

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19**

-----X

E.,

Plaintiff,

Index No: _____

**MOTION FOR DEFAULT
JUDGMENT**

Against

I And S.,

Defendants.

-----X

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR DEFAULT JUDGMENT

(Attorney Name & Address)

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TABLE OF AUTHORITIES**Cases**

1. *Clemente Latham Concrete v Integrity Masonry, Inc.*, 2013 N.Y. Misc. LEXIS 3842 (N.Y. Sup. Ct. Aug. 28, 2013).
2. *Boyarski v. City of New York*, 2013 N.Y. Misc. LEXIS 337 (N.Y. Sup. Ct. Jan. 22, 2013).
3. *Landco Mtge. Bankers, Inc. v Shinnecock Realty Corp.*, 2012 N.Y. Misc. LEXIS 1630 (N.Y. Sup. Ct. Mar. 29, 2012).

Statute

1. NY CLS CPLR § 3215
2. NY CLS CPLR § 308

A. PRELIMINARY STATEMENT

Plaintiff respectfully submits this Memorandum of Law in support of its Motion for entry of default judgment against non-appearing Defendant no. 2 S, pursuant to CPLR §3215(a).

B. THE FACTUAL RECORD

The annexed affirmation of _____, Esq. and exhibits, establish that Defendant no. 1, I ("I") has a duty to defend and indemnify Plaintiff, E (E") in a personal injury action commenced by T ("T"), pursuant to the Commercial Umbrella Liability Policy no. _____, issued by I to E, with effective dates from ____ to _____. Such annexed affirmation and exhibits also establish that Defendant no. 2, S, Inc. ("S") has a duty to pay the self-insured retention of \$ _____ under N policy in order to contribute towards the damages claimed by T. Defendant no. 2 subcontracted Plaintiff to perform carpentry work at _____ under the sub-contract dated _____. The subcontract required Plaintiff to obtain liability insurance for an amount of at least \$ _____ combined single limit naming S as additional insured. Plaintiff obtained primary liability insurance from Q for an amount of \$ _____ and excess insurance coverage from I for an amount of \$ _____. Defendant no.2 obtained self-insured retention insurance policy from its primary insurer N. T, an employee of Plaintiff at relevant point of time, filed a personal injury action against Defendant no. 2 for injuries suffered on _____ while working on construction site of Defendant no.2. Defendant no.2 filed a third party complaint against Plaintiff. Plaintiff was impleaded as a third party Defendant in the above personal injury action. Thereafter, Defendant no. 2 filed a declaratory judgment action against Plaintiff, Q and Defendant no. 1 in _____. On the date of occurrence, the insurance policies were in force. The Court held that Q was obligated to provide, on a primary basis, coverage and a defense to Defendant no.1. Plaintiff was unaware about the actual damages claimed by T, and believed that Q being the primary insurer would solely be liable to indemnify Defendant no. 1. Defendant no. 1 came to know about T 's action in ___ by virtue of the declaratory judgment action filed by Defendant no.2 in _____. However, Defendant no.1 sent a denial letter disclaiming its duty to provide coverage to Plaintiff on _____. Defendant no.1 did/does not have a plausible explanation for such delay. Such belated denial by Defendant no.1 was/ is not effective, and did not/ does not insulate Defendant no. 1 from its duty to indemnify and Plaintiff under the excess insurance coverage. Defendant no. 2 has also refused to pay self-insured retention amount of \$ _____ on the ground that Defendant no. 1's policy affords priority coverage over N.

Therefore, Plaintiff filed an Amended Complaint for Declaratory judgment on _____ praying for a declaration that (a) Pursuant to the Commercial Umbrella liability policy issued to Plaintiff, Defendant no.1 has a duty to defend and indemnify Plaintiff (in the personal injury action filed by T against Defendant no.2 wherein Plaintiff was impleaded as a third party defendant), and (b) Defendant no.2, has a duty to pay the self-insured retention of \$ ____ under N policy in order to contribute towards the damages claimed by T.

Plaintiff served Summons and Amended Complaint for Declaratory judgment properly on Defendant no.1. Defendant no.1 has filed Answer and Affirmative Defense dated _____.

Plaintiff served Summons and Amended Complaint for Declaratory judgment properly on Defendant no.2 retainable on _____. Plaintiff filed affidavit of service dated _____. Despite proper service of summons and amended complaint Defendant no.2 did not respond.

Accordingly Plaintiff files this Motion for default judgment as against the Defendant no.2.

C. PLAINTIFFS IS ENTITLED TO JUDGMENT BY DEFAULT

Under CPLR §3215(a), if a Defendant fails to appear or plead in spite of proper service of Summons and Complaint, Plaintiff may obtain default judgment. In this case, Defendant no. 2 was lawfully served with Summons and the Amended Complaint for Declaratory judgment which the Affidavit of Service dated _____ reflects. In addition, Defendant no.2 was aware of the lawsuit when the Summons and the Amended Complaint for Declaratory judgment was served through affidavit of service dated _____. Defendants have not responded and are in default. The technical requirements under CPLR §3215 to obtain default judgment in the State of New York are submission of the following: Proof of service of the Summons and Complaint; Proof of the claim, and Proof of default. CPLR §3215; *See Clemente Latham Concrete v Integrity Masonry, Inc.*, 2013 N.Y. Misc. LEXIS 3842 (N.Y. Sup. Ct. Aug. 28, 2013); *Boyarski v. City of New York*, 2013 N.Y. Misc. LEXIS 337 (N.Y. Sup. Ct. Jan. 22, 2013).

Plaintiff has submitted the requisite proof to obtain default judgment. Plaintiff proved evidence of lawful service on Defendant no.2 by a licensed process server. Such affidavit of service, which sets forth that service was made in accordance with CPLR §308, is prima facie proof of service. *See Landco Mtge. Bankers, Inc. v Shinnecock Realty Corp.*, 2012 N.Y. Misc. LEXIS 1630 (N.Y.

Sup. Ct. Mar. 29, 2012)

Plaintiff has provided with the detailed proof of the claim as stated in the Amended Complaint for Declaratory judgment as against Defendant no.2. The Amended Complaint for Declaratory judgment clearly establishes that defendant no.2, has a duty to pay the self-insured retention of \$ _____ under N in order to contribute towards the damages claimed by T, and accordingly Plaintiff respectfully requested the Court to grant Amended Complaint for Declaratory judgment.

Plaintiff submits that, when Defendant no.2 defaulted and failed to respond to Amended Complaint for Declaratory judgment, all the factual allegations, and reasonable inferences to be drawn therefrom, are considered admitted as they relate to liability against Defendant no.2. The proof of default is properly established by the affirmation of _____ Esq., Plaintiff's attorney and respectfully filed before the Honorable Court.

D. CONCLUSIONS

For the reasons and cause of action contained in the Amended Complaint for Declaratory judgment, Motion for Default judgment and affirmation submitted herewith and in addition to any other relief the Honorable Court deems just and reasonable Plaintiff respectfully requests the following:

1. Judgment by default in favor of Plaintiff declaring that Defendant no.2 has a duty to pay the self-insured retention of \$ _____ under N policy in order to contribute towards the damages claimed by T.
2. For such other and further relief in Plaintiff's favor as may be just and proper.

Respectfully submitted,

Date: _____.

(Attorney Name & Address)