

Kahn v Fusaris

2025 NY Slip Op 34488(U)

November 25, 2025

Supreme Court, New York County

Docket Number: Index No. 650584/2025

Judge: Judy H. Kim

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDY H. KIM PART 04

Justice

-----X

BRENDA KAHN,

Plaintiff,

- v -

MARIENE FUSARIS,

Defendant.

-----X

INDEX NO. 650584/2025

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing papers, plaintiff’s motion for a default judgment is denied.

In her complaint, plaintiff alleges that she entered into an agreement to lease certain unspecified space—which the record reflects is 153 Spring Street, South Salem New York 10590) (the “Premises”)—from defendant for a term commencing on July 1, 2018 (NYSCEF Doc No. 1, complaint at ¶1). At that time, plaintiff paid defendant, as pertinent here, a security deposit of \$6,000.00 (*id.* at ¶3). Plaintiff alleges that she vacated the Premises on or about May 31, 2022, pursuant to a written agreement with defendant, but that defendant wrongfully withheld all but \$345.00 of the security deposit, based on false claims that plaintiff had damaged the Premise (*id.* at 8). Plaintiff seeks the return of her full security deposit of \$6,000.00 and punitive damages.

Plaintiff now moves for a default judgment on her complaint. Plaintiff has also filed a “cross-motion” to her own motion, seeking an order: extending her time for service pursuant to CPLR 306(b), allowing alternative service pursuant to CPLR 308(5), and granting leave to amend her complaint pursuant to CPLR 3025(b). Defendant opposes the default judgment motion, arguing

that service of the summons and complaint failed to satisfy CPLR 308(4) because the papers were only affixed to the “buzzer panel” near her building’s front door and that she was entitled to withhold the security deposit pursuant to General Obligations Law §7-108. However, defendant also concedes that she comingled the security deposit in violation of GOL §7-103 (NYSCEF Doc No. 20, Kahn aff in opp).

DISCUSSION

To establish her entitlement to a default judgment pursuant to CPLR 3215, plaintiff must submit proof of: (1) service of the summons and complaint; (2) the facts constituting the claim; and (3) defendant’s default in answering or appearing (*see Gordon Law Firm, P.C. v Premier DNA Corp.*, 205 AD3d 416, 417 [1st Dept 2022]). “CPLR 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994] [quotation marks and citations omitted]).

Plaintiff fails to establish proper service of the summons and complaint, as she fails to submit the requisite non-military affidavit. “While the absence of a valid nonmilitary affidavit may be a simple irregularity and not a jurisdictional defect (*see Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]), the nonmilitary affidavit is a requirement under federal law for any civil action in order to protect military personnel from default judgments (*see 50 USC § 3931*)” (*Matter of Petre v Lucia*, 205 AD3d 438, 438 [1st Dept 2022]). The process server’s representation that he asked “the subject’s neighbor whether the subject was in active military service or financially dependent,” on anyone in military service of the United States or the State of New York, and “the affiant received a negative reply” (NYSCEF Doc No. 2) does not satisfy

this requirement. Plaintiff also fails to submit proof of the facts constituting her claim; her complaint is verified only by counsel, and she fails to submit an affidavit of merit (*see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]). Plaintiff has also failed to submit a copy of the Lease, although defendant submits a copy of same in opposition (NYSCEF Doc No. 24).

Plaintiff's cross-motion¹ is denied as procedurally improper, as it was filed by plaintiff in connection with her own motion (*see Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013] ["a cross motion is an improper vehicle for seeking relief from a nonmoving party"]) and, in any event, for lack of proof it was served on defendant in the time and manner required by CPLR 2215.

Finally, while the Court cannot enter a default judgment at this juncture, it notes that "[i]mproper commingling under General Obligations Law §7-103(1) provides tenant with an immediate right to receive [the tenant's] deposit intact" and results in a landlord's forfeiture of "any right it had to avail itself of the security deposit for any purpose" (*Jimenez v Henderson*, 144 AD3d 469, 470 [1st Dept 2016] [internal citations and quotations omitted]).

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

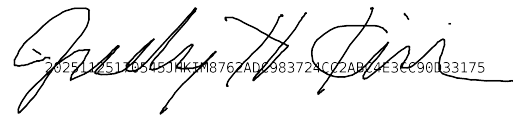
ORDERED that plaintiff shall serve a copy of this decision and order, with notice of entry of same, upon defendant by U.S. first class mail and the Clerk of the Court within ten days of the date of this decision and order; and it is further

¹ To the extent plaintiff's counsel has, after the fact, characterized this cross-motion as an informal "application" to amend plaintiff's damages (NYSCEF Doc No. 39), this characterization is belied by the substantive relief sought in that "application".

ORDERED that service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court's website); and it is further

ORDERED that the parties appear for a preliminary conference in Part 4 on February 19, 2026 at 9:30 a.m.

This constitutes the decision and order of this court.



30251122511054534438762AD298372NCZ2ARU4E3EC90033175

11/25/2025
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
--------------------------	--------------

<input type="checkbox"/>	SUBMIT ORDER
--------------------------	--------------

CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
--------------------------	----------------------------

<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
--------------------------	-----------------------	------------------------------------