

Elk Cent. Props. Orchard LLC v 191 Orchard Corp
2018 NY Slip Op 32183(U)
September 5, 2018
Supreme Court, New York County
Docket Number: 161846/2015
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X INDEX NO. 161846/2015

ELK CENTRAL PROPERTIES ORCHARD LLC,

Plaintiff,

- v -

191 ORCHARD CORP, FOOD ON ORCHARD LLC, JAMES
DUFFY, GIL ELNATAN, and AMIR RAMATI

Defendants.

MOTION DATE 08/31/18
submission oral
argument
transcript

MOTION SEQ. NO. 002 003

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 11
were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40,
41, 42, 44, 45, 46, 47, 48, 49, 50, 51
were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is

ORDERED that the cross motion of plaintiff for an order
finding, nunc pro tunc, that the service upon defendant James Duffy
was proper pursuant to CPLR 308(5) is denied; and it is further

ORDERED that the motion of defendant James Duffy to dismiss
the complaint herein against him pursuant to CPLR 3211(a)(8)
(motion sequence no. 002) is granted and the complaint is dismissed
in its entirety as against such defendant, with costs and
disbursements to such defendant as taxed by the Clerk of the Court,
and the Clerk is directed to enter judgment accordingly in favor
of such defendant; and it is further

ORDERED that the motion of plaintiff to enter a default judgment against 191 Orchard Corp., Food on Orchard LLC (motion sequence no. 003) is denied, and, it is further

ORDERED that pursuant to CPLR § 3215 (c) and (f), the complaint against such defendant and (on the court's own initiative) against defendant Amir Ramiti is dismissed, and the Clerk is directed to enter judgment in favor of such defendants accordingly.

DECISION

For judicial economy, the court consolidates motion sequence numbers 002 and 003 for disposition.

With respect to the motion of defendant James Duffy, such defendant is correct that the manner of which plaintiff attempted to serve him failed to confer personal jurisdiction over him. This court disagrees with plaintiff that defendant Duffy consented to service of process upon the vacated premises when he failed to fill in his address on the guaranty, the space for which was left blank. Nor did the court ever approve an alternate method of service upon the defendant pursuant to CPLR 308(5). Compare Wishni v Taylor, 75 AD3d 747 (3d Dept. 2010).

Moreover, unlike in Morgan Guaranty Trust Co. v Hauser, 183 AD2d 683 (1st Dept. 1992), defense counsel did not acknowledge that defendant Duffy received actual notice of the action, which plaintiff attempted to commence by "nail and mail" service upon

the premises that defendant corporation and defendant, its officer, had vacated four months before. Rather both sides agree that defense counsel merely stated that he would review with defendant Duffy the courtesy copy of the complaint that plaintiff's counsel sent to defense counsel. Nor does plaintiff's counsel contest that defense counsel refused to accept service on defendant Duffy's behalf.

Turning to defendant's motion to enter a default judgment against defendant corporation, no proof of service of process upon the corporation is included in any of the motion papers before the court, as required under CPLR § 3215(f). The 2015 index number of the herein action, together with the defendant waiting one and one-half years to file motion to enter a default judgment, establish that plaintiff did not move within a year for a default judgment. Plaintiff counsel's excuse that he was negotiating with defendant Duffy's counsel, who he believed also represented the corporate defendant, does not establish a sufficient cause for plaintiff counsel's taking seventeen months before bringing the motion pursuant to CPLR § 3215 (c).

On its own initiative pursuant to CPLR § 3215(c), the court judicially notices that no answer has been served on behalf of defendant Amir Ramati, and as plaintiff has sought no default judgment against such defendant within one year of his default, the complaint against such defendant must be dismissed as well pursuant to CPLR § 3215 (c).

9/5/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>	