

ARSR Solutions, LLC v 304 E. 52nd St. Hous. Corp.
2011 NY Slip Op 30814(U)
March 21, 2011
Supreme Court, Nassau County
Docket Number: 10272-10
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

SCAN

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ARSR SOLUTIONS, LLC,

Plaintiff,

-against-

304 EAST 52ND STREET HOUSING CORPORATION,

Defendant.
-----X

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 10272-10
Motion Seq. No: 2
Submission Date: 2/7/11

Papers Read on this Motion:

- Notice of Motion, Affidavits in Support (2) and Exhibits.....X
- Memorandum of Law in Support.....X
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X¹
- Affidavits in Further Support (2) and Exhibits.....X
- Memorandum of Law in Further Support.....X

This matter is before the court on the motion by Plaintiff filed November 17, 2010 and submitted February 7, 2011. For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff ARSR Solutions, LLC ("ARSR" or "Plaintiff") moves for an Order granting Plaintiff a default judgment against Defendant for the relief sought in the Complaint.

Defendant 304 East 52nd Street Housing Corporation ("Housing Corp." or "Defendant") opposes Plaintiff's application.

¹ Defendant's opposition papers make reference to a cross motion but no cross motion was filed by Defendant.

B. The Parties' History

The Complaint (Ex. D to P's motion) alleges as follows:

Plaintiff ARSR Solutions, LLC ("ARSR") is a limited liability company formed and existing under the laws of the State of Delaware with its principal place of business in Uniondale, New York. Defendant is a corporation formed and existing under the laws of the State of New York.

On or about May 8, 2007, East 51st Street Development Company, LLC ("East 51st LLC") executed and delivered to Arbor Realty Funding, LLC ("ARF") an Amended, Restated and Consolidated Loan Promissory Note payable to the order of ARF in the original principal amount of \$39,489,253.20 on the terms set forth in that note. On or about May 8, 2007, East 51st LLC also executed and delivered to ARF a Building Loan Promissory Note payable to the order of ARF in the original principal amount of \$3,704,275 on the terms set forth in that note. On or about May 8, 2007, East 51st LLC also executed and delivered to ARF a Project Loan Promissory Note payable to the order of ARF in the original principal amount of \$2,444,428.80 on the terms set forth in that note. These notes are referred to collectively as the "Notes."

On or about May 8, 2007, James Kennelly ("Kennelly") executed and delivered to ARF a Pledge and Security Agreement (Ex. A to Compl.). Pursuant to that Pledge and Security Agreement, Kennelly pledged the shares ("Shares") that he owned in Housing Corp., correlating to Units 2, 3 and 4 in the building located at and known as 304 East 52nd Street, New York, New York ("Units") and the proprietary leases appurtenant thereto to secure repayment of the Notes.

Also on or about May 8, 2007, Housing Corp. and ARF entered into a recognition agreement ("Recognition Agreement") (Ex. B to Compl.) in which Housing Corp., *inter alia*, recognized as valid ARF's lien on the shares of Housing Corp. pledged to ARF by Kennelly and the leases appurtenant to those shares which concern the Units. The Recognition Agreement provides, *inter alia*, that 1) Housing Corp. shall recognize ARF's right as lienor against the Units pursuant to the Security and, if one or more of the Leases be terminated and/or Shares canceled, against the net proceeds of any sale or subletting of the applicable Unit, after reimbursement of all sums due under the applicable lease; and 2) notwithstanding any apparent authority granted to ARF under agreements with Kennelly, ARF shall have no right or power to transfer the Units upon foreclosure or otherwise without Housing Corp's approval, which approval shall not be unreasonably withheld or delayed.

On or about April 15, 2010, ARF foreclosed on its lien on the Units and thereafter

assigned its winning credit bid of \$750,000 to ARSR. ARSR has succeeded to ARF's rights and obligations under the Recognition Agreement. By letter dated April 27, 2010, addressed to the managing agent and copied to Kennelly, counsel for ARSR wrote to Housing Corp. and demanded that Housing Corp. immediately issue a new stock certificate in the name of ARSR. ARSR received no response and, on May 10, 2010, counsel for ARSR sent a second letter to Housing Corp. repeating its demand in the prior letter. Plaintiff alleges that Housing Corp. has still failed and refused to approve and effectuate the transfer of ownership of Shares and leases appurtenant to the Units to ARSR. Plaintiff further alleges that Housing Corp. has unreasonably withheld its approval of the transfer of the Shares and leases appurtenant, in violation of the Agreement with ARSR.

Plaintiff provides an Affidavit of Service (Ex. E to motion) reflecting service on Housing Corp. by service on the Secretary of State on June 4, 2010. In addition, on July 13, 2010, Plaintiff mailed a copy of the motion papers to Housing Corp., c/o Raphael and Marcus PC ("Raphael and Marcus"), 551 5th Avenue, Suite 1419, New York, New York 10017 which is the address listed on the New York State, Department of State ("DOS"), Division of Corporations website entry for Housing Corp. (Ex. F to motion) to which DOS will mail process if accepted on behalf of the entity. Defendant failed to answer or otherwise respond to the Complaint within the required statutory time.

In his Affidavit in Support, William P. Connolly ("Connolly") affirms as follows:

Connolly is Associate General Counsel of Arbor Realty Trust, an entity that, indirectly, owns and controls Plaintiff ARSR. Connolly affirms the truth of the allegations in the Complaint, and attests to service of the Complaint on Defendant as reflected by the documentation provided. Connolly submits that it is entitled to judgment compelling Housing Corp. to 1) cancel the Shares stocks held by Kennelly; 2) approve and recognize ARSR as the owner of said Shares; and 3) issue new stock certificates for those Shares in the name of ARSR.

In his Affidavit in Support, counsel for Plaintiff ("Plaintiff's Counsel") affirms as follows:

On August 4, 2010, Plaintiff filed a Request for Judicial Intervention and motion for default judgment ("Prior Motion"). On October 15, 2010, while the Prior Motion was pending, counsel for Defendant ("Defendant's Counsel") contacted Plaintiff's counsel to advise him that he had been retained by Defendant and intended to interpose an answer. Counsel for the parties entered into a Stipulation Resolving Motion for a Default Judgment dated October 15, 2010

("Stipulation") (Ex. J to P's motion), pursuant to which Plaintiff withdrew the Prior Motion and Defendant agreed to serve its answer within twenty (20) days. More than 20 days have passed since the date of the Stipulation and Defendant has not interposed an answer, or communicated with Plaintiff's Counsel.

In his Affidavit in Opposition, Kennelly affirms as follows:

Kennelly is the principal and owner of the entities to which the Complaint refers. Kennelly submits that Plaintiff's claims are "frivolous and preposterous" and that Plaintiff "has no claims of any sort" (Kennelly Aff. at ¶ 3) to the property ("Property") at 304 East 52nd Street, New York, which is Kennelly's apartment. Kennelly affirms that he has been the titled owner of the stock and leases for the Property for several years. Kennelly admits that he previously entered into a loan arrangement with ARF ("ARF Loan") in or about May of 2007, but affirms that the loans, notes, mortgages and agreements ("Loan Documents") relating to the ARF Loan were resolved in an action titled *Arbor Realty Funding, LLC v. Kennelly et al.*, New York County Supreme Court Index Number 602186-08.

Kennelly affirms that he executed a Deed in Lieu Agreement ("Deed Agreement") with HFZ East 51, LLC ("HFZ") on February 18, 2010 in which ARF acknowledged that the Loan Documents were transferred to HFZ. The Deed Agreement provides that there will be no deficiency judgment or proceedings against Kennelly, supporting the conclusion that, by signing the Deed Agreement, HFZ and AFC were resolving all issues and claims against Kennelly.

Kennelly disputes Plaintiff's assertion that Plaintiff became the owner of the Property through the assignment of a bid from a foreclosure sale on April 15, 2010. Kennelly submits that such a result was not possible in light of ARF's prior acknowledgment that there was a transfer of the Loan Documents to HFZ several months before the foreclosure sale.

With respect to the allegations in the Complaint that ARF foreclosed