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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

***Justice***

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FRANKLIN MENDOZA, JUAN AQUINO, GABRIEL RINCON, YOQUEL VARGAS

Plaintiff,

- v -

UNO CONSTRUCTION CORP., JOHN DOE BONDING COMPANY,

Defendant.

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**INDEX NO.** 150215/2019

**MOTION DATE** 11/04/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

This action was brought by four individual Plaintiffs, Franklin Mendoza, Juan Aquino, Gabriel Rincon, and Yoquel Vargas against their former employer, Uno Construction Corporation ("Defendant"), for outstanding wages. On June 23, 2020, Plaintiffs filed a notice of discontinuance as to Plaintiffs Mendoza, Aquino, and Rincon. In motion sequence 001, the remaining Plaintiff, Yoquel Vargas, brings a motion for default judgment on his claims for overtime compensation and breach of public works contracts, on the grounds that Defendant, a corporation, has continually failed to appear by counsel, in violation of CPLR 321 [a].

Defendant filed its answer on May 13, 2019, signed by Mohammad Hallack, the principle of Defendant corporation, who is not an attorney. (NYSCEF Doc No. 8.) On March 3, 2020, the parties appeared for a preliminary conference before the court. However, that conference was adjourned to May 26, 2020, with the court noting that this was the fourth adjournment granted due to Defendant corporation's lack of counsel. Plaintiff Vargas now brings this motion for default

judgment based on Defendant's continued failure to appear with counsel. The motion has been submitted unopposed.

Pursuant to CPLR 321 [a], "a corporation . . . shall appear by attorney[.]" A default judgment may be entered against a corporation for failure to appear by attorney. (See *Jimenez ex rel. Disla v Brenilee Corp*., 48 AD3d 351, 352 [1st Dept 2008], citing *Mail Boxes Etc. USA, Inc v Higgins*, 281 AD2d 176 [1st Dept 2001].)

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the Defendant's default in answering or appearing. (*SMROF II 2012-1 Tr. v Tella*, 139 AD3d 599, 600 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (*Bianchi v Empire City Subway Co.*, 2016 NY Misc LEXIS 6730, 2016 WL 1083912, at *1 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

In support of his motion, Plaintiff provides proof that Defendant corporation was properly served with the amended complaint under CPLR 311 [a], by personal service on an individual authorized to receive such, on April 24, 2019. (NYSCEF Doc No. 20.)

Additionally, Defendant corporation has failed to appear, in that Defendant's principle and non-lawyer, Mohammad Hallack, signed both its answers and appeared before the court on four separate occasions in an attempt to participate in a preliminary conference. (See NYSCEF Doc No. 12 [adjourning preliminary conference on four occasions to allow Defendant to retain

counsel]; see also *Evans v Conley*, 124 AD2d 981, 982 [4th Dept 1986] ["By appearing *pro se*, defendant's president violated CPLR 321 and her appearance was a nullity."].)

The court notes that, although CPLR 3215 states that a plaintiff should move for a default judgment within one year after the default or suffer dismissal of the complaint, Plaintiff herein demonstrates sufficient cause as to why the amended complaint should not be dismissed. This court adjourned the preliminary conference on four occasions based on Defendant's principle's representation that he would retain an attorney to represent him in this litigation. Additionally, the court recognizes the logistical challenges presented by the COVID epidemic.

Plaintiff submits an affidavit of merit attesting to his alleged outstanding wages. (NYSCEF Doc No. 24, Vargas Affidavit.) In total, Plaintiff claims $165,907.32 in damages and $18,384.29 in attorneys' fees. (NYSCEF Doc No. 16 at ¶¶ 45-46; see also NYSCEF Doc No. 26, Damages Chart.) This amount is comprised of overtime calculated for a period of 75 days, or 11 work weeks, at one-and-a-half times Plaintiff's regular pay of $500.00 a week (for a total of $193.88), plus overtime calculated for a period of 274 days, or 39 work weeks, at prevailing wage rates for demolition under the Davis-Bacon Act minus the rate he was actually paid (for a total of $82,759.78). Both totals are then doubled to account for liquidated damages, pursuant to Labor Law § 663, and added together, for the grand total of $165,907.32.

> While a defendant in default is deemed to have admitted all traversable allegations in the complaint (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Browny Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), "CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Feffer v Malpeso*, 210 AD2d 60, [1st Dept 1994]. As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exist (*Woodson*, *supra* at 70-72).

(*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].)

"However, the defaulting defendant does not admit the plaintiff's conclusion as to damages, and unless for a sum certain or a sum which can be 'made certain' by computation, damages are determined in a separate proceeding requiring additional notice to the defaulting party." (*Jsignal LLC v. Artisan Const. Partners LLC*, 2017 WL 2671005, at *2 [Sup Ct, NY County 2017]; see also *Gagen v Kipany Prods. Ltd.*, 289 AD2d 844, 846 [3d Dept 2001] ["Plaintiff's conclusory allegation that he and defendant entered into an oral contract that provided for overtime compensation fails to satisfy his minimal burden on his default application."]; *Styles v Global Quality, Inc.*, 2020 WL 1929814 [Sup Ct, NY County 2020] [granting default judgment in overtime compensation case on liability but referring damages portion to special referee for an inquest]; *Gandham v K&N Gifts, Inc.*, 2019 WL 1597697, at *1 [Sup Ct, NY County 2019] [directing an inquest be held on issue of damages because "other than his self-serving claims which are otherwise unsubstantiated, plaintiff has failed to demonstrate the terms of his agreement, provide proof of the hours he allegedly worked, or even explain TKNP Inc. and the individual defendant's connection to his claims"]; *Dias v PS Bros. Gourmet, Inc.*, 2017 WL 3592441 [Sup Ct, NY County 2017] [in overtime compensation case, holding inquest after granting default judgment as to liability only].)

Here, Plaintiff's affidavit is insufficient to support an entry of default on the amount of damages claimed. Plaintiff's affidavit states that he was paid $500.00 per week for the majority of his tenure with Defendant, regardless of hours worked and regardless of whether he should have been receiving overtime pay. The damages chart takes the hourly approximations made in the affidavit, applies Davis-Bacon Act prevailing wage rates for demolition work, then doubles the total amount to account for liquidated damages. However, Plaintiff fails to offer proof to demonstrate actual hours worked or entitlement to Davis-Bacon wage rates. Accordingly, Plaintiff

has not met his burden in submitting "some proof of liability" (*Feffer*, 210 AD2d at 61) and the motion for default judgment is granted only to the extent that Defendant's default to appear in this action is noted. All issues regarding damages are to be decided at an inquest held at the time of trial. Thus, it is hereby

ORDERED that Uno Construction Corporation is hereby in default and the matter shall be set down for an inquest and an assessment of liability and damages; and it is further

ORDERED that, upon the filing by the Plaintiff with the General Clerk's Office (60 Centre Street, Room 119) of a copy of this order with notice of entry and a note of issue, and the payment of the fee therefor, the Clerk shall place this matter upon the trial calendar for an inquest and an assessment of liability and damages; and it is further

ORDERED that such filing with the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

**01/25/21**
**DATE**

**W. FRANC PERRY, J.S.C.**

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