

Smith v Stevenson
2025 NY Slip Op 35626(U)
January 2, 2025
Supreme Court, Rockland County
Docket Number: Index No. 031041/2024
Judge: Keith J. Cornell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND----- X
MYLA SMITH,

Plaintiff,

-against-

YOLANDA STEVENSON,

Defendant.
----- X**DECISION & ORDER**Index No.: 031041/2024
(Motions #3 & 4)**Hon. Keith J. Cornell, A.J.S.C.**

Before the Court is Plaintiff Myla Smith's motion for a default judgment on her complaint seeking payment of \$17,875 in damages. *Pro se* Defendant Yolanda Stevenson filed opposition to the default motion. The following documents electronically filed were read and considered: NYSCEF Docs. # 15-27.

Background

This matter involves a dispute over an apartment unit owned by Plaintiff and occupied by Defendant from 2015 until March 2, 2024. Defendant resided in the unit pursuant to a lease that was last renewed on March 1, 2022 for a one year term ending February 28, 2023. Plaintiff elected not to renew the lease and properly notified Defendant that she had to move out by March 31, 2023. Defendant did not vacate the unit, so Plaintiff commenced a summary proceeding of eviction based on holdover in the Town of Ramapo Justice Court. On November 3, 2023, Hon. Djinsad Desir issued an amended decision finding that Petitioner was entitled to a judgment of possession and warrant of eviction.

Defendant filed a notice of appeal of the judgment of possession with the Appellate Term. Defendant also filed an action in Supreme Court seeking a stay on the warrant of eviction. The

Court (Fried, J.) issued a temporary restraining order staying the eviction through February 2, 2024. On February 12, 2024, Defendant filed a petition by Order to Show Cause in the Town of Ramapo Justice Court seeking to further stay the eviction and set an undertaking. The outcome of that petition is not clear. On August 26, 2024, the Appellate Term granted a motion filed by Defendant for a further stay of eviction and directed that the appeal be perfected by November 25, 2024.

Plaintiff separately has attempted to recover money allegedly owed by Defendant for use and occupancy. First, in late 2023 or early 2024, Plaintiff filed a non-payment petition in the Town of Ramapo Justice Court. Plaintiff then withdrew that petition on or about January 18, 2024. On February 27, 2024, Plaintiff filed the instant complaint, seeking to collect a fee of \$1,625 for each month from April 2023 through February 2024 on an account stated cause of action. In the alternative, Plaintiff pleads breach of contract and unjust enrichment. Plaintiff also seeks legal fees in excess of \$10,000 and the ability to add additional amounts in damages for additional months. Defendant, who is *pro se*, filed a pre-answer motion to dismiss on March 26, 2024. Plaintiff, who is represented by counsel, filed a “cross-motion” with opposition to the motion to dismiss. On June 6, 2024, this Court denied Defendant’s motion and dismissed Plaintiff’s motion.

On August 14, 2024, Plaintiff filed the instant motion for a default judgment, arguing that Defendant’s time to serve an answer had expired. The parties appeared on August 22, 2024 and the Court set a briefing schedule. On September 13, 2024, Defendant filed, in essence, opposition to the motion for a default judgment and a cross-motion to reargue the denial of the dismissal of the complaint. On September 26, 2024, Plaintiff filed a letter brief in reply and opposition to the cross-motion. On October 11, 2024, Defendant filed a letter brief in reply.

Arguments

Plaintiff argues that Defendant failed to file an answer and is therefore in default. Plaintiff points out that the complaint was filed on February 27, 2024. Defendant filed a pre-answer motion to dismiss on March 26, 2024. The motion was denied and a hard copy of the decision was mailed to Defendant on June 9, 2026. Plaintiff argues that more than two months had elapsed since this Court's decision was mailed but Defendant had failed to file an answer. Therefore, Plaintiff argues that she is entitled to a default judgment on the complaint.

