

Gibson v Castillo

2022 NY Slip Op 30574(U)

February 22, 2022

Supreme Court, New York County

Docket Number: Index No. 154827/2021

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 154827/2021

CATHERINE GIBSON,

Plaintiff,

MOTION SEQ. NO. 003 and 005

- v -

JOSE CASTILLO, MARIA CASTILLO, 526 WEST 158TH STREET HOUSING DEVELOPMENT FUND CORP., LUIS CORDERO, and JOHN DOES 2-4,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 11, 12, 13, 15, 16, 50, 99

were read on this motion to/for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 55, 56, 57, 80, 81, 82, 83, 100

were read on this motion to/for DEFAULT JUDGMENT.

In this action seeking, inter alia, damages for breach of contract and housing discrimination, plaintiff Catherine Gibson, an attorney appearing pro se, moves, pursuant to CPLR 3215, for a default judgment against defendants 526 West 158th Street Housing Development Fund Corp. s/h/a 526 West 158th Street Housing (“the HDFC”), Jose Castillo, and Maria Castillo (“the Castillos).” The HDFC opposes plaintiff’s motion filed under motion sequence number 005.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, a Georgia resident, commenced this action by filing a summons and complaint in May 2021. Doc. 1. As a first cause of action in her complaint, plaintiff alleged that the Castillos breached a contract to sell her Unit #51 at 526 West 158th Street in Manhattan (“the apartment”), which apartment was located in a building operated by the HDFC. Doc. 1. As a second cause of

action, plaintiff alleged that the HDFC tortiously interfered with the contract she had with the Castillos. Doc. 1. As a third cause of action, plaintiff, who is an African American female, alleged that the HDFC discriminated against her based on her race and her son's disability. Doc. 1. As a fourth cause of action, plaintiff sought "a preliminary injunction to allow the sale of [the apartment] between [the Castillos] and [p]laintiff." Doc. 1.

On May 21, 2021, plaintiff served the HDFC with process via the Secretary of State pursuant to Business Corporation Law ("BCL") § 306(b) and served the Castillos personally pursuant to CPLR 308. Docs. 4-6. HDFC appeared in this action by its attorneys, Tane Waterman & Wurtzel, P.C., on July 21, 2021. Doc. 19. The Castillos have not appeared.

Plaintiff thereafter filed two motions for injunctive relief (mot. seq. nos. 001 and 002) and another for a default judgment against the HDFC and the Castillos (mot. seq. 003). Docs. 10, 11, and 14. Pursuant to a stipulation filed July 23, 2021 (Doc. 20), the HDFC agreed to resolve the motions for injunctive relief (mot. seq. nos. 001 and 002) by consenting to a temporary restraining order enjoining it from selling the apartment. Doc. 20. Plaintiff also stipulated to withdraw its motion for default against the HDFC (mot. seq. 003), without prejudice, and agreed to vacate any default by the HDFC. Docs. 20, 50. The HDFC also consented to personal jurisdiction and waived any defenses related to service of process. Doc. 20. Finally, plaintiff consented to allow the HDFC an extension of time to answer until July 30, 2021 and HDFC agreed that it would respond to interrogatories served by plaintiff within 30 days after it answered. Doc. 20. The HDFC filed its answer on July 30, 2021. Doc. 21.

On August 3, 2021, plaintiff moved to amend the complaint (mot. seq. 004) to substitute Luis Cordero, a member of the board of the HDFC, as a defendant in place of John Doe # 1, as well as to add a fifth cause of action sounding in discrimination against individual board members.

Docs. 22, 46. On August 20, 2021, Cordero, with the consent of the HDFC, filed a notice removing this action to the United States District Court for the Southern District of New York (“the SDNY”). Docs. 39, 58. Plaintiff then moved in the SDNY to remand the case back to state court. Doc. 58. By decision and order entered October 19, 2021, United States District Judge Jesse Furman granted the motion reasoning, inter alia, that the Castillos did not consent to removal. Doc. 58.

After the captioned action was remanded, this Court, by order entered October 27, 2021, granted the branch of plaintiff’s motion (mot. seq. 004) seeking to add Cordero as a defendant, but denied that branch of the motion seeking to add a fifth cause of action. Doc. 59.

By order entered December 7, 2021, this Court noted that “the branch of plaintiff’s motion seeking a default judgment against [the Castillos] [mot. seq. 003] was incorrectly marked resolved and is hereby restored and marked submitted.” Doc. 99.

Plaintiff now moves (mot. seq. 005), pursuant to CPLR 3215, for a default judgment against the HDFC and the Castillos. She argues that she is entitled to a default judgment against the HDFC because it removed the case to the SDNY and did not respond to her interrogatories. Docs. 55-57. She further asserts that she is entitled to a default judgment against the HDFC and the Castillos because she has valid claims against them. Id.

