

Paljr, LLC v Lazzaro
2018 NY Slip Op 31362(U)
June 26, 2018
Supreme Court, New York County
Docket Number: 158626/2017
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

**PALJR, LLC d/b/a EAST NECK NURSING &
REHABILITATION CENTER,**

INDEX NO. 158626/2017

MOTION DATE 6/8/18

Plaintiff,

MOTION SEQ. NO. 001

- v -

STEPHEN LAZZARO,

Defendant.

NYSCEF Doc Nos. 4-13 were read on this motion for an order directing the entry of a default judgment.

Motion by Plaintiff PALJR, LLC d/b/a East Neck Nursing and Rehabilitation Center pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant Stephen Lazzaro is granted, there being no opposition submitted.

BACKGROUND

Plaintiff commenced the instant action on September 28, 2017, by e-filing a summons and verified complaint ("Complaint"). The Complaint alleges that Plaintiff is engaged in the business of providing room, board, skilled nursing, and other ancillary health care services at its principal place of business located at 134 Great East Neck Road, West Babylon, New York 11704 (the "Nursing Home"). The Complaint also alleges that Defendant resides at 321 East 43rd Street, Apartment 205, New York, New York 10017.

The Complaint alleges that Defendant's father, Frank Lazzaro, resided at the Nursing Home from October 23, 2013 to April 15, 2014. The Complaint then alleges that Defendant signed Plaintiff's payment agreement on or about August 5, 2014, that Defendant has breached the payment agreement by failing to make some payments, and that \$22,200.00 is due and owing to Plaintiff from Defendant. The Complaint next alleges that Plaintiff relied to its detriment on Defendant's false representations regarding his intent to pay for Frank Lazzaro's residency at the Nursing Home. The Complaint then alleges that a demand for payment letter was sent to Defendant, that the demand was held for more than 30 days without objection, and that there is therefore an account stated between Plaintiff and Defendant in the amount of \$22,200.00.

On October 12, 2017, Plaintiff e-filed an affidavit of service of process, dated October 12, 2017, indicating that Defendant was served with process pursuant to CPLR 308 (2). (NYSCEF Doc No. 2 [Affidavit].) The Affidavit states that a process server left a copy of process with Defendant's doorman, Joel Mora, at 321 East 43rd Street, Apartment 205, New

York, New York 10017, allegedly Defendant's "dwelling house (usual place of abode)." (*Id.*) The Affidavit then states that a copy of process was mailed to the same address. The Affidavit further states that "[t]he doorman confirmed Stephen Lazzaro lives in apartment 205. He called up to the apartment and spoke with Stephen. Stephen told the doorman not to allow me access up to his apartment. I then served the documents to the doorman." (*Id.*)

As Defendant has not answered or appeared in the instant action, Plaintiff now moves pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant in the sum certain of \$22,000.00.

Movant has submitted a letter, dated January 17, 2018, from Plaintiff to Defendant enclosing an additional copy of process pursuant to CPLR 3215 (g) (3) (i). (Pisano affirmation, exhibit C.)

Movant has also submitted a copy of the alleged payment agreement (the "Agreement," referred to in the footer as a "Payment Agreement Form"), dated July 23, 2014, between Plaintiff and Defendant. (Pisano affirmation, exhibit D.) The Agreement lists Defendant's name and address and lists "Frank Lazzaro" as "Resident" under "Account # 140277." (*Id.*) The Agreement is addressed to Defendant and states that "[w]e write to confirm our agreement with respect to your voluntary payment of the balance of \$33,000.00 owed to East Neck for services provided to Frank Lazzaro. You have agreed that this amount is validly due an[d] ow[ing] to East Neck. You accordingly agree that you will repay the amount owed of \$33,000.00 [b]y monthly payments of \$2,775 on the fifth (5th) of each month until past due is paid in full." (*Id.*) The Agreement then states that the first installment amount of \$2,775.00 is due from Defendant to Plaintiff on August 5, 2014. The Agreement appears to have been executed by Charlotte Brouwer, Nursing Home Representative, and by Defendant, whose name, "Stephen Lazzaro" is handwritten on the bottom-right corner of the page on a "print name" line beneath a "Signature" line bearing a signature, which is beneath a typed statement, "Agreed to and Confirmed:".

Movant has also submitted scanned copies of four checks, dated July 29, 2014, August 22, 2014, September 30, 2014, and October 22, 2014, from a Chase checking account that appears to belong to Stephen J. Lazzaro and a Janice Anne Herlihy, jointly. (Pisano affirmation, exhibit E.) Each check is made payable to "East Neck Nursing" in the amount of \$2,775.00 and bears account number 140277.

Movant has also submitted an invoice, dated September 20, 2017, addressed to Defendant at 321 East 43rd Street, Apartment 205, New York, New York 10017, regarding account number 140277, with a "Balance Due" of \$22,200.00. (Pisano affirmation, exhibit F.)

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1)

proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (See CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; see also *Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Based upon the submitted papers, the Court finds that Defendant was served with process. Ordinarily, a "process server's affidavit constitutes prima facie evidence of proper service." (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; see also *Nazarian v Monaco Imports, Ltd.*, 355 AD2d 265, 266 [1st Dept 1998].) A plaintiff must nevertheless submit evidence that the process server was denied access to a defendant's building or apartment before the process server may leave process with a doorman or superintendent to establish jurisdiction over the defendant pursuant to CPLR 308 (2). (See *Menkes v Beth Abraham Health Servs.*, 120 AD3d 408 [1st Dept 2014]; *Soils Eng'g Servs., Inc. v Donald*, 258 AD2d 425 [1st Dept 1999].) Here, the Affidavit indicates that Defendant spoke with his doorman and denied the process server access to his apartment. As such, the Court finds that it was appropriate for the process server to leave process with the doorman, a person of suitable age and discretion, under the circumstances. The Court finds further that, together with the mailing of process to the same address, service of process was effectuated upon Defendant. Moreover, Plaintiff has submitted adequate proof of the mailing of an additional copy of process pursuant to CPLR 3215 (g) (3) (i).

The Court finds further that Plaintiff has for the purposes of the instant motion submitted adequate proof of the facts constituting its claims by means of its verified complaint and the exhibits representing the payment agreement, the checks, and the invoice. The Court finds further that Defendant has failed to appear or to answer the Complaint and that his time to do so has expired. As such, Plaintiff has shown prima facie entitlement to a default judgment against Defendant.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff PALJR, LLC d/b/a East Neck Nursing and Rehabilitation Center pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant Stephen Lazzaro is granted, there being no opposition submitted; and it is further

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon Defendant and upon the Clerk, who is directed to enter judgment in favor of Plaintiff and against Defendant in the sum of \$22,200.00, with interest at the rate of 9.00% per annum from the date of December 5, 2014, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

The foregoing constitutes the decision and order of the Court.

Dated: June 26, 2018
New York, New York


_____, J.S.C.
HON. ROBERT D. KALISH

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

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