229 West 113th St. v Lamb
2015 NY Slip Op 31488(U)
August 10, 2015
Civ Ct, New York County
Docket Number: 59150/2015
Judge: Michael Weisberg

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART

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229 WEST 113TH STREET, UHAB HDFC,

Petitioner,

-against-

MARK LAMB,

Respondent.

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Index No. 59150/2015

DECISION/ORDER

Present: Hon. Michael Weisberg
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1

Upon the foregoing cited papers, the decision and order on this motion are as follows:

In this summary nonpayment eviction proceeding where Respondent has failed to answer or appear, Petitioner moves for an order 1) relieving it of the obligation to file an affidavit stating that Respondent is not in military service (otherwise known as a "nonmilitary affidavit") before entry of a default judgment and 2) for entry of a default judgment against Respondent. In support of its motion Petitioner annexes an affidavit from its agent in which she alleges that she was unable to determine whether or not Respondent is engaged in military service. The affidavit also sets forth the steps she took in her attempts to ascertain Respondent's military status, specifically two unsuccessful attempts to speak with Respondent at his apartment. It also refers to unspecified conversations with other tenants in the building and the existence of unspecified "records" concerning Respondent. The question before the court is whether this investigation

was sufficiently thorough and the facts of the investigation were sufficiently detailed to entitle Petitioner to the relief sought.

Petitioner is required to address the military status of Respondent because of the Servicemembers Civil Relief Act (50 App. USCA § 501 *et seq.*), which was enacted with the express purposes of 1) strengthening the national defense by extending certain protections to military servicemembers with respect to judicial proceedings, thereby enabling such servicemembers to devote their entire energy to the defense needs of the country (*id.* § 502[1]) and 2) temporarily suspending judicial and administrative proceedings that may adversely affect the civil rights of servicemembers during their military service (*id.* § 502[2]).

To those ends, section 521 of the Act provides for the protection of military servicemembers against default judgments in any civil action or proceeding in which the servicemember does not make an appearance. Specifically, the Act requires that before a default judgment may be entered against a respondent, the petitioner must file with the court an affidavit "stating whether or not the [respondent] is in military service and showing necessary facts to support the affidavit" (*id.* § 521[b][1][A]). However, if the petitioner is unable to determine whether the respondent is in military service, the court may enter a default judgment against the respondent after the filing by the petitioner of an affidavit attesting thereto (*id.* § 521[b][1][B]). If the petitioner asserts that it is unable to ascertain whether the respondent is in military service, the court is empowered by the Act to require the petitioner to file a bond so as to indemnify the respondent in the event that the respondent is later found to be in military service (*id.* § 521[b][3]).

The statute does not detail how thorough an investigation, if any, a petitioner must undertake before informing the court that it is unable to determine a respondent's military status.

Nor does it specify what showing a petitioner must make to the court before the court may award a default judgment under such circumstances. In the absence of any appellate law, lower courts have interpreted the statute to require that the petitioner undertake some form of investigation and to provide the court with sufficient details of its investigation prior to entry of a default judgment (*L&F Realty Co v. Kazama*, NYLJ, Nov. 26, 1997 at 31, col 1 [Civ Ct, NY County 1997]; *Tivoli Assoc. v. Foskey*, 144 Misc 2d 723 [Civ Ct, Kings County 1989]). These interpretations are consistent with the express purposes of the Act: if a petitioner need not conduct any investigation, or if it need only conduct a *pro forma* or cursory investigation, before relying on the "unable to determine" provision of the Act to obtain a default judgment, then the protection of servicemembers for whom the Act exists could hardly be achieved.

Other courts have held that an investigation similar to the one conducted by the Petitioner is insufficient to entitle a landlord to a default judgment. In *L&F Realty Co.* (NYLJ, Nov. 26, 1997), the court denied the petitioner's motion for an order dispensing with the requirement to submit an affidavit setting forth the military status of the respondent where the petitioner submitted an affidavit from its managing agent in which the managing agent averred that it had visited the respondent's apartment on five separate occasions in its unsuccessful attempt to personally inquire as to his military status. The affidavit further stated that neither the managing agent nor the building superintendent had ever seen the respondent in a military uniform and that they "[had] no reason to believe" that respondent was in military service. In *Tivoli* (144 Misc 2d at 726), the court denied petitioner's motion where the only "investigation" undertaken was two unsuccessful attempts to visit the respondent at his home. In *Benabi Realty Mgt. Co. v. Van Doorne* (190 Misc 2d 37 [Civ Ct, NY County 2001]) the court held that an investigation

comprising "several" alleged unsuccessful attempts to interview the respondent at his apartment was insufficient to serve as basis on which to dispense with nonmilitary affidavit requirement.

In determining the extent to which a petitioner must investigate the military status of the respondent, the court must balance the purposes and requirements of the Act against the right of the petitioner to take advantage of the remedies afforded it under the law. On the one hand, the Act's allowance for entry of a default judgment upon an affidavit that the respondent's military status could not be ascertained requires that a court not refuse entry of an otherwise lawful default judgment indefinitely if certain conditions are met. On the other hand, the protections and procedures set forth in the Act must not be regarded as mere speed bumps requiring a petitioner to ease up on the accelerator as it races to its desired destination. As one court has noted, "To some litigants, and their attorneys and investigators, the requirements as to military status affidavits may seem to obstruct or slow down unduly their having a judgment entered. However, these are legal requirements with which petitioners and plaintiffs must comply, and those who are serving our country should receive the full protection of the law" (*One Sickles St. Co. LP v. Vasquez*, NYLJ, Mar. 19, 1997 at 26, col 3 [Civ Ct, NY County 1997]).

In this court's opinion, and in the absence of any guidance from the appellate courts on the matter, a petitioner has met the requirements of section 521(b)(1)(B) where it has demonstrated that it has undertaken a thorough, good faith investigation to ascertain the military status of the respondent and that the investigation is designed and implemented such that it will result in the petitioner having ascertained the respondent's military status with certainty whenever possible.

Petitioner's "investigation" into Respondent's military status hardly merits that designation and does not meet the standard set forth above. The sum total of its alleged inquiry

comprised only two attempts by its agent to contact Respondent by going to his apartment on two consecutive days in June, at 6:15 PM and 10:15 AM, respectively. Petitioner's agent attests that on both occasions no one answered the door. Petitioner's agent further attests that "based on the records contained in [her] office [she] does not believe that respondent is actively engaged in the military or dependent upon anyone in the military." Missing from the agent's affidavit is any indication of what records she reviewed prior to making her conclusion and what information those records contained.

The agent also states that "no one" she has spoken to, "including members of the Board of Directors who live in the subject building," believe that Respondent is a military servicemember. The affidavit doesn't provide any other information as to the identities of the individuals with whom she spoke, when these alleged conversations took place, the questions asked of the board members, or the basis for those individuals' beliefs. While hearsay allegations are not *per se* not probative in an affidavit regarding a respondent's military status (*Central Park Gardens, Inc. v. Ramos*, NYLJ, Apr. 9, 1984 at 12, col 6 [App. Term 1st Dept 1984]), the bald, conclusory, and detail-less allegations in the affidavit have no probative value. Finally, the agent alleges that she visits the building regularly and has never seen anyone enter or leave Respondent's apartment "dressed in military fashion." Missing from the affidavit is how many times the agent has ever seen someone enter or leave the apartment at all, whether it's one time or one thousand times. Not only is the agent's allegation meaningless without context, courts have declined to assign significance to a respondent's dress since as far back as 1942 (*see Nat'l Bank of Far Rockaway v. Van Tassell*, 178 Misc 776, 778 [Sup Ct, Qns County 1942] ["[T]he reference to 'civilian clothes' is of no import, for it is now common practice for selectees and other to be sworn in to the military service and then given short furloughs during which they are

permitted to wear civilian clothes"]; *New York City Hous. Auth. v. Smithson*, 119 Misc 2d 721, 723 [Civ Ct, NY County 1983] [rejecting as basis for nonmilitary affidavit the claim that respondent was not wearing military uniform]).

The investigation undertaken by Petitioner was not thorough and does not seem to have been designed or implemented such that Petitioner could actually ascertain the military status of Respondent. Accordingly, Petitioner's motion to dispense with the filing of a nonmilitary affidavit and for a default judgment is denied in its entirety, without prejudice to renew with proof of a sufficient investigation.[1]

This constitutes the decision and order of this court.

Dated: August 10, 2015

Hon. Michael Weisberg
J.H.C.

HON. MICHAEL L. WEISBERG

[1] The court notes that useful information for litigants and practitioners regarding the requirements of nonmilitary investigations, including the use of the Department of Defense Manpower Data Center military verification service, can be found in Legal/Statutory Memorandum 152B (LSM 152B) promulgated by the Deputy Chief Administrative Judge and in Chief Clerk's Memorandum 158A (CCM 158A) (http://www.courts.state.ny.us/courts/nyc/civil/directives.shtml). *See also Tracey Towers Assoc. v. Cobblah*, 26 Misc 3d 132(A), 2010 NY Slip Op 50061(U) (Civ Ct, NY County 2010).