Board of Mgrs. of the Heritage at Trump Place Condominium v Moran
2018 NY Slip Op 30065(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 153987/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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BOARD OF MANAGERS OF THE HERITAGE AT TRUMP PLACE CONDOMINIUM,

Plaintiff,

- v -

TREVOR MORAN, JOSEPH TANSEY, SUE TANSEY, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 15

Defendant.

INDEX NO. 153987/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 6, 7, 8, 9, 10 were read on this motion to/for JUDGMENT - DEFAULT.

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

Plaintiff, Board of Managers of the Heritage at Trump Place Condominium, moves against defendant Trevor C. Moran seeking: (1) entry of a default judgment, pursuant to CPLR 3215; (2) dismissal of the action as against Joseph Tansey, Sue Lin Tansey, and "John Doe" No. 1 through "John Doe" No. 15 and removal of the related omnibus clause in the case caption, without prejudice; and (3) referral of the matter to a referee, pursuant to RPAPL 1321, for computation of the amount owed to plaintiff on a lien. After a review of the motion, 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.**

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Board of Managers of the Heritage at Trump Place Condominium is a condominium board of managers acting on behalf of all unit owners residing at 240 Riverside Boulevard, New York, New York. Defendant Trevor C. Moran is the owner in fee of units 10A and 12D at the condominium. Ex. A to Doc. 8, at pars. 1-3.[1] Defendants Joseph Tansey and Sue Lin Tansey ("the Tanseys"), residents of New York State, were (at some unspecified time) occupants of unit 10A. Id., at pars. 4, 17. In or about September of 2015, defendant defaulted on his obligation to pay common charges relating to unit 10A in accordance with Article 6 of the condominium's By-Laws. Id., at par. 10. Plaintiff further alleged that, in or about April 2016, defendant defaulted on his obligation to pay common charges on unit 12D pursuant to Article 6 of the condominium's By-Laws. Id., at par. 26-27.

On March 24, 2017, plaintiff filed a lien against units 10A and 12D for unpaid common charges in the amount of $21,921.95 with respect to unit 10A, and $6,246.62 with respect to unit 12D. Id., at pars. 11, 27. Plaintiff claims that it has not been paid all the monthly common charges, assessments, late fees, and legal fees owed by defendant since the defaults and that the grace period for paying the same has expired. Id., at pars. 12-13.

On May 1, 2017, plaintiff commenced the captioned action against defendant, the Tanseys, and "John Doe" No. 1 through "John Doe" No. 15, *et al.* , the latter of whom were named as unknown occupants or individuals with possible interests in the unit, by filing a summons and verified complaint and a notice of pendency. Docs. 1 and 2. Plaintiff alleged in the complaint,

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

which was verified by Sonja Talesnik, its Assistant Secretary, that, since the grace period for paying the common charges, assessments, late charges and interest had expired, it was entitled to foreclose on the lien filed, as well as to collect attorneys' fees pursuant to Article 6 of the condominium's By-Laws. Doc. 1.

On May 15, 2017, plaintiff filed an affidavit of service reflecting that, on May 9, 2017, defendant was served by affix and mail pursuant to CPLR 308(4) after attempts to serve him on May 3, 2017 at 8:12 p.m., May 4, 2017 at 11:22 p.m., and May 9, 2017 at 12:32 p.m. Doc. 3. An additional copy of the summons and verified complaint was purportedly sent to defendant pursuant to CPLR 3215(g)(3)(i) on September 5, 2017. Doc. 4. Plaintiff claims that, to date, defendant has failed to answer or otherwise appear in this action. Shoor Aff. In Supp., at pars. 9-10.

Plaintiff now moves for: (1) entry of a default judgment against defendant pursuant to CPLR 3215; (2) dismissal of the action as against the Tanseys and "John Doe" No. 1 through "John Doe" No. 15, without prejudice, and removal of the related omnibus clause in the case caption; and (3) referral of the matter to a referee, pursuant to RPAPL 1321, for computation of the amount owed to plaintiff.

LEGAL CONCLUSIONS

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." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of

service of the summons and complaint, (2) proof of the facts constituting its claim, and (3) proof of the defendant's default in answering or appearing. *See* CPLR 3215 (f); *Matone v Sycamore Realty Corp.*, 50 A.D.3d 978 (2d Dept 2008); *Allstate Ins. Co. v Austin*, 48 A.D.3d 720 (2d Dept 2008); *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 A.D.3d 783 (2d Dept 2015).

The motion must be denied since plaintiff failed to establish all of the foregoing criteria. Initially, plaintiff did not establish proper service of the summons and complaint. Pursuant to CPLR 308 (4), if service of process cannot be made with due diligence by personal delivery pursuant to CPLR 308(1) or by substituted service pursuant to CPLR 308(2), service can be effected, inter alia, "by affixing the summons to the door of ... the actual ... dwelling place or usual place of abode within the state of the person to be served and by ... mailing the summons to such person at his or her last known residence."

Here, plaintiff has failed to demonstrate that reasonable diligence was exercised in serving defendant pursuant to CPLR 308(4). *Spath v Zack*, 36 AD3d 410, 412-413 (1st Dept 2007). None of the three attempts to serve defendant was made on a weekend and there is no indication that the process server attempted to locate defendant's place of business. Id. Nor did the process server check with the Department of Motor Vehicles to determine whether defendant still lived at the premises. Id. This Court is also puzzled by the fact that, although defendant allegedly owned units 10A and 12D in the condominium, attempts to serve him were made only at unit 12D.

Additionally, although plaintiff purported to serve defendant with an additional copy of the summons and verified complaint pursuant to CPLR 3215(g)(3)(i) (Doc. 4), such service was meaningless given that defendant was not served properly in the first instance. Additionally, there is no affidavit of service reflecting that the additional copy of the summons and complaint were actually mailed to defendant.

Given that there has not been proper service of process on defendant, plaintiff cannot establish that defendant has failed to answer or otherwise appear in this matter.

Additionally, plaintiff has failed to establish the facts constituting the claim. Although plaintiff may use a verified complaint to establish the facts constituting a claim (*see Stevens v Law Off. of Blank & Star, PLLC*, ___ AD3d ___ , 63 NYS3d 733 [2d Dept 2017]), the contradictory allegations of the complaint fail to adequately apprise this Court of such facts. Specifically, although plaintiff alleges that defendant defaulted on his obligations relating to unit 10A in September 2015 and his obligations relating to unit 12D in April 2016 (Doc. 1 at pars. 10, 26), it simultaneously alleges that the common charges and other fees owed by defendant "became due and payable since on or about March 1, 2012 for the [u]nits. . ." (Doc. 1, at par. 37).

In light of the foregoing, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers; and it is further

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

1/11/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED	[X]	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE