

Archives, L.L.C. v Schmitter

2023 NY Slip Op 34436(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 153352/2021

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

On May 14, 2021, additional service, pursuant to CPLR 3215(g)(3), was mailed to Tenants at the Apartment. NYSCEF Doc. No. 5. NYSCEF Doc. No. 5.

On June 4, 2021, Levstik filed a Covid-19 Hardship Declaration. NYSCEF Doc. No. 6.

On June 28, 2021, defendants surrendered the Apartment, with use and occupancy unpaid from March 2020. NYSCEF Doc. No. 42.

On July 12, 2021, Landlord filed a Notice of Discontinuance with Prejudice. NYSCEF Doc. No. 7.

On August 23, 2022, Landlord moved to restore the action and vacate the prior Notice of Discontinuance, which it alleged was a “mistake.” NYSCEF Doc. No. 8.

In a Decision and Order dated May 18, 2023, but e-filed May 22, 2023, this Court granted Landlord’s motion, finding that there was “no legal prejudice” and noting that, “as they say in basketball, ‘No harm, no foul.’” NYSCEF Doc. No. 36.

On June 21, 2023, defendants filed an Answer with general denials and seven affirmative defenses. NYSCEF Doc. No. 38.

On June 22, 2023, Landlord rejected Tenants’ Answer as untimely, and noted that counsel had offered a stipulation permitting a late answer so long as the fifth, sixth, and seventh affirmative defenses, asserting lack of personal jurisdiction, were waived. NYSCEF Doc. No. 40.

On June 29, 2023, Landlord moved, pursuant to CPLR 3025(c), to amend the complaint to include all amounts due through the filing of the motion, and, pursuant to CPLR 3215, for a default judgment against Schmitter in the amount of \$138,020 (use and occupancy from March 1, 2020, through June 30, 2021 at \$8,620 per month plus two months of late fees) and against Levstik in the amount of \$137,920 (use and occupancy from March 1, 2020, through June 30, 2021) plus reasonable attorneys’ fees against both defendants, to be determined at a hearing. NYSCEF Doc. No. 41.

On July 11, 2023, Tenants cross-moved, pursuant to CPLR 3012(d), to compel Landlord to accept service of their Answer, and, pursuant to CPLR 3211(a)(8), to dismiss the action for lack of personal jurisdiction due to improper service. NYSCEF Doc. No. 58.

Arguments

Landlord argues, inter alia, that Tenants had more than ample notice to answer before the “inadvertent” Notice of Discontinuance, which was filed when both Tenants were in default, and, further, emphasizes that Tenants rejected Landlord’s offer of a stipulation permitting a late answer. NYSCEF Doc. No. 42.

In opposition, Tenants argue that Levstik filed her Hardship Declaration “only two days after her time to answer the Complaint expired” and that the delay was “due to her need to investigate her

options with respect to the instant action and her life being extremely chaotic at that time on account of the COVID-19 pandemic, being in the process of moving to California, and going through a divorce.” NYSCEF Doc. No. 59. Further, Tenants note that they filed their Answer within thirty days of Landlord’s Notice of Discontinuance being vacated by this Court. Id.

Tenants argue that this Court lacks personal jurisdiction on Schmitter because, inter alia: Nassar served Schmitter at the Apartment when he “knew that [Schmitter] resided elsewhere” (at an address listed in the Complaint); Levstik was not a proper recipient for service because she and Schmitter were “legally separated and their relationship was highly acrimonious”; and, anyway, Levstik denies ever being personally served by Nassar. NYSCEF Doc. Nos. 59 and 60.

In opposition, Landlord argues, inter alia, that: the affidavit of Nassar is prima facie evidence of proper service; service upon a person of suitable age is permitted under CPLR 308(2); Levstik identified herself as Schmitter’s wife and said that he lived in the Apartment; and, the quality of Levstik’s relationship with Schmitter does not determine the adequacy of service, particularly when, as here, the legal interests of the spouses are not in conflict (indeed, they are essentially the same). NYSCEF Doc. No. 75. Landlord also provides an additional affidavit from Nassar in which he explains why he served Schmitter at the Apartment (the other address listed in the Complaint did not have a doorbell) and submits an auto-recorded and time-stamped photograph of a woman, whom he says identified herself as Levstik, accepting papers at the time and date listed in the original affidavit of service. NYSCEF Doc. Nos. 67 and 73.

Tenants also argue, inter alia, that this Court lacks personal jurisdiction against Levstik because the service was effectuated upon her doorman when Landlord, the party seeking to effectuate service, had the ability to direct the doorman to provide the process server with access. NYSCEF Doc. No. 59.

In opposition, Landlord argues that Nassar affirms he was turned away by the doorman on behalf of Levstik and, therefore, service upon the doorman was proper. NYSCEF Doc. No. 67. Landlord also files an affidavit from the doorman, Alci Estevez, who did not recollect the incident in question, but acknowledges that an automatic photograph taken by Nassar is of him, and explains that:

in the normal course of my duties, I permit a process server to go to the apartment without asking the resident for permission when I have notice from Plaintiff’s counsel that a process server will be coming to the Building. When I do not have notice, I telephone the resident for permission to let the process server proceed to the apartment. If the resident declines the request, I do not let the process server upstairs.

NYSCEF Doc. No. 66.

Discussion

As a threshold matter, this Court has personal jurisdiction over Schmitter and Levstik pursuant to the affidavits of Nassar, which are prima facie evidence of proper service that Tenants fail

adequately to refute. Grinshpun v Borokhovich, 100 AD3d 551, 552 (1st Dept 2012) (“The affidavit of the process server constitutes prima facie evidence of proper service and the mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper.”). Nassar served Schmitter through Levstik when she identified herself as Schmitter’s wife and said that Schmitter lived in the Apartment; Nassar served Levstik through the doorman who was told not to let Nassar upstairs by someone in the Apartment. Therefore, the Court must deny that part of defendants’ cross-motion seeking dismissal pursuant to CPLR 3211(8).

CPLR 3012(d) says that the Court, upon the application of a party, “may ... compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” Here, because Tenants filed their Answer soon after this Court granted Landlord’s motion to vacate a (more than year-old) Notice of Discontinuance, and as it sees no legal prejudice, this Court grants defendants’ motion to compel plaintiff to accept service of their Answer. A well-worn aphorism in this Part is, “Sauce for the goose is sauce for the gander.”

Therefore, plaintiff’s motion for a default judgment is denied, solely as moot.

The Court has considered the parties’ other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the motion of plaintiff, Archives, L.L.C., for a default judgment is hereby denied; that part of the cross-motion of defendants, Tom A. Schmitter and Karen L. Levstik, seeking to compel the acceptance of their answer filed at NYSCEF Doc. No. 38 is granted; that part of the cross-motion seeking dismissal of the complaint is denied.

DEC 18 2023

HON. ARTHUR F. ENGORON



12/18/2023
DATE

ARTHUR F. ENGORON, J.S.C.

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