

Alston v Golfo

2019 NY Slip Op 30716(U)

March 13, 2019

Supreme Court, New York County

Docket Number: 653591/2018

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 38EFM

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FRED ALSTON AS TRUSTEE OF THE LOCAL 272 WELFARE FUND,

INDEX NO. 653591/2018

Plaintiff,

MOTION DATE 01/28/2019

- v -

MOTION SEQ. NO. 001 002

SALVATORE GOLFO, DENISE GOLFO, JOSEPH MATTESI

Defendant.

**DECISION, ORDER,
AND JUDGMENT**

-----X

HON. LOUIS L. NOCK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for ORDER/JUDGMENT NUNC PRO TUNC.

HON. LOUIS L. NOCK:

In motion sequence 001, plaintiff Fred Alston, as Trustee of the Local 272 Welfare Fund (“Plaintiff”), moves pursuant to New York Civil Practice Law and Rules (“CPLR”) § 3215 for an order directing an entry of judgment upon default in favor of Plaintiff and against defendant Denise Golfo (“Defendant”), in the amount of \$77,317.43, plus applicable interest and attorneys’ fees.¹

¹ That portion of its motion that sought a default judgment against defendant Salvatore Golfo was previously withdrawn by stipulation (Dkt. No. 37).

In motion sequence 002, Plaintiff moves pursuant to CPLR § 2001 for an order curing Plaintiff's failure to file the Affidavits of Service of the Summons and Complaint upon defendants Denise Golfo and Salvatore Golfo by permitting the filing of same *nunc pro tunc*.

"[W]here service is proper and a plaintiff makes out the facts of its entitlement to judgment, a plaintiff is entitled to a default judgment when defendant fails to appear." *Ostroy v. Six Square LLC*, 74 AD3d 693, 693 (1st Dept 2010); CPLR § 3215. Such application "must be supported by an affidavit of a person with knowledge, or a verified complaint." *Id.* Where a plaintiff seeks to rely on service pursuant to CPLR § 308(4), he or she must demonstrate that service pursuant to CPLR § 301(1) or (2) could not be made with due diligence. CPLR § 308(4).

In support of its motion for a default judgment, plaintiff submits the Affirmation of Amy E. Strang and Affidavit of Service evidencing that a process server made three unsuccessful attempts to serve Defendant at her "dwelling house/usual place of abode" on August 2, 2018 at 1:35 p.m., October 4, 2018 at 7:21 a.m., and October 5, 2018 at 6:03 p.m. Following the third unsuccessful attempt, the process server affixed a true copy of the Summons and Verified Complaint with Notice of Electronic Filing to the door of the premises on October 5, 2018 at 6:03 p.m. and thereafter mailed a copy of the documents to Defendant at the same address. These actions constituted sufficient due diligence to justify substituted service under CPLR 308(4). *Krodel v. Amalgamated Dwellings, Inc.*, 139 AD3d 572 (1st Dept 2016); *Albert Wagner & Son, Inc. v. Schreiber*, 210 AD2d 143 (1st Dept 1994).

Plaintiff has also submitted an Affidavit of Additional Mailing evidencing that its counsel mailed additional copies of the Summons and Verified Complaint to defendant Denise Golfo on October 18, 2018.

Although Plaintiff failed to file the affidavits of service until it made the motion for a default judgment, such failure is not a jurisdictional defect and is an irregularity that can be properly cured by deeming it filed *nunc pro tunc*. *Matter of Savitt*, 161 AD3d 109, 115 (1st Dept 2018). Defendant failed to answer the Verified Complaint or otherwise appear in this action.

By virtue of Defendant's default, this court grants the motion for a default judgment, except as to the request for attorneys' fees, which is unsupported by any contractual or statutory predicate therefor.

Accordingly, it is

ORDRED that Plaintiff's motion for a default judgment (Mot. Seq. 001) against defendant Denise Golfo is granted on default and without opposition, except as to the request for attorneys' fees; and it is further

ORDERED that Plaintiff's motion to permit the affidavits of service of the summons and complaint upon defendants Denise Golfo and Salvatore Golfo to be deemed filed *nunc pro tunc* (Mot. Seq. 002) is granted; and it is further

ORDERED that the affidavits of service filed as Exhibits B through E to the Affirmation of Amy E. Strang dated December 4, 2018 in support of Plaintiff's motion for a default judgment (Dkt. Nos. 5-8) are deemed filed *nunc pro tunc* as of October 11, 2018; and it is further

ORDERED and **ADJUDGED** that Plaintiff shall have judgment against defendant Denise Golfo in the principal amount of \$77,317.43, plus interest thereon from July 19, 2018

until the date of satisfaction of judgment, plus its statutory costs and disbursements incurred in this action, and that Plaintiff shall have execution therefor.

ENTER:

Louis L. Nock
LOUIS L. NOCK, J.S.C.

3/13/2019
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE