,

Defendant(s).

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Decision and Order

Index No. 514056/2018

Submitted: 11/19/19

Mot. Seq.: 1 & 2

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

Plaintiff's Notice of Motion for Default Judgment dated March 26, 2019; Attorney Affirmation of Andrew Siegel, Esq., affirmed on March 26, 2019; Affidavit of Herbert Ray, sworn to on April 3, 2019 (Exhibit A); and Exhibits A-D.....	1
Defendant's Notice of Cross-Motion to Dismiss dated August 26, 2019; Attorney Affirmation of Adam Paul Pollack, Esq., affirmed on August 22, 2019; Affidavit of Mel Farrell, sworn to on August 26, 2019; Exhibits 1-7.....	2
Plaintiff's Attorney Affirmation in Opposition of Katherine Howells, Esq., affirmed on November 12, 2019.....	3
Defendant's Attorney Affirmation in Reply of Adam Paul Pollack, Esq., affirmed on November 15, 2019; Affidavit of Mel Farrell, sworn to on November 14, 2019	4

**MONTELIONE, RICHARD J., J.**

In this personal injury action, plaintiff moves to enter a default judgment against defendants Metroplex on the Atlantic, LLC., Walter & Samuels, Inc. and Walter & Samuels Capital Group, LLC. based upon their failures to interpose an answer. Defendants Walter & Samuels, Inc. and Walter & Samuels Capital Group, LLC. oppose and cross-move for dismissal of the complaint against them for failure to state a cause of action.

Plaintiff's summons and complaint was filed on July 10, 2018. Defendants were served pursuant to Business Corporation Law 306 and Limited Liability Company Law 303. Defendant 120 Beach 26th Street, LLC. interposed an answer on November 20, 2018. No other answers were interposed and plaintiff moves for default judgment against the defaulting defendants herein.

Defendants Walter Samuels, Inc. and Walter & Samuels Capital Group, LLC. (the "Walters" defendants), argue, *inter alia*, that they were not the managing agents at the time of the purported accident and had not been the managing agents for about six months prior based upon the Order of the Bankruptcy Court in the bankruptcy case involving Metroplex on the Atlantic, LLC., the entity which owned the subject property. The Walters defendants proffer the affidavit of Mel Farrell, defendants' employee, who avers that the Walters defendants' relationship ended with respect to the building with the appointment of another property manager by the Order of the Bankruptcy Court dated December 17, 2015.

Plaintiff argues, *inter alia*, that the complaint is sufficient to demonstrate a cognizable cause of action and that the Walters defendants' affiant, Mel Farrell "make[s] the erroneous assertion that 'there is no conceivable way to maintain this action as against the Walter's defendants'" as the Walters defendants "provides no evidence to demonstrate that the complaint's factual allegations could not be true."

In reply, defendant's affiant argues, *inter alia*, that the matter was inadvertently and not immediately addressed and that should dismissal not be warranted, defendants should be given an opportunity to interpose an answer.

On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts

constituting the claim by an affidavit made by the party, and proof of the defendant's default (*see* CPLR 3215[f]; *Mercury Cas. Co. v. Surgical Ctr. at Milburn, LLC*, 65 A.D.3d 1102, 885 N.Y.S.2d 218; *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202). While a verified complaint may be used as the affidavit of the facts constituting the claim (*see* CPLR 3215[f]; *Woodson v. Mendon Leasing Corp.*, 100 N.Y.S.2d 62, 70, 760 N.Y.S.2d 727, 790 N.E.2d 1156), it must allege "enough facts to enable a court to determine that a viable cause of action exists" (*Woodson*, 100 N.Y.S.2d 62, at 71; *see Neuman v. Zurich N.A.*, 36 A.D.3d 601, 602, 828 N.Y.S.2d 169).

To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action (*see Atl. Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 A.D.3d 649, 932 N.Y.S.2d 109 [2nd Dept. 2011]; *Juseinoski v. Board of Education*, 15 A.D.3d 353, 790 N.Y.S.2d 162 [2nd Dept. 2005]). Furthermore, in absence of a motion to request an extension of time to answer or appear and where defendant's motion to dismiss, in essence, fails to set for a reasonable excuse for the default along with a showing of a potentially meritorious defense, the court may not consider the same (*see McGee v. Dunn*, 75 A.D.3d 624 [2nd Dept. 2010][where the Court held that the Supreme Court improvidently exercised its discretion in granting the defendant's untimely motion to dismiss the complaint, "as it, in effect excused the defendant's default in the absence of a request for such relief."]).

Inasmuch as defendants Walter & Samuels, Inc. and Walter & Samuels Capital Group, LLC. fail to articulate in detail, a reasonable excuse for its delay in filing an answer or to move to request an extension of time to answer, defendants' have not demonstrated their entitlement to

the relief requested. Additionally, defendants have not affirmatively moved for an extension of time to answer or appear and in absence of the same, the court declines to grant such relief.

Upon review, plaintiff submitted proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defendants' default (see CPLR 3215[f]). As such, plaintiff demonstrated his entitlement to default judgment as to the defaulting defendants.

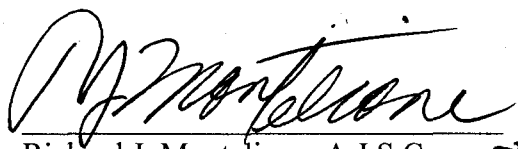
Therefore, based on the foregoing, plaintiff's motion for default judgment against defaulting defendants Metroplex on the Atlantic, LLC., Walter & Samuels, Inc. and Walter & Samuels Capital Group, LLC. are granted. The inquest shall be held at the time of trial.

Defendants, Walter & Samuels, Inc. and Walter & Samuels Capital Group, LLC.'s motion to dismiss is denied without prejudice to moving the court for proper relief.

This matter shall be overridden to a random IAS part. Appearing parties to appear in the intake part for a preliminary conference on February 21, 2020 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: JAN 17 2020

  
Richard J. Montelione, A.J.S.C.

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