

Sommeseo v Zilberman
2022 NY Slip Op 32942(U)
August 30, 2022
Supreme Court, New York County
Docket Number: Index No. 156326/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

DENNIS A. SOMMESO,
Plaintiff,

- v -

INDEX NO. 156326/2021

MOTION DATE 05/13/2022

MOTION SEQ. NO. 001

SUSAN ZILBERMAN, ROBERT SANTUCCI, ROCK STAR
HOSPITALITY GROUP and ROCK STAR HOTELS, LLC

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

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

In this action seeking reimbursement of \$143,268.00 allegedly paid by the plaintiff for the defendants' tax liabilities, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against defendant Robert Santucci. ¹ No opposition was filed. The motion is denied.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have 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 [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., supra. While the "quantum of proof necessary to support an application

¹ Defendant Susan Zilberman answered the complaint with general denials and affirmative defenses. The corporate defendants were never served.

for a default judgment is not exacting ...some firsthand confirmation of the facts forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, supra. As such, “[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default.” Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

The complaint alleges several causes of action against defendant Santucci, including breach of contract, indemnification and promissory estoppel, all seeking the same relief – reimbursement of monies that the plaintiff allegedly paid to the New York State Department of Taxation and Finance for sales tax liabilities. In his affidavit, he alleges he was a 50% shareholder of non-party Villa Enrico, Inc., which operated a New York restaurant, until 2016, the other 50% shareholder being defendant Susan Zilberman. Sometime prior to selling his shares in 2016, on behalf of the corporation, he hired defendant Santucci and his companies, defendants Rock Star Hospitality Group and Rock Star Hotels, LLC, Inc. to manage the financial affairs of Villa Enrico, Inc., including the payment of sales tax. The plaintiff claims that he had no involvement with Villa Enrico, Inc. after 2016 but was contacted by New York State tax authority in 2018 about the company’s unpaid sales taxes. When he advised the defendants of this notice, they assured him they would resolve the issue but they did not. In 2019, the plaintiff was again notified by the tax authority of outstanding sales taxes and he again notified each defendant. He claims to have then negotiated an agreement with the New York State Department of Taxation and Finance to pay a total of \$105,000.00 in installments to satisfy the debt. He claims that each defendant expressly and repeatedly agreed to fund the settlement and make the monthly payments of \$7,500.00 when they became due. This agreement was apparently oral only and not reduced to writing. According to the plaintiff, the defendants paid \$20,000.00 and defaulted on the balance. As a result, a tax warrant and judgment in the sum of \$223,364.92 was obtained against him by the tax authority. The plaintiff alleges that he paid \$147,677.91 on August 31, 2021. He does not explain the discrepancy between these amounts and the amount sought herein, \$143,268.00.

With his affidavit, the plaintiff submits several documents from the New York State Department of Taxation and Finance - (1)) a billing notice from the tax authority dated August 2, 2018, addressed to Villa Enrico, Inc. reflecting unpaid sales taxes for periods ranging from May 2015 to May 2016, (2) a warrant dated February 13, 2019, for “Dennis A. Sommeso,

individually and as a responsible person of Villa Enrico, Inc.” showing an outstanding balance of \$223,364.92, (3) a Tax Installment Payment Agreement, addressed to the plaintiff and signed by the plaintiff and defendant Santucci on April 23, 2019, Santucci signing as “President” and both representing that they were “authorized signatories”, which indicates that \$7,500.00 was to be automatically deducted monthly from a Signature Bank business checking account in the name of defendant Rock Star Hotels, LLC, Inc., and (4) a billing invoice dated July 8, 2019, reflecting an outstanding balance of \$94,646.89. He also submits a cashier’s check dated August 31, 2021, in the amount of \$147,677.91 payable to the Commissioner of Taxation & Finance and drawn on an attorney’s trust account.

The plaintiff’s proof is insufficient to warrant entry of a default judgment against defendant Santucci. The plaintiff alleges that he sold his shares in Villa Enrico, Inc. and left the business in sometime in 2016, yet in 2019 he negotiated the Tax Installment Payment Agreement with the tax authority on behalf of the business and the defendants, signing as an “authorized signatory.” No documents are submitted showing the sale of shares or his separation from the business and no explanation is provided. In any event, the billing invoice he submits shows that the subject tax liabilities arose in 2015 and 2016 before he left the business. He also alleges that the defendants “expressly and repeatedly” agreed to make all tax payments due under the payment agreement he signed. However, he offers no proof of such promises by or agreement with the defendants. Notably, both the plaintiff and Santucci signed the payment agreement with the tax authority, while defendant Zilberman, the other 50% shareholder in Villa Enrico, Inc. did not. Further, they agreed to have the monthly payments withdrawn for an account in the name of defendant Rock Star Hotels, LLC, Inc., an entity that was never served in this action. No explanation is provided.

Therefore, even assuming that the plaintiff submitted sufficient proof of service of the summons and complaint and proof of defendant Santucci’s default, he has failed to submit sufficient proof of the facts constituting his claim as required for relief under CPLR 3215(f). However, since the defects can be cured, denial of the motion is without prejudice to renewal on proper papers within 60 days of the date of this order.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against defendant Robert Santucci is denied without prejudice to renewal on proper papers within 60 days, and it is further

ORDERED that counsel for the plaintiff and counsel for defendant Susan Zilberman shall commence discovery and appear for a preliminary/settlement conference on December 1, 2022, at 10:00 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

8/30/2022
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER