

Action No 37 LLC v West
2022 NY Slip Op 30649(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 152362/2021
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

INDEX NO. 152362/2021

ACTION NO 37 LLC,

MOTION DATE 07/14/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

JOSEPH WEST, FREEDOM REAL ESTATE
INVESTMENTS, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff Action No 37 LLC brings this action against Defendants Joseph West and Freedom Real Estate Investments LLC (“Freedom”) to quiet title of the property located at 16 West 129th Street, New York, NY 10027, Block 1726, Lot 47 (the “premises”). Plaintiff alleges that the premises was fraudulently conveyed to Freedom via a January 12, 2021 deed (the “fraudulent deed”), with Defendant Joseph West and Plaintiff listed as purported grantors.

In motion sequence 001, Plaintiff moves for a default judgment against Freedom only, seeking 1) a declaration that it is a rightful partial owner of the premises; 2) voiding the fraudulent deed; 3) directing the Clerk to cancel the fraudulent deed; and 4) awarding actual and punitive damages. The motion is submitted unopposed.

Background

Plaintiff alleges that Alexander A. West purchased the premises on March 24, 1952. (NYSCEF Doc No. 3, Automated City Register Information System [“ACRIS”] Property History, at 3.) He passed away on December 18, 1958, leaving the premises to his estate. (NYSCEF Doc

No. 2, Complaint, at ¶ 5.) He was married to Louise West at the time of his death but had no children with her, although he had several children from a previous marriage with Sarah Hill, including Defendant Joseph West. (*Id.*)

Plaintiff alleges that it purchased partial title interests in the premises on several occasions:

- From Louise Jones, heir of Louise West, on August 25, 2020, via deed CRFN 202000247533, recorded with the City Register on September 2, 2020 (NYSCEF Doc No. 4);
- From Richard Jones, heir of Louise West, on August 27, 2020, via deed CRFN 2020000247558, recorded with the City Register on September 2, 2020 (NYSCEF Doc No. 5); and
- From Delores Allen, heir of one of Alexander A. West's children with Sarah Hill, on November 6, 2020, via deed CRFN2020000316282, recorded with the City Register on November 13, 2020 (NYSCEF Doc No. 6).

Plaintiff alleges that it then discovered the fraudulent deed, which purports to transfer title to the premises from Defendant Joseph West and Plaintiff to Defendant Freedom for \$0.00, when it was recorded with the City Register on March 5, 2021. (NYSCEF Doc No. 7, the Deed.) Plaintiff alleges that the individual who signed on behalf of both grantors, i.e., Defendant West and Plaintiff, signed her name as "Michelle Dawn, PoA [Power of Attorney]" and that the individual who signed on behalf of Defendant Freedom, as grantee, is listed as "Dr. Michael Barton-El." Plaintiff alleges that Barton-El is also listed as the registered agent of Freedom on New York State Division of Corporations records. (Complaint at ¶¶ 12-13; NYSCEF Doc No. 8.) The fraudulent deed also states that the premises is "under the control of The Michael Alexander

Barton Trust” and that Freedom “has private exclusive agency” from the Trust “to sell, refinance and/or transfer the property[.]” (NYSCEF Doc No. 7, the Deed, at 6.)

Plaintiff commenced this action on March 9, 2021, setting forth claims for: 1) a declaratory judgment voiding the fraudulent deed against both Defendants; 2) conversion against Freedom; 3) unjust enrichment against Freedom; and 4) slander of title against Freedom. Plaintiff now moves for default judgment against Freedom only.

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 submits proof that service was proper upon Freedom pursuant to Limited Liability Company Law § 303. (NYSCEF Doc No. 10.) Additionally, Plaintiff properly served Freedom with an additional notice as required by CPLR 3215[g]. (NYSCEF Doc No. 17.) To date, Freedom has failed to appear.¹

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]; *Brown Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), “CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once

¹ While the instant motion seeks a default judgment against Defendant Freedom only, the court notes that Defendant West has also failed to appear. Plaintiff has not filed an affidavit demonstrating service upon Defendant West.

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 exists (*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].) CPLR 3215[f] [“Proof”] provides that “[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due[.]”

Here, the complaint was verified by Plaintiff’s attorney, the verification page stating:

That I have read the foregoing Verified Complaint and know the contents thereof; that the same is true to the best of my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

The reason affirmant make this affirmation and not the Plaintiff is because the Plaintiff is not within the county of this law office at the time of the filing of this action. The grounds of affirmant’s belief as to all matters not stated upon affirmant’s knowledge are communications with the Plaintiff and copies of Plaintiff’s records in affirmant’s possession.

(NYSCEF Doc No. 2, Complaint, at 12.)

However, “[a] complaint verified by an attorney, although permissible under CPLR 3020(d)(3) where, as here, the client is not in the county where the attorney maintains his office, is insufficient for purposes of CPLR 3215(e) when the attorney lacks personal knowledge of the facts constituting the claim.” (*Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987]; *see also Two*

Manhattan LLC v The Negro Labor Committee, 2015 WL 1957967 [Sup Ct, NY County 2015] [denying motion for default judgment in action to quiet title because the “affirmation of the attorney, who claims no personal knowledge of the facts, is without probative value on this motion”].)

Further, CPLR 1521 provides that, in actions seeking quiet title, the “[f]inal judgment in the action *shall* declare the validity of any claim to any estate or interest established by any party to the action.” (CPLR 1521(1) [“Judgment”] [emphasis added].) “The function of the judgment in such an action is to resolve each party's claim to the disputed property.” (*Levenson v Est. of Laviero*, 136 AD3d 1248, 1249 [3d Dept 2016].)


Here, the court is unable to render a final judgment as required by the CPLR, as Plaintiff fails to demonstrate what each party's interest in the premises is. Plaintiff submits multiple deeds in support of its claim to be a “rightful partial owner.” However, each of those deeds, as well as the ACRIS property history, indicate that Plaintiff purchased the “entire lot.” (*See* NYSCEF Doc No. 3 at 2; Doc No. 4 at 2; Doc No. 5 at 2; Doc No. 6 at 2.) Meanwhile, each of the Real Property Transfer Reports annexed to the deeds indicate that Plaintiff purchased a “Fractional or Less than Fee Interest” in the premises. (*See* NYSCEF Doc No. 4 at 9; Doc No. 5 at 9; Doc No. 6 at 9.) The reports contain an instruction to “Specify Below” the fraction of interest, but each report fails to do so. (*Id.*)

Further, there is no evidence to support Plaintiff's allegation that ownership of the premises went to the estate of Alexander A. West in 1958, nor is there evidence indicating the quantity or identity of any alleged rightful heirs or beneficiaries. (Complaint at ¶ 7.) As such, and coupled with Plaintiff's concession that Defendant Joseph West is an heir and beneficiary to the alleged

estate and thus a rightful partial owner of the premises (Complaint at ¶ 8), the court is unable, on this record, to render a final judgment declaring the interests of each party in the premises.

Finally, Plaintiff does not submit proof of any actual or punitive damages, nor does Plaintiff request a sum certain, and this portion of the motion is denied as well. (See *Dwight W. Winkelman Foundation, Inc. v Winkelman*, 219 AD2d 816 [4th Dept 1995].) Thus, it is hereby

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

<u>3/1/2022</u> DATE	 WILLIAM PERRY, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE