

Taveras v City of New York

2022 NY Slip Op 32801(U)

August 19, 2022

Supreme Court, New York County

Docket Number: Index No. 153810/2021

Judge: Judy H. Kim

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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**

<p>PRESENT: <u>HON. JUDY H. KIM</u></p> <p align="right"><i>Justice</i></p> <p>-----X</p> <p>UZIEL TAVERAS,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTION, CAPTAIN BERNARD MATHIS, CORRECTION OFFICER AHMED BUTLER, CORRECTION OFFICER HASHIM HAYNES, CORRECTION OFFICER ALEKSANDR GALUIZEVSKIY, CAPTAIN NIGEL GRAHAM, CORRECTION OFFICER SHAUN HANSEN, CORRECTION STEVEN MAIORINO</p> <p align="center">Defendants.</p> <p>-----X</p>	<p>PART 05RCP</p> <p>INDEX NO. <u>153810/2021</u></p> <p>MOTION DATE <u>03/22/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42
were read on this motion for JUDGMENT - DEFAULT.

On April 20, 2021, plaintiff commenced this action by filing a summons and complaint asserting claims for, inter alia, negligence and excessive force, against the City of New York (the “City”), the New York City Department of Correction (“DOC” and, with the City, the “Municipal Defendants”), and—as particularly pertinent here—certain “DOC” employees Captain Bernard Mathis, Ahmed Butler, Hashim Haynes, Captain Nigel Graham, and Steven Maiorino (collectively, the “Correction Officer Defendants”). On May 12, 2021, plaintiff effected service of the summons and complaint on the Municipal Defendants and on August 20, 2021, the Municipal Defendants interposed an answer. (NYSCEF Doc. No. 15).

On June 17, 2021, plaintiff served the Correction Officer Defendants but, due to a clerical error, failed to file the affidavits of service documenting such service with the Court by July 7,

2021, as required by CPLR §308(2). Plaintiff eventually filed the affidavits of service as to the Correction Officer Defendants on February 8, 2022. Notably, an Amended Answer was filed on behalf of both the Municipal Defendants and the Correction Officer Defendants on April 27, 2022, after the submission of the instant motion.

Plaintiff now moves for an order: (1) deeming these untimely affidavits of service timely filed *nunc pro tunc*; and (2) granting plaintiff a default judgment as against the Correction Officer Defendants. None of the defendants oppose the motion.

For the reasons set forth below, plaintiff's motion is granted to the extent that his affidavits of service are deemed timely filed *nunc pro tunc* and is otherwise denied.

DISCUSSION

Failure to timely file proof of service is “a procedural irregularity, not a jurisdictional defect” and may be cured by deeming such proof filed *nunc pro tunc* (First Fed. Sav. & Loan Assn. of Charleston v Tezzi, 164 AD3d 758, 760 [2nd Dept 2018]). CPLR §2001 “allows a court to permit a mistake, omission, defect, or irregularity in the filing [of] process to be corrected at any stage of the action, provided it does not prejudice a substantial right of a party” (Furuya v Parry, 2019 NY Slip Op 31354 [U], *6 [Sup Ct, NY County 2019]). Here, no such prejudice is alleged. Accordingly, that branch of plaintiff's motion for an order deeming the affidavits of service timely filed *nunc pro tunc* is granted without opposition.

That branch of plaintiff's motion for a default judgment as against the Correction Officer Defendants is denied, however. To establish his entitlement to a default judgment, plaintiff must submit proof of: “valid service of process, the facts constituting the causes of action, and the [defendants'] default” (First Fed. Sav. & Loan Assn. of Charleston v Tezzi, 164 AD3d 758, 759-

60 [2nd Dept 2018] [internal citations omitted]). Plaintiff has failed to meet his burden of proving valid service of process upon the Correction Officers and failed to prove that they defaulted.

Where, as here, service was made pursuant to CPLR §308(2), “proof of such service shall be filed with the clerk of the court ... within twenty days of ... delivery or mailing, whichever is effected later,” and “service shall be complete ten days after such filing” (CPLR §308[2]). In this case, it is undisputed that the relevant affidavits of service were not filed within the requisite twenty days. Therefore, at the time the instant motion was made, “service was never completed” (First Fed. Sav. & Loan Assn. of Charleston v Tezzi, 164 AD3d 758, 759-60 [2d Dept 2018] [internal citations omitted]). As a result, defendants’ “time to answer the complaint had not yet started to run and, therefore, [they] could not be in default” (Id.).

While the subject affidavits of service have now been deemed timely filed *nunc pro tunc*, this ruling does not permit plaintiff to retroactively satisfy the requirements of CPLR §3215. When granting this *nunc pro tunc* relief, “[t]he court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order” (Id. at 760 [internal citations omitted]). Rather, under the circumstances presented here, the proper course would have been for the Court to extend the time for the Correction Officer Defendants to answer (Id. at 760), which has already been done as of the April 27, 2022 when the answers were filed. Accordingly, no such extension is necessary.

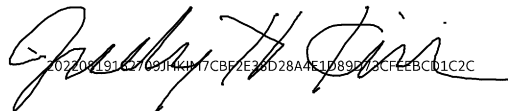
Accordingly, it is hereby

ORDERED that the branch of plaintiff’s motion for an order deeming plaintiff’s affidavits of service timely filed *nunc pro tunc* is granted; and it is further

ORDERED that the branch of plaintiff’s motion for an order entering a default judgment against the Correction Officer Defendants is denied; and it is further

ORDERED that the answer of the Correction Officer Defendants served on April 27, 2022 is deemed timely served and filed, *nunc pro tunc*.

This constitutes the decision and order of the Court.



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8/19/2022

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE