

West 174 St. Realty LLC v 555 Hous. Group LLC

2020 NY Slip Op 30269(U)

January 9, 2020

Supreme Court, New York County

Docket Number: 653590/2019

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

WEST 174 ST REALTY LLC,
Plaintiff,

INDEX NO. 653590/2019
MOTION DATE 01/09/2020
MOTION SEQ. NO. 001 002

- v -

555 HOUSING GROUP LLC, BUSHWICK ECONOMIC
DEVELOPMENT CORP., JOHN DOE, and JANE DOE, XYZ
CORP.,

ORDER - INTERIM

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 19

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 20

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

WHEREAS, this matter having come on before this court on January 09, 2020, on motion of the plaintiff for a default judgment against defendants (motion sequence number 001) and on motion of defendant 555 Housing Group LLC for summary judgment dismissing the complaint for lack of personal jurisdiction (motion sequence number 002), and plaintiff having appeared by Pamela Smith, Esq., and the defendant 55 Housing Group LLC having appeared by Steven Kirkpatrick, Esq., and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of

a referee to hear and report, and it appearing to the court that an appointment is appropriate, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of whether the summons and complaint were properly served upon defendant 555 Housing Group LLC, and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated:

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from

the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's

website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in both motions identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that counsel are directed to appear in IAS Part 59, Room 331, 60 Centre Street, on April 21, 2020, 9:30 PM for a preliminary conference.

DECISION

As plaintiff served and filed its motion for a default judgment eight days before defendant 555 Housing Development Group LLC served and filed its motion for summary judgment, and five days before defendant served its answer, and never submitted facts and arguments clearly indicating that plaintiff was deliberately charting a summary judgment course, this court cannot properly treat defendant's motion as one for summary

judgment and must consider it only as a motion on the pleadings. Compare Okeke v Momah, 132 AD3d 648, 648-649 (2d Dept. 2016).

In addition, and in any event, the court may not consider the affidavit of defendant or the facts contained therein submitted for the first time in reply. JPMorgan Chase Bank, N.A. v Luxor Capital, LLC, 101 AD3d 575, 576 (1st Dept. 2012).

Finally, unlike in Foster v Cranin, 180 AD2d 712 (1992), where on a motion for summary judgment, the court examined the evidence before it and found that the process was served upon an incorrect and incomplete address, before the court at bar is solely defense counsel's contention that the address, 555 174th Street, New York, New York 10033, is incomplete, as it does not qualify 174th Street, as East or West. Whether there is West 174th Street as opposed to East 174th Street in the Borough of Manhattan is not an appropriate subject for judicial notice. See Walker ex rel. Velilla v City of New York, 46 AD3d 278, 282 (1st Dept. 2007). Nor may this court determine as a matter of law whether the inclusion of the zip code ameliorated the absence of West or East from the address. See Karlsson & Ng v Cirincione, 156 Misc2d 359, 362 (New York City Civil Ct, NY Co 2000).

However, the Complaint, which is verified by a member of plaintiff, alleges that "Plaintiff is the owner in fee of the premises 555 West 174th Street, New York, New York", which claim

raises an issue of fact as to whether process was properly served at the correct address, and as such issue implicates credibility, it must be determined at a traverse hearing.

1/9/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input checked="" type="checkbox"/> |
| | | | | | <input type="checkbox"/> |
| | | | | | OTHER |
| | | | | | REFERENCE |