

Ismail v JAS Produce

2021 NY Slip Op 33930(U)

March 3, 2021

Supreme Court, Kings County

Docket Number: Index No. 507154/2019

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of March, 2021.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X
MOHAMMAD ISMAIL,

Plaintiff,

-against-

Index No.: 507154/2019

JAS PRODUCE, CECELI TRADING LLC,
MMK PRODUCE LLC, MEHMET KOCACAL,
MELIKE S. KOCACAL and MEHMET BOZKURT,

Defendant.
-----X

DECISION AND ORDER

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Affirmation/Exhibits Annexed _____

130-138

Plaintiff Mohammad Ismail (“Plaintiff”) moves for an order (1) granting Plaintiff a default judgment against defendant Ceceli Trading LLC (“Ceceli”) and (2) setting this matter down for an inquest on damages against Ceceli (Mot. Seq. No. 5). No opposition papers have been filed.

On or about April 2, 2019, Plaintiff commenced this action by filing a summons and verified complaint seeking to recover damages for personal injuries. On March 30, 2020, Justice Carl J. Landicino issued an order granting defendants Mehmet Bozkurt, Mehmet Kocacal and Melike S. Kocacal’s motions to dismiss Plaintiff’s complaint (Mot. Seq. Nos. 1 and 2). By order dated February 2, 2021, Justice Landicino granted

Plaintiff's motion to reargue (Mot. Seq. No. 3) and vacated the March 30, 2020 order. Plaintiff now moves for a default judgment against Ceceli, who has not answered or otherwise appeared in this matter to date.

As a preliminary matter, prior to making a motion for a default judgment, the moving party is generally required to provide the defendant with notice (CPLR 3215 [g] [1]). Here, Plaintiff avers that Ceceli is a foreign limited liability company with its principal place of business in New Jersey. Plaintiff provided a copy of a letter purportedly sent to Ceceli advising them that Plaintiff would be seeking a default judgment.¹ Plaintiff failed to attach an affidavit of service. However, because Ceceli is a limited liability company, additional notice was not required (CPLR 3215 [g] [4] [i]; *Gershman v Ahmad*, 131 AD3d 1104, 1105 [2d Dept 2015]; *see also Confidential Lending, LLC v Nurse*, 120 AD3d 739, 742 [2d Dept 2014]).

On a motion for default judgment, the movant is required to submit proof of: (a) service of the summons and complaint, (b) the facts constituting the claim, and (c) the party's default in answering or appearing (*see* CPLR 3215 [f]).

In support of his motion, Plaintiff argues that Ceceli was properly served in accordance with Section 304 of the Limited Liability Company Law ("LLCL"). For the Court to grant a default judgment, the movant must strictly comply with this statute (*Glob. Liberty Ins. Co. v Surgery Ctr. of Oradell, LLC*, 153 AD3d 606, 607 [2d Dept 2017]). First, service under Section 304 may be made by personal delivery of the summons and complaint, with the requisite fee, to the Secretary of the State (LLCL 304

¹ NY St Cts Elec Filing [NYSCEF] Doc No. 138.

[b]). Here, Plaintiff produced an affidavit of service reflecting that Ceceli was served through the Secretary of State on April 12, 2019.² Second, the statute provides that service in this manner is deemed sufficient if notice thereof and copy of the process are served on the limited liability company either personally or by registered mail, return receipt requested (LLCL 304 [c]). The Court finds that Plaintiff complied with LLCL 304 [c] [2] on April 18, 2019, by mailing the summons and verified complaint with notice of service upon the Secretary of State to Ceceli via registered mail, return receipt requested.³ Third, where service is effected by mail, LLCL 304 [3] requires that proof of such service in the form of an affidavit of compliance must be filed within thirty days after receipt of the signed return receipt. In this matter, Plaintiff included as an exhibit a copy of the signed return receipt, stamped on April 25, 2019.⁴ Plaintiff's counsel filed an affidavit of compliance on May 22, 2019.⁵ Thus, Plaintiff timely filed the affidavit of compliance. Accordingly, the Court finds that Plaintiff has complied with LLCL 304 and submitted sufficient proof of service.

With respect to the proof of default, Plaintiff's counsel submitted an affirmation wherein he states that Ceceli has not answered or filed any pre-answer motion and no attorneys have appeared on its behalf (*see* CPLR 3215 [f] [the default must be established

² NYSCEF Doc No. 135.

³ *Id.* Plaintiff produced an affidavit of service with several discrepancies. NYSCEF Doc No. 136. First, the affidavit states that on April 10, 2019, the deponent served Ceceli by corporate service. *Id.* Second, the deponent purportedly tried to personally serve Ceceli on April 6, April 11 and April 17 before affixing the summons and complaint to the door. *Id.* Third, per the affidavit, the summons and verified complaint were mailed on April 18, 2019. *Id.* Finally, the affidavit was sworn to on April 11, 2019, prior to two attempts at personal service and the mailing. *Id.* As the Court found that service was properly effectuated by registered mail under LLCL 304 [c] [2], this defective affidavit does not affect the Court's analysis.

⁴ NYSCEF Doc No. 135.

⁵ NYSCEF Doc No. 137.

by affidavit of the party *or* the party's attorney]. Plaintiff failed, however, to establish the facts constituting the claim. Though a verified complaint may be submitted instead of an affidavit (CPLR 3215 [f]), Plaintiff's attorney verified the complaint and it is thus inadequate (*see Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010] ["[T]he verified complaint must contain evidentiary facts from one with personal knowledge"]). To remedy this, Plaintiff's counsel attached as an exhibit to this motion a verification signed by Plaintiff on September 16, 2020. There is no evidence that this verification, which was executed over a year after the filing of the complaint, was ever served on the parties. In addition, Plaintiff's affidavit submitted in opposition to Motion Sequences 1 and 2 is insufficient because it does not address claims against Ceceli. Accordingly, the Court finds that Plaintiff did not meet its prima face burden of establishing entitlement to a default judgment. Thus, it is hereby

ORDERED, that Plaintiff's motion is denied without prejudice.

This constitutes the decision and order of the court.



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**