In opposition, Defendant argues that she was not properly served with the motion for a default judgment. Defendant argues that Plaintiff improperly attempted to serve the motion on Defendant at the property address, 40 S. Cole Avenue, Apt. 5B, Spring Valley, despite Plaintiff's knowledge that Defendant no longer resides in the unit because it was damaged in a fire and is allegedly uninhabitable. Defendant concedes that the motion was emailed to her on August 22, 2024.

In her cross-motion to reargue the denial of the motion to dismiss, Plaintiff primarily repeats the arguments raised in the prior motion to dismiss. She again argues that the complaint is barred by collateral estoppel and/or *res judicata*. She again claims that the complaint should be dismissed because it is repetitive and vexatious litigation. She again argues that a breach of contract claim cannot stand because there is no longer a contract between the parties. Finally, she raises a new affirmative defense of constructive eviction due to the fire.

In response, Plaintiff argues that the cross-motion to reargue should be denied because it simply repeats the arguments already considered and rejected by the court in the prior motion sequence. As to the issue of service, Plaintiff argues that Defendant does still reside at the property. Plaintiff argues that Defendant admitted on the record on August 22, 2024 that she has not fully

vacated the property or turned over the keys. Plaintiff argues that Defendant never notified Plaintiff that she is living somewhere else. Plaintiff argues that email of motion papers would not be proper service. Plaintiff points out that Defendant is filing papers by NYSCEF, so she should been able to access the motion. As to Defendant's request to be restored to the property, Plaintiff argues that Defendant continues to be in possession and she now owes 17 months' worth of use and occupancy. Plaintiff argues that the repetitious delays have caused her irreparable harm.

In reply, Defendant first asks this Court to forgive her procedural missteps and accept her formal answer and reply (no actual answer has been filed). Defendant argues that Plaintiff attempted to conceal from the Court that the issue of use and occupancy was already decided in the Town of Ramapo Justice Court in the decision of November 2, 2023, which included an award of \$0 for non-payment through October 2023. Defendant argues that she has not breached her rental agreement. She points out that there is a stay in effect pending the outcome of her appeal of the Judgment of Possession. Defendant argues that Plaintiff's request for use and occupancy and an undertaking were not granted. Defendant points out that her motion for a stay of the eviction was granted by the Appellate Term without any monetary condition.

Defendant argues that Plaintiff has known about the condition of the apartment since she personally inspected it on March 11, 2024 with an insurance adjustor. Defendant argues that she has been greatly inconvenienced by Plaintiff's failure to make repairs after the fire. She alleges that the gas to the kitchen was turned off and the fire department destroyed structures in the kitchen in the process of putting out the fire. Finally, Defendant argues that she has not made her filings directly through NYSCEF until September 30, 2024. Prior to that date, she delivered her filings to the Rockland County Clerk's window. Defendant argues that Plaintiff could have asked for permission to serve the motion papers by email.

DISCUSSION

Service of the Motion for a Default Judgment

Defendant argues that the motion for a default judgment was not properly served upon her. Motion papers must be served per CPLR § 2103. When a party is not represented by an attorney, CPLR § 2103(c) directs that service be made by personal delivery, mail to a designated address or the party's residence, or by fax. The failure to provide proper notice of a motion is a fundamental defect as it deprives the opposing party of a fair opportunity to oppose the motion. See Paulus v. Christopher Vacirca, Inc., 128 A.D.3d 116 (2d Dept. 2015). Therefore, improper service deprives the court of jurisdiction to entertain the motion. See Crown Waterproofing, Inc. v Tadco Constr. Corp., 99 A.D.3d 964, 965 (Dept. 2012).

Plaintiff argues that she properly served the motion by mail on the Defendant at the apartment that is the center of this dispute. Defendant argues that Plaintiff knew or should have known that service in that manner would not be effective, as Defendant does not actually reside in the unit due to the fire. Plaintiff points out that Defendant has not returned the keys and still has property in the unit. Plaintiff also argues that Defendant had the responsibility of checking NYSCEF.

Plaintiff's service of the motion by mail to the unit was proper. Per CPLR § 2103(c), papers may be served by mailing them to the address designated by the party for that purpose or, if none is designated, at the party's last known address. Defendant does not claim to have informed Plaintiff of an alternate address. Therefore, service by mail at the unit, Defendant's last known address, was proper.

Motion for a Default Judgment

A motion for a default judgment must be supported with proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default. See CPLR § 3215(f); see also Gordon Law Firm, P.C. v. Premier DNA Corp., 205 A.D.3d 416 (1st Dept. 2022). Here, Plaintiff failed to prove entitlement to a default judgment. First, Plaintiff has failed to provide any proof of the service of the summons and complaint. Second, Plaintiff submitted no proof of the facts constituting the claim.

CPLR § 308 prescribes the process for effective service. When a person is served by “nail and mail” at their home address per CPLR § 308(4), additional steps are required for service to be complete. First, the party must establish that personal service or service upon a person of suitable age and discretion could not be made after attempts made with due diligence. Next, the summons and complaint must be affixed to the address and mailed by first class mail within 20 days of the date of the affixing at the address. Proof of service must then be filed with the clerk of the court within 20 days of the mailing or affixing, whichever is later. Service is effective ten days after the filing of the proof of service with the clerk of the court.

The failure to timely file proof of service does not constitute a jurisdictional defect. See Chunyin Li v. Joffe, 210 A.D.3d 737, 739 (2d Dept. 2022); Weininger v. Sassower, 204 A.D.2d 715, 716 (2d Dept. 1994). Instead, the failure to file proof of service is considered a procedural irregularity. See Khan v. Hernandez, 122 A.D.3d 802, 803 (2d Dept. 2014). The delay in filing proof of service may be corrected by an order of the court permitting late filing of proof of service per CPLR § 2004. See Pipinias v J. Sackaris & Sons, Inc., 116 A.D.3d 749, 753 (2d Dept. 2014).

Here, no affidavit of service was filed with the clerk. Therefore, service never became effective and the requirement that Defendant answer was never actually triggered. Having not yet

missed the date to answer, Defendant is not in default. Therefore, Plaintiff is not entitled to a default judgment. The Court, *sua sponte*, grants Plaintiff an additional twenty (20) days to file the affidavit of service of the summons and complaint. Upon filing the affidavit of service, Defendant will have thirty (30) days to file her answer to the complaint.

Second, Plaintiff provided no proof of the underlying facts. See CPLR § 3215(f). Even if the Court found that Defendant was in default, Plaintiff must also offer “some proof of liability ... to satisfy the court as to the *prima facie* validity of the uncontested cause of action.” Feffer v. Malpeso, 210 A.D.2d 60, 61 (1st Dept. 1994). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.” Id.

Plaintiff failed to provide any proof. The motion lacks an affidavit from a person with direct knowledge of the underlying facts. Nor has Plaintiff submitted any documentary evidence to support her claim. Plaintiff submitted no evidence of monthly billing statements, which form the basis of a cause of action to recover on an account stated. Plaintiff failed to submit evidence of a lease agreement that was in effect during the relevant period or even address the unjust enrichment claim. Therefore, Plaintiff’s motion for a default judgment must be denied.

Motion to Reargue denial of Motion to Dismiss

Defendant, in essence, argues that she should be given leave to reargue per CPLR § 2221(d)(2) because the Court misapprehended the facts and law when her petition to dismiss the complaint was denied.

Defendant argues that Plaintiff cannot as a matter of law prevail on her cause of action to recover damages for breach of contract. To establish a breach of contract, a plaintiff must establish (i) the existence of a valid contract, (ii) plaintiff’s performance pursuant to the contract, (iii) material breach by the defendant and (iv) resulting damages. See JP Morgan Chase v. J.H. Electric

of New York, Inc., 69 A.D.3d 802, 803 (2d Dep't 2010); Furia v. Furia, 116 A.D.2d 694 (2d Dep't 1986). Defendant argues that Plaintiff has failed to establish the existence of a valid lease contract between the parties because the lease is expired.

