

Tivoli BI LLC v Plantt
2023 NY Slip Op 31826(U)
May 22, 2023
Supreme Court, Kings County
Docket Number: Index No. 522218/2022
Judge: Francois A. Rivera
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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 22nd day
of May 2023

HONORABLE FRANCOIS A. RIVERA

-----X

TIVOLI BI LLC

Plaintiff,

-against-

GEBRA PLANTT,

Defendant.

-----X

DECISION & ORDER

Index No.: 522218/2022

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Tivoli BI LLC (hereinafter plaintiff) on February 9, 2023, under motion sequence number three, for an order pursuant to CPLR 3215 granting a default judgment against defendant Gebra Plantt (hereinafter defendant) due to the failure of the defendant to answer or appear in this action, including a judgment directing the defendant to immediately remove personal property from the common hallway of the building and a further Order severing the plaintiff's second, third, fourth, fifth and sixth causes of action and directing this matter be set down for an inquest and determination of any/all damages due and owing to the plaintiff. This motion is unopposed.

- Notice of Motion
- Affirmation in Support
- Affidavit in Support
- Exhibits A-I
- Affidavit of Service

BACKGROUND

On August 3, 2022, the plaintiff commenced the instant action by filing a summons, complaint, and an order to show cause with the Kings County Clerk's office.

On August 17, 2022, the Court signed the order to show cause, filed under motion

sequence one, and directed personal service of the summons, complaint, and the order to show cause on the defendant or before September 16, 2022.

On September 9, 2022, plaintiff filed an affidavit of service of the summons, complaint, and order to show cause filed under motion sequence number one. The affidavit demonstrated that the process server did not effectuate service on the defendant because the defendant refused to accept service and the process server did nothing more to effectuate service after the defendant refused same.

By decision and order dated November 1, 2022, the order to show cause was denied based on the plaintiff's failure to personal serve the summons, complaint, and order to show cause on the defendant as directed.

On December 15, 2022, plaintiff filed another order to show cause under motion sequence number two. The Court signed the order to show cause, filed under motion sequence two, and directed personal service of the summons, complaint, and the order to show cause on the defendant or before January 20, 2023.

On January 26, 2023, plaintiff filed an affidavit of service of the summons, complaint, and order to show cause filed under motion sequence number two. The affidavit demonstrated that the process server personally delivered the summons, complaint, and order to show cause, filed under motion sequence number two on the defendant on January 17, 2023.

By decision and order dated February 1, 2023, the order to show cause filed under motion sequence two was denied based on the plaintiff's failure to serve the summons and complaint on the defendant within one hundred and twenty days of its filing.

LAW AND APPLICATION

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the plaintiff must prove proper service of the summons and complaint on the defendant (*Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). Additionally, the plaintiff must submit proof of the defendant's default in answering or appearing and must submit proof of facts sufficient to establish a viable claim (*Id.*; *see also* CPLR 3215[f]). CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009]).

With exceptions not relevant here, under CPLR 306-b, service of the summons and complaint or summons with notice shall be made within 120 days after the commencement of the action (*Waggaman v Vernon*, 123 AD3d 1110, 1110-11 [2d Dept 2014], citing *PDK Labs, Inc. v G.M.G. Trans W. Corp.*, 101 AD3d 970, 974 [2d Dept 2012]). If service is not made upon a defendant within the time provided in the CPLR, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service (*Id.*; CPLR 306-b).

Contrary to the requirements of CPLR 306-b, the plaintiff did not serve the defendant with the summons and complaint within 120 days after the commencement of the action. Therefore, as the defendant has not been properly served, the defendant is not in default in answering the complaint. Accordingly, plaintiff's motion for a default

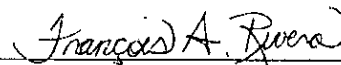
judgment is denied. As all other requested relief was based on the defendant's purported default, all other relief requested by the plaintiff is denied without prejudice.

CONCLUSION

The motion by the plaintiff Tivoli BI LLC for an order pursuant to CPLR 3215 granting a default judgment against the defendant Gebra Plantt due to her failure to answer the complaint or appear in this action is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

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