

900 Eighth Ave. Condominium LLC v Malfi
2019 NY Slip Op 31904(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 156744/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE

PART 15

HON. MELISSA A. CRANE

Justice
J.S.C.

900 EIGHTH AVENUE CONDOMINIUM LLC

INDEX NO. 156744/2018
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- v -

ROBERT MALFI and DAFNI DIMITRIADOU

The following papers, numbered _ to _ were read on this motion to/for _____.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is

Plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants, Robert Malfi (Malfi) and Dafni Dimitriadou (Dimitriadou). Plaintiff owner prima facie demonstrates that it leased apartment 19B at 260 West 54th Street, New York, New York to Malfi, that he agreed to pay \$4,375 in monthly rent, that Malfi failed to pay the rent due between November 2015 and June 2016 and from October 2016 through July 31, 2018, that the lease allowed plaintiff to assess a \$150 late fee for rent that was more than five days overdue, and that Malfi stipulated to a judgment of possession in plaintiff's favor in a Housing Court proceeding plaintiff had commenced against him. Additionally, plaintiff demonstrates prima facie that Dimitriadou initialed the lease as the "occupant" of the subject premises and that she remained in possession of the apartment until August 7, 2018.

A party seeking a default judgment must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of a defendant's failure to

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

answer or appear in the action (*see* CPLR 3215; *see also Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]).

Plaintiff has tendered proof of service of process upon Malfi under CPLR 308 (1), effectuated July 23, 2018 at 2056 East 14th Street, 1st Floor, Brooklyn, New York (NY St Cts Elec Filing [NSYCEF] Doc No. 9, affirmation of plaintiff's counsel, exhibit B at 1), proof of additional service as required under CPLR 3215 (g) (3), and an affidavit stating that a search of the Defense Manpower Data Center for Malfi's name revealed that he was not an active member in the military. As for Dimitriadou, an affidavit of service reveals that she was served pursuant to CPLR 308 (4) by affixing the summons and complaint to the door of 260 West 54th Street, Apt. 19B, New York, New York on July 26, 2018 and mailing same to that address after previous attempts at personal service had failed (NYSCEF Doc No. 11, affirmation of plaintiff's counsel, exhibit D at 1). Plaintiff also attempted to personally serve Dimitriadou with process at Malfi's address in Brooklyn, although counsel affirms that "[p]laintiff's records do not indicate that Dimitriadou resided" there (NYSCEF Doc No. 5, affirmation of plaintiff's counsel, ¶ 6). None of the attempts at service upon Dimitriadou occurred on a weekend (*see Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007] [concluding that the plaintiff's three attempts at service, none of which occurred on a weekend, did not constitute due diligence]). Additionally, the two other attempts at service occurred when Dimitriadou could have been at work or traveling to work (*see O'Connell v Post*, 27 AD3d 630, 631 [2d Dept 2006] [finding that the plaintiff could not resort to nail-and-mail service when "two of the attempts at service occurred on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit to and from work"]). Nevertheless, plaintiff's counsel affirms that he received a voicemail message from Dimitriadou confirming her receipt of the summons and complaint (NYSCEF Doc

No. 5, ¶ 24). Plaintiff has also furnished proof of additional service of the summons and complaint upon Dimitriadou at her last known residence (*see* CPLR 3215 [g] [3]) and an affidavit attesting that a search of the Defense Manpower Data Center for Dimitriadou's name yielded a negative result.

Plaintiff has established that it suffered damages of \$136,337.50 in unpaid rent, use and occupancy and late fees, excluding its reasonable attorneys' fees to which it is entitled to recover from Malfi under the lease (*see Omansky v 160 Chambers St. Owners, Inc.*, 158 AD3d 566, 566 [1st Dept 2018]). Plaintiff had requested \$16,989.51 in attorneys' fees in the complaint, and asks the court to amend the complaint to conform to the evidence showing that it has been billed \$22,230.59 in legal fees. Submitted on the application are detailed invoices, the biographies of two of the attorneys, Martin Meltzer (MM) and Julian M. Rodriguez (JMR), who worked on the matter, and an affidavit from one of plaintiff's officers attesting to the reasonableness of those fees. However, plaintiff has not tendered sufficient proof to substantiate the full amount sought. In addition to MM and JMR, the invoices list the initials for four others who worked on the matter – NG, RLS, RI, and MJ (NYSCEF Doc No. 20, affirmation of plaintiff's counsel, exhibit M at 1-2 and 4). The application fails to list the full names for these individuals, their positions, their experience, their hourly rates and whether those rates are comparable to those charged within the legal community (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]). As noted on the invoices, it cannot be said that the work these individuals performed was insignificant. Nevertheless, plaintiff's request for fees shall be reduced by \$2,941.95, which represents the amounts charged by these unknown individuals.

Additionally, CPLR 3025 (c) provides that the court may conform the pleadings to the evidence presented during or after trial where there is no prejudice shown (*see Dinizio & Cook*,

Inc. v Duck Cr. Mar. at Three Mile Harbor, Ltd., 32 AD3d 989, 990 [2d Dept 2006]). Here, there is no prejudice to defendants, who were alerted to plaintiff's claim for attorneys' fees. Thus, plaintiff is entitled to \$19,288.64 in legal fees.

Lastly, the court selects October 1, 2016 as a single reasonable intermediate date from which pre-judgment interest shall be calculated (*see* CPLR 5001 [b]; *see Hanover Data Servs. v Arcata Natl. Corp.*, 115 AD2d 403, 404 [1st Dept 1985], *lv denied* 68 NY2d 602 [1986]).

Defendants have not answered, or appeared in this action, and did not oppose plaintiff's default motion.

Accordingly, it is

ORDERED that plaintiff's motion for default judgment against defendants, Robert Malfi and Dafni Dimitriadou, is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff in the sum of one hundred thirty-six thousand three hundred thirty-seven dollars and fifty cents (\$136,337.50) with interest at the rate of 9% per annum from October 1, 2016, until the entry of judgment, and thereafter at the statutory rate, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that the court awards plaintiff attorneys' fees in the amount of nineteen thousand two hundred eighty-eight dollars and sixty-four cents (\$19,288.64) from defendant Robert Malfi.

DATED: 6-27, 2019


MELISSA A. CRANE, J.S.C

HON. MELISSA CRANE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER

Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER SUBMIT ORDER
 FIDUCIARY APPOINTMENT