City of New York v Hernandez
2022 NY Slip Op 30980(U)
March 25, 2022
Supreme Court, New York County
Docket Number: Index No. 452135/2021
Judge: William Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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** *Justice* **PART** **23**

---X

CITY OF NEW YORK

Plaintiff,

- v -

MARIO HERNANDEZ,

Defendant.

---X

INDEX NO. 452135/2021

MOTION DATE 10/13/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiff City of New York brings this action against Defendant Mario Hernandez to recover, pursuant to New York City Charter § 1049-a, an unpaid penalty assessed against Defendant by the Environmental Control Board ("ECB") in the amount of $70,000.00. In motion sequence 001, Plaintiff moves for a default judgment. Defendant, who is pro se, opposes the motion.

Background

Plaintiff submits a "Decision Based on Failure to Answer Summons" issued to Defendant by the City of New York Office of Administrative Trials and Hearings ("OATH") with a mailing date of January 24, 2020. (NYSCEF Doc No. 11 at 6.) The Decision indicates that, on November 25, 2019, the ECB issued summons #039013470K to Defendant at 2674 Briggs Avenue, Bronx, NY, for violations of New York City Code §§ 28-210.1 ["Illegal residential conversion"] and 28-202.1 ["Civil penalties"]. The Decision further indicates that Defendant failed to appear for a January 17, 2020 hearing, thus rendering him liable for $70,000.00, the full amount of the fine imposed, unless he asked for a new hearing within 60 days.

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].)

Here, Plaintiff submits one affidavit of service and an "amended" affidavit of service. (NYSCEF Doc No. 9, Affidavits.) The amended affidavit of service clarifies that a process server attempted service upon Defendant on July 15, 2021 at 10:21 am; July 17, 2021 at 12:47 pm; and July 20, 2021 at 7:51 pm, before affixing a copy of the summons upon the door of the premises located at 50 Saint Andrews #4L, Yonkers, NY 10705. The affidavits state that the premises is Defendant's "dwelling house (usual place of abode)" and that a second copy of service was mailed to the "above stated address". Additionally, the affidavits state that "the residence of the subject was confirmed by DMV verification 623N.Y.S.2d932."

Plaintiff also submits an affidavit of additional mailing, pursuant to CPLR 3215[g][3], to the same Yonkers address. (NYSCEF Doc No. 5.)

Both the summons and complaint, however, state that Defendant's address is "2674 Briggs Avenue, Apt 1, Bronx, NY 10458." (NYSCEF Doc No. 1, Complaint, at p 1 and ¶ 4.) Notably, this Bronx address is the same address for which the ECB violations pertained, where the OATH

Decision was mailed, and where a copy of the instant motion for default judgment was mailed on September 10, 2021. (NYSCEF Doc No. 11 at 6; NYSCEF Doc No. 13.)

Defendant, pro se, filed his opposition to the motion, which is dated September 24, 2021. (NYSCEF Doc No. 16, Opposition.) Defendant alleges that he first received notice of the instant action on September 15, 2021, ostensibly when he received the motion for default judgment at the Bronx address. (*Id.* at 4.) He also alleges that he has not lived at the Yonkers address, which is his grandmother's apartment, for more than five years. (*Id.*)

The court finds that Plaintiff fails to provide proof of proper service. The affidavits demonstrate that the process server attempted service pursuant to CPLR 308[4], otherwise known as affix-and-mail service. That provision states that, where service under CPLR 308[1] and 308[2] cannot be made with due diligence, service upon a natural person shall 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].)

Affix-and-mail service is only to be relied upon "where service under paragraphs one [personal service] and two [leaving the summons with a person of suitable age and discretion] cannot be made with due diligence[.]" (CPLR 308[4].) Plaintiff fails to state why it chose to serve Defendant with the summons and complaint at the Yonkers address, when in the same documents, Plaintiff states that Defendant lives in the Bronx. "There is no reason to conclude that the premises is [his] dwelling place or usual place of abode. Given the address on the summons and the [motion

papers], the opposite is true. (*Hickman v Beretta*, 58 Misc 3d 294, 298 [Sup Ct, Nassau County 2017].)

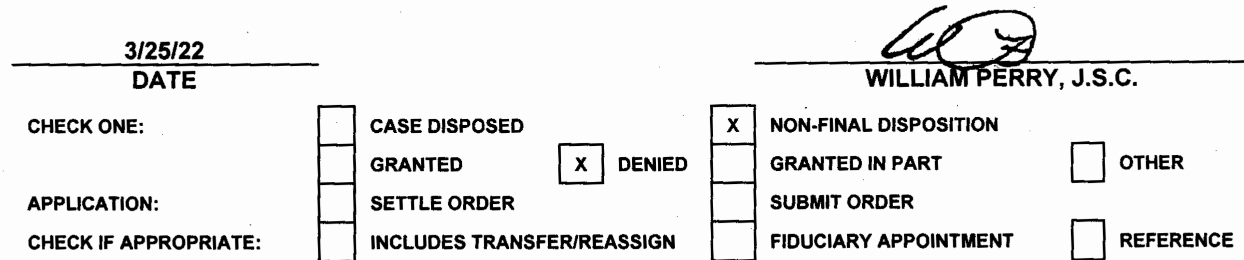
Moreover, the affidavits of service state that service was completed by mailing a second copy of service to the same Yonkers address, listed as the "dwelling house (usual place of abode)" of Defendant. (NYSCEF Doc No. 9.) This fails to comply with CPLR 308[4], which requires the second copy of service to be mailed to Defendant's "last known residence". "While there may be some question as to whether there is a distinction between 'dwelling place' and 'usual place of abode', there has never been any serious doubt that neither term may be equated with the 'last known residence' of the defendant." (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979].) "Indeed there are cogent reasons for preserving the distinction, apart from the obvious principle that where the Legislature has used different words in a series, the words should not be construed as mere redundancies." (*Id.* [internal citations omitted].)

The affidavits of service state that "the residence of the subject was confirmed by DMV verification 623NYS2d932," which presumably is a citation to *Burke v Zorba Diner, Inc.*, 213 AD2d 577, 623 NYS2d 932 [2d Dept 1995]. In that case, however, plaintiff served the defendant, pursuant to CPLR 308[2], by leaving a copy of the summons and complaint with the defendant's mother (an address found via a Department of Motor Vehicles record search), while in this case, Plaintiff already knew of Defendant's address, but chose to resort to affix-and-mail service without having exercised due diligence. Further, there is no evidence of the alleged DMV record search.

In any event, Defendant has filed opposition to the motion, and "[p]ublic policy favors the resolution of cases on the merits, especially where the default was not willful, and the opposing party is not prejudiced by the delay." (*331-5 West 21st Street Corp. v New York Roofscapes, Inc.*, 2019 WL 3308468, at *1 [Sup Ct, NY County 2019].)

Additionally, the court notes that Plaintiff's affidavit of facts cites to summons #039013470K "annexed hereto as Exhibit '1'", but the page is blank. (NYSCEF Doc No. 11 at 1, 4.) The affidavit of facts also cites to a "Final Decision and Order of OATH ... annexed hereto as Exhibit '2'", but there is no Exhibit 2 submitted. (*Id.* at 1, 4-5.) For the reasons above, it is hereby

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



3/25/22
DATE

WILLIAM PERRY, J.S.C.

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