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[*1]

555 Tenth Ave. LLC v Grace
2022 NY Slip Op 51287(U) [77 Misc 3d 1216(A)]
Decided on December 19, 2022
Supreme Court, New York County
Lebovits, J.
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Decided on December 19, 2022

Supreme Court, New York County

555 Tenth Avenue LLC, Plaintiff,
against
Dylan Grace and JAMES FRAWLEY, Defendants.

Index No. 160488/2021

Rivkin Radler LLP, New York, NY (David M. Grill and Ryan Goldberg of counsel), for plaintiff.

Himmelstein McConnell Gribben & Joseph LLP, New York, NY (William J. Gribben of counsel), for defendant Dylan Grace.

No appearance for defendant James Frawley.

Gerald Lebovits, J.

This is an action to collect on amounts allegedly owed on a residential lease. On motion sequence 001, plaintiff-landlord, 555 Tenth Avenue LLC, moves for default judgment against defendant-tenants, Dylan Grace and James Frawley. On motion sequence 002, defendant Grace [*2] moves under CPLR 3012 (d) to compel plaintiff to accept filing of his otherwise-untimely answer.

Motion sequences 001 and 002 are consolidated here for disposition. Plaintiff's request for a default judgment against defendant Frawley is granted without opposition. [\[EN1\]](#) With respect to defendant Grace, plaintiff's request for a default judgment against Grace, and Grace's request for an order compelling plaintiff to accept his answer, are held in abeyance pending the submission of additional evidence about where Grace lived at the time of service.

DISCUSSION

Plaintiff moves for default judgment under CPLR 3215 against defendants. A party seeking default judgment must establish proper service, the defendant's default, and the facts constituting plaintiff's claim.

Plaintiff has provided an affidavit of its process server, attesting to service on defendants in December 2021 by nail-and-mail service under CPLR 308 (4). (*See* NYSCEF No. 4; NYSCEF No. 5 [affidavits of service].) The affidavit of service states that the process server satisfied CPLR 308 (4)'s "due diligence" requirement through two unsuccessful service attempts—one on a weekend afternoon, and one on a weekday evening; and that the process server was "unable to confirm" the defendants' "place of employment of work habits." (*See id.*) Typically, a process server establishes due diligence through three unsuccessful attempts, made at different times of day, and including both weekdays and a weekend attempt. (*E.g. Brafman & Assoc., P.C. v Balkany*, 190 AD3d 453, 453 [1st Dept 2021]). But two attempts, rather than three, may be sufficient when they were made at times outside of working hours and when it was reasonable for the process server to assume that the individual would be home. (*See Brunson v Hill*, 191 AD2d 334, 335 [1st Dept 1993].) Although the due-diligence question here is close, the process server's two failed attempts, coupled with a representation that he had attempted unsuccessfully to ascertain defendants' places of employment, suffices to satisfy the requirements of CPLR 308 (4). And neither Grace nor Frawley timely appeared.

Plaintiff has also satisfactorily established the facts constituting its claim for default judgment. Plaintiff provides the affidavit of its vice president (NYSCEF No. 8), the lease agreement confirming the landlord's right to collect rent until expiration of the lease upon tenant's default (NYSCEF No. 2 at § 17), and the rent ledger showing the amount of defendants' total unpaid rent (NYSCEF No. 3).

Plaintiff has thus established, without opposition, that it is entitled to default judgment as against Frawley. Whether plaintiff is also entitled to default judgment against Grace is a

more complicated question, as discussed further below.

On motion sequence 002, Grace argues, among other things, that service on him was not valid because he was not living at the service address in December 2021; and that he only learned of this action when he (through his housekeeper) received a copy of the default-judgment motion papers at his current address in late-August 2022. (NYSCEF No. 20 at ¶¶ 4, 7.) Grace's representation about his residence is supported by the fact that plaintiff served a copy of [*3]the default-judgment papers on Grace at a different address than the one used for service of the complaint; and that the date of that service (delivery to a co-tenant on August 19, 2022, follow-up mailing on August 20) is consistent with the date that Grace said he received the default-judgment papers at his current address (August 23, 2022). (*Compare* NYSCEF No. 17 [default-judgment-motion affidavit of service], *with* NYSCEF No. 20 at ¶ 4.) This evidence exceeds the kind of bare, conclusory denial of receipt that plaintiff correctly argues would be insufficient.

In response, plaintiff contends, in effect, that Grace is foreclosed from challenging the validity of service on that ground because the process server identified the correct service address in December 2021 "through a DMV search." (NYSCEF No. 25 at ¶ 16; *see also id.* at 6 n 4.) And the affidavit of service on Grace includes a comment that describes the appearance of the service address and its location within the building, and states "DMV Verified" (NYSCEF No. 4)—presumably to indicate that the process server had checked Grace's Department of Motor Vehicles records before attempting service. But plaintiff does not otherwise provide evidence about what DMV records indicated Grace's address to have been in December 2021 (such as a properly authenticated screenshot). (*Cf. Itshaik v Singh*, [165 AD3d 902](#), 904 [2d Dept 2018] [rejecting plaintiff's argument that defendant could not challenge the validity of service because it had been made on the address on file with DMV because, among other things, "the record does not contain a DMV driver's abstract for the defendant"].) Nor does plaintiff explain its choice to serve the default-judgment papers on Grace at a different address in August 2022—whether that use of a new address reflected a change in DMV records, that information obtained by plaintiff indicating that Grace moved between December 2021 and August 2022, or some other reason.

This court is thus left with questions about (i) the location of Grace's usual place of abode in December 2021; and (ii) whether, assuming that location differed from the service address, Grace is nonetheless precluded from raising that argument by a failure to have updated his residential address on file with DMV. (*See Perlbinders Holdings LLC v Patel*, [202 AD3d 578](#), 578 [1st Dept 2022].)

The court concludes that these questions require conducting a traverse hearing, to be held by virtual means on Microsoft Teams. The court will in the near future consult with the parties about mutually convenient dates for the hearing. For purposes of the traverse hearing, the court is most interested in evidence about (i) where Grace was living at the time of service of the complaint in December 2021 and service of the default-judgment motion in August 2022 (for example, in the form of utility bills, bank statements, and other comparable documents); and (ii) what official governmental records (DMV records, voter-registration records, and the like) reflect about Grace's residence at those times.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking a default judgment under CPLR 3215 against defendant Frawley (mot seq 001) is granted without opposition, and plaintiff is awarded a judgment against Frawley for \$44,250.61, with interest running from February 15, 2021, plus costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of plaintiff's motion seeking a default judgment under CPLR 3215 against defendant Grace (mot seq 001) is held in abeyance pending a traverse hearing as discussed above; and it is further

ORDERED that defendant Grace's motion under CPLR 3012 (d) to compel acceptance of [*4]an untimely answer (mot seq 002) is held in abeyance pending the traverse hearing;

ORDERED that plaintiff serve a copy of this order with notice of its entry on Grace; on Frawley by certified mail, return receipt requested directed to his last-known address; and on the office of the County Clerk, which shall enter judgment against Frawley accordingly.

DATE 12/19/2022

Footnotes

Footnote 1: Although NYSCEF lists Grace's counsel as having appeared for both Grace and defendant Frawley, counsel's affirmation on motion sequence 002 refers only to counsel's having been retained by Grace; and the arguments made in support of that motion pertain only to Grace.

[Return to Decision List](#)