

T. Park Cent. LLC v Torres

2007 NY Slip Op 31259(U)

May 11, 2007

Supreme Court, New York County

Docket Number: 0117936/2005

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART _____

Index Number : 117936/2005

T. PARK CENTRAL LLC

vs

TORRES, PEDRO J. DIAZ

Sequence Number : 002

REFERENCE - OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *decided in accordance with the accompanying memorandum decision.*

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/11/07


JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
T. PARK CENTRAL LLC,

Plaintiff,

-against-

PEDRO J. DIAZ TORRES,

Decision/Order

Index No.: 117936/05

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

FILED

MAY 22 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Pltf's motion [ord/ref] w/ERS affirm in support, SLL aff, exhs 1

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff T. Park Central LLC seeks to foreclose a Purchase Money Mortgage ("Mortgage") securing a Purchase Money Note ("Note"). Presently before the court is plaintiff's motion to renew its prior motion for an order directing the Clerk to enter a default judgment on the issue of liability against Pedro J. Diaz Torres ("Torres") and an order of reference, pursuant to RPAPL § 1321, to compute the amount due to the plaintiff and to examine and report whether the mortgaged premises can be sold in parcels. The prior motion was denied because of defects identified in the court's order dated November 8, 2007 which have now been addressed. Since the denial was without prejudice, permission to renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979).

Background

This action is against Torres, an individual defendant. Plaintiff served the

* 3]
Summons and Verified Complaint on Torres, via both certified mail, return receipt requested and regular mail, on January 3, 2006. Torres consented to "service of a summons and complaint and all legal papers in connection with any lawsuit by certified mail, return receipt requested and regular mail." Paragraph 4.3 of the Mortgage.

Torres has not appeared, or answered the complaint within the time provided under the CPLR, nor obtained an order from the Court extending his time to do so. On January 17, 2007, plaintiff mailed an additional copy of the Summons and Verified Complaint to Torres bearing the legend "Personal and Confidential," thereby complying with the additional notice requirements of CPLR § 3215(g)(3)(i). Such additional notice was served at least 20 days prior to this application.

Plaintiff's motion is supported by the affirmation of Evan R. Schieber and the affidavit of Scott L. Lager. Copies of the Mortgage and Note entered into by Torres, dated May 28, 2004 and April 9, 2004, respectively, have been provided to the court. Based upon the foregoing, Torres and plaintiff executed the Note in the amount of \$26,286.30 whereby Torres promised to pay plaintiff monthly installments of \$211.24 until Torres has paid all of the principal and interest and any other charges due under the Note. As security for the payment of the Note, Torres mortgaged her ownership interest, a 1/52 interest as tenant-in-common in timeshare unit 1615 in the condominium known as T. Park Central located at 200 West 56th Street, New York, New York (the "Mortgaged Premises"), under the Mortgage.

Plaintiff claims that on October 6, 2004, plaintiff notified Torres that she had defaulted under the Note for failure to pay monthly installments due and interest and late charges thereon, although the date of Torres' alleged default has not been

provided to the court. As for the delay in plaintiff's instant application, plaintiff claims that it did not have sufficient funds to prosecute this action until now; and in light of Torres' default, Torres has not been prejudiced by plaintiff's delay in bringing this action.

Plaintiff now moves for an order appointing a referee to compute the amounts due to plaintiff and whether or not the Mortgaged Premises can be sold in parcels.

Discussion

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)], plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)].

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

The above claims establish the elements of a *prima facie* cause of action for default under the Note against Torres. In particular, plaintiff has proved that defendant defaulted under the terms of the Note and that it is entitled to money damages as a

[* 5]
result. Plaintiff has proved that under the Note it is entitled to the following money damages:


1. \$25,646.42 representing an acceleration of the monthly payments due under the Note at the time of default;
2. Interest calculated at the rate of 14.90% annually from the date of default to the date of the court's judgment;
3. Reasonable costs and expenses; and
4. Reasonable attorneys' fees.

The Mortgage gives plaintiff the right to sell the Mortgaged Premises, which collateralized the Note. Accordingly, plaintiff's motion is granted to the extent that plaintiff is hereby directed to submit to the court (in the form annexed as an attachment to the motion) an order appointing Meryl Lisa Wenig, Wenig, Saltiel & Greene, LLP, 26 Colurt Street, Suite 502, Brooklyn, New York, as referee to ascertain and compute the amount due to plaintiff for principal, interest and other disbursements advanced as provided for in the Mortgage upon which this action was brought, to examine and report, by documentary evidence submitted in lieu of a hearing, whether or not the Mortgaged Premises can be sold in parcels, and that the referee make his/her report to the Court with all convenient speed.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 11, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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