Burns v Burns
2023 NY Slip Op 30324(U)
January 23, 2023
Supreme Court, Kings County
Docket Number: Index No. 504491/2019
Judge: Richard J. Montelione
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At IAS Part DJMP of the Supreme Court of the State of New York, Kings County, on the ____ day of _____2023

JAN 23 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

DECISION AND ORDER

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LOUIS BURNS,

Plaintiff,

-against-

STEPANIE BURNS,

Defendant.

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Index No.: 504491/2019
Mot. Seq. 1 & 2

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion for Default Judgment filed on 11/17/2020, Exhibits, Order Dated 5/25/202, Affidavit of Merit affirmed by Louis Burns on September 24, 2021.....	6-13, 15
Defendant's Notice of Cross-Motion to Dismiss the Complaint filed on 10/6/2021, Memorandum of Law in Opposition to Motion and in Support of Cross-Motion Filed on 10/6/2021, Exhibits.....	17-25
Plaintiff's Affirmation in Opposition to Cross-Motion Affirmed By Abraham Reingold, Esq. on October 7, 2021.....	26

This is an action *inter alia* for conversion of rent, abuse of process, and waste to the premise located at 256 Decatur Steet, Brooklyn, New York and 198 Clackson Avenue, Brooklyn, New York. In an action commenced in 2007, plaintiff Louis Burns previously brought suit against defendant Stephanie Burns under Index No. 37327/2007. After a bench trial in August 2017 in the earlier action, by order dated October 25, 2017, Justice Lawrence Knipel granted a constructive trust and directed defendant to convey the two premises to plaintiff. In this action, plaintiff alleges, *inter alia,* that defendant interfered with plaintiffs' rights to the premises in question by misappropriating tenants' rent and leaving personal effects, junk and debris in the premises.

This action was commenced by filing the summons and complaint on February 28, 2019. An amended complaint was filed on May 16, 2019. Plaintiff attempted service by "nail and mail" (CPLR 308[4]) upon defendant, on June 17, 2019 at 8:00 PM. Previous attempts at service were made on May 28, 2019 at 11:00 AM, June 1, 2019 at 10:00 AM, and June 14, 2019 at 4:00 PM. Plaintiff moves for default judgment against defendant, pursuant to CPLR 3215, on November 17, 2020 (MS#1). Defendant cross-moves to dismiss the complaint, pursuant to CPLR 3215, 3211(a)(1) and 3211(a)(8), or in the alternative to vacate her default, pursuant to CPLR 5015, 317 and 3012(d) (MS#2). Plaintiff's only opposition to the cross-motion is that it is not supported by an affirmation or affidavit.

Where a defendant seeks to vacate a default judgment by raising a jurisdictional objection, "the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default." *Rattner v. Fessler,* 202 A.D.3d 1011, 1015 (2d Dep't 2022). "The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process. In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and void." *Bank of New York Mellon v. Lawson,* 176 A.D.3d 1155, 1156-7 (2d Dep't 2019) quoting *Washington Mut. Bank v. Murphy*, 127 A.D.3d 1167, 1173–1174 (2d Dep't 2015). Upon a motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the "ultimate burden of proof" to establish a basis for such jurisdiction. *America/Intl. 1994 Venture v. Mau*, 146 A.D.3d 40, 51 (2d Dep't 2016).

Defendant cross-moves to dismiss the complaint in its entirety and claims that this court lacks jurisdiction over this matter, because service of process was defective. Specifically, defendant argues that the process server did not satisfy the due diligence requirements of CPLR 308(4). Under CPLR 308(4), service may be effectuate "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…mailing the summons to such person at his or her last known residence" only when service upon the person to be served or delivery upon a person of suitable age and discretion " cannot be made with due diligence." Attempts to serve a defendant "during normal business hours or at times when it could reasonably have been expected that defendant was in transit to or from his place of employment, [are] insufficient to satisfy 'due diligence' requirement." *Gantman v. Cohen*, 209 A.D.2d 377, 618 N.Y.S.2d 100 (2d Dep't 1994) (holding that due diligence is not met where a process server made three attempts to personally serve the defendant at his residence on weekdays at the hours of 10:50 A.M., 4:30 P.M., and 6:36 P.M.). In the instant case, the court takes notice that June 1, 2019, the second date service was attempted, was a Saturday and therefore not during normal business hours. Accordingly, plaintiff's multiple earlier attempts to serve defendant were made with due diligence and the court has jurisdiction. The branch of the cross-motion to dismiss the complaint for lack of jurisdiction is DENIED.

Defendant additionally cross-moves to dismiss for failure to move for default judgment within one year of defendant's default. Under CPLR 3215(c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned… unless sufficient cause is shown why the complaint should not be dismissed." Plaintiff's affidavit of service was filed on June 25, 2019. Defendant had forty days, until August 5, 2019, to respond to the complaint. *See* CPLR 308(4), 320(a). Normally, plaintiff would be required to move for default judgment on or before June 25, 2020.

However, plaintiff's time to respond to move for default judgment was tolled by a series of former Governor Andrew Cuomo's COVID-19 related Executive Order. *See* Executive Orders Nos. 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72; *Brash v. Richards,* 195 A.D.3d 582 (2d Dep't 2021). During the COVID-19 pandemic, the Governor's Executive Orders took effect on March 20, 2020 and lasted until November 3, 2020. "A toll suspends the running of the applicable period of limitation for a finite time period, and '[t]he period of the toll is excluded from the calculation of the [relevant time period].'" *Id,* quoting *Chavez v. Occidental Chem. Corp.,* 35 N.Y. 3d 492, 505 (2020). "Unlike a toll, a suspension does not exclude its effective duration from the

calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension." *Brash* at 582, quoting *Foy. v. State of New York*, 71 Misc. 3d 605, 608 (Ct Cl 2021). Since the Executive Orders created a true toll of the statute of limitations, plaintiff had until well after the November 3, 2020 cutoff date, to file his motion for default judgment. *See Brash v. Richards,* 195 A.D.3d 582 (2d Dep't 2021). As the motion for default judgment was filed on November 17, 2020, a mere two weeks after the end-date of the Executive Orders' period, the motion was still made within the one-year period since default. The branch of the cross-motion to dismiss the complaint as abandoned is DENIED.

The court need not address the branch of defendant's motion to dismiss certain causes of action, because of defendant's default. However, the court will consider the branch of defendant's motion dismiss the second cause of action alleging abuse of process, third cause of action alleging voluntary waste to the premises, fourth case of action alleging involuntary waste and illegally subleasing the premises, fifth cause of action sounding in intentional tort and sixth cause of action regarding printing costs, only to the extent of whether such causes of action are viable. *Woodson v. Mendon Leasing Corp.,* 100 N.Y.3d 62, 71 (2003); *Alterbaum v. Shubert Org.., Inc.,* 80 A.D.3d 635, 636 (2d Dep't 2011); *Neuman v. Zurich M. Am.,* 36 A.D.3d 601, 602 (2d Dep't 2007). On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true. *Leon v. Martinez*, 84 N.Y.S.2d 83, 87 (1994). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275 (1977). The second cause of action alleges defendant commenced a guardianship proceeding for her mother to delay her mother's eviction from the premises. Additionally, defendant allegedly failed to inform plaintiff her mother had already moved out of the premises. "[T]he mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process." *Greco v. Christoffersen,* 70 A.D.3d 769, 770 (2d Dep't 2010). Since the only basis for abuse of discretion stated in the complaint is the unrelated guardianship action, the branch of the cross-motion to dismiss the second cause of action is GRANTED.

The third cause of action alleges waste to real property sustained when defendant was vacating the premises and left "junk and debris" there. Damage to real property must be of a permanent or lasting nature to be actionable as waste. *See Rumiche Corp. v. Eisenreich,* 40 N.Y.2d 174, 179-180 (1976), "[o]ther courts have also emphasized the definition of waste as permanent or lasting damage." As plaintiff does not allege that the junk and debris caused a long-standing condition, the branch of the cross-motion to dismiss the third cause of action is GRANTED as the complaint has not stated a viable cause of action.

The fourth case of action alleging involuntary waste and illegally subleasing the premises. Specifically, plaintiff alleges that defendant illegally subleased the premises to an individual named Clarkson and failed to cure certain New York violation to the premises. Defendant has not established that this cause of action is inviable. The branch of the cross-motion to dismiss the fourth cause of action is accordingly DENIED.

The fifth cause of action alleges defendant engaged in "*prima facie* and intentional tort" by failing and refusing to turnover certain financial records. The court cannot discern what exactly plaintiff is alleging in this cause of action. "The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal." *Diorio v. Ossining Union Free School Dist.,* 96 A.D.3d 710, 712 (2d Dep't 2012). A plaintiff does not make out a cause of action for prima facie tort "unless malevolence is the sole motive for defendant's otherwise lawful act." i.e., unless the defendant acts out of "disinterested malevolence." *Burns Jackson Miller Summit & Spitzer v. Lidner,* 59 N.Y.2d 314, 333 (1983). Plaintiff does not demonstrate how failing to produce evidence constitutes disinterested malevolence. Additionally, "New York does not recognize spoliation of evidence as an independent tort." *Lalima v. Consolidated Edison Co. of New York, Inc.,* 151 A.D.3d 832, 834 (2d Dep't 2017). Accordingly, the branch of the motion to dismiss the fifth cause of action is GRANTED as no viable cause of action has been stated.

Defendant further moves to dismiss the compliant for a prior action pending, specifically, a case with the same caption as this one, that bears Index No. 37327/2007. Pursuant to CPLR 3211(a)(4) "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that... there is another action pending between the same parties for the same cause of action." " 'Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same.' " *Brestin v. LaBianca,* 144 A.D.3d 722, 723 (2d Dep't 2016) quoting *Mazzei v. Kyriacou,* 139 A.D.3d 823, 824 (2d Dep't 2016). The twelve causes of action in the 2007 action are completely dissimilar from those in the case at bar and request different relief. The branch of the cross-motion to dismiss the complaint for a prior action pending is DENIED.

Finally, defendant moves to dismiss the sixth cause of action alleging it owes printing costs, as a result of an appeal, for lack of standing. Plaintiff alleges that because an earlier case was appealed, defendant filed a duplicative Notice of Appeal, when it was required to file a Joint Record on Appeal and share certain appellate printing costs equally, plaintiff has been damages $3,249. "The appealing parties shall file a joint record or joint appendix certified as provided in section 1250.7(g) of this Part and shall share equally the cost of that record or appendix." Appendix M-20. New York State Court Rules, Appellate Division, All Departments, Part 1250—Practice Rules of the Appellate Division, 8 N.Y.Prac., Civil Appellate Practice Appendix M-20 (3d ed.) Defendant has produced no evidence to rebut plaintiff's claim that plaintiff was caused to pay unnecessary printing costs. Accordingly, the branch of the motion to dismiss the sixth cause of action is DENIED.

Turning now to plaintiff's motion for a default judgment, plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the claim by an affidavit made by the party, and proof of the defendant's default. *See* CPLR 3215; *Mercury Cas. Co. v. Surgical Ctr. At Milburn, LLC,* 65 A.D.3d 1102 (2d Dep't 2009). To avoid the entry of a default judgment upon failure to answer or appear, the defendant must demonstrate a reasonable excuse for the default and a potential meritorious defense. *Pennymac Corp. v. Shelby,* 190 A.D.3d 759 (2d Dep't 2021). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court.

Bardales v. Blades, 191 A.D.2d 667, 668 (2d Dep't 1993). "[P]ublic policy favors the resolution of cases on the merits." *Westchester Medical Center v. Hartford Cas. Ins. Co.,* 58 A.D.3d 832, 833 (2d Dep't 2009). Additionally, under CPLR 317, "[a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action" within one year of learning of the judgment upon demonstrating a potentially meritorious defense.

It is undisputed that defendant failed to timely answer or appear. Defendant opposes the motion, contending she has a reasonable excuse for her default and a potential meritorious defense. As for a reasonable excuse, defendant claims she was not served properly. However, the court has already ruled that service upon defendant was proper. Furthermore, as for relief under CPLR 317, defendant submitted no evidence and made no arguments about when she learned about this action. As for a potential meritorious defense, defendant argues "[t]he focus on a motion under CPLR 5015(a) is on whether to vacate a default, and not to decide the merits of the action. A defendant is not required to demonstrate the validity of the defenses it had as a matter of law, but rather that the defenses are 'potentially meritorious defenses.' *Marinoff v. Natty Realty Corp.*, 17 A.D.3d 412 (2d Dept. 2005). As discussed in detail in supra, Defendant has asserted claims against Plaintiff to dismiss this Amended Complaint." NYSCEF # 17, p 17. Defendant offers no further details about a potential meritorious defense to plaintiff's claims. Moreover, the court has already considered the defendant's argument regarding the untimeliness of plaintiff's motion for default judgment and found it without merit. The court also considered whether the complaint stated causes of action and concluded that certain of the causes of action states are viable. Accordingly, defendant has demonstrated neither a reasonable nor a potentially meritorious defense.

However, plaintiff failed to submit an affidavit of defendant's non-military service. "While the absence of a valid nonmilitary affidavit may be a simple irregularity and not a jurisdictional defect. *See Gantt v North Shore-LIJ Health Sys.*, 140 A.D.3d 418, 418 (1st Dep't 2016), the nonmilitary affidavit is a requirement under federal law for any civil action in order to protect military personnel from default judgments. *See* 50 USC § 3931. Thus, plaintiff should have filed an affidavit stating whether [the defendant is] in military service." *Petre v. Lucia*, 205 A.D.3d 438, 438 (1st Dep't 2022); see also *Poyser v. JCF Trucking Corp.*, 184 A.D.3d 886 (2d Dep't 2020).

For the foregoing reasons, it is hereby

ORDERED that plaintiff Louis Burns' motion for default judgment against defendant Stephanie Burns is GRANTED on condition that plaintiff files an affidavit of non-military service as to defendant Stephanie Burns within at least 20 days before entry of judgment (MS #1); and it is further

ORDERED that defendant Stephanie Burns' cross-motion is granted to the extent that the second cause of action, third cause of action and fifth cause of action are DISMISSED as not viable and denied in all other respects; and it is further

ORDERED that a Note of Issue is to be filed on or before March 9, 2023. The failure to timely file a Note of Issue will result in the dismissal of this action; and it is further

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ORDERED that an inquest and assessment of damages is scheduled for March 29, 2023 at 2:30 PM in the DJMP Part – in accordance with DJMP Part Rules. The inquest will be in-person and all subpoenaed records are to be delivered to the subpoenaed records room.

All other requests for relief are DENIED.

This constitutes the decision and order of the court.

ENTER

Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK
FILED
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