

Village of Greenport v Horton
2016 NY Slip Op 31805(U)
March 25, 2016
Supreme Court, Suffolk County
Docket Number: 693/16
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 2/1/16
SUBMIT DATE: 3/4/16
Mot. Seq. # 001 - Mot D
Submit Judgment
CDISP: Yes

-----X	:		
VILLAGE OF GREENPORT,	:		JOSEPH W. PROKOP, ESQ.
	:		Atty. For Plaintiff
	:	Plaintiff,	267 Carleton Ave. - Ste. 301
	:		Central Islip, NY 11722
	:		
-against-	:		DONNA C. HORTON
	:		Defendant
DONNA C. HORTON,	:		229 Third St.
	:	Defendant.	Greenport, NY 11944
	:		
-----X	:		

Upon the following papers numbered 1 to 8 read on this motion by plaintiff for a default judgment
; Notice of Motion/Order to Show Cause and supporting papers 1 - 5
; Notice of Cross Motion and supporting papers _____
; Answering papers _____
; Reply papers _____
; Other 6-7 (affidavit); 8 (3/14/16 correspondence); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that those portions of this motion (#001) wherein the plaintiff seeks, in effect, a default judgment on its pleaded demands for a declaration of a public nuisance with respect to an exterior staircase allowing access to the second residential structure on the subject premises is denied as the plaintiff's pleaded demands for declaratory and nuisance abatement relief with respect to such staircase have been withdrawn by plaintiff's counsel in correspondence dated March 14, 2016; and it is further

ORDERED that those portions of this motion (#001) by the plaintiff for, in effect, a default judgment against the defendant on those portions of its complaint wherein it seeks a judgment declaring the existence of a public nuisance on the subject premises due to the presence of litter,

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debris, refuse junk and discarded items of equipment and machinery and judicial directives for the abatement of such public nuisance by the defendant, or upon her default, by the plaintiff Village of Greenport, its employees and agents existing is considered under CPLR 3215, and is granted to the extent set forth below; and it is further

ORDERED that those portions of this motion (#001) by the plaintiff, for in effect, a default judgment on those portions of its complaint wherein it seeks a judgment declaring “that the Village should collect its reasonable costs and disbursements in the abatement of the nuisance” is denied, as the procedures for the recovery of such abatement costs and disbursements set forth in Greenport Village Code § 90-6 are not justiciable as the procedures for such recovery have not been complied with; and it is further

ORDERED that the remaining portions of this motion (#001) wherein the plaintiff seeks a default judgment on its claim for an award of reasonable attorney’s fees incurred in the prosecution of this action is denied, without prejudice, as the plaintiff failed to submit proof of the fees, costs and expenses incurred in the prosecution of this action and the reasonableness thereof; and it is further

ORDERED that the plaintiff’s claim for recovery of reasonable attorney’s fees incurred in connection with its prosecution of this action is severed and continued herein.

The plaintiff commenced this action for a judicial declaration that a public nuisance exists at premises known as 229 Third Street, Greenport, New York 11944, which are owned by defendant Horton. The premises are improved with a single family residence which the defendant occupies and a second residential structure in the rear of the property which the defendant allegedly leases to persons who occupy it as their residences.

On December 7, 2013, the plaintiff posted a Notice of Public nuisance on the premises advising of the existence of a public nuisance on the property due to the defendant’s failure to maintain the exterior of a structure on the premises in good repair and in a structurally sound sanitary manner. The Notice of Public Nuisance further identified the premises as housing a public nuisance due to the accumulation of rubbish, garbage and abandoned items. The identified conditions were stated to be in violation of various provisions of the Village Code and/or the Property Maintenance Code of the State of New York. The defendant had until December 27, 2013 to abate these conditions and restore the premises to a sound and conforming condition. While the defendant allegedly took steps in this regard, the plaintiff alleges that the conditions described in the Notice of Public Nuisance have not been removed nor the property restored to a safe condition which conforms to the standards set forth in the Village Code and the Property Maintenance Code of the State of New York.

On November of 2014, and again in April 2015, appearance tickets were issued by the plaintiff to the defendant with respect to the existence of public nuisances on the subject property in the form of the placement of an unregistered vehicle thereon, and the existence of lumber, junk,

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refuse, waste, abandoned and discarded objects and equipment such as furniture, appliances and play equipment. These appearances tickets remain pending before the Town Justice Court.

