

Fulton Hous. LLC v Walters

2024 NY Slip Op 30317(U)

January 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 506773/2021

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 24th day of January 2024

HONORABLE FRANCOIS A. RIVERA

DECISION & ORDER

Index No.: 506773/2021

FULTON HOUSING LLC,

Plaintiff,

-against-

LORRAINE WALTERS,

Defendant.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Fulton Housing LLC, on June 7, 2023, under motion sequence three, for an order: (1) pursuant to CPLR § 3404, restoring the instant action to the active calendar; and (2) pursuant to CPLR §§3215 and 3025(c), granting plaintiff a default judgment on the first cause of action against Lorraine Walters in the sum of \$361,535.58 as of June 1, 2023, plus interest; and (3) pursuant to CPLR §3215, granting plaintiff judgment against Lorraine Walters, for liability as to attorneys' fees costs, disbursements and expenses \$20,000.00, and directing the submission of an attorneys' fee affirmation to affix damages, or alternatively (4) setting the matter down for a hearing to affix damages thereon. The motion is unopposed.

- Notice of Motion
- Affidavit in Support
- Exhibit A-F
- Memorandum of law in support
- Affidavit of Merit¹

¹ On August 17, 2023, the Court issued an order granting the branch of the plaintiff's motion seeking restoration of the action to active status. The Court also adjourned the matter to November 2, 2023, and gave the plaintiff until October 20, 2023, to file an affidavit of merit.

BACKGROUND

On March 22, 2021, plaintiff commenced the instant action for breach of a guaranty agreement by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk's Office. The verified complaint alleges twenty-four allegations of facts in support of a single cause of action for breach of a guaranty agreement.

The verified complaint alleges the following salient facts. Plaintiff is the landlord of 1078 Fulton Street, Store 1 and basement space, in Brooklyn, New York 11238 ("hereinafter the subject premises"). Non-party Magic Moments Brooklyn LLC is a lessee of the subject premises. The term of the lease runs through September 30, 2024. The defendant executed a guaranty which guaranteed to the plaintiff full and faithful payment and performance and observance of all obligations to be performed and observed by the lessee. The lessee breached substantial obligations of the Lease by failing to pay the plaintiff the full base rent and additional rent for several months totaling \$292,827.84 through March 2021.

The defendant absolutely and unconditionally guaranteed the payment of rent and additional rent to the plaintiff and has not paid to plaintiff the rent and additional rent due and owing. Defendant is liable under the Guaranty for the rent and additional rent due and owing, plus attorneys' fees, court costs and other expenses incurred in enforcing the Guaranty, plus interest.

LAW AND APPLICATION

CPLR 3215(a) permits a plaintiff to seek default when the defendant has failed to appear. "On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting plaintiff's claim, and proof of the defaulting party's default in answering

and appearance” (*Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 AD3d 649 [2nd Dept 2011]). CPLR 3215(f) states that upon any application for judgment by default, proof of facts constituting claim, default, and amount due are to be set forth in affidavit made by the party (*HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735, 736 [2nd Dept 2009]).

CPLR 3215(f) states that upon any application for judgment by default, proof of facts constituting claim, default, and amount due are to be set forth in affidavit made by the party (*HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735, 736 [2nd Dept 2009]). The complaint in the instant action is not verified by the plaintiff and may not serve as an affidavit pursuant to CPLR 105(u). The plaintiff was given an opportunity to submit an affidavit of merit and filed it on September 12, 2023. The affidavit of merit was by submitted by Dave Denis who described himself as a property manager for No Tomorrow Management Corp., the managing agent of Fulton Housing LLC. The motion papers, however, did not contain any documents demonstrating that Dave Denis had authority to speak or act on behalf of the plaintiff. Under these circumstances, contrary to the requirements of CPLR 3215(f), there is no affidavit of the party providing proof of the facts constituting the claim.

Furthermore, a plaintiff seeking to assert jurisdiction over a defendant must bear the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process (*Gottesman v Friedman*, 90 AD3d 608, 609 [2nd Dept 2011], quoting *Santiago v Honcraft*, 79 AD3d 847, 848 [2nd Dept 2010]).

On March 22, 2021 the plaintiff commenced the instant action. On April 14, 2021, the plaintiff electronically filed an affidavit of the service of the commencement papers. Tyrone S. Hawker, plaintiff's licensed process server (hereinafter Hawker), averred service of the commencement papers on the defendant as follows. Hawker attempted to serve the

defendant at defendant's residence on Wednesday March 24, 2011, at 8:59 p.m. a.m. and again on Thursday March 25, 2021, at 10:10 am. That proving unsuccessful, on Friday March 26, 2021, at 3:58 PM, Hawker affixed the commencement papers to the entrance door. On March 30, 2021, Hawker mailed the commencement papers to the defendant at the same address through the United States Postal Service. On April 14, 2021, Hawker filed the affidavit of service of the commencement papers and other documents with the Kings County Clerk's office.

CPLR § 308(4) provides as follows:

“Where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing”

The affidavit of plaintiff's process server demonstrates that he attempted service of the summons and complaint on the defendant pursuant to CPLR § 308 (4). The affidavit of service of the plaintiff's process server indicates that he made two attempts to serve the commencement papers upon the defendant at the defendant 's residence but there was no one there each time.

A plaintiff may only resort to service pursuant to CPLR § 308(4) where service pursuant to CPLR § 308(1) and (2) cannot be made with due diligence (*County of Nassau v Lotosky*, 34 AD3d 414 [2d Dept 2006]). Both attempts at service on the defendant was made during the work week with one of the attempts being during normal business hours when it

could reasonably have been expected that the defendant would either be working or be in transit to or from work (*see Earle v Valente*, 302 AD2d 353 [2d Dept 2003]). Moreover, the affidavit of the plaintiff's process server, together with the papers submitted with the instant motion failed to demonstrate that the process server attempted to ascertain the defendant's business address and to effectuate personal service at that location, pursuant to the provisions of CPLR § 308(1) and (2) (*County of Nassau v. Long*, 34 AD3d 787 [2d Dept 2006]).

Having failed to demonstrate the exercise of due diligence before attempting service of the summons and complaint pursuant to CPLR 308(4), plaintiff's motion for a default judgment must be denied for this reason as well.

CONCLUSION

The motion by plaintiff Fulton Housing LLC for an order pursuant to CPLR 3215 and 3025(c), granting plaintiff a default judgment on the first cause of action against Lorraine Walters in the sum of \$361,535.58 as of June 1, 2023, plus interest is denied.

The motion by plaintiff Fulton Housing LLC for an order: (1) pursuant to CPLR 3215 pursuant to CPLR §3215, granting plaintiff judgment against Lorraine Walters, for liability as to attorneys' fees costs, disbursements, and expenses \$20,000.00, and directing the submission of an attorneys' fee affirmation to affix damages, or alternatively setting the matter down for a hearing to affix damages thereon is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:


