

Kumar v European Auto Group

2023 NY Slip Op 31466(U)

May 1, 2023

Supreme Court, New York County

Docket Number: Index No. 157621/2020

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

Justice

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SUNDIP KUMAR,

Plaintiff,

INDEX NO. 157621/2020

MOTION DATE 09/06/2022

MOTION SEQ. NO. 003

- v -

EUROPEAN AUTO GROUP, ART BARTOSIK, DAVID
BARTOSIK

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the unopposed motion of plaintiff Sundip Kumar (plaintiff) for a default judgment against defendants European Auto Group (EAG), Art Bartosik, and David Bartosik (collectively, defendants) is granted. The instant motion arises out of an action seeking to recover monies for property damage to plaintiff's vehicle, allegedly caused by defendants. Plaintiff argues that defendants have not appeared in this action, served an answer, or asked for an extension to so do. No opposition has been submitted to the motion by any defendant.

Plaintiff previously moved for the same relief, which was denied by Justice Barbara Jaffe on June 10, 2022, without prejudice to renew. See NYSCEF doc. no. 58. Justice Jaffe denied plaintiff's first motion because plaintiff failed to submit certificates of conformity for the affidavits of service upon defendants Art Bartosik and David Bartosik (together, individual defendants), which were sworn to in Texas, or non-military affidavits as to the individual defendants.

Justice Jaffe also denied plaintiff's first motion for plaintiff's failure to submit an affidavit of merit. In denying the prior application for a default judgment, Justice Jaffe noted that plaintiff had failed to present proof that defendants agreed to perform and performed work on plaintiff's vehicle. Moreover, the expert reports and other evidence of plaintiff's damages were neither certified nor admissible as plaintiff's business records. Absent any proof of merit and without proper proof of service, Justice Jaffe denied plaintiff's first motion with leave to renew within 60 days. Plaintiff now renews their motion.

Pursuant to CPLR 3215 (f), governing entry of default judgments:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ...

On a motion for leave to enter a default judgment under CPLR 3215, the moving party must submit "proof sufficient to enable a court to determine that a viable cause of action exists." *Bigio v Gooding*, 213 AD 3d 480 (1st Dept 2023) (internal citations omitted). When seeking a default judgment against a corporation, a movant must also submit an affidavit of additional service of the summons "by first class mail upon the defendant corporation at its last known address at least 20 days before the entry of judgment," which must be accompanied by a notice to the corporation that service is being made or has been made to the Office of the Secretary of State. *See* New York Business Corporation Law (BCL) § 306; CPLR 3215 (g) (4).

Plaintiff now submits the requisite supporting documents and sufficient proof of the facts constituting the claim. Plaintiff submits the affidavits of service, now with certificates of conformity annexed to those sworn to in Texas (*see* NYSCEF doc. no. 54); the affidavits of non-military service as to the individual defendants (*see* NYSCEF doc. no. 59); and a sworn certification to the appraisal affidavit (*see* NYSCEF doc. no. 56). Additionally, plaintiff submits an affirmation and notice of service of an additional summons and complaint by first class mail

upon corporate defendant EAG at its last known address at least twenty days prior to entry of judgment pursuant to CPLR 3215 (g)(4)(i), (ii). *See* NYSCEF doc. no. 55.

Plaintiff emphasizes that this action is not based on a breach of contract, as Justice Jaffe's order seems to suggest, and no proof of any contract is required. Rather, plaintiff maintains that the action is based on defendants' alleged misuse of plaintiff's vehicle and resulting diminution of its value. Therefore, plaintiff submits an affidavit of merit in which plaintiff attests that defendants drove and damaged the subject vehicle while it was in their possession. *See* NYSCEF doc. no. 52. The Court finds that this is sufficient.

To date, defendants have failed to answer, appear, or obtain an order from the Court extending its time to do so. Additionally, the time to answer or otherwise appear has expired. *See* CPLR 3012 (a).

Accordingly, it is hereby

ORDERED that plaintiff Sundip Kumar's motion for a default judgment against defendants European Auto Group, Art Bartosik, and David Bartosik is granted; and it is further

ORDERED that an inquest is directed against defendants European Auto Group, Art Bartosik, and David Bartosik; and it is further

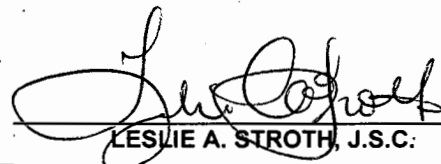
ORDERED that counsel for the movant shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the inquest hereinabove directed; and it is further

ORDERED that such service upon 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); and it is further

ORDERED that within 30 days of entry of this order, counsel for the moving party shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

This constitutes the decision and order of the Court.


LESLIE A. STROTH, J.S.C.

5/1/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: