

<b>Atlantic Specialty Ins. Co. v ARS Nova Theatre I, Inc.</b>
2020 NY Slip Op 32360(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 153979/2019
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 2EFM**

*Justice*

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**INDEX NO.** 153979/2019

ATLANTIC SPECIALTY INSURANCE COMPANY A/S/O  
ARS NOVA PGM, LLC AND 511 WEST 54TH STREET  
ASSOCIATES, LLC,

**MOTION SEQ. NO.** 001

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

ARS NOVA THEATRE I, INC.,

Defendant.

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

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

In this subrogation action, plaintiff Atlantic Specialty Insurance Company (“Atlantic”) a/s/o ARS Nova PGM, LLC (“ARS Nova PGM”) and 511 West 54<sup>th</sup> Street Associates, LLC (“511 West 54”) moves, pursuant to CPLR 3215, for a default judgment against defendant ARS Nova Theatre I, Inc. (“ARS Nova Theatre”). After consideration of plaintiff’s arguments, as well as a review of the relevant statutes and case law, the motion is decided as follows.

Plaintiff, an insurance company, issued a policy covering ARS Nova PGM and 511 West 54, which owned a building located at 511 West 54<sup>th</sup> Street in Manhattan (“the building” or “the premises”). On or about September 28, 2018 ARS Nova Theatre, a tenant which operated a theater at the building, allegedly caused the sprinkler system at the premises to discharge water, resulting in damages of \$255,632.61 to Arts Nova PGM and 511 West 54.

On April 17, 2019, Atlantic commenced the captioned action against ARS Nova Theatre, claiming that the water damage was caused by the negligence of the latter. Atlantic further

alleged that it had paid ARS Nova PGM and 511 West 54 the sum of \$250,632.61 as a result of the alleged incident and that those entities had paid a \$5,000 deductible. Thus, claimed Atlantic, ARS Nova Theatre owed it \$250,632.61 and owed ARS Nova PGM and 511 West 54 \$5,000 for reimbursement of their deductible, a total sum of \$255,632.61. Following the commencement of the action, the summons and complaint were served on ARS Nova Theatre via the Secretary of State, although it has failed to answer or otherwise appear in this matter.

Atlantic now moves, pursuant to CPLR 3215, for a default judgment against ARS Nova Theatre. In support of the motion, Atlantic submits the summons and complaint; the affirmation of its attorney, Alan Wenig, Esq., who represents, inter alia, that ARS Nova Theatre has failed to answer or otherwise appear in this action and who acknowledges that the motion was filed past the one-year period mandated by CPLR 3215(c); the affidavit of Jenny Steingart, “the building owner”, who represents that the total damages owed to Atlantic are \$255,632.61 (water damage of \$250,632.61 plus \$5,000 for reimbursement of the deductible); and a proof of loss reflecting that the amount of the claim was \$250,632.61.

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 (1<sup>st</sup> Dept 2016). Here, Atlantic has established that ARS Nova Theatre was served with process and that it failed to answer or otherwise appear. However, the motion is denied with leave to renew for the following reasons.

Initially, Atlantic has failed to set forth the facts constituting the claim. Although Steingart represents in her affidavit that she is the owner of the building, Atlantic alleges in the complaint, and Steingart states in her affidavit, that ARS Nova PGM and 511 West 54 are the owners of the premises. Thus, a discrepancy clearly exists in this regard. Further, if Steingart is a principal or officer of ARS Nova PGM or 511 West 54, she has not so stated in her affidavit and, thus, this Court cannot ascertain the source of her personal knowledge.

Further, as Mr. Wenig concedes, Atlantic's motion is untimely. CPLR 3215(c) provides, in pertinent part, as follows:

(c) Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Mr. Wenig maintains that the instant motion was not filed within one year because:

numerous attempts were made to contact [ARS Nova Theatre] in order to obtain insurance coverage and resolve this matter. In view of the ongoing attempts to resolve this matter with the defendant, and the desire of [Mr. Wenig] not to burden the court in the event that attempts proved successful, the instant application was caused to be made beyond one year from the date of the defendant's default.

Doc. 7 at par. 7.

However, this Court does not deem the foregoing to be "sufficient cause" for filing the motion more than one year after ARS Nova Theatre's default. In order to establish "sufficient cause" where there has been a failure to move for a default within one year, plaintiff must submit an affidavit of merits. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3215:11. Here, aside from the fact that Mr. Wenig does purport to have personal

knowledge of any of the events described in his affirmation, he not specify who made the “numerous attempts” to contact ARS Nova Theatre to obtain information about its insurance coverage. Additionally, despite what Mr. Wenig refers to as “ongoing attempts to resolve this matter”, he does not state who made such attempts or when they were made. Indeed, there is no documentation annexed to the motion, including, but not limited to any correspondence or emails, reflecting that any such attempts were made. Nor are any such events documented by Steingart in her affidavit.

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

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

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

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KATHRYN E. FREED, J.S.C.

7/20/2020  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: