

King Enters. Ltd. v O'Halloran
2022 NY Slip Op 30138(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 152173/2021
Judge: William Perry
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. WILLIAM PERRY PART 23

Justice

-----X
KING ENTERPRISES LTD.,
Plaintiff,
- v -
ROSALEEN O'HALLORAN, ANNE HAYDEN, JOHN DOE,
JANE DOE
Defendant.
-----X

INDEX NO. 152173/2021
MOTION DATE 08/16/2021
MOTION SEQ. NO. 001

**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, 24

were read on this motion to/for JUDGMENT - DEFAULT

In this action, Plaintiff and landlord King Enterprises Ltd. alleges that its former tenant, Defendant Rosaleen O'Halloran, used its rent stabilized apartment as her non-primary residence, while Defendants Anne Hayden, John Doe, and Jane Doe actually resided there without Plaintiff's consent. In motion sequence 001, Plaintiff moves for default judgment. The motion has been submitted unopposed.

Background

Plaintiff alleges that it leased 28 King Street, Apartment 20, New York, NY 10014 (the "premises") to O'Halloran pursuant to a 1978 lease, that the apartment is rent stabilized, and that the lease was most recently renewed for the period of April 27, 2018 through July 31, 2020. Plaintiff further alleges that Plaintiff served a notice of non-renewal upon O'Halloran on April 28, 2020, based upon Plaintiff's belief that O'Halloran did not use the apartment as her primary residence, that she had cable, utility, and telephone services in her name at 486 10th Street, Brooklyn, NY (the "Brooklyn address"), and that the apartment was instead occupied by the other

named Defendants-herein. (NYSCEF Doc No. 19, Notice.) Plaintiff alleges that Defendants have collectively remained in possession of the apartment despite the notice of non-renewal and the lease's expiration on July 31, 2020. (NYSCEF Doc No. 1, Complaint, at ¶ 13.)

Plaintiff commenced this action on March 3, 2021, setting forth causes of action against Defendants for ejectment, use and occupancy fees in the amount of \$5,198.00, and legal fees in the amount of \$50,000.00 plus interest. (*Id.* at ¶¶ 14-27.) Plaintiff now moves for the entry of default judgment on its cause of action for ejectment only.

Discussion

On a motion for leave to enter a default judgment, a 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].) "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, New York County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Plaintiff alleges that service was properly made upon all Defendants pursuant to CPLR 308 [4], by affixing a copy of service upon the door of the premises and mailing an additional copy to the same address. (NYSCEF Doc No. 21, Affidavits of Service.)

CPLR 308[4] provides that, where service under CPLR 308[1] and 308[2] cannot be made with due diligence, service upon a natural person may be made:

by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served *and* by either mailing the summons to such person 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 affixing and mailing to be effected within twenty days of each other[.]

(CPLR 308[4] [emphasis added].)

Here, service upon O’Halloran was improper, as the premises was neither her “actual place of business, dwelling place or usual place of abode” and, as such, affixing service there was not permitted by the CPLR. Although the affidavit of service states that an additional copy of service was mailed both to the premises and the Brooklyn address, such service is still incomplete absent compliance with the first prong of CPLR 308 [4]. (Affidavits of Service at 2-3.) Plaintiff’s allegation that O’Halloran did not actually reside at the premises is the very foundation for this proceeding, and this affidavit of service is contrary to the rest of Plaintiff’s submissions. (See NYSCEF Doc No. 12, Rivera Affidavit, at ¶ 7 [“I have not observed the Tenant at the Apartment or the Building from at least January 1, 2019 to the present”].) As such, the motion is denied as to O’Halloran.

The motion is likewise denied as to Defendant Hayden for the reasons that follow.

While a defendant in default is deemed to have admitted all traversable allegations in the complaint (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Brownly Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), “CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 60 [1st Dept 1994]. As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exist (*Woodson*, supra at 70-72). (*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].)

“Proof that the plaintiff has submitted ‘enough facts to enable [the] court to determine that a viable’ cause of action exists may be established by an affidavit of a party or someone with

knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability.” (*Perney v Medical One New York, P.C.*, 2020 WL 4604812, at *4 [Sup Ct, NY County 2020] [internal citations omitted].)

In support of its motion, Plaintiff mainly relies upon a surveillance log memorializing video footage taken from a camera placed outside of the premises. (NYSCEF Doc No. 18, Log.) The log, dated February 25, 2020, appears to summarize the comings and goings of each individual, dubbed John and Jane Does #1-9, who entered the premises from March 25, 2019 through February 23, 2020, with the final three entries indicating that “Jane Doe 7 exited with a tote bag” on February 21, 2020, and that there was “no activity” for February 22 or 23. The log also provides certain screenshots of the videos purporting to identify each individual “Doe”. (*Id.* at 36-53.)

In further support, Plaintiff submits the affidavit of Kenneth Hatch, a former employee of TenanTracers LLC, who states that the “only individuals [who] were seen spending at least one night at the Apartment was an individual identified by David Rivera as Anne Marie Hayden and unknown male and female individuals who are identified in this action as ‘John Doe’ and ‘Jane Doe’.” (NYSCEF Doc No. 11, Hatch Affidavit, at ¶ 9.) Rivera, however, states that “the only individuals seen spending at lease [sic] one night the Apartment was an individual known as Anne Marie Hayden and unknown male and female individuals who are identified in this action as ‘John Doe’ and ‘Jane Doe’.” (Rivera Affidavit at ¶ 8, *citing* Log at 2-34.)

However, upon review of the log, the court finds that the log itself does not identify Anne Marie Hayden as any of the nine Jane Does. As such, the court is unable to hold that Anne Marie Hayden is a proper defendant, that she was properly served, or that Plaintiff has met its burden of proof in submitting “some proof of liability[.]” (*Feffer*, 210 AD2d at 60.) Further, although Plaintiff alleges that the Defendants have collectively remained in possession of the Apartment

despite the expiration of the lease on July 31, 2020 (NYSCEF Doc No. 10 at ¶ 16), Plaintiff's evidence only documents the comings and goings of unnamed individuals up until February 23, 2020. For all the above reasons, it is hereby

ORDERED that Plaintiff's motion sequence 001 for default judgment against the Defendants is denied.

1/19/2022
DATE


WILLIAM PERRY, J.S.C.

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