

Montalvo v Douglas

2023 NY Slip Op 30762(U)

March 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 514387/2021

Judge: Francois A. Rivera

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.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of March 2023

HONORABLE FRANCOIS A. RIVERA

-----X
ROLANDO MONTALVO

DECISION & ORDER

Plaintiff,

Index No. 514387/2021

-against-

YANDRA DOUGLAS, HENRY DOUGLAS and
RAPHAEL MATFO

Defendants,

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Rolando Montalvo on October 16, 2022, under motion sequence two, for an order: (1) amending the complaint pursuant to CPLR 3025; (2) granting a default judgment against defendants Henry Douglas and Raphael Matfo pursuant to CPLR 3215 and issuing a warrant of eviction or writ of ejectment against them pursuant to RPAPL 601 and 621; (3) striking the defendants' affirmative defenses pursuant to CPLR 3211(b); (4) issuing an order pursuant to CPLR 3212 granting plaintiff summary judgment on his cause of action for legal possession of the subject premise and a writ of ejectment or warrant of eviction against defendants Henry Douglas and Raphael Matfo; and (5) issuing an order granting the plaintiff a money judgment in the amount of \$27,600.00 against all defendants for unpaid rent/use and occupancy through the later of October 31, 2022 or to date; and (6) pursuant to RPAPL 601 and issuing a warrant of eviction or writ of ejectment against all defendants and removing them from possession of 31 Park Street, 3rd Fl, Apartment 3, Brooklyn, New York (hereinafter the subject premises). This motion is unopposed.

- Notice of Motion
- Affirmation in Support
- Affidavit in Support
- Exhibits A to K
- Affidavit in Opposition by Yandra Douglas
- Affirmation in Reply

BACKGROUND

On June 5, 2021, plaintiff commenced the instant action by filing a summons and complaint (hereinafter the commencement papers) with the King County Clerk's office (KCCO). The complaint alleges twenty-three allegations of fact in support of three denominated causes of action. The first cause of action seeks a judgment of possession of certain real property pursuant to RPAPL 601. The second cause of action is for breach of contract. The third cause of action is for legal fees and costs.

On May 17, 2022, defendant Yandra Douglas filed an answer with the KCCO. By decision and order issued on July 14, 2022, plaintiff's prior motion for a default judgment against all the defendants including Yandra Douglas was denied. The denial with respect to Yandra Douglas was based on the plaintiff's failure to reject defendant Yandra Douglas's answer. The denial with respect to co-defendants Henry Douglas and Rafael Matfo was based on plaintiff's failure to annex nonmilitary affidavits as to those defendants.

Defendants Henry Douglas (hereinafter Henry D.) and Rafael Matfo (hereinafter Matfo) have not appeared or answered the complaint.

LAW AND APPLICATION

Motion To Amend the Pleading

The plaintiff seeks an order pursuant to CPLR 3025(b) granting leave to amend the complaint. CPLR 3025(b) provides in pertinent part as follows:

(b) “Amendments and supplemental pleadings by leave. A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

Leave to amend a pleading should be freely given absent prejudice to the opposing party (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403 [2014]) and where the proposed claims are not palpably insufficient or devoid of merit (*Lewis v Pierce Bainbridge Beck Price & Hecht LLP*, 205 AD3d 618, 619 [1st Dept 2022]).

The movant, however, must include a proposed answer clearly showing the changes or additions to be made to the pleading (*see Mendoza v Enchante Accessories, Inc.*, 185 AD3d 675, 679 [2d Dept 2020]). In the case at bar, the plaintiff failed to do that. Accordingly, this branch of the plaintiff’s motion seeking leave to amend the complaint is denied without prejudice because the plaintiff failed to include a proposed amended answer “clearly showing the changes or additions to be made to the pleading” (*Mendoza*, 185 AD3d at 679, citing CPLR 3025[b]; *see also G4 Noteholder, LLC v LDC Props., LLC*, 153 AD3d 1326, 1327 [2d Dept 2017]).

Motion For a Default Judgment

The plaintiff seeks a default judgment against defendants Henry D. and Matfo pursuant to CPLR 3215 based on their failure to appear or answer the complaint. In support of the motion plaintiff submitted, among other things, two affidavits of service by

Stephen Theus, the plaintiff's process server (hereinafter Theus), setting for the manner and method that the commencement papers were served on each of these non-answering defendants.

Theus' affidavit of service alleged the following facts regarding service of the commencement papers on Henry Douglas. Theus made four unsuccessful attempts at service at the defendant's home¹ on the following dates and times: June 21, 2021, at 9:13 am, June 28, 2021, at 1:16 p.m., June 30, at 9:55 p.m. and July 6, 2021, at 7:56 p.m. On the date and time of the final unsuccessful attempt, he then affixed a copy of the commencement papers to the door of Henry D.'s residence. He then mailed a copy of the papers to Henry Douglas on July 6, 2021, at the same address where the attempts were made. Thereafter, on July 16, 2021, Theus's affidavit of service upon Henry Douglas was filed with the KCCO.

Theus' affidavit of service alleged the following facts regarding service of the commencement papers on Matfo. Theus made four unsuccessful attempts at service at the defendant's home on the following dates and times: June 21, 2021, at 9:13 a.m., June 28, 2021, at 1:16 p.m., June 30, at 9:55 p.m. and July 6, 2021, at 7:56 p.m. After that final unsuccessful attempt, he then affixed a copy of the commencement papers to the door of Matfo's residence. He then mailed a copy of the papers to Matfo on July 6, 2021, at the same address where the attempts were made. Thereafter, on July 16, 2021, Theus' affidavit of service upon Matfo was filed with the KCCO.

¹ It is noted that the subject premise is also alleged to be the residence of all three defendants.

Here, three of the four process server's prior attempts at personal delivery upon each of the defendants' residence occurred on weekdays during hours when it reasonably could have been expected that the defendants were either working or in transit from work (*Coley v Gonzalez*, 170 AD3d 1107, 1108–09 [2d Dept 2019], citing, *Serraro v Staropoli*, 94 AD 3d 1083, 1084 [2d Dept 2012]). The first attempt was on a Monday morning, the second was on a Monday afternoon, and the third attempt was on a Wednesday morning. The first three attempts were in the middle of the work week and between 9:00 a.m. and 5:00 p.m. Here, there was no evidence that the process server made any genuine inquiries about each of the defendants' whereabouts and place of employment (*see Serraro*, 94 AD 3d at 1085). Under these circumstances, the plaintiff failed to establish due diligence in attempting to effectuate service pursuant to CPLR 308 (1) or (2) before resorting to the affix and mail method pursuant to CPLR 308 (4). Accordingly, this branch of the plaintiff's seeking leave to enter a default judgment against defendants Henry D. and Matfo is denied without prejudice.

Motion For a Writ of Ejectment or Warrant of Eviction

The plaintiff has moved pursuant to CPLR 3215 and RPAPL 601 and 621 for a writ of ejectment or a warrant of eviction against Henry Douglas and Rafael Matfo. Plaintiff has also moved pursuant to CPLR 3212 for a warrant of eviction against Henry Douglas and Rafael Matfo. The plaintiff utilizes the distinct procedural vehicle of CPLR 3215 and 3212 seeking the same relief based on the same substantive grounds of RPAPL 601 and 602.

CPLR 3215 is appropriate when the non-answering defendant are within the court's personal jurisdiction and have not appeared or answered the complaint. A motion pursuant to CPLR 3212 does not lie against a defendant whose has not been brought within the Court's jurisdiction by proper service of the commencement papers upon that defendant.

RPAPL 601 provides in pertinent part as follows:

"In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims. Where permanent improvements have been made in good faith by the defendant or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages."

RPAPL 621 pertains to separate action by joint tenant or tenant in common and provides as follows:

"Where two or more persons are entitled to the possession of real property as joint tenants or tenants in common, one or more of them may maintain the action to recover his or their undivided shares in the property in any case where such an action might be maintained by all."

The plaintiff's motion pursuant to CPLR 3215 and RPAPL 601 and 621 for a writ of ejectment or warrant of eviction against these non-answering defendants must be denied for lack of personal jurisdiction over them. The denial is without prejudice. The plaintiff's motion pursuant to CPLR 3212 and RPAPL 601 and 621 for a writ of

ejection or warrant of eviction against these non-answering defendants must also be denied for the same reason.

Motion To Strike Affirmative Defenses

The plaintiff has moved to strike the affirmative defenses of all defendants. Yandra Douglas, however, is the only defendant who has interposed an answer to the complaint. Yandra Douglas' answer was filed with the KCCO on May 17, 2022. The answer does not assert any affirmative defenses.

Motion for Summary Judgment for Possession & a Money Judgment

A plaintiff demonstrates its prima facie entitlement to judgment as a matter of law on a cause of action for ejection by establishing that (1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate (*Noamex, Inc. v Domsey Worldwide, Ltd.*, 192 AD3d 817 [2d Dept 2021]).

The plaintiff seeks an order pursuant to CPLR 3212 and RPAPL 601 granting him possession of the subject premises. It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

The Court inquired whether the plaintiff was seeking summary judgment on the original complaint or on the complaint as amended. The plaintiff stated that the motion for summary judgment was to be applied on the complaint as amended, assuming the amendment was granted, and not on the original complaint. Inasmuch as the original complaint has not been amended, albeit without prejudice, the motion for summary judgment is not applicable.

CONCLUSION

The branch of the motion by plaintiff Rolando Montalvo for an order amending the complaint pursuant to CPLR 3025 is denied without prejudice.

The branch of the motion by plaintiff Rolando Montalvo for an order granting a default judgment against defendants Henry Douglas and Raphael Matfo pursuant to CPLR 3215 and issuing a warrant of eviction or writ of ejectment against them pursuant to RPAPL 601 and 621 is denied.

The branch of the motion by plaintiff Rolando Montalvo for an order striking the defendants' affirmative defenses pursuant to CPLR 3211(b) is denied as there are no affirmative defenses asserted.

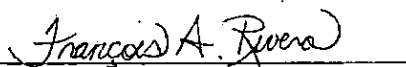
The branch of the motion by plaintiff Rolando Montalvo for an order pursuant to CPLR 3212 granting plaintiff summary judgment on his cause of action for legal possession of the subject premise and a writ of ejectment or warrant of eviction against defendants Henry Douglas and Raphael Matfo is denied.

The branch of the motion by plaintiff Rolando Montalvo for an order granting plaintiff a money judgment in the amount of \$27,600.00 against all defendants for unpaid rent/use and occupancy through the later of October 31, 2022, or to date is denied.

The branch of the motion by plaintiff Rolando Montalvo for an order pursuant to RPAPL 601 issuing a warrant of eviction or writ of ejectment against all defendants and removing them from possession of the subject premises is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.