SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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CITY OF NEW YORK

Plaintiff,

- v -

JOSELYN L. MARTINEZ,

Defendant.

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INDEX NO. 452410/2022

MOTION DATE 02/16/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to enforce five administrative penalties imposed upon the defendant by the New York City Office of Administrative Trials and Hearings (OATH), the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment in the principal sum of $350,000.00 against the defendant. The defendant does not oppose the motion. The motion is granted.

The defendant, Joselyn L. Martinez, owns residential real property located at 1316 Clay Avenue, Bronx, New York 10456. Upon inspection of the property, an inspector employed by the New York City Department of Buildings (DOB) concluded that the property had been issued a certificate of occupancy permitting the defendant to maintain a two-family dwelling, but that she had illegally converted it to an eight-unit, single-room occupancy dwelling, and maintained that illegal use over a period of time. On June 30, 2021, the DOB issued five separate notices of violation (NOVs) to the defendant, numbered 035577441J, 035577440H, 035577443N, 035577444P, and 035577439K, alleging that she violated Administrative Code of the City of New York (Ad Code) §§ 28-210.1 by illegally converting a two-family dwelling into premises with three or more additional dwelling units than permitted by the applicable certificate of occupancy, and thereafter maintaining and occupying the premises. The DOB inspector apparently issued

a separate violation with respect to each of five of the six additional units. The NOVs each specified the items and appliances that had been discovered in each unit that made that unit a separate dwelling. The NOVs also informed the defendant that she was obligated to restore the property to its prior legal condition, and discontinue the illegal occupancies.

The DOB properly served the defendant with the NOVs pursuant to New York City Charter § 1049-a(d)(2)(a)(i), (ii), and (b), after which OATH scheduled a hearing on the NOVs for October 8, 2021. The defendant did not appear at that hearing. Pursuant to New York City Charter §1049-a(d)(1)(d), the defendant's failure to appear "shall be deemed, for all purposes, to be an admission of liability and shall be grounds for rendering default decision and order imposing a penalty in the maximum amount prescribed under law for the violation charged." An OATH administrative law judge (ALJ) found that the DOB made a prima facie showing that the defendant committed the violations described in the five NOVs, applied the default provisions of the City Charter, and imposed a penalty upon the defendant in the sum of $70,000.00 for each of the five NOVs, for a total of $350,000.00. In accordance with 48 RCNY 6-17(c)(3), the New York City Environmental Control Board (ECB) adopted the decision rendered by the OATH ALJ.

The defendant's time to pursue an administrative appeal of the hearing decision expired, (*see* 48 RCNY 6-19[c]), thereby rendering the ECB's October 8, 2021 determination the final determination in the matter, and causing the defendant to forfeit her opportunity to exhaust her administrative remedies, which is a condition precedent to any CPLR article 78 challenge to an adverse ECB/OATH determination. The City now seeks to enforce the penalty, as authorized by New York City Charter § 396, which requires that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law." Hence, the City is the proper party plaintiff in this action (*cf.* New York City Charter § 1049-a[d][3] [apart from an administrative order imposing a civil penalty, "(t)he environmental control board may apply to a

court of competent jurisdiction for enforcement of any *other decision or order* issued by such board"] [emphasis added]).

Where a plaintiff moves for leave to enter a default judgment, it must submit proof that the summons and complaint properly was served upon the defaulting defendant, proof of the defendant's default, and proof of the facts constituting the claim (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp*., 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc*. 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

The service effectuated upon the defendant, as set forth in the relevant affidavit of service, was proper, and sufficient to obtain jurisdiction over her pursuant to the "affix and mail" provisions of CPLR 308(4) (*see Greenwood Realty Co. v Katz*, 187 AD3d 1153, 1154 [2d Dept 2020]). Since that affidavit of service was filed on October 28, 2022, service under CPLR 308(4) was "completed" within the meaning of that statute on November 7, 2022, or 10 days subsequent to the filing of proof of service (*see id.*), and the defendant thus had 30 days from November 7, 2022 (see CPLR 320[a]), or until December 7, 2022, to answer, appear, or move with respect to the complaint. The affirmation of the plaintiff's counsel was sufficient to establish that the defendant did not appear, or answer or move with respect the complaint on or before that date, and has yet to appear, answer, or move. Counsel has thus established the defendant's default. In addition, New York City Charter § 1049-a(d)(1)(h) requires that

> "before a judgment based upon a default [at the administrative level] may be so entered the board must have notified the respondent by first class mail in such form as the board may direct: (i) of the default decision and order and the penalty imposed; (ii) that a judgment will be entered in the civil court of the city of New York or any other place provided for the entry of civil judgments within the state of New York; and (iii) that entry of such judgment may be avoided by requesting a stay of default for good cause shown and either requesting a hearing or entering a plea pursuant to the rules of the board within thirty days of the mailing of such notice."

The plaintiff established that it served this additional notice on December 19, 2022. Moreover, on January 13, 2023, the plaintiff also served copies of its notice of motion and supporting papers upon the defendant.

With respect to the proof of the facts constituting the claim,

> "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts"

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered" (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (*see id*.; *Silberstein v Presbyterian Hosp*., 95 AD2d 773 [2d Dept 1983]). "Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Green v Dolphy Constr. Co*., 187 AD2d 635, 636 [2d Dept 1992]; *see Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must "state a viable cause of action" (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating whether the plaintiff has fulfilled this obligation, the defendant, as the defaulting party, is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The court, however, must still reach the legal conclusion that those allegations establish a prima facie case (*see Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]).

Proof that the plaintiff has submitted "enough facts to enable [the] court to determine that a viable" cause of action exists (*Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *see Gray v*

Doyle, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability (*see* CPLR 105[u]; *Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc*., 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; *see also Michael v Atlas Restoration Corp*., 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc*., 20 AD3d 521, 522 [2d Dept 2005]; *see generally Mitrani Plasterers Co., Inc. v SCG Contr. Corp*., 97 AD3d 552, 553 [2d Dept 2012]).

With respect to proof of the facts constituting the claim, the plaintiff submitted the affidavit of Anayansi Cervera, a supervisor in OATH's penalty processing unit. Cervera recounted the issuance the NOVs to the defendant, the propriety of the service of the NOVs upon the defendant in accordance with the New York City Charter, the defendant's failure to appear at the hearing on the NOVs, the OATH ALJ's issuance of a decision finding the defendant in violation of the Ad Code and imposing a penalty of $70,000.00 for each of the five violations, the correctness of the penalties under the ECB's penalty policy, and the ECB's approval of the ALJ's determination. Cervera also annexed copies of the NOVs, the affidavits of service referable to service of the NOVs upon the defendant, the notices issued to the defendant informing her of the hearing, and the ALJ's determination after the hearing. This submission is clearly sufficient to establish that the defendant is liable for the penalties that were assessed against her. As noted, New York City Charter § 396 authorizes the City to pursue an action in a court of competent jurisdiction to enforce and collect an ECB/OATH administrative penalty that has been duly imposed (*cf*. New York City Charter § 1049-a[d][1][g] [authorizing the ECB to enter judgments directly in the Civil Court in connection with penalties of up to $25,000.00, without the need for commencing a plenary action]).

Consequently, the plaintiff has established that it is entitled to enter a default judgment against the defendant.

The court notes that a defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718 720 [2d Dept 2015]; *Gonzalez v Wu*, 131 AD3d 1205 1206 [2d Dept 2015]; *G.M. Data Corp. v Potato Farms, LLC*, 95 AD3d 592 [1st Dept 2012]). Where, as here, the damages sought in a complaint are for a sum certain or a sum which can be made certain by computation, there is no need to conduct an inquest to assess the appropriate amount of damages (*see Curiale v Ardra Ins. Co.*, 88 NY2d 268, 279 [1996]; *Transit Graphics v Arco Distrib.*, 202 AD2d 241, 241 [1st Dept 1994]).

Finally, the plaintiff is entitled to statutory prejudgment interest on the award from October 8, 2021, the date that the administrative penalties were imposed (*see City of New York v Azad*, 2021 NY Misc LEXIS 10628 [Sup Ct, N.Y. County, May 20, 2021]).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendant is granted, without opposition; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, City of New York, and against the defendant, Joselyn L. Martinez, in the principal sum of $350,000.00, plus statutory simple interest at 9% per annum from October 8, 2021.

This constitutes the Decision and Order of the court.

5/18/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**