In January of 2016, the plaintiff filed its summons and complaint in this action and therein seeks relief in the form of a judicial declaration as to the existence of a public nuisance on the subject premises and a direction authorizing the Village of Greenport, through its employees and agents, to enter the premises and remove therefrom and discard all items of junk, debris or abandoned or discarded items present on the exterior of the defendant's premises so as to abate the public nuisance pursuant to Greenport Village Code § 90-3; §90-5. The plaintiff likewise demands a declaration adjudging that a public nuisance in the form of an unsafe stairway affording exterior access to the second residential structure in the back of the premises and a direction authorizing the Village of Greenport, through its employees or agents, to enter the premises and repair and remove the unsafe stairway from this second rear residential structure so as to abate the public nuisance caused by such unsafe stairway. However, this demand was withdrawn by counsel in his March 14, 2016 correspondence to the court and is accordingly denied herein as academic. Finally, the plaintiff demands a Judgment "pursuant to Chapter 90-5(g)(2) [sic] directing that the Village should collect its reasonable costs and disbursements in the abatement of the nuisance and reasonable costs and disbursements and reasonable attorney's fees in this matter". Defendant Horton failed to appear in response to the plaintiff's service of its summons and complaint by answer or otherwise and her time to do so has now expired.

By the instant motion (#001) the plaintiff seeks, in effect, a default judgment on its complaint against defendant Horton. In both its complaint and the papers submitted in support of the instant motion for a default judgment, the plaintiff argues that the relief sought is available to it under Chapter 90 of the Greenport Village Code. For the reasons stated, the motion is granted only to the extent set forth below.

Entitlement to a default judgment rests upon the plaintiff's submission of proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215[f]; *U.S. Bank Natl. Ass'n v Alba* 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 1 NYS3d 111 [2d Dept 2014]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *Oak Hollow Nursing Ctr. v Stumbo*, 117 AD3d 698, 985 NYS2d 269 [2d Dept 2014]; *U.S. Bank Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Dela Cruz v Keter Residence, LLC*, 115 AD3d 700, 981 NYS2d 607 [2d Dept. 2014]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 941 NYS2d 663 [2d Dept. 2012]; *Triangle Prop. #2, LLC v Narang* 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). While the quantum of proof necessary to support an application for a default judgment is not nearly as exacting as the proof required on a motion for summary judgment, some firsthand confirmation of the facts forming the basis for the claim must be presented (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Feffer v Malpeso*, 210 AD2d 60, 619 NYS2d 46 [1st Dept 1994]). Accordingly, the plaintiff must advance facts from which the

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court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or verified complaint by a party or other person possessed of knowledge of the facts alleged (*see Boudine v Goldmaker, Inc.*, 130 AD3d 553, 14 NYS3d 405 [2d Dept 2015]; *DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; *Williams v North Shore LIJ Health Sys.*, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; *CPS Group, Inc. v Gastro Enter. Corp.*, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480 [2d Dept. 2006]); *Beaton v Transit Fac. Corp.*, 14 AD3d 637, 789 NYS2d 314 [2d Dept. 2005]), together with proof of the amount due, if sufficiently certain (*see* CPLR 3215[f]).

Here, the moving papers established the plaintiff's service of the summons and complaint upon the defendant, her default in timely appearing in response thereto by answer or otherwise and the plaintiff's possession of cognizable claims for the declaratory relief demanded regarding the existence a public nuisance on the premises due to the existence debris, refuse, junk and other items scattered about the defendant's premises. In addition, the plaintiff demonstrated cognizable claims for mandatory injunctive relief in the form of judicial directives mandating that the defendant abate this public nuisance, and in the event of failure to do so, that the plaintiff, through its employees and agents, enter upon the premises and take all reasonably necessary action to abate the nuisance solely in accordance with the dictates of Greenport Village Code § 90-5.

However, the plaintiff failed to demonstrate its possession of a cognizable claim for judicial directive "that the Village should collect its reasonable costs and disbursements in the abatement of the nuisance and reasonable costs and disbursements and reasonable attorney's fees in this matter". This relief is not available to the plaintiff due to non-justiciability since the recovery of abatement costs is expressly governed by the provisions of Greenport Village Code § 90-6, which requires action by the Town Board and because it presumes that the defendant will not undertake to abate the nuisance herself. Accordingly, those portions of this motion wherein the plaintiff seeks a default judgment on the relief demanded in subparagraph [C] of the wherefore clause of its complaint is denied.

The remaining portions of this motion (#001) wherein the plaintiff seeks, in effect, a default judgment on its claims for recovery of counsel fees is denied, without prejudice, as no proof of the amount of such fees was adduced. The plaintiff's claim for recovery of reasonable counsel fees is severed and continued.

In view of the foregoing, the instant motion (#001) by the plaintiff for, in effect, a default judgment on its complaint is granted to the extent set forth above. The claim for recovery of reasonable counsel fees is severed and continued herein.

The plaintiff's demands for an award of costs and disbursements is granted to the extent that the Clerk shall allow such costs and disbursement to be taxed and allowed in the judgment to be entered hereon.

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Submit judgment to this Court, upon a copy of this order, reflecting the granting and denial of the relief requested under the terms of this order and the severance of the plaintiff's claim for recovery of reasonable counsel fees incurred in the prosecution of this action.

DATED: 3/25/16



THOMAS F. WHELAN, J.S.C.