In fact, Plaintiff's whole argument in the holdover preceding is that Defendant has retained possession of the apartment after the expiration of the lease. Plaintiff was granted a judgment in the Town of Ramapo Justice Court that confirmed that the lease expired on February 28, 2023. Plaintiff through her own arguments has established that a valid lease is no longer in effect. Therefore, as a matter of law, she cannot sue for breach of contract, and that claim must be dismissed.

Defendant also argues for reconsideration of the denial of her motion to dismiss under CPLR § 3211(a)(5) because the complaint is barred by *res judicata* and/or collateral estoppel. To prevail on a motion to dismiss under CPLR § 3211(a)(5), the movant must establish that the issues or claims in the complaint have been raised in a prior action or proceeding and decided against that party. See 7 New York Civil Practice, CPLR P 3211.25 (2020). As the Court of Appeals said in Ryan v. New York Telephone,

[I]t is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.

62 N.Y.2d 494, 500 (1984) (internal quotations omitted).

Defendant points out that an award of \$0 for use and occupancy was entered by the Town of Ramapo Justice Court on November 2, 2023. While Defendant seems to be correct that a non-payment judgment with a \$0 award "through October 2023 and beyond" was included with the November 2, 2023 decision, Defendant fails to give the appropriate weight to that decision, which

is none. The November 2, 2023 Decision and Order was replaced in its entirety by the Amended Decision & Order of November 3, 2023, which makes no reference to any monetary award. Therefore, Defendant cannot establish that the matter of use and occupancy was raised and decided in a prior action, and Defendant's motion to dismiss based on *res judicata* is denied.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's motion for a default judgment is DENIED in its entirety; and it is further,

ORDERED, that pursuant to CPLR § 2004, Plaintiff has twenty (20) days from the date of this order to file proof of service of the summons and complaint; and it is further

ORDERED that Defendant's time for service and filing of an answer is extended to thirty (30) days after the date of filing of the proof of service of the summons and complaint by Plaintiff; and it is further

ORDERED that the cross-motion by Defendant to reargue the motion to dismiss is GRANTED; and it is further

ORDERED that the motion to dismiss as to the claim for breach of contract is GRANTED; and it is further

ORDERED that the motion to dismiss based on *res judicata* and collateral estoppel is DENIED; and it is further

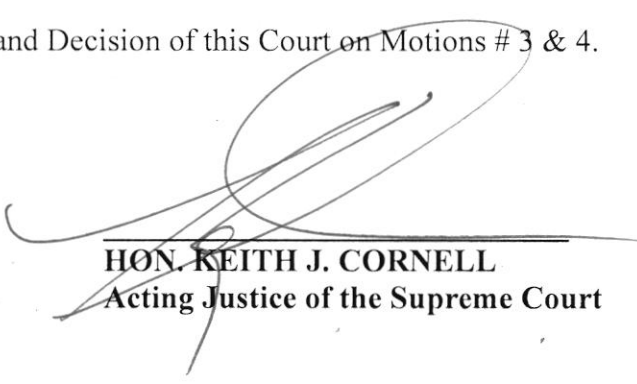
ORDERED that Plaintiff may serve a copy of this Decision and Order upon Defendant by email and by first class mail to the address on her motion of September 13, 2024; and it is further

ORDERED that Defendant shall inform Plaintiff within one day of the receipt of a copy of this decision of the best address to use for future service of papers; and it is further

ORDERED, that the parties shall appear before the Court for a conference at a date and time to be noticed by the Court Clerk.

The foregoing constitutes the Order and Decision of this Court on Motions # 3 & 4.

Dated: January 2, 2025
New City, New York



HON. KEITH J. CORNELL
Acting Justice of the Supreme Court

TO: All Counsel and Parties via NYSCEF