Nevins v Lamb
2021 NY Slip Op 30293(U)
February 2, 2021
Supreme Court, New York County
Docket Number: 156646/2020
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

---X

INDEX NO. 156646/2020

CYNTHIA NEVINS,

Plaintiff,

MOTION SEQ. NO. 001

- v -

JOAN LAMB and THE 467 CONDOMINIUM,

Defendants.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DEFAULT JUDGMENT.

In this action seeking, inter alia, a declaratory judgment to quiet title pursuant to RPAPL Article 15, plaintiff Cynthia Nevins moves, pursuant to CPLR 3215, for a default judgment against defendant Joan Lamb. Defendant opposes the motion. After consideration of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the captioned action by filing a summons and complaint on August 21, 2020. Doc. 1. In her complaint, which she personally verified, plaintiff alleged that she was the housekeeper for defendant and her now deceased husband, Dr. Sidney Druce, and that she has resided in a one bedroom condominium at 467 Central Park West, Apt. 3C ("the apartment"), which has been her sole residence since 1995. Id. Plaintiff claimed that defendant owned multiple homes in the United States but that the latter was domiciled at 1160 Park Avenue, Apt. 1D, in Manhattan. Id.

After Dr. Druce passed away, defendant advised plaintiff that Dr. Druce had bequeathed $25,000 to her and that the said funds were to be applied to the down payment for an apartment for plaintiff as a reward for her many years of service. Id. Defendant told plaintiff that she would advance to her cash needed to purchase the apartment; that plaintiff would repay defendant the amount advanced for the purchase, as well as any additional money needed to purchase furniture and make basic renovations, less the amount of the bequest, plus 8% interest, and that, to secure plaintiff's payment obligation, plaintiff and defendant were to be listed as joint purchasers on the deed, and that defendant's name would be removed from the deed once all of plaintiff's payments were made. Id.

Plaintiff agreed to the foregoing arrangement and defendant provided her with a contract of sale identifying them both as the purchasers of the apartment. Id. Plaintiff and defendant executed the contract of sale and rider on March 15, 1995. Id. The purchase price under the contract was $59,000. Id. At the closing on March 29, 1995, defendant was represented by counsel but plaintiff was not. Id. Although neither the contract of sale nor the rider specified whether the apartment was being purchased by plaintiff and defendant as tenants in common or joint tenants, defendant or her attorney allegedly wrote on the deed at the closing that plaintiff and defendant were purchasing the apartment as joint tenants with right of survivorship. Id. After the closing, plaintiff moved into the apartment and began making payments to defendant in accordance with their agreement. Id. Since 1995, defendant, who has not lived in the apartment, allegedly kept spreadsheets documenting plaintiff's payments, and these records reflected that plaintiff's debt was satisfied over a decade ago. Id. Plaintiff maintained that she paid all common charges and property tax on the apartment and that defendant did not make any such payments. Id. Plaintiff further alleged that defendant acknowledged, in writing, the

existence of their oral agreement relating to the apartment, although no proof of this claim is submitted with the motion. Id.

As her first cause of action, plaintiff sought to quiet title to the apartment based on the deed listing she and defendant as joint tenants with right of survivorship, as well as the oral agreement between them. Id. Plaintiff further alleged that, since she paid defendant in full, as proven by defendant's spreadsheet, any interest defendant possessed in the apartment had to be extinguished. Id. Plaintiff further claimed that the condominium was named as a defendant solely because it held an interest in the apartment. Id.[1]

As a second cause of action, plaintiff alleged that she was entitled to a constructive trust since defendant would be unjustly enriched if she were permitted to remain on the deed as a joint tenant or tenant in common. Id.

Plaintiff alleged that she was entitled to a judgment declaring that: "(a) [defendant] and all persons claiming under her be forever barred from any claim to or interest in the [apartment]; (b) [she was] the lawful owner of the [apartment] and [was] vested with an absolute title in fee simple to the [apartment], and that this Court direct[ed] [defendant] to issue a deed to [her]; (c) That the sole and complete title to and possession of the [apartment] be awarded to [her]; [and] (d) That [she] recover her costs, disbursements and allowances against [defendant] in this action." Doc. 1.

Plaintiff thereafter purported to serve defendant with process. Doc. 12. In an "Affidavit of Attempted Service" dated September 1, 2020, Hector Figueroa represented that he attempted to serve defendant at 1160 Park Avenue, Apt. 1D, New York, New York on August 25, 2020, but that the doorman told him that he had not seen defendant in about one month. Doc.12.

[1] The documents filed with NYSCEF in connection with this matter are devoid of any indication that defendant The 467 Condominium has been served with process.

In an "Affidavit of Service" also dated September 1, 2020, Euclide Decastro represented that he attempted to serve defendant at the same address on August 27, 2020 but that defendant "ha[d] not been seen since the coronavirus lockdown began." Id. Decastro further stated that he attempted to serve defendant at that address again on August 28, 2020 but he was told by the security guard at the front desk that defendant did not live there anymore. Id. On August 31, 2020, Decastro attempted once again to serve defendant at that address but he was refused access upstairs. Id. Decastro further represented that, on the same day, he delivered the summons and complaint to the doorman at the same address, which was defendant's "actual place of residence", and that he served another copy of the documents on defendant by first class mail, with the words "personal and confidential" on the envelope. Id.

In an Affidavit of Service dated September 8, 2020, plaintiff's counsel, Eric Seiff, Esq., represented that he served defendant with process at "her residence" at 1160 Park Avenue, Apt. 1D, in Manhattan by giving the papers to a woman named Eliza who worked for defendant. Id. Seiff said he gave a duplicate copy of the papers to a doorman named Andrew. Id. Seiff's affidavit is silent regarding any follow up mailing.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendant. Doc. 9. In support of the motion, plaintiff argues, inter alia, that defendant was properly served with process but has failed to answer. Id.

In opposition to the motion, defendant argues that she was never properly served with process. Doc. 18. Defendant asserts that plaintiff attempted to serve her with process while she was in Nevada during the Coronavirus pandemic and that she informed plaintiff's counsel that she was away and intended to defend the lawsuit upon her return. Id. Defendant further maintains that plaintiff's motion must be denied because she had a reasonable excuse for failing

to answer, i.e., the parties were attempting to settle, and that she has a meritorious defense, i.e., the deed reflecting that plaintiff and defendant owned the premises as joint tenants with the right of survivorship. Id. Defendant urges this Court to deny plaintiff's motion and to allow her the opportunity to appear herein. Id.

LEGAL CONSIDERATIONS

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." It is well settled that a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016).

Here, plaintiff clearly did not serve defendant "by delivering the summons [to her] within the state" in accordance with CPLR 308(1). Rather, plaintiff attempted to serve defendant pursuant to CPLR 308(2), which provides for service:

> by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other . . .

Here, Figueroa's "Affidavit of Attempted Service" dated September 1, 2020 does not reflect that the summons and complaint was served on the doorman, or anyone else, at 1160 Park Avenue and, thus, Figueroa's attempt to serve defendant failed to satisfy CPLR 308(2).

Decastro represented that, on August 31, 2020, he delivered the summons and complaint to the doorman at 1160 Park Avenue, defendant's "actual place of residence", and that he served another copy of the documents on defendant by first class mail, with the words "personal and confidential" on the envelope. Id. However, since CPLR 308(2) requires service on a "person of suitable age and discretion" at the "dwelling place" or "usual place of abode" of the person to be served, service was improper insofar as Decastro stated that he served defendant at her "actual place of residence." Decastro's affidavit of service is also defective insofar as he fails to state that he mailed the commencing documents to defendant's "last known address."

Seiff's affidavit of service is defective as well, insofar as he represents that he served defendant "at her residence at 1160 Park Avenue," as opposed to her "dwelling place" or "usual place of abode" as required by CPLR 308(2). Nor does Seiff's affidavit reflect that a follow up mailing was made to defendant at her "last known address." Since plaintiff failed to establish proper service of process on defendant, and more than 120 days have elapsed since the filing of the complaint (see CPLR 306-b), the complaint is dismissed without prejudice (*See Diaz v Perez*, 113 AD3d 421 [1st Dept 2014]).

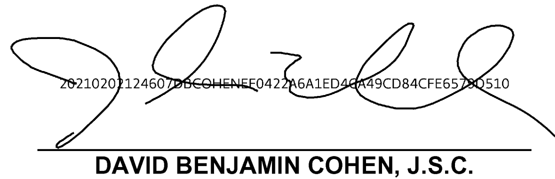
Even assuming that service of process had been properly effectuated, the motion would still be denied since plaintiff failed to set forth the facts constituting the claim (See CPLR 3215[f]). Specifically, plaintiff alleges that she is entitled to sole possession of the apartment because she made certain payments to defendant in accordance with the oral agreement between them, and that these payments were documented in certain spreadsheets kept by defendant which were not annexed to the motion. However, such conclusory allegations do not suffice to set forth the facts constituting a claim (*See St. Paul Fire & Marine Ins. Co. v A.L. Eastmond & Sons, Inc.*, 244 AD2d 294 [1st Dept 1997]).

Further, "New York courts "rarely, if ever" grant declaratory judgments on default "with no inquiry by the court as to the merits." *Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 (1st Dept 1978). Default declaratory judgment actions "'will not be granted on the default and pleadings alone'" but require that the "'plaintiff establish a right to a declaration against . . . a defendant.'" *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 (3d Dept 1986), *quoting National Sur. Corp. v Peccichio*, 48 Misc2d 77, 78 (Sup Ct Albany County 1965)." *de Beeck v Costa*, 39 Misc3d 347 (Sup Ct New York County 2013). Here, since plaintiff has failed to establish her right to the declaration demanded, the motion is denied on this ground as well. See *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d at 902.

Finally, since defendant was not properly served with process, plaintiff cannot establish that she defaulted in answering the complaint.

Accordingly, it is:

ORDERED that plaintiff's motion is denied and the complaint is dismissed, without prejudice.



2/2/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
APPLICATION:		GRANTED	X	DENIED		GRANTED IN PART	OTHER
		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE