

Pratt v 32 W. 22nd St., LLC

2017 NY Slip Op 31866(U)

August 23, 2017

Supreme Court, New York County

Docket Number: 159105/2016

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED
Justice

PART 2

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MARIE-LOUISE PRATT,
Plaintiff,

INDEX NO. 159105/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

32 WEST 22ND STREET, LLC, SECOND JAM DEVELOPMENT,
LLC, MOSAIC HOUSE, LLC, MOHAMED BENSLIMANE
Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 7, 8
were read on this application to/for Default Judgment

Upon the foregoing documents, it is
Ordered that the motion is **denied with leave to renew upon proper papers.**

In this personal injury action, plaintiff Marie-Louise Pratt moves, pursuant to CPLR 3215, for a default judgment against defendant 32 West 22nd Street, LLC. After a review of plaintiff's motion papers, as well as consideration of the relevant statutes and case law, the motion, which is unopposed, is **denied with leave to renew upon proper papers.**

This action arises from an incident on January 9, 2015 in which plaintiff was allegedly injured when she tripped and fell on a grate abutting the premises at 32 West 22nd Street, New York, New York. She commenced the captioned action by filing a summons and complaint verified by counsel as against defendants 32 West 22nd Street, LLC (“32 West 22”) and Second Jam Development, LLC (“Second Jam”) on October 28, 2016. Doc. 1.¹ In her complaint, plaintiff alleged that 32 West 22 and Second Jam owned, operated, and/or managed the premises where she fell. Id.

On December 1, 2016, plaintiff’s process server purportedly served 32 West 22 with the summons and complaint. Doc. 5. The amended affidavit of service reflects that 32 West 22, a “corporation”, was served when the summons and complaint was given to Trecia Ramsarup as Reception for 32 West 22nd Street LLC [sic] at the address of: 235 Park Avenue South, 8th Floor, Palin Enterprise, New York, NY 10003.” Id.

By stipulation dated April 27, 2017, plaintiff amended the caption to add as defendants Mosaic House, LLC and Mohammad Benslimane. Doc. 9. Plaintiff

¹ All references are to the documents filed with NYSCEF in this matter.

discontinued her claims as against Second Jam by stipulation filed June 30, 2017.

Doc. 12.

Plaintiff now moves, in effect, pursuant to CPLR 3215, for a default judgment against 32 West 22. In support of the motion, plaintiff submits an attorney affirmation attesting to the fact 32 West 22 has not answered, the summons and complaint, the amended affidavit of service of the summons and complaint, and an affidavit by plaintiff regarding how the incident occurred.

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n 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 the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, issues exist regarding service of the summons and complaint which preclude the issuance of a default judgment. In the amended affidavit of service purporting to establish proper service of process on 32 West 22, the process server,

Orelbi Rodriguez, states that he or she served 32 West 22, a “corporation”, when the summons and complaint was given to “Trecia Ramsarup as Reception for 32 West 22nd Street, Llc [sic].” Doc. 5.

However, the amended affidavit of service is deficient in several respects. First, it reflects that 32 West 22 is a “corporation” whereas it is a limited liability corporation (“LLC”). Thus, it had to be served pursuant to Limited Liability Company Law section 303 or CPLR 311-a. It clearly was not served pursuant to Limited Liability Law section 303, since that section addresses service of an LLC via the Secretary of State.

CPLR 311-a requires that service on an LLC be made upon specific principals of an LLC, none of which apply here, or upon an agent designated by, or upon another person designated to, receive process for, the LLC. Here, the amended affidavit of service is silent regarding whether the receptionist had authority to accept service on behalf of 32 West 22. Doc. 5. Indeed, the motion papers contain “no evidence that [the receptionist] was an agent authorized by appointment or law to accept service on its behalf (citations omitted).” *Gleizer v American Airlines, Inc.*, 30 Ad3d 376, 376 (2d Dept 2006).

Further, although the amended affidavit of service reflects that service was effectuated at the address of “Palin Enterprise”, the process server provides no explanation regarding if or how that entity is related to 32 West 22.

Finally, the affidavit of plaintiff setting forth the facts constituting the claim (Doc. 7) was executed in Colorado and has been submitted without a certificate of conformity, as required by CPLR 2109 (c).

Since proper service on 32 West 22 has not been established (see CPLR 311 [a][1]), the motion is thus denied with leave to renew upon proper papers.²

Therefore, in accordance with the foregoing, it is hereby:


ORDERED that the motion by plaintiff is denied with leave to renew upon the submission of proper papers; and it is further,

² Given the expiration of the 120-day period in which to serve 32 West 22, which began to run on the date of the commencement of this action (see CPLR 306-b), plaintiff would, at this point, be required to move to extend the time to re-serve these entities, if it be so advised.

ORDERED that this constitutes the decision and order of this Court.

8/23/2017

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE