

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36183
T/kmb

_____AD3d_____

Argued - September 10, 2012

PETER B. SKELOS, J.P.
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2011-03488

DECISION & ORDER

Kristina Dupps, et al., appellants, v Jessica
Betancourt, et al., respondents, et al., defendants.

(Index No. 14789/10)

Kristina Dupps and Michael Ostrowski, Elmont, N.Y., appellants pro se.

Zeichner Ellman & Krause, LLP, New York, N.Y. (Steven S. Rand and Michael E.
Sims of counsel), for respondent Bank of New York.

In an action, inter alia, to set aside a transfer of real property, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Feinman, J.), dated March 10, 2011, which denied their motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Jessica Betancourt, Alexis Samuels, Commerce America Banking Center, and Bank of New York, and, sua sponte, directed the dismissal of the complaint insofar as asserted against those defendants.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, directed the dismissal of the complaint insofar as asserted against the defendants Jessica Betancourt, Alexis Samuels, Commerce America Banking Center, and Bank of New York, is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof which, sua sponte, directed the dismissal of the complaint insofar as asserted against the defendants Jessica Betancourt, Alexis Samuels, Commerce America Banking Center, and Bank of New York, and (2) by deleting the provision thereof denying that branch of the motion which was pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Jessica

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Betancourt, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

“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” (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651; *see* CPLR 3215[f]). Here, on the plaintiffs’ motion for leave to enter a default judgment, the plaintiffs submitted all of these things with respect to the defendant Jessica Betancourt. Accordingly, the Supreme Court should have granted that branch of the plaintiffs’ motion which was for leave to enter a default judgment against Betancourt, and should not have, *sua sponte*, directed the dismissal of the complaint insofar as asserted against Betancourt.

The Supreme Court properly determined that the plaintiffs failed to make a *prima facie* showing that they properly served the defendants Alexis Samuels, Commerce America Banking Center, and Bank of New York with copies of the summons and complaint (*see* CPLR 308[4], 311[a][1]; *Prudence v Wright*, 94 AD3d 1073, 1074; *Gray v Giannikios*, 90 AD3d 836, 837; *Leviton v Unger*, 56 AD3d 731, 732). Accordingly, the Supreme Court properly denied those branches of the plaintiffs’ motion which were for leave to enter a default judgment against those defendants. However, because improper service of the summons and complaint is a defense that may be waived (*see* CPLR 3211[e]), the Supreme Court should not have, *sua sponte*, directed the dismissal of the complaint insofar as asserted against those defendants.

SKELOS, J.P., LEVENTHAL, CHAMBERS and LOTT, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court