

Hildun Corp. v Odin N.Y., Ltd.
2020 NY Slip Op 34265(U)
December 23, 2020
Supreme Court, New York County
Docket Number: 157188/2017
Judge: Robert D. Kalish
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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. 157188/2017

HILLDUN CORPORATION ASSIGNEE OF PS39 LLC DBA
PUBLIC SCHOOL & OF INFLUX STUDIO LLC DBA SIMON
MILLER,

MOTION DATE 09/23/2020

MOTION SEQ. NO. 003

Plaintiff,

- v -

DECISION + ORDER ON
MOTION

ODIN NEW YORK, LIMITED &, JOHN BIRARDI

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - DEFAULT

Motion by Plaintiff Hilldun Corporation assignee of PS39 LLC dba Public School & of Influx Studio LLC dba Simon Miller for an order (i) entering Judgment pursuant to CPLR 3215; (ii) amending the caption pursuant to CPLR 2001 and CPLR 305; and (iii) for such other and further relief as to the Court may appear just and proper in the circumstances is GRANTED to the extent the Defendant John Birardi's name in the caption shall be amended to the following: "defendant John Paul Birardi aka Paul Birardi aka Joseph Paul Birardi," and the motion is OTHERWISE DENIED for the reasons discussed below.

BACKGROUND

Plaintiff Hilldun Corporation ("Plaintiff") commenced this action for the alleged failure of the Defendants Odin New York, Limited, ("Odin") and John Birardi ("Birardi") (collectively "Defendants") to pay for goods sold and delivered by filing a summons and complaint with the Court on August 10, 2017. Thereafter, the summons and complaint were served upon the defendant Odin on August 17, 2017. (See Ex A, NYSCEF Doc No 44; see also NYSCEF Doc No 002.) The summons and complaint were further served upon defendant Birardi on August 22, 2017. (See Ex A, NYSCERF Doc No 44; see also NYSCEF Doc No 03.) Defendants filed an Answer on October 12, 2017. (See Ex B, NYSCEF Doc No 45; see also NYSCEF Doc No 05.)

On October 30, 2018, a hearing was held on an order to show cause before this Court (Mot. Seq. No. 002) at which time the motion to withdraw from representing Defendants by Defendants' attorneys Ellenoff Grossman & Schole, LLP was granted. (See Decision and Order, NYSCEF Doc No 30 [Mot. Seq.002]; Tr at 03:10-17, NYSCEF Doc No 33 [Mot. Seq. 002].)

Status Conferences were held in the action on April 23, 2019 (NYSCEF Doc No 35), and May 28, 2019 (NYSCEF Doc No 37). On April 15, 2019 and September 23, 2019, Defendants entered into two stipulations of settlement with Plaintiff. In one settlement, Defendants entered into a stipulation with Plaintiff as assignee of Influx Studio LLC dba Simon Miller. (Ex C, NYSCEF Doc No 46.) In the second settlement, Defendants entered into a stipulation with Plaintiff as assignee of PS39 LLC dba Public School. (*Id.*)

In the partial stipulation of settlement dated April 15, 2019 (the “Simon Miller Settlement Agreement”), Defendants Odin through its agent, and John Paul Birardi signed and agreed to pay Plaintiff as assignee of Influx Studio LLC dba Simon Miller a sum of \$8,974.18 to be paid in nine monthly payments. (*Id.* at 3.) In this April 15, 2019 partial stipulation, the parties also agreed that “[i]n the event of default in any of the [aforementioned] payments, the attorney for the plaintiff shall give written notice to the defendants. The defendants shall have FIVE (5) days in which to cure said default. Should said default remain, then and in that event, the plaintiff shall have the right, without further notice to the defendants and without further application to the court, to enter judgment for the \$11,690, together with costs, interest and disbursements less any amounts paid hereunder.” (*Id.*)

In the partial stipulation of settlement dated September 23, 2019 (the “Public School Settlement Agreement”), Defendants Odin, through its agent Paul Birardi, and Paul Birardi, who, this time, did not use his initial name of “John” for his signature, signed and agreed to pay Plaintiff as assignee of PS39 LLC dba Public School a sum of \$22,577.38 to be paid in eleven monthly installments. (*Id.* at 2.) In this September 23, 2019 partial stipulation, the parties also agreed that “[i]n the event of default in any of the [aforementioned] payments, the attorney for the plaintiff shall give written notice to the defendants. The defendants shall have FIVE (5) days in which to cure said default. Should said default remain, then and in that event, the plaintiff shall have the right, without further notice to the defendants and without further application to the court, to enter judgment for the \$30,103.17, together with interest less any amounts paid hereunder.” (*Id.*)

According to the moving papers on this motion (Mot. Seq. No. 003), Defendants made two payments on the Simon Miller Settlement Agreement for a total of \$2,247.41 before defaulting. (Affirm in Supp ¶ 19, NYSCEF Doc No 41.) According to the moving papers, Defendants made one payment on the Public School Settlement Agreement for a total of \$2,000 before defaulting. (*Id.* ¶ 24.)

Further, according to the moving papers, on November 15, 2019, Plaintiff served upon Defendants a default notice. (*Id.* ¶ 20.) A copy of the default notice has not been included in the record. According to the moving papers and based on the aforementioned stipulations, pursuant to the Simon Miller Settlement Agreement, Plaintiff has the right to judgment for “\$11,690, together with costs, interest and disbursements less any amounts paid hereunder.” (*Id.* ¶ 21.) Since Defendants allegedly made a payment of \$2,247.41, the remaining amount owed on the Simon Miller Settlement Agreement is \$9,442.59. (*Id.* ¶ 22.)

Further, according to the moving papers and based on the aforementioned stipulations, Plaintiff has the right to judgment for “\$30,103.17, together with interest less any amounts paid

hereunder.” (*Id.* ¶) Since Defendants allegedly made a payment of \$2,000, the remaining amount owed on the Public School Settlement Agreement is \$28,103.17. (*Id.* ¶ 27.)

Overall, according to the moving papers and based on the partial stipulations, Plaintiff argues that it has a right to judgment for \$37,545.76, plus interest, costs and disbursements. (*Id.* ¶ 28.) The motion (Motion Seq. No. 003) is unopposed.

DISCUSSION

I. Default Judgment

CPLR 3215(f), Proof, in relevant part, states:

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party[.] Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. ... Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(CPLR 3215 [f].)

In the case at issue, the Court lacks sufficient proof to grant a default judgment against Defendants based on the record submitted. In each of the two partial settlements, if there was a default by Defendants in making the agreed upon payments, it was the obligation of Plaintiff to serve a notice of default giving Defendants five days to cure the default. However, a notice of default has not been made part of the record. It is not enough that the Affirmation in Support of this motion alleges that “[a] default notice was served upon the Defendants on November 15, 2019.” (Affirm in Support ¶ 20.) Further, the record lacks properly executed affidavits made by the party stating failure of Defendants to make payments and an affidavit of mailing. (*See* CPLR 3215 [f].) It is not sufficient for an attorney to state that Defendants defaulted absent further explanation as to the attorney’s role as the custodian of the payments. (*See* Affirm in Supp ¶¶ 18-28.)

However, that portion of the motion seeking to amend the caption is granted. Plaintiff alleges in its moving papers on this motion that “[a]fter it filed its summons and complaint, [it] learned that the true name of defendant, John Paul Birardi aka Paul Birardi, is Joseph Paul Birardi.” (Memo in Supp at 2, NYSCEF Doc 42.) In support of its argument, Plaintiff submits into the record Defendants’ Response to Initial Demand for Interrogatories signed by Joseph Paul Birardi. (Ex C, NYSCEF Doc No 47.)

II. Misnomer in Caption

CPLR 2001, Mistakes, omissions, defects and irregularities, states:

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

(CPLR 2001.)

CPLR 305(c), Amendment, states:

At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.

(CPLR 305[c]; see also Chambers v Prug, 162 AD3d 974, 974 [2d Dept 2018] [“Where the motion is to cure a misnomer in the description of a party defendant, it should be granted even after the statute of limitations has run where (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought.”] [internal quotations and citations omitted].)

In light of the fact that Birardi was served with the action (Ex A, NYSCERF Doc No 44), that Birardi participated in the litigation both in his individual capacity and as an agent of Defendant Odin, and that Birardi signed the aforementioned stipulations, the Court is convinced that amending the caption does not affect a substantial right of Defendants.

CONCLUSION

Accordingly, it is hereby ORDERED that the Motion by Plaintiff Hilldun Corporation assignee of PS39 LLC dba Public School & of Influx Studio LLC dba Simon Miller for an order (i) entering Judgment pursuant to CPLR 3215; (ii) amending the caption pursuant to CPLR 2001 and 305; and (iii) for such other and further relief as to the Court may appear just and proper in the circumstances is GRANTED to the extent Defendant John Birardi’s name in the caption shall be amended to the following: “defendant John Paul Birardi aka Paul Birardi aka Joseph Paul Birardi,” and the motion is OTHERWISE DENIED.

12/23/2020
DATE

Robert David Kalish
ROBERT DAVID KALISH, J.S.C.

CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
[] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
APPLICATION: [] SETTLE ORDER [] SUBMIT ORDER
CHECK IF APPROPRIATE: [] INCLUDES TRANSFER/REASSIGN [] FIDUCIARY APPOINTMENT [] REFERENCE