

**30 E. 126 Corp. v Green Park One Corp.**

2018 NY Slip Op 31521(U)

July 9, 2018

Supreme Court, New York County

Docket Number: 158732/2017

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**

**30 EAST 126 CORP.,**

**INDEX NO. 158732/2017**

**Plaintiff,**

**MOTION DATE 6/29/18**

**- v -**

**MOTION SEQ. NO. 003**

**GREEN PARK ONE CORP. et al.,**

**Defendants.**

**NYSCEF Doc Nos. 38-52 were read on this motion for an order directing the entry of a default judgment.**

Motion by Plaintiff 30 East 126 Corp. pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against defendants Green Park One Corp. ("Green Park One"), David Duval ("Duval"), the Internal Revenue Service (the "IRS"), and The New York State Department of Taxation and Finance ("NYSDTF") is denied.

**BACKGROUND**

Plaintiff commenced the instant action to determine title pursuant to RPAPL Article 15 on October 2, 2017, by e-filing a summons and verified complaint. (Nizin affirmation, exhibit A [Complaint].) The Complaint alleges, in sum and substance, that Green Park One and its principal, Duval, forged a quitclaim deed, dated December 21, 2015, and recorded April 17, 2017, conveying the interest in property at 30 East 126th Street, New York, New York 10035, Block 1750, Lot 60 (the "Property") from Millicent Hurdle, as Seller, to Green Park One, as Purchaser. (Nizin affirmation, exhibit E [2015 Deed]) The Complaint then alleges that Charles Hurdle died intestate in April 1988 and Millicent Hurdle died intestate in February 1996. The Complaint further alleges that Millicent Hurdle could not have signed the 2015 Deed because she died in 1996. The Complaint then alleges that, on September 12, 2017, Plaintiff purchased the Property "from the legitimate heirs at law of Charles Hurdle and Millicent Hurdle." (Affirmation of Nizin ¶ 9; Nizin affirmation, exhibit F [2017 Deeds].) Plaintiff seeks, among other things, a judgment quieting title to the Property.

Plaintiff e-filed affidavits indicating that: (1) Green Park One was served with process on October 3, 2017, by service upon the secretary of state pursuant to Business Corporation Law § 306; (2) that NYSDTF was served with process on October 4, 2017, by personal service pursuant to 20 NYCRR 2391.3 (a); (3) that defendant The City of New York s/h/a The City of New York Department of Finance (the "City") was served with process on October 5, 2017, by personal service pursuant to CPLR 311 (a) (2); and (4) that the IRS was served with process on October 17, 2017, by personal service pursuant to Fed. R. Civ. P. 4 (i). (Nizin affirmation,

exhibit B.) On November 14, 2017, Plaintiff discontinued the action with prejudice as against the City. (Nizin affirmation, exhibit C.)

As Green Park One, Duval, the IRS, and NYSDTF have failed to answer or appear in the action, Plaintiff now moves pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Green Park One, Duval, the IRS, and NYSDTF for the relief demanded in the Complaint.

Plaintiff has annexed a copy of a deed, dated June 16, 1952, and recorded at liber 4787, page 415, in the Office of the New York City Register, allegedly conveying the Property from from Olli Herttua and Hulda Herttua to Charles Hurdle and Millicent Hurdle, their heirs, and their assigns, forever. (Nizin affirmation, exhibit D.) Plaintiff has further annexed a copy of the 2017 Deeds allegedly conveying the property to Plaintiff from the lawful heirs of Charles Hurdle, Millicent Hurdle, and their daughters, Ursula and Islyn M. Hurdle. The alleged heirs are listed on the 2017 Deeds as: Hilsy H. Brathwaite; Cicely D. Morgan; Keith Donnerson Hunte; Cora Ameta Braithwaite; Oslyn L. Braithwaite; Nina Luttgering; Anthony Brathwaite; Maureen Springer; Lydia Cherry; and Coral Padmore. Cicely Morgan signed on behalf of herself and the other Grantors, as agent, except Hilsy H. Brathwaite, who appears to have signed on her own behalf.

Plaintiff has also annexed copies of the certificates of death of Charles Hurdle, Millicent Hurdle, Ursula Hurdle, and Islyn M. Hurdle, who are listed as having died on June 11, 1984, February 2, 1996, October 2, 2011, and March 4, 2015, respectively. (Nizin affirmation, exhibits G–J.)

Plaintiff argues that Charles Hurdle died intestate leaving Millicent Hurdle and his two children Ursula Hurdle and Islyn Hurdle (collectively with Charles, Millicent, and Ursula Hurdle, the “Hurdles”) as his heirs at law. (Affirmation of Nizin ¶ 11.) Plaintiff further argues that Millicent Hurdle died intestate leaving Ursula Hurdle and Islyn Hurdle as her survivors at law. (*Id.* ¶ 12.) Plaintiff further argues that Ursula Hurdle died intestate leaving Islyn Hurdle as her sole survivor at law. (*Id.* ¶ 13.) Plaintiff further argues that Islyn Hurdle died intestate leaving “Hilsy H. Brathwaite, Cicely D. Morgan, Keith Donnerson Hunte, Cora Ameta Brathwaite, Oslyn L. Braithwaite, Nina Luttgering, Amity Lodge, Lydia Cherry, [and] Coral Padmore as her survivors at law.” (*Id.* ¶ 14.) Plaintiff then argues that it purchased the property “from Hilsy H. Brathwaite, Cicely D. Morgan, Keith Donnerson Hunte, Cora Ameta Brathwaite, Oslyn L. Braithwaite, Nina Luttgering, Amity Lodge, Lydia Cherry, [and] Coral Padmore, the heirs at law of Charles Hurdle and Millicent Hurdle [], Ursula Hurdle[,] and Islyn M. Hurdle, deceased, intestate.” (*Id.* ¶ 15.)

Plaintiff has annexed a proposed judgment and order declaring Plaintiff the owner, free and clear, of the Property.

## 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].)

In the instant motion, Plaintiff has shown prima facie valid proof of service of process on Green Park One, the IRS, and NYSDTF. Plaintiff has further shown that Green Park One, the IRS, and NYSDTF have failed to answer or appear in the instant action. Nevertheless, Plaintiff has failed to show prima facie that Duval was served with process. As such, Duval's time to answer the Complaint or appear in the action has not begun to run, Duval is not in default, and no default judgment may be entered as to him.

Plaintiff has further failed to show prima facie that Green Park One was served with an additional copy of process pursuant to CPLR 3215 (g) (4). As such, Plaintiff has failed to show prima facie entitlement to the entry of a default judgment against Green Park One. (*See Burlington Ins. Co. v Aisyrk Co., Inc.*, 153 AD3d 777, 778 [2d Dept 2017].)

Plaintiff has further failed to submit adequate proof of the facts constituting its claims. Plaintiff's attorney's representations in the affirmation in support are “utterly devoid of evidentiary value” and fail to provide “some firsthand confirmation of the facts.” (*St. Paul Fire & Marine Ins. Co. v A.L. Eastmond & Sons, Inc.*, 244 AD2d 294, 294 [1st Dept 1997].) Further, an attorney's affidavit is insufficient to support the entry of a default judgment. (*See Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994].) Indeed, “the affirmation of an attorney who has no personal knowledge lacks evidentiary value.” (*Tower Ins. Co. of New York v Zaroom*, 145 AD3d 556, 557 [1st Dept 2016].)

Here, while the Complaint is verified by Joseph Makhani, the president of Plaintiff entity, the Complaint fails to specify who are Charles and Millicent Hurdle's heirs. The Complaint only specifies that Plaintiff purchased the Property from Charles and Millicent Hurdle's “legitimate heirs at law.” The 2017 Deeds list Hilsy H. Brathwaite and Cicely D. Morgan “as some of the heirs at law” of the Hurdles and list the rest of the Grantors as “as remaining heirs at law” of the Hurdles. It is unclear to the Court whether the list of Grantors is an exhaustive list of all the Hurdles' heirs.

Moreover, the 2017 Deeds do not list an “Amity Lodge”, whom Plaintiff alleged in its papers is among the heirs at law, as a signor of the 2017 Deeds. The Court does note that it appears “Amity Lodge” is a part of grantor Maureen Springer's address, so it appears to the Court that Plaintiff's attorney may have misread this section of the 2017 Deeds. Further, the

2017 Deeds list Anthony Brathwaite and Maureen Springer as grantors, but neither has been alleged in the papers to be the Hurdle's heir at law.

Based upon the foregoing, there is no reading of the Complaint from which the Court can find that Plaintiff has firsthand knowledge of the entirety of the Hurdles' "legitimate heirs at law." Further, the 2017 Deeds, on their face, do not show prima facie that the list of Grantors is an exhaustive list of all the Hurdles' heirs, and there is no affidavit from someone with personal knowledge to verify this fact. As such, the Court finds that Plaintiff has failed to submit adequate proof of the facts constituting its claims.

Further, it appears to the Court that Duval is a necessary party to the instant action. Pursuant to CPLR 1001, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." While "[p]redecessors in title who claim no interest in the property are neither necessary nor proper parties to an action to quiet title" (*McGahey v Topping*, 255 AD2d 562, 563 [2d Dept 1998]), "it is settled that an action for a declaratory judgment is brought to forever settle the rights of all parties interested, and, generally speaking, all persons who may be affected thereby must be joined as parties." (*United Svcs. Auto. Assn. v Graham*, 21 AD2d 657, 657 [1st Dept 1964].) Pursuant to RPAPL 1511 (2), "[w]here it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, . . . on its own motion, may direct that such person be made a party." (*See also Censi v Cove Landings, Inc.*, 65 AD3d 1066, 1067-68 [2d Dept 2009].)

Here, Duval, as a defendant in his individual capacity, and as the alleged signor of the 2015 Deed, is a necessary party who should have been served with process within 120 days of the commencement of the instant action pursuant to CPLR 306-b. The Court, in the interest of justice, shall, sua sponte, extend Plaintiff's time to serve Duval with process for an additional 60 days from the date of the decision and order on this motion.

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**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiff 30 East 126 Corp. pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against defendants Green Park One Corp., David Duval, the Internal Revenue Service, and The New York State Department of Taxation and Finance is denied; and it is further

ORDERED that the time for Plaintiff to serve process upon defendant David Duval shall be extended a further 60 days from the date of the decision and order on this motion; and it is further

ORDERED that Plaintiff shall, within 60 days from the date of the decision and order on this motion, serve process upon defendant David Duval per the CPLR and file an affidavit of service on NYSCEF evidencing said service of process or the action shall be dismissed pursuant to CPLR 1001 (b) for Plaintiff's failure to join a necessary party.

The foregoing constitutes the decision and order of the Court.

Dated: July 9, 2018  
New York, New York

*Robert D. Kalish*, J.S.C.  
**HON. ROBERT D. KALISH**  
J.S.C.

- 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