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2 Riverside Drive LLC v. Truth

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2 Riverside Dr. LLC v Truth
2024 NY Slip Op 50020(U)
Decided on January 8, 2024
Supreme Court, New York County
Lebovits, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 8, 2024

Supreme Court, New York County

<p>2 Riverside Drive LLC, Plaintiff,</p> <p>against</p> <p>Doctor Marcus Truth, Defendant.</p>

Index No. 154943/2023

The Price Law Firm, LLC, New York, NY (Joshua C. Price, John M. Churneftsky, and Heather A. Ticotin of counsel) for plaintiff.

No appearance for defendant.

Gerald Lebovits, J.

In this action to collect unpaid rent, plaintiff, 2 Riverside Drive LLC, moves under CPLR 3215 for default judgment against defendant, Dr. Marcus Truth, and for attorney fees of at least \$20,000. Defendant has not appeared.

Under CPLR 3215 (f), a plaintiff moving for default judgment must establish proper service on the defendant, the defendant's default, and the facts constituting plaintiff's claims.

Plaintiff provides an affidavit from its process server showing that it attempted, with due diligence, to effect personal service at defendant's residence on three occasions. Each attempt was on a weekday, but each attempt was at a different time of day—one at 7:45 a.m., one at 4:02 p.m., and one at 6:46 p.m. (*See* NYSCEF No. 11 at 1.) The attempts at 7:45 a.m. and 6:46 p.m. were outside normal working hours. (*See Brunson v Hill*, 191 AD2d 334, 335 [1st Dept 1993] [holding "there was a sufficient showing of due diligence permitting substituted service pursuant to CPLR 308 (4) [when] the process server . . . attempted service at appellant's actual home address on two occasions when a working person might reasonably have been expected to be at home."].) Plaintiff thus made a sufficient showing of due diligence for purposes of CPLR 308 [*2](4).

Plaintiff has proven the facts constituting its claim for unpaid rent from October 2021 through August 2023. Plaintiff supplies defendant's lease (covering July 2018 through June 2019) and defendant's renewal lease (covering July 2019 through June 2020). (NYSCEF Nos. 8, 9.)

Plaintiff demonstrates that defendant became a month-to-month tenant after the renewal lease expired. (*See* NYSCEF No. 7 at ¶ 7 [party affidavit representing that month-to-month tenancy arose after the expiration of the lease].) Under Real Property Law § 232-c, if a tenant holds over after the expiration of a lease with a term "longer than one month" and the landlord accepts rent "for any period subject to the expiration of" the lease, there is a month-to-month tenancy unless there is an agreement providing otherwise. Plaintiff's evidence shows that defendant made, and plaintiff accepted, one lump sum payment after the expiration of the renewal lease, presumably to cover many months' rent. (NYSCEF No. 14; *see Jaroslow v Lehigh Valley R. Co.*, 23 NY2d 991, 993 [1969] [holding that a month-to-month holdover tenancy is created with landlord's "acceptance of rent from the holding over tenant."].)

It is true that the existence of a holdover month-to-month tenancy is generally evidenced by the continuous payment and acceptance of rent each month, which did not occur here. (*E.g. Logan v Johnson*, [34 AD3d 758](#), 759 [2d Dept 2006] ["[A] month-to-month tenancy was created when, upon holding over, the plaintiff paid and the defendant accepted the agreed-upon monthly rent . . . for a number of months."].) But RPL § 232-c requires only that the landlord accept rent for "any period" after the expiration of the lease to create the month-to-month tenancy, which did occur here.

Plaintiff has also established, through a rent ledger, that defendant owes the claimed

amount in unpaid rent of \$40,425. (*See* NYSCEF No. 14.)

Plaintiff also requests attorney fees "in an amount to be determined but in no event less than \$20,000." (NYSCEF No. 5 [notice of motion].) The record reflects that plaintiff is entitled under the lease to its reasonable attorney fees incurred in this action. Plaintiff has not, however, attempted on this motion to demonstrate the amount of those fees through an affirmation of counsel supported by documentation (such as invoices, billing statements, or the like). This court is skeptical, given the amount claimed in unpaid rent and the straightforward nature of plaintiff's claims in this action, that plaintiff's reasonable attorney fees equal or exceed \$20,000. But the court need not definitively resolve that question now, absent a fuller record with respect to plaintiff's fee claim.

Accordingly, it is ORDERED that plaintiff's motion for default judgment is granted, and plaintiff is awarded a judgment against defendant for \$40,425, with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff may enter a supplemental judgment for its reasonable attorney fees, with the amount of those fees to be determined by motion made on notice, supported by appropriate documentation; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of its entry on defendant by certified mail, return receipt requested, directed to defendant's last-known address; and on the office of the County Clerk (by the means set forth in the court's e-filing protocol, available on the e-filing page of the court's website, <https://ww2.nycourts.gov/courts/1jd/supctmanh/E-Filing.shtml>), which shall enter judgment accordingly.

DATE 1/8/2024

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