

<b>Board of Mgrs. of the Downtown Club Condominium v Kyle</b>
2019 NY Slip Op 32744(U)
September 16, 2019
Supreme Court, New York County
Docket Number: 160075/2018
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 160075/2018

THE BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM,

MOTION DATE 07/30/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

TERRENCE J. KYLE,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for JUDGMENT - DEFAULT

In this action for unpaid common charges and other late fees, plaintiff the Board of Managers (the "Board") of the Downtown Club Condominium ("Plaintiff" or "Condominium"), moves, pursuant to CPLR 3215 and 3025, for an order (1) granting leave to amend to correct defendant Terrance J. Kyle's ("Defendant") name in the caption from "TERRENCE J. KYLE" to "TERRANCE J. KYLE"), (2) deeming the Proposed Amended Complaint served *nunc pro tunc*, and (3) directing entry of default judgment against Defendant and an assessment of damages based on Defendant's failure to answer the complaint. The motion is submitted without opposition.

**BACKGROUND**

The Condominium consists of the property governed by the Declaration of Condominium, recorded in the Office of the City Register of New York on April 19, 2006, located at 20 West Street, New York, New York. The Board is the body duly authorized by the Declaration and the Bylaws (the "Bylaws") of the Condominium to maintain and operate the

Condominium. Pursuant to the Declaration, the owner of each unit of the Condominium is subject to the terms of the Declaration and Bylaws.

Defendant is the owner of record of Unit 23F of the Condominium (the "Unit"). Under the Bylaws, Defendant is responsible for the payment of common charges, special assessments by the Board against the Unit, and electricity charges for the Unit. In the event that common charges, assessments and electricity charges are not paid, the Bylaws impose penalties consisting of (1) interest at 1.5% per month and (2) a late charge of \$150.00 per month, (3) together with the costs and expenses of the Condominium in collecting unpaid sums, including attorneys' fees. According to the Complaint, as of October 17, 2018, Defendant had failed to pay common charges, special assessment fees, electricity charges, late fees, returned check fees, and professional fees assessed against the Uni in the amount of \$13,495.28, with additional charges accruing during the pendency of this action.

### DISCUSSION

Now, Plaintiff moves to amend a defect in the spelling of Defendant's name in the Complaint and for default judgment against Defendant and an assessment of damages.

#### **I. Plaintiff's Motion to Amend.**

Where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that two criteria are met. The first criterion is that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect (*Simpson v. Kensington Warehouse Corp.*, 154 A.D.2d 526 [2nd Dept.1985]). The second criterion is that the intended

but misnamed defendant would not be prejudiced (*Foley v Chase Manhattan Banking Corp.*, 212 AD2d 448, 449 [1st Dept 1995]).

Here, the allegations contained in the original complaint fairly apprised Defendant that it was the party Plaintiff intended to name as the individual responsible for paying all outstanding charges under the Declaration and Bylaws. There is no evidence of any prejudice to Defendant. Accordingly, the Court accepts the filing of the Proposed Amended Complaint *nunc pro tunc* for the purposes of correcting and adding the Defendant's correct name (*see Dunbar v Madison Sq. Garden, L.P.*, 18 Misc 3d 1131(A) [Sup Ct Kings Cnty 2008]).

## II. Plaintiff's Motion for Default Judgment.

A motion for default judgment against a non-appearing party is governed by CPLR 3215 (*IMG Int'l Mktg Grp. v. SDS William ST., LLC*, 32 Misc.2d 1233(A) [Sup Ct NY 2011]). A party's failure to file a responsive pleading does not give rise to a mandatory ministerial duty for the court to enter a default judgment (*Popescu v. The Brand Suite, LLC*, 2014 WL 3671434 [Sup Ct NY Cnty 2014], *citing PDQ Aluminum Products Corp. v Smith*, 20 Misc3d 94, 96 [App Term, 2d Dept 2008]). The plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant's default in answering or appearing (*SMROF II 2012-I Tr. V Tella*, 139 AD3d 599 [1st Dept 2016]).

In support of the motion, Plaintiff provides the affidavit of an employee of FirstService Residential, the managing agent for the Condominium, and proof that Defendant was properly served by personal service on November 19, 2018 (NYSCEF Doc. No. 12). Plaintiff also submits proof that it complied with the additional notice requirements of CPLR 3215(g)(3) by mailing an additional notice and a copy of the Complaint to Defendant on June 6, 2019 (NYSCEF Doc. No. 13). To date, Defendant has not answered the complaint or otherwise appeared.

The Complaint contains causes of action for, *inter alia*, breach of contract based on Defendant's purported breaches of the subject Declaration and Bylaws of the Condominium.

To state a claim for breach of contract in New York, one "must allege (1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages" (*Oppman v IRMC Holdings, Inc.*, 14 Misc. 3d 1219[A] [Sup Ct NY Cnty 2007], citing *Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004] [citation omitted]). "The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent" (*Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003] [citation omitted]).

Plaintiff has met its prima facie burden with respect to its causes of action for Defendant's breach of the Declaration and Bylaws. Plaintiff established that Defendant as the owner of the Unit was subject to the terms and conditions of the Declaration and Bylaws, whereby he agreed to pay certain common charges, special assessments by the Board against the Unit, late fees and penalties, electricity charges, and attorneys fees incurred in connection with this action. To date, Defendant has failed to pay the requisite common charges, special assessments by the Board, late fees, and costs and attorneys' fees incurred by Plaintiff in enforcing Defendant's obligations under the Declaration and Bylaws.

### CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Plaintiff's motion seeking to amend the caption is granted and the Proposed Amended Complaint is deemed served *nunc pro tunc*; and it is further

ORDERED that the action shall bear the following caption:

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THE BOARD OF MANAGERS OF THE DOWNTOWN  
CLUB CONDOMINIUM,

Plaintiff,

-against-

TERRANCE J. KYLE,

Defendant.

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And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office 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 <http://www.nycourts.gov/courts/1jd/suptmanh/>); and it is further

ORDERED that the branch of Plaintiff's motion for a default judgment on the Complaint herein is granted on Plaintiff's first, second third and fourth causes of action on liability only; and it is further

ORDERED that an assessment of the Plaintiffs' damages is directed, and it is further

ORDERED that a copy of this order with a notice of entry be served by the movant upon the defaulting defendant by first class mail and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of

readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and county Clerk Procedures for Electronically Filed cases.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/16/2019  
DATE

  
W. FRANC PERRY, J.S.C.

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