

**Stahl Assoc., LLC v Consolidated Edison Co.**

2022 NY Slip Op 30688(U)

March 4, 2022

Supreme Court, New York County

Docket Number: Index No. 155166/2018

Judge: William Perry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

STAHL ASSOCIATES, LLC

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Third-Party Plaintiff,

-against-

ARMOR MECHANICAL SYSTEMS LLC, A.D.S. PLUMBING AND HEATING, INC.

Third-Party Defendants.

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INDEX NO. 155166/2018

MOTION DATE 11/10/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party Index No. 595825/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - DEFAULT

In this negligence action, Plaintiff Stahl Associates LLC alleges that Defendant Consolidated Edison Company ("Con Ed") negligently and unnecessarily shut down the gas system of a building owned by Plaintiff, causing \$1,902,980.09 in damages. In motion sequence 001, Con Ed, as Third-Party Plaintiff, moves for default judgment against Armor Mechanical Systems LLC ("Armor"), a plumber. The motion is submitted unopposed.

Background

Plaintiff is the owner of 360 East 55th Street, New York, NY, a 16-story mixed use residential and commercial building. In 2016, Plaintiff's commercial tenant Sofia Pizza hired

Armor to renovate its premises and install a gas pizza oven. Plaintiff alleges that Armor contacted Con Ed and requested that Con Ed send an employee to the premises to hook up the new gas line that Armor had installed. However, Con Ed, according to Plaintiff, asserted that certain corrective work had to be performed, and, on June 24, 2016, Con Ed employees shut off gas service due to an erroneous belief that it was an “unauthorized connection.” (NYSCEF Doc No. 1, Complaint, at ¶ 14.) Plaintiff alleges that it had to unnecessarily renovate its gas system, costing \$1,200,000.00, in addition to rebating its residential tenants a percentage of their monthly rents, totaling \$655,118.09. (*Id.* at ¶¶ 19-20.)

Con Ed filed a third-party complaint on October 6, 2020, setting forth causes of action for indemnification/contribution against Armor and ADS Plumbing and Heating, Inc. (NYSCEF Doc No. 24, 3PC), with the latter answering on January 11, 2021. (NYSCEF Doc No. 32.) Now, Con Ed moves for default judgment as against Armor. (NYSCEF Doc No. 35, Con Ed Memo.)

### Discussion

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-I Tr. v Tella*, 139 AD3d 599 [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 WL 1083912 [Sup Ct, New York County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Here, Con Ed properly effected service upon Armor on October 13, 2020, pursuant to Limited Liability Company Law § 303. (NYSCEF Doc No. 39.) To date, Armor has not appeared.

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]; *Brown 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, 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 exists (*Woodson, supra* at 70-72).

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

“Proof that the plaintiff has submitted ‘enough facts to enable [the] court to determine that a viable’ cause of action exists may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability.” (*Perney v Medical One New York, P.C.*, 2020 WL 4604812, at \*4 [Sup Ct, NY County 2020] [internal citations omitted].) CPLR 3215[f] [“Proof”] provides that “[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due[.]”

Here, Con Ed’s third-party complaint was verified by Con Ed’s attorney (NYSCEF Doc No. 24 at 11), and Con Ed fails to submit an additional affidavit of facts in support of its motion. Accordingly, Con Ed’s motion is granted only to the extent that Armor’s default in appearance is noted. All issues regarding Armor’s liability and damages are to be decided at an inquest which will be held at the time of trial. Thus, it is hereby

ORDERED that Defendant/Third-Party Plaintiff Con Ed’s motion for default judgment against Third-Party Defendant Armor Mechanical Systems LLC is granted, in part, to the extent that Armor’s failure to appear is noted; and it is further

ORDERED that the degree of liability and Con Ed's damages attributable to Armor are to be decided at an inquest which will be held at the time of trial.

03/04/2022  
DATE

  
WILLIAM PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE