

City of New York v Styles

2023 NY Slip Op 33545(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 450448/2022

Judge: Eric Schumacher

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIC SCHUMACHER PART 23M

Justice

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CITY OF NEW YORK,

Plaintiff,

- v -

JESSICA ANN STYLES,

Defendant.

-----X

INDEX NO. 450448/2022

MOTION DATE 09/06/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

NYSCEF doc nos. 17-22 and 26-28 were read on this motion for an order vacating a default judgment.

Motion by defendant pursuant to CPLR 5015 for an order vacating the prior motion court's August 12, 2022 order directing the entry of a default judgment in favor of plaintiff and against defendant denied.

BACKGROUND

Plaintiff commenced this action on January 28, 2022, by filing a summons and complaint. The complaint alleges that the New York City Department of Buildings (hereinafter DOB) issued three summonses, numbered 039024561J, 039024568M, and 039024563N, and dated June 25, 2020, to defendant (hereinafter summonses) (NYSCEF doc no. 1 ¶ 6). The complaint further alleges that the summonses directed defendant to appear before the New York City Office of Administrative Trials and Hearings (hereinafter OATH) for a hearing on October 28, 2020 (*id.*). The complaint further alleges that defendant failed to appear at the hearing (*id.* ¶ 12). The complaint further alleges that a failure to appear at an OATH hearing is grounds for rendering a decision and order on default and imposing a penalty in the maximum amount prescribed under law for the violation charged (*id.* ¶ 13). The complaint further alleges that, on November 4, 2020, the Environmental Control Board (hereinafter ECB) adopted a default decision and order by OATH as to defendant and imposed a penalty of \$70,000.00 per summons (*id.* ¶¶ 7, 9, 11).

Plaintiff alleges that defendant has failed to pay any part of these penalties (*id.* ¶ 15), and seeks a Supreme Court judgment in favor of plaintiff and against defendant in the amount of \$210,000.00, plus costs and disbursements (*id.* at 3).

On February 18, 2022, plaintiff filed an affidavit of service stating that, on February 11, 2022, the deponent served defendant by delivering a copy of the summons and complaint to a person of suitable age and discretion at 1134 Herkimer St., Brooklyn, NY 11233, defendant's alleged place of residence (hereinafter residence) (NYSCEF doc no. 3). The affidavit further states that process was delivered to an alleged cotenant described as a Black male with black hair, age 45-55, over 6ft tall (*id.*). The affidavit further states that the deponent was unable to obtain the recipient's full name and lists the recipient as "Carl Doe" (*id.*). The affidavit further

states that “[deponent] asked [Carl Doe] whether [defendant] was in active military service or financially dependent upon any one [sic] who is in the military service of the United States or of the State of New York in any capacity whatever and received a negative reply” (*id.*). The affidavit further states that, on February 14, 2022, a copy of the summons and complaint was mailed to the residence by first-class mail in an envelope marked personal and confidential (*id.*).

On May 26, 2022, plaintiff filed motion seq. no. 001 pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of plaintiff and against defendant for the sum certain of \$210,000.00, plus costs and disbursements (NYSCEF doc no. 4). In support of the motion, plaintiff filed: (1) an affidavit of service stating that an additional copy of the summons and complaint was mailed to the residence on May 6, 2022 (NYSCEF doc no. 7); (2) an affirmation of service stating that the notice of motion was mailed to the residence on May 24, 2022 (NYSCEF doc no. 11); and (3) an affidavit of facts by Cervera, an employee of plaintiff, alleging that defendant has not attempted to vacate the default judgment against her nor appeal any of the three final decisions of OATH nor commence an Article 78 proceeding (aff of Cervera ¶ 1, 6). Cervera annexes copies of the summonses (aff of Cervera, exhibit 1), which allege that defendant converted a two-family dwelling into seven-family apartments in violation of New York City Administrative Code §§ 28-210.1 and 28-202.1 (*id.*).

On June 21, 2022, defendant filed a notice of appearance (NYSCEF doc no. 13). Plaintiff then filed a stipulation adjourning the motion to July 21, 2022, for defendant to file opposition papers (NYSCEF doc no. 15). No opposition papers were filed, and, in an order dated August 12, 2022, the prior motion court granted the motion (NYSCEF doc no. 16).

On September 6, 2022, defendant filed motion seq. no. 002 pursuant to CPLR 5015 for an order vacating the order in motion seq. no. 001 and granting defendant leave to file a late answer (NYSCEF doc no. 17). Defendant submits an affirmation in support together with an affidavit by Styles alleging that Styles’ husband does not fit the description of the person described in the affidavit of service of process (aff of Styles ¶ 6). Styles alleges that she first learned of this proceeding when she received the default judgment motion papers in the mail and disputes service of process on the basis that the person allegedly served pursuant to CPLR 308(2), “Carl Doe”, has never lived or stayed with defendant (*id.*). Styles further alleges that her husband, although “African-American-looking”, does not exactly fit the description within the affidavit of service (*id.*). Defendant avers that her husband is 5’7”, not 6’, has gray hair, not black hair, is age 58, not age 45-55, and weighs 225 pounds, not 161-200 pounds (*id.*).

Defendant argues, in sum and substance, that the default judgment against defendant should be vacated because there is a reasonable excuse for defendant’s default in answering, appearing, or otherwise responding to the complaint, as defendant was not personally served with process, and defendant has a meritorious defense (affirmation of Hall ¶¶ 29-33).

On October 19, 2022, plaintiff filed an affirmation in opposition. Plaintiff argues, as is relevant here, that defendant has not proffered a reasonable excuse and the affidavit submitted fails to rebut the prima facie showing of service of process (*id.* ¶ 2). No reply papers were filed.

On November 3, 2022, the clerk entered judgment against defendant in the amount of \$210,000.00, plus \$215.00 in costs and disbursements (NYSCEF doc no. 30).

DISCUSSION

Pursuant to CPLR 5015(a)(1), a party seeking to vacate a default judgment must demonstrate: (1) a reasonable excuse for the default; and (2) the existence of a meritorious defense (see Johnson-Roberts v Ira Judelson Bail Bonds, 140 AD3d 509, 509 [1st Dept 2016]). “While this determination is a two-part inquiry, the court must first decide whether a reasonable excuse has been offered” (SOS Capital v Recycling Paper Partners of PA, LLC, —NYS3d—, 2023 NY Slip Op 04480 *8 [1st Dept, Aug. 31, 2023]).

Where discrepancies between the appearance of the alleged person served and the process server’s descriptions are minor, a traverse hearing is not warranted (see F.D.I.C. v Evangelista, 226 AD2d 208, 208 [1st Dept 1996]; Wells Fargo Bank, N.A. v McGloster, 48 AD3d 457, 458 [2d Dept 2008]). Moreover, where a recipient of substitute service indicates that they are staying at the residence in question, service is proper despite a recipient’s refusal to give their name (see Washington Mut. Bank v Murphy, 127 AD3d 1167, 1171 [2d Dept 2015]).

Here, the court finds that the discrepancies alleged are minor. Further, there is no specific allegation in the affidavit of service of process that the person of a suitable age and discretion was named “Carl Doe”. Rather, the affiant indicated that the recipient refused to provide a full name, and there is no indication as to whether the recipient gave any name, “Carl” or otherwise. Further, defendant’s husband’s name is conspicuous in its absence, and defendant does not explicitly deny that her husband did not receive the papers. Rather, defendant merely states that her husband’s name is not Carl. It would have been for defendant to submit an affidavit from the husband stating that he is the only male staying at the residence and that he never received the papers, but this has not been done.

The minor discrepancies and lack of testimony establishing that the husband never received service, taken together, do not yield a traversable dispute as to the service. Further, the indicated colloquy as to military service demonstrates the recipient’s knowledge of and familiarity with defendant. Further, the reference to the recipient as a cotenant establishes prima facie that the recipient was staying at the residence and, taken together with the other descriptors, was a person of suitable age and discretion.

Based on the foregoing, the court finds that defendant has failed to rebut the prima facie showing of service of process. As such, the court finds that defendant has not proffered a reasonable excuse for the default in answering, appearing, or otherwise responding to the complaint.

Defendant further asserts law office failure as a reasonable excuse for the default in opposing plaintiff’s motion in seq. no. 001. This argument is immaterial here. Specifically, defendant’s counsel affirms that he was in a car while discussing the briefing schedule with plaintiff’s counsel and forgot his intention to assign the motion to someone at his firm (id.). As

this argument relates merely to defendant's failure to submit opposition papers and not to defendant's failure to answer, appear, or otherwise respond to the complaint, it is of no moment.

Even if defendant had submitted a reasonable excuse for the default, defendant has failed to establish the existence of a meritorious defense. Where a movant fails to show that a claim is not time-barred or barred by collateral estoppel, the movant cannot establish a meritorious defense (see Karimian v Karlin, 173 AD3d 614, 615 [1st Dept 2019]; Leader v Parkside Group, 174 AD3d 420, 421 [1st Dept 2019]).

Pursuant to 48 RCNY § 6-21(c), as is pertinent here, a motion before OATH to vacate a decision issued on default and to request a new hearing must be filed within one year of the date of the default decision and be accompanied by a statement setting forth a reasonable excuse for the respondent's failure to appear and any documents to support the request.

Here, defendant has not moved before OATH to vacate the default against her nor filed any appeal nor commenced an Article 78 proceeding (aff of Cervera ¶ 6). The date of the OATH decision was November 4, 2020 (NYSCEF doc no. 1 ¶¶ 7, 9, 11), and defendant's time to move to vacate the OATH decision, appeal, or commence an Article 78 proceeding has long passed. Based on the foregoing, the court finds that the finality of the OATH decision renders any defense by defendant meritless as to the complaint in this action. As such, defendant is not entitled to vacatur of the default judgment.

The court has considered defendant's other arguments in support of vacatur and they are unavailing. In light of the determination, the court need not reach plaintiff's remaining contentions.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant pursuant to CPLR 5015 for an order vacating the prior motion court's August 12, 2022 order directing the entry of a default judgment in favor of plaintiff and against defendant is denied; and it is further

ORDERED that to the extent that the motion sought vacatur of the subsequent judgment, that aspect of the motion is also denied; and it is further

ORDERED that, within five days of entry, plaintiff shall serve a copy of this order with notice of entry on defendant.

The foregoing constitutes the decision and order of the court.

10/11/2023
DATE


ERIC SCHUMACHER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE