

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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PERFORMLINE, INC.

Plaintiff,

- v -

APOGEE EVENTS INC.,

Defendant.

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INDEX NO. 650217/2021

MOTION DATE 04/19/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16

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

In this breach of contract action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant in the principal sum of \$40,000.00. No opposition was filed. The motion is granted inasmuch as the plaintiff has submitted proof of proper service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant’s failure to answer or appear. See CPLR 3215(f); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011).

The plaintiff’s proof includes the complaint, the subject contract and an affidavit of Michael DeMarco, Chief Financial Officer of the plaintiff. This proof establishes the elements of a breach of contract claim: (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Specifically, the proof establishes that the defendant failed to return \$40,000.00 of the \$110,000.00 deposit paid by the plaintiff for a catered event scheduled for May 5, 2020, and that Paragraph 11 of the parties’ contract required the defendant to return the deposit under the circumstances which prevented its performance. Having failed to timely answer, the defendant is “deemed to have admitted all

factual allegations in the complaint and all reasonable inferences that flow from them.” Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). The untimely answer filed by the defendant on March 22, 2021 is not considered.

In opposition, the defendant files only a single-page affirmation of counsel in which he, incorrectly, states that the filing of an answer on March 22, 2021, renders the instant motion moot. It does not. Moreover, the affirmation is silent as to the reason for the defendant’s delay in answering or any defense that may be asserted by the defendant. Merely reciting the general public policy favoring resolution of disputes on the merits does not warrant denial of the plaintiff’s motion. No affidavit of someone with personal knowledge of the underlying facts is submitted.

Accordingly, and upon the papers submitted, it is

ORDERED that the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment is granted, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the principal sum of \$40,000.00, plus costs and statutory interest from May 5, 2020.

This constitutes the Decision and Order of the court.



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

4/19/2021
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: