

<b>Rollins 113 LLC v Ellison</b>
2021 NY Slip Op 30036(U)
January 7, 2021
Supreme Court, New York County
Docket Number: 151767/2020
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

*Justice*

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INDEX NO. 151767/2020

ROLLINS 113 LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

HERBERT ELLISON,

**DECISION, ORDER AND  
JUDGMENT ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15 were read on this motion to/for JUDGMENT - DEFAULT.

In this action seeking, inter alia, to quiet title, plaintiff Rollins 113 LLC moves, pursuant to CPLR 3215, for a default judgment against defendant Herbert Ellison due to his failure to answer the summons and complaint. Plaintiff further seeks a declaration, pursuant to Real Property and Proceedings Law Article 15, barring defendant from all claims to an estate, interest, lien or encumbrance of any sort in 318 West 113<sup>th</sup> St., New York, New York (“the premises”); declaring that the judgment obtained by defendant against Helen Woodford, Maurice Gapson and Wayne Hill, jointly and severally, filed with the New York County Clerk’s Office on February 18, 2016, does not constitute an estate, interest, lien or encumbrance of any sort in the property described herein; that said judgment is not enforceable against plaintiff; declaring that this Court’s order deciding the instant application be recorded in the public records of the New York County Clerk’s Office to preclude such judgment from constituting an estate, interest, lien or encumbrance of any sort in the premises; awarding plaintiff its reasonable attorneys’ fees,

costs and disbursements of bringing this action; and for such other and further relief as this Court deems just and proper.

This case arises from an incident in 2005 in which defendant was allegedly injured when attacked by a dog or dogs at the premises. In 2008, defendant commenced a personal injury action against Helen Woodford, Maurice Garson, and Wayne Hill (collectively “the judgment debtors”) in this Court under Index Number 103814/08 (“the 2008 action”). Defendant alleged that his injuries were caused by the negligence of the judgment debtors, who owned and/or controlled the premises. When the judgment debtors failed to appear in the 2008 action, defendant successfully moved against them for a default judgment, which was granted by order entered December 15, 2009. The said order also directed that a Special Referee calculate the amount of damages awardable to defendant. After defendant’s damages were determined, this Court entered a judgment in his favor against the judgment debtors, entered February 18, 2016, in the total amount of \$337,291.30 (Doc. 4). The judgment was not recorded in New York City real property records relating to the premises (Doc. 5).

In 2020, plaintiff commenced the captioned action pursuant to Real Property Actions and Proceedings Law Article 15 to quiet title and for a declaration regarding the parties’ claims to the premises. The judgment debtors were thereafter served with process (Doc. 14). To date, defendant has failed to answer or otherwise appear in this action (Doc. 12 at par. 15). Plaintiff now moves for the relief set forth above.

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 a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the

default in answering or appearing (*see Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 [1<sup>st</sup> Dept 2016]). Here, plaintiff has submitted proof that defendant was served with process but has failed to answer or otherwise appear. Thus, it remains for plaintiff to establish the facts constituting the claim. In doing so, plaintiff “need only allege enough facts to enable a court to determine that a viable cause of action exists (*see* 7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3215.24, at 32-326; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Plaintiff has done so here by submitting a complaint verified by its managing member (Doc. 1) attesting to the fact that it took title in 2017, after the 2016 entry of the judgment against the judgment debtors. Since plaintiff “cannot be held liable for torts that occurred prior to [its] ownership of the building” (*Manette v 5337-225 West 23<sup>rd</sup> & 220 West 24<sup>th</sup> St. Manhattan LLC*, 2020 NY Misc LEXIS 2378; 2020 NY Slip Op 31900[U] [Sup Ct New York County 2020]), plaintiff is entitled to the relief demanded in its motion.

The branch of plaintiff’s motion seeking attorneys’ fees is denied. Such fees were not requested in the complaint and plaintiff’s motion papers set forth no basis upon which to award them.

Therefore, it is hereby ordered that the motion is granted to the extent that it is:

ORDERED, DECLARED and ADJUDGED that defendant Herbert Ellison has no claim to an estate, interest, lien or encumbrance of any sort in the real property 318 West 113<sup>th</sup> Street, New York, New York, Block 1847, Lot 34, arising from a judgment entered in his favor and against Helen Woodford, Maurice Gapson and Wayne Hill, jointly and severally, which was entered in the New York County Clerk's Office on February 18, 2016 under Index Number 103814/08; and it is further

ORDERED, DECLARED and ADJUDGED that the judgment entered February 18, 2016 is not enforceable against plaintiff Rollins 113 LLC; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that the County Clerk is to record this decision, order and judgment so as to ensure that the February 18, 2016 judgment will not constitute an estate, interest, lien or encumbrance of any sort in the property described above; and it is further

ORDERED that the branch of the motion seeking attorneys' fees is denied.

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1/7/2021  
**DATE**

**DAVID BENJAMIN COHEN, J.S.C.**

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