

City of New York v Peters

2023 NY Slip Op 34506(U)

December 21, 2023

Supreme Court, New York County

Docket Number: Index No. 452276/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

-----X

CITY OF NEW YORK

Plaintiff,

- v -

LENNOX PETERS,

Defendant.

-----X

INDEX NO. 452276/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

Plaintiff’s motion for a default judgment is granted and defendant’s cross-motion to dismiss is denied.

Background

Plaintiff brings this action to recover a fine imposed after a hearing before the New York City Office of Administrative Trial and Hearings (“OATH”) for \$140,000. It alleges that defendant failed to appear for any of the hearing dates. The nature of the alleged violations concerns a property owned by defendant that was purportedly converted to contain more dwelling units than legally authorized.

Plaintiff moves for a default judgment. Defendant cross-moves to dismiss on the ground that the decision by the OATH hearing officer should be set aside and that he was never properly served in this action.

Discussion

There is no dispute that defendant failed to timely appear and answer (although he has now uploaded an untimely answer yet he did not cross-move for an order compelling the acceptance of that answer). The central question as to the default is whether defendant raised a reasonable excuse for not timely answering the complaint. To the extent that plaintiff claims that defendant failed to cite a meritorious defense, that argument is without merit as he was “not required to set forth a meritorious defense because no default judgment had been entered” (*Hirsch v New York City Dept. of Educ.*, 105 AD3d 522 [1st Dept 2013]).

The Court begins with defendant’s affidavit (NYSCEF Doc. No. 17). In his affidavit, Mr. Peters details substantive issues with the underlying OATH hearing and why he did not appear for those hearing dates. Those issues are irrelevant to whether he was properly served in this action. With respect to this case, defendant offers a single paragraph in which he contends that “However, Plaintiff never obtained jurisdiction over me in any event. Plaintiff alleges services [sic] upon a person in my residence by the name of Ms. Peters as per copy of Affidavit of Service annexed as Exhibit "D." My wife, Vennis Peters is 71 years old with salt and pepper hair and weighs 240 Lbs” (NYSCEF Doc. No. 17, ¶ 11). The affidavit of service contends that defendant was served via a person of suitable age and discretion described as “Ms. Peters (Co-Tenant)” and she is listed as a black woman with black hair, aged 50 and weighing 131-160 pounds (NYSCEF Doc. No. 21).

The single paragraph in defendant’s affidavit is not sufficient to raise a reasonable excuse for not answering. As an initial observation, Mr. Peters does not directly deny that he was served. Instead, he appears to argue that the Ms. Peters identified in the affidavit of service does not match the description of his wife. But the affidavit of service only characterizes a Ms. Peters

as a co-tenant (NYSCEF Doc. No. 21) and Mr. Peters did not argue that no other person at the address fits the description in the affidavit of service (such as a daughter, cousin or other relative). And Mr. Peters made no mention about not receiving service via the follow up mailing described in the affidavit of service nor did he even argue that the location where service was effectuated was incorrect. And, most critically, defendant did not include an affidavit from Ms. Peters to deny that she received service or that she does not fit the description in the affidavit of service.

In other words, a vague assertion that the Court lacks jurisdiction because a Ms. Peters (identified as a co-tenant in the affidavit of service) does not match the description of his wife is not sufficient to rebut the affidavit of service especially where the defendant did not expressly deny receiving service. The fact is that service may have been effectuated on someone else at the residence other than defendant's wife. And defendant's affidavit did not deny service on everyone present that day.

Moreover, the Court denies the branch of defendant's cross-motion to dismiss pursuant to CPLR 3211(a)(7). Most of defendant's claims about the merits relate to the underlying OATH hearings where defendant apparently did not appear. But, as plaintiff points out, defendant did not commence an article 78 to challenge the OATH decision or make a proper application before OATH to reconsider. Therefore, the only issue before this Court concerns plaintiff's demand to recover the amount awarded by OATH. That means that defendant's possible defenses would include that he paid the amount already or, possibly, that he is not the person subject to the OATH determination. But he cannot challenge the OATH decision itself in this case.

Of course, a challenge to a governmental or administrative decision must be done via a special proceeding brought under CPLR Article 78 (*Sloninski v City of New York*, 173 AD3d

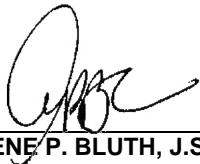
801, 802, 104 NYS3d 634 [2d Dept 2019]). The instant action is merely a plenary action where plaintiff has to show that there was a determination in its favor and that defendant has not yet paid that amount. Plaintiff met that burden.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment granted and defendant's cross-motion to dismiss is denied; and it is further

ORDERED the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$140,000 plus interest from August 5, 2022.

12/21/2023
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

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

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

OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT
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REFERENCE