

Briskin v Thomas

2013 NY Slip Op 30162(U)

January 28, 2013

Supreme Court, New York County

Docket Number: 101838-2012

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Briskin, Peter

INDEX NO. 101838-2012

MOTION DATE _____

Thomas, Shirley

MOTION SEQ. NO. 4

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED
JAN 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/28/13

[Signature], J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

~~NON-FINAL DISPOSITION~~

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Louis York

PART 2

Justice

PETER BRISKIN,

Plaintiff,

- v -

SHIRLEY THOMAS A/K/A SHIRLEY WILLIAMS, ENNIS FOWLER,
ANDRE DAVIS, BONITA BROWN, FRANKIE WILLIAMS, and JOHN
DOE 1-3,

Defendants.

INDEX NO. 101838-2012
MOTION DATE _____

~~MOTION NO. 101838-2012~~

The following papers, numbered 1 to _____, were read on this motion for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits— Exhibits _____ | No(s). _____

Replying Affidavits — Exhibits _____ | No(s). _____

FILED

JAN 29 2013

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 003 and 004 have been consolidated for disposition. In sequence 003, plaintiff Peter Briskin moves, pursuant to CPLR 3215, for a judgment of default against Shirley Thomas a/k/a Shirley Williams (Thomas), Enis Fowler, Andre Davis, and Bonita Brown. In sequence 004, plaintiff moves to confirm the referee report of Judicial Hearing Officer, the Honorable Ira Gammerman, which is dated June 27, 2012. Defendants Thomas and Warren Mills (Mills), an alleged unnamed defendant, cross-moved to dismiss the summons and the complaint for lack of subject matter jurisdiction and for failure to state a cause of action, to hold plaintiff's motion to confirm the referee report in abeyance pending the disposition of defendants' cross motion to dismiss, or in the alternative, to grant Thomas and Mills additional time to serve an answer.

Plaintiff filed a complaint on February 21, 2012, alleging that Thomas was occupying a ground floor apartment at a building which he recently purchased at 53 West 119 Street, Manhattan, New York. Plaintiff alleges that Thomas refused to pay plaintiff for the use and occupancy of the apartment and claimed that she was the owner of the premises. Plaintiff maintains that Thomas collected rents from the co-defendants without accounting for the rents to himself or his predecessor. Plaintiff also contends that Thomas unlawfully interfered with management of the premises, allowing disrepairs which caused hazardous conditions to exist. Plaintiff argues that defendants Thomas, Frankie Williams, Andre Davis, Bonita Brown, Ennis Fowler, as well as John

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Does 1-3, must be ejected from the property.

In sequence 004, plaintiff moves to confirm the referee report on the sufficiency of service. Service was upheld, and in an order of this court dated June 27, 2012, this court held that “[i]t is now well over two months since J.H.O. Gammerman’s Report had been rendered and neither side had moved to confirm or reject the Report. Therefore, pursuant to Uniform Rule 202.44, I confirm the J.H.O.’s report and sustain jurisdiction.” Therefore, plaintiff’s motion to confirm the referee’s report is deemed moot.

In sequence 003, plaintiff moves, pursuant to CPLR 3215, for a default judgment against Thomas, Enis Fowler, Andre Davis, and Bonita Brown. Thomas maintains that she first appeared in this action with counsel on March 9, 2012, by submitting a notice of appearance and an opposition to the order to show cause which sought a preliminary injunction seeking to restrain Thomas from interfering with plaintiff’s operation of the building. Thomas also requests additional time to answer.

An order of this court dated June 27, 2012 denied the preliminary injunction. In that order, this court acknowledged that Thomas disputed “point-by-point the allegations made by plaintiff as to her interference with his running of the building.” Thomas maintains that she did not claim ownership of the property to plaintiff’s representatives, has not refused access or prevented plaintiff or his representatives from making repairs to the property, and is not responsible for any of the violations which plaintiff has alleged. Furthermore, Thomas’ opposition to the motion for default, her affirmation in opposition to the order to show cause, and her cross motion have all demonstrated that she seeks to actively defend against the allegations made by plaintiff and may have a meritorious defense. *See Reich v Redley*, 96 AD3d 1038, 1039 (2d Dept 2012) (holding that in order to vacate a default, a reasonable excuse and potentially meritorious defense must be demonstrated); *Harwood v Chaliha*, 291 AD2d 234, 234 (1st Dept 2002) (holding that a preference exists to dispose of cases on their merits). Therefore, because Thomas has demonstrated that she has actively pursued this litigation and may have a meritorious defense, the court will permit Thomas to serve an answer within 30 days from service of entry of this order.

Mills, who alleges that he is an unnamed defendant, also requests additional time to answer. Mills submits an affidavit in which he states that he resides in apartment 9 of the premises and that he was improperly served. He maintains that he found a summons and complaint on the sidewalk and steps outside of his apartment,

and was not served by any other methods. Plaintiff does not submit a proof of service which states that Mills was served. Mills also alleges that he is directly affected by this litigation as a notice of termination for his apartment was to be effective on June 30, 2012. As Mills has submitted an affidavit explaining his need to pursue a defense, alleges that he was improperly served, and maintains that he will be directly affected by this proceeding as he will be ejected from his apartment, the court will allow Mills to file an answer within 30 days of service of this order.

Plaintiff also moves for a default judgment against Thomas Fowler, Andre Davis, and Bonita Brown. The court has not received any indication from these three defendants that they have answered and has not received any opposition for the default. Plaintiff submits affidavits of service dated March 7, 2012 which are signed and sworn by process server, Julius Thompson, which indicate that each defendant was served by posting the summons and compliant at the entrance of the defendants' residence and a copy was mailed to each defendant. Counsel for plaintiff also submits an affirmation in support of the motion for a default judgment dated June 21, 2012, which states that defendants Andre Davis, Bonita Brown, and Ennis Fowler have been served. Therefore, as defendants Andre Davis, Bonita Brown, and Ennis Fowler have failed to appear or request time to extend their answer, a default judgment is granted against these defendants.

Thomas also cross-moves to dismiss the complaint pursuant to CPLR 3211 (a) (2) and CPLR 3211 (a) (7). Thomas contends that plaintiff does not have subject matter jurisdiction regarding this matter because a predicate notice was required to be served at least thirty days before an ejection proceeding for month-to-month rent stabilized apartments could be brought. However, plaintiff maintains that he is the owner of the premises and provides an affidavit which states that the records from the Department of Housing and Community Renewal (DHCR) do not support the allegations that the premises was subject to the Rent Stabilization Law. Plaintiff submits a form entitled "Data Request/Status Update Determination" dated February 6, 2012, which states that "[n]o record of a Registration Statement is on file with the DHCR for the years: 1984-present." Along with the documents submitted by plaintiff which question Thomas' assertion that the premises was rent stabilized, the notice provided to Thomas was dated February 14, 2012 and the tenancy was not to be terminated until May 31, 2012, over ninety days later. Therefore, the part of Thomas' cross motion regarding lack of subject matter jurisdiction due to inadequate notice, must be denied because Thomas had over ninety days notice of the

termination.

Accordingly, it is

ORDERED that plaintiff Peter Briskin's motion for default against defendants Enis Fowler, Andre Davis, and Bonita Brown is granted, and plaintiff is to settle order with these defendants within 30 days and submit proof of service on the defaulting defendants when submitting the settled order to the court, and it further

ORDERED that the cross motion of defendant Shirley Thomas a/k/a Shirley Williams, is granted in part in that defendant Shirley Thomas must serve an answer within 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that Warren Mills must serve an answer within 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that motion sequence 004 to confirm the referee report, is deemed ^{as} moot.

Dated: 1/28/13

ENTER:

[Signature]
J.S.C.

FILED
JAN 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

- 1. Check one:
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE