

80 Adams Prop. Owner, LLC v Bevilacqua
2021 NY Slip Op 32538(U)
December 3, 2021
Supreme Court, New York County
Docket Number: Index No. 157446/2020
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X	INDEX NO. <u>157446/2020</u>
80 ADAMS PROPERTY OWNER, LLC	MOTION DATE <u>N/A</u>
Plaintiff,	MOTION SEQ. NO. <u>001</u>

- v -

CLAUDIO ALEJANDRO BEVILACQUA,
Defendant.

**DECISION + ORDER ON
MOTION**

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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, 17, 18, 19, 20, 21, 22

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff 80 Adams Property Owner LLC brings this action against Defendant Claudio Alejandro Bevilacqua, alleging that he breached their condominium purchase agreement by failing to pay the sum of \$29,750.00 (the "additional deposit") pursuant to the terms of the agreement. In motion sequence 001, Plaintiff moves for default judgment. The motion is submitted unopposed.

Background

Plaintiff alleges that it is the sponsor of the offering for sale of condominium units located in the building at 98 Front Street, Brooklyn, New York 11201, and that on May 23, 2019 it entered into a purchase agreement with Defendant for Unit 3F. (NYSCEF Doc No. 1, Complaint, at 3; NYSCEF Doc No. 8, Agreement.) Pursuant to the payment terms therein, Plaintiff alleges that Defendant paid an initial sum of \$29,750.00 (the "initial deposit," which Plaintiff alleges is currently in escrow), but that Defendant was required, and failed, to pay the additional deposit of \$29,750.00 within 180 days, resulting in his default. (Complaint at 3.) Further, Plaintiff alleges that Defendant had until January 14, 2020 to cure his default, but that he failed to do so. (*Id.*)

Plaintiff commenced this action on September 15, 2020, seeking \$59,500.00 as liquidated damages, and now moves for default judgment.

Discussion

On a motion for leave to enter a default judgment, "the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party[.]" (CPLR 3215 [f]; *see also SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Plaintiff alleges that it properly served Defendant, a resident and citizen of Uruguay, when it personally served his attorney, Charles Stark, at his New York business address on September 17, 2020. (NYSCEF Doc No. 5, Pl.'s Memo, at ¶ 14; NYSCEF Doc No. 11, Affidavits, at 3.)

Plaintiff alleges that this constitutes proper service pursuant to a provision in the agreement, § 42.2, "Governing Law/Jurisdiction and Venue/Agent for Services of Process," which provides, in pertinent part, that:

Purchaser does hereby designate and appoint Attorney for Purchaser as its authorized agent to accept and acknowledge on its behalf service of any and all process which may be served in any such suit, action or proceeding in any federal or state court in New York, New York, and agrees that service of process upon said agent at said address and written notice of said service of Purchaser mailed or delivered to Purchaser in the manner provided herein shall be deemed in every respect effective service of process upon Purchaser (unless local law requires another method of service), in any such suit, action or proceeding in the State of New York.

(Agreement at p 18-19, § 42.2.) In § 2.4, “Attorney for Purchaser” is defined as “Friedberg Pinkas PLLC, having an address at 767 Third Avenue, 31st Floor, New York, NY 10017. Attention: Charles R. Stark, Esq.” (*Id.* at p 5, § 2.4.)

CPLR 318, “Designation of agent for service,” provides that:

A person may be designated by a natural person ... as an agent for service in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon. The writing shall be filed in the office of the clerk of the county in which the principal to be served resides or has its principal office. The designation shall remain in effect for three years from such filing unless it has been revoked by the filing of a revocation, or by the death, judicial declaration of incompetency or legal termination of the agent or principal.

Here, the purchase agreement is insufficient to designate Charles Stark as the agent for Defendant, in that the agreement does not have Charles Stark’s consent endorsed thereon. (*Wichlenski v Wichlenski*, 67 AD2d 944, 947 [2d Dept 1979] [holding that “strict compliance” with CPLR 318 is required and finding service upon defendant invalid where writing allegedly designating agent for defendant did not have agent’s consent endorsed thereon].) Further, Plaintiff fails to specifically allege that Charles Stark actually forwarded the summons and complaint to Defendant. (*See Orix Fin. Servs., Inc. v Baker*, 1 Misc 3d 288, 292 [Sup Ct, NY County 2003] [plaintiff’s “method of serving papers upon non-residents, i.e., by depositing the papers with [the alleged agent], with no claim that [the alleged agent] sent the material to defendants or was under any duty to do so, does not comport with the traditional notions of ‘fair play and substantial justice’ necessary to establish personal jurisdiction”].) Finally, Plaintiff fails to demonstrate that the written designation of Stark as Defendant’s agent was “filed in the office of the clerk of the county in which the principal [i.e., Defendant] to be served resides or has its principal office.” (*Bednarczyk v Kiese*, 188 AD2d 794, 795 [3d Dept 1992].)

Accordingly, it is hereby

ORDERED that Plaintiff's motion for default judgment is denied.

12/3/21
DATE

WJP
WILLIAM PERRY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE