

**SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NASSAU**

-----x
EHI-ERIC'S HOME IMPROVEMENTS, LLC

Plaintiff,

-against-

SANDRA KOSOWITZ,

Defendant.
-----x

**Michele M. Woodard
J.S.C.
TRIAL/IAS Part 8
Index No. ~~004560/11~~
Motion Seq. No.: 01**

001579/12

DECISION AND ORDER

Papers Read on this Decision:

Plaintiff's Notice of Motion for Default Judgment 01

Plaintiff EHI-Eric's Home Improvements, LLC (hereinafter "EHI") moves by Notice of Motion for an order, pursuant to CPLR § 3215, granting EHI a default judgment against Defendant Sandra Kosowitz (hereinafter "Kosowitz") and awarding EHI the relief demanded in the complaint on the ground that Kosowitz failed to file an answer or otherwise appear in this matter. Plaintiff also seeks a hearing to determine the amount of attorneys' fees which EHI is entitled from Defendant. Kosowitz has not appeared in this action by filing an answer or opposition to the motion, which was served on May 21, 2012 according to the affidavit of service attached to the motion.

Facts

According to the affidavit of service attached to the motion, EHI commenced this action by personal service of process on February 28, 2012 to recover monies owed from an alleged breach of contract. EHI alleges that on December 7, 2009, it agreed to perform certain work

(hereinafter the "Project") at 2346 Logue Street, Bellmore, NY 11710 in a contract (hereinafter the "Contract") with Kosowitz. Movant asserts that it completed all of the contracted work in a timely and professional manner and that Kosowitz has yet to pay in full despite EHI's demand for payment of the balance of \$19,087.00 plus interest and, purportedly pursuant to the Contract, attorney's fees. On February 9, 2011, EHI filed a mechanic's lien, a copy of which EHI provided with its moving papers, on the Project in the sum of the balance owed: \$19,087.00. Pursuant to CPLR § 3215(g), EHI mailed an additional notice of motion and copy of the summons to Kosowitz on May 21, 2012 according to the affidavit of service attached to the moving papers.

The court has not received Defendant's answer or opposition to EHI's motion. EHI's counsel affirms that it has neither received an answer or any responsive paper from Kosowitz nor extended Kosowitz's time to answer. Defendant's time to appear, move, or otherwise respond to the complaint expired on April 2, 2012, thus rendering Kosowitz in default and entitling EHI to a default judgment against Kosowitz along with interest and attorney's fees.

Analysis

CPLR § 3215 governs motions for default judgment against a non-appearing party. *IMG Int'l Mktg. Grp. v. SDS William St., LLC*, 32 Misc.3d 1233(A), (Sup. Ct. NY 2011). The movant for default judgment must provide proof of: (1) service of the summons and complaint; (2) the facts constituting the claim for a certain or ascertainable sum; and (3) default, and (4) move within a year of the default. *Id.*; CPLR § 3215(a).

EHI has met most of the criteria but failed to sufficiently prove its claims under CPLR § 3215(f) for a default judgment against Kosowitz. EHI has failed to provide a copy of the

contract between the parties. Although the “standard of proof is not stringent,” there must be “some firsthand confirmation of the facts.” *Feffer v. Malpeso*, 210 AD2d 60, 61 (1st Dept 1994). CPLR § 3215 does not contemplate the rubberstamping of default judgment motions once jurisdiction and failure to appear have been shown. *Joosten v. Gale*, 129 AD2d 531, 535 (1st Dept 1987) (citing Weinstein, Korn & Miller, *New York Civil Practice: CPLR* ¶¶ 3215.22-3215.27 (David L. Ferstendig ed., LexisNexis 2d ed. 2006)). Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action. *Id.*; accord *Feffer*, 210 AD2d at 61 (“[P]laintiff submitted no substantiation of the alleged [cause of action] . . . , unsupported by any other form of documentary or testimonial evidence.”); *IMG Int’l Mktg. Grp.*, 32 Misc.3d 1233(A) (quoting *Manhattan Telecom Corp. v. H & A Locksmith, Inc.*, 82 AD3d 674 (1st Dept 2011)). “While the factual allegations found in the complaint . . . are deemed admitted, the court must nonetheless examine whether these facts give rise to the causes of action asserted.” *IMG Int’l Mktg. Grp.*, 32 Misc.3d 1233(A).

In this matter, EHI did not provide a copy of the Contract. The mechanic’s lien provided is insufficient to replace a copy of the Contract. Failure to provide the underlying contract has warranted the denial of motions for default judgment. See *Giordano v. Berisha*, 45 AD3d 416, 417 (1st Dept 2007). Also, this failure “offers no proof that this agreement was ever reduced to writing, possibly raising statute of frauds issues.” *IMG Int’l Mktg. Grp.*, 32 Misc.3d at *3.

Failing to provide a copy of the Contract also precludes the remedy sought from being a sum certain because part of it consists of an attorney’s fees reimbursement purportedly provided by the Contract. However, without a copy of the contract, it is not known what the parties agreed

to regarding the possibility of litigation and the corresponding costs.

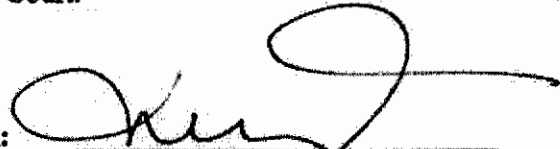
Based on the foregoing, Plaintiff's unopposed motion for an order, pursuant to CPLR § 3215, granting default judgment for Plaintiff and against Defendant is *denied* without prejudice. It is hereby

ORDERED, that a copy of this Decision and Order with notice of entry is to be served on all parties within 10 (ten) days of entry and proof of service is to be filed with the Nassau County Clerk within 10 (ten) days of said services.

This constitutes the Decision and Order of the Court.

Dated: August 7, 2012
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

FADECISION - DEFAULT\NEHL.wpd

ENTERED
AUG 10 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE