

**Lott Estates LLC. v Gindings**

2023 NY Slip Op 32894(U)

July 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 502795/2021

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS – PART 24

-----X

LOTT ESTATES LLC.,

Plaintiff,

Index # 502795/2021

-against-

Mot. Seq. #1

MARK GINDINGS a/k/a MARK GIDDINGS, MARK,  
GIDDINGS JR., and JOHN DOE,

**Decision and Order**

Defendants.

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**HON. LISA S. OTTLEY, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Default Judgment, submitted on January 25, 2023.

Papers	Numbered
Notice of Motions and Affirmation .....	1&2[Exh. A-F]; 3
Affirmation/Affidavit in Opposition.....	5[Exh. A]
Memoranda of Law.....	4

Plaintiff moves pursuant to CPLR 3215 for an order granting a default judgment against defendants on its first cause of action declaring, that defendants have no tenancy rights with respect to the premises known as 38 Lott Avenue, Brooklyn, New York, and that defendant Mark Giddings has breached the Surrender Agreement; on the second cause of action, ordering defendants to specifically perform their obligation to surrender possession of the premises; the third cause of action for return of the monies tendered pursuant to the surrender agreement, against defendant Mark Giddings in the amount of \$15,000.00, plus interest from January 1, 2020; and the fourth cause of action against defendants for use and occupancy in the amount of \$5,000.00 monthly from July 2019 to date, to be amended upward through the date of the judgment and statutory interest, fees and costs.

Defendant, Mark Giddings Jr., opposes the plaintiff’s motion on the following grounds: the instant proceeding must be stayed to January 15, 2022, by way of the decree of the New York State Legislature; pursuant to the doctrine of election of remedies, defendant, Mark Giddings, Jr., is not a signatory to the stipulation of settlement; the award of use and occupancy lacks documentation in support of its claim for \$,5000.00 per month and is not a sum certain; and defendant requests, if necessary, leave to file a late answer.

### Discussion

Plaintiff is the owner of the premises known as 38 Lott Avenue located in Brooklyn, New York. The defendants Mark Giddings, the father herein, and Mark Giddings, Jr., the son herein, are occupants of the subject premises. The subject premises is a two-family house that was owned by Jillian Telford, the plaintiff's predecessor-in-interest before there was a transfer of title of the property to the plaintiff on or about July 2, 2019. On October 30, 2019, Mark Giddings entered into an agreement with the plaintiff surrendering all rights and interests to the premises and agreed to vacate the home on or before December 31, 2019. The execution of the warrant was stayed through December 31, 2019, contingent upon the surrender and vacatur of the entire property and extinguishing all tenancy rights thereunder, with time being of the essence as to the date of surrender. In addition, the agreement was conditioned upon plaintiff waiving any money owed through December 31, 2019, and in consideration for the surrender and vacatur of the property, the plaintiff was to tender the sum of \$26,500 as follows: \$15,000.00 in cash on or before December 25, 2019; and \$11,500 in cash on or before the vacatur and surrender of the keys and premises. Upon default, the surrender payment is void.

As a result of defendants' failure to vacate the subject premises, as per the stipulation of settlement, plaintiff commenced this lawsuit. Plaintiff argues that the defendants are unlawful occupants of the subject premises and have no legal right to remain in the subject premises. Defendant, Mark Giddings, the father has failed to appear, nor has an answer been filed on his behalf. Co-defendant, Mark Giddings, Jr., the son, has appeared but has failed to file an answer and plaintiff argues that defendants' time to answer has expired.

### Law and Application

After having been served with process, to avoid a default, a defendant must respond in a proper and timely manner. See, *21<sup>st</sup> Mortgage Corporation v. Raghu*, 197 A.D.3d 1212, 154 N.Y.S.3d 84 [2<sup>nd</sup> Dept., 2021], citing, *Deutsche National Trust Co. v. Hall*, 185 A.D.3d 1006, 129 N.Y.S.3d 146 [2<sup>nd</sup> Dept., 2020]. A defendant must appear within twenty (20) days of service of a summons, or within thirty (30) days of service where service was made by delivering the summons "to an official of the state authorized to receive service in his or her behalf [CPLR 320(a)]; *21<sup>st</sup> Mortgage Corporation v. Raghu*, *supra*, citing, *Duncan v. Emerald Expositions, LLC.*, 186 A.D.3d 1321, 130 N.Y.S.3d 96 [2<sup>nd</sup> Dept., 2020]. In the case at bar, the defendant, Mark Giddings (father) has failed to establish an appearance as set forth in the CPLR in which a defendant may appear in an action (1) by serving an answer, (2) by serving a notice of appearance, or (3) by making a motion which has the effect of extending the time to answer. See, CPLR 320(a). The defendant's failure to respond to a summons and complaint as specified in CPLR 320(a) amounts to what CPLR 3215 deems a failure to appear. See, *Deutsche National Trust Co. v. Hall*, *supra*, quoting, *Siegel & Connors, N.Y. Practice §293* [6<sup>th</sup> Ed].

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant must show proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing. See, Atlantic Cas. Ins. Co. v RJNJ Servs., Inc., 89 A.D.3d 649, 932 N.Y.S.2d 109 [2<sup>nd</sup> Dept., 2011]. The plaintiff has established proof of service via its affidavits of service filed with the court. Furthermore, there is no denial of service in terms of both defendants being served with the summons and complaint on February 20, 2021. While a defaulting defendant admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination (McGee v. Dunn, 75 A.D.3d 624, 906 N.Y.S.2d 74 [2<sup>nd</sup> Dept., 2010]). "The court must determine whether the motion was supported with enough facts to enable the court to determine that a viable cause of action exists." (*id.* [internal quotations and citations omitted]). "Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (Green v. Dolphy Constr. Co., 187 A.D.2d 635, 590 N.Y.S.2d 238 [2<sup>nd</sup> Dept., 1992]). In the case at bar, the plaintiff has established that the defendant, Mark Gindings a/k/a Mark Giddings, via a surrender agreement, agreed to vacate the subject premises and was given \$15,000.00 pursuant to the terms of the agreement, as the initial payment to vacate the subject premises on or before December 31, 2019.

The plaintiff's application for a default judgment pursuant to CPLR 3215(a) is authorized when a defendant has failed to appear, plead, or proceed to trial of an action, or when the court orders a dismissal for any other neglect to proceed. See, 21<sup>st</sup> Mortgage Corporation v. Raghu, 197 A.D.3d 1212, 154 N.Y.S.3d 84 [2<sup>nd</sup> Dept., 2021]; Weinstein-Korn-Miller, N.Y. Civ. Practice: CPLR ¶3215.02. As such, plaintiff is entitled to a default judgment on its first cause of action and third cause of action against defendant, Mark Gindings a/k/a Mark Giddings.

Defendant, Mark Giddings, Jr., appeared in this case by Notice of Appearance filed by his attorney, on March 16, 2021. (See, *NYSCEF Doc. No. 5*). However, although a defendant appears within the meaning of CPLR 320(a) by serving a notice of appearance, service of a notice of appearance does not absolve a defendant from complying with the time restrictions imposed by CPLR 320(a), which governs the service of an answer or making a motion pursuant to CPLR 3211(a), which extends a defendant's time to answer, and must be made before service of the responsive pleading is required (CPLR 3211(e)) or, it is untimely. Here, defendant, Mark Giddings, Jr., fails to meet the time restrictions imposed by CPLR 320(a).

To oppose a default judgment based on a failure to appear or timely serve an answer, a defendant is required to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious defense to the action. See, L&Z Masonry Corp. v. Mose, 167 A.D.3d 728, 90 N.Y.S.3d 92 [2<sup>nd</sup> Dept., 2018]. In opposition, Mark Giddings, Jr., states that he was not a signatory to the agreement to vacate the subject premises and did not receive any money to

vacate the premises. Alternatively, he argues, that he was negotiating the terms under which he was to vacate the subject premises, which is why he did not file an answer.

The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court. See, *Grinage v. City of New York*, 45 A.D.3d 729, 846 N.Y.S.2d 300 [2<sup>nd</sup> Dept., 2007]. Defendant, Mark Giddings, Jr.'s conclusory, undetailed, and uncorroborated claim of settlement discussions are insufficient to excuse his default. See, *Kouzios v. Dery*, 57 A.D.3d 949, 871 N.Y.S.2d 303 [2<sup>nd</sup> Dept., 2008]. In addition, Mr. Giddings argues that he experienced significant loss of income during the COVID-19 pandemic and lacks the funds necessary to secure alternative housing to date, causing him to file a Declaration of Hardship due to COVID-19. The expired hardship declaration states in relevant part: "If you have lost income or had increased costs during the COVID-19 pandemic, or moving would pose a significant health risk for you or a member of your household due to an increased risk for severe illness or death from COVID-19 due to an underlying medical condition, and you sign and deliver this hardship declaration form to your landlord, you may be protected from eviction until at least January 15, 2022 for nonpayment of rent or for holding over after the expiration of your lease (emphasis added)."

It is now a year after the expiration of the hardship declaration and the mere filing of the hardship declaration does not establish a meritorious defense.

As to the arguments raised by the defendant's attorney regarding a pending Housing Court holdover summary proceeding that predates the commencement of this proceeding, the court notes, that the landlord/tenant proceeding under Index No. L&T 55369/20 was discontinued by the plaintiff, (*Notice of Discontinue*, NYSCEF Doc. No. 3 filed on January 13, 2021), and the court finds the argument as to the election of remedies to be unavailing.

To avoid entry of a default judgment, defendants are required to demonstrate a reasonable excuse for the default and a meritorious defense to the action. See, *Gershman v. Ahmad*, 131 A.D.3d 1104, 16 N.Y.S.3d 836 [2<sup>nd</sup> Dept., 2015]; *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202 [2<sup>nd</sup> Dept., 2008]. Defendants have failed to demonstrate either requirement, therefore Plaintiff is entitled to a default judgment.

Based on the foregoing, the Plaintiff's motion is granted to the extent that Plaintiff is entitled to a default judgment as follows:

- a) Plaintiff is entitled to possession of 38 Lott Avenue, Brooklyn, New York as against defendants, Mark Gindings, a/k/a Mark Giddings, Mark Giddings, Jr., and John Doe since the defendants have failed to appear, answer, and raise a meritorious defense to the relief sought herein.
- b) Plaintiff is entitled to a default judgment against defendant, Mark Gindings, a/k/a Mark Giddings, in the amount of \$15,000.00, plus interest from January 1, 2022. If

the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk of the court within one year after the default." See, *21<sup>st</sup> Mortgage Corporation v. Raghu*, 197 A.D.3d 1212, 154 N.Y.S.3d 84 [2<sup>nd</sup> Dept., 2021]. A "sum certain" contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due.

- c) Plaintiff is entitled to a **use** an **occupancy** hearing pursuant to Real Property Law § 220, to determine its entitlement to a default judgment against defendants, as to use and occupancy for the subject premises, from July 19, 2019, to be amended upward through the date of judgment and statutory interest.

Plaintiff's request for entry of a default judgment against the defendants on the second cause of action ordering defendants to specifically perform their obligation to surrender possession of the premises, as per the surrender agreement is denied, in that a default judgment does not lie on a purported breach of a stipulation of settlement agreement. See, *Yes Lender, LLC v. High Protection Intelligence, LLC.*, 78 Misc.3d 1240(A), 187 N.Y.S.3d 905 [Sup. Ct., Kings. Co., 2023].


It is hereby **ORDERED** that the hearing for use and occupancy is referred to the Central Compliance Part (CCP), to be **held on October 23, 2023**, and it is further

**ORDERED**, the Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of the same together with receipt of payment, upon the Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney Referee, as he or she deems appropriate.

Defendant, Mark Giddings, Jr.'s request to file a late answer is denied.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York  
July 24, 2023

  
HON. LISA S. OTTLEY, J.S.C.  
**HON. LISA S. OTTLEY**

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FILED  
KINGS COUNTY CLERK