In opposition, the HDFC argues, inter alia, that it is not in default since it filed an answer and that “[p]laintiff’s own memorandum of law acknowledges that, to support her motion, she must ‘submit proof of the defendant’s default in answering or appearing’”, which she has not done. Docs. 56, 80. Alternatively, the HDFC argues that it did not waive its right to remove the case by signing the July 23, 2021 stipulation and that, even if it breached the said stipulation, the penalty for doing so is not the striking of its answer. Doc. 80. The HDFC further asserts that plaintiff’s

motion must be denied since she failed to establish that her claim has merit and because she failed to comply with CPLR 3215(g)(4)(i). Doc. 80.

LEGAL CONCLUSIONS

CPLR 3215(a) provides, in pertinent part, that when "a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her]." To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (*See PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645 [1st Dept 2020]; *Gantt v North Shore-LH Health Sys.*, 140 AD3d 418 [1st Dept 2016]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim. (*See Zelnick v Biderman Industries U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422, 422 [2d Dept 1996]).

(*State Farm Fire & Cas. Co. v Quinones*, 2022 NY Slip Op 30268[U], *2 [Sup Ct, NY County 2022] [Saunders, J.]).

The HDFC

It is clear that the HDFC is not in default. As the HDFC correctly asserts, plaintiff stipulated to withdraw the branch of her motion seeking a default against it (mot. seq. 003), as well as to allow the HDFC until July 30, 2021 to answer. Since the HDFC answered on July 30, 2021, it did not violate the stipulation. Plaintiff provides no legal authority for its argument that the HDFC somehow breached the stipulation by removing the captioned action to the SDNY. In any event, Judge Furman notes in his remand order that the action was removed to the SDNY by Cordero. Since the HDFC did not fail to answer or otherwise appear in this action, it is not in default.

Even assuming, arguendo, that the HDFC were in default, plaintiff would not be entitled to a default judgment against it because plaintiff failed to effectuate additional service on it

pursuant to CPLR 3215(g)(4)(i). That section requires such additional service in order to obtain a default judgment against a defendant served pursuant to BCL § 306-b.

The Castillos

Although plaintiff represents in her affidavits in support of the motions for default (mot. seq. nos. 003 and 005) that the Castillos were served with process, she fails to submit proof of their defaults in support of the motion. Docs. 12 and 57. Thus, the motions must be denied (*See*, CPLR 3215; *PV Holding Corp., supra*; *Gantt, supra*).

Even if plaintiff had stated in the affidavits in support of her motions that the Castillos had defaulted, the applications would be denied on procedural grounds.¹ This is because the caption of each of plaintiff's affidavits reflects that she executed the same in New York County, where she resided at 11 Broadway, Suite 615, New York, New York 10004, whereas both affidavits also reflect that they were signed in Atlanta, Georgia, where the complaint reflects that she resides. Docs. 1, 12 and 57.

This Court further notes that, although both of plaintiff's affidavits were signed by a Georgia notary, no certificate of conformity was submitted as required by CPLR 2309(c). This defect, alone, however, does not require the denial of the motions, and may be cured by the submission of a proper certificate of conformity *nunc pro tunc*. (*See Wager Estate of Cordaro v Rao*, 178 AD3d 434, 435-436 [1st Dept 2019]).

The parties' remaining contentions are without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

¹ The affidavits (Docs. 12 and 57) are virtually identical. The difference is that the second affidavit (Doc. 57), signed October 20, 2021, alleges that HDFC breached the stipulation filed July 23, 2021. Doc. 20.

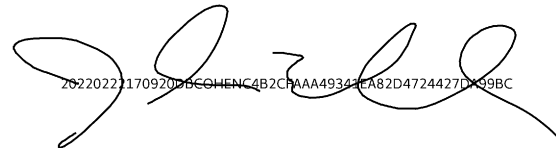
ORDERED that the branch of plaintiff Catherine Gibson’s motion for a default judgment (mot. seq. 003) against defendant 526 West 158th Street Housing Development Fund Corp. s/h/a 526 West 158th Street Housing is denied as moot; and it is further

ORDERED that the branch of plaintiff Catherine Gibson’s motion for a default judgment (mot. seq. 003) against defendants Jose Castillo and Maria Castillo is denied with leave to renew upon proper papers; and it is further

ORDERED that the branch of plaintiff Catherine Gibson’s motion for a default judgment (mot. seq. 005) against defendant 526 West 158th Street Housing Development Fund Corp. s/h/a 526 West 158th Street Housing is denied; and it is further

ORDERED that the branch of plaintiff Catherine Gibson’s motion for a default judgment (mot. seq. 005) against defendants Jose Castillo and Maria Castillo is denied with leave to renew upon proper papers; and it is further

ORDERED that the parties are to appear for a previously scheduled status conference via Microsoft Teams on March 29, 2022 at 2:30 p.m.



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DAVID B. COHEN, J.S.C.

2/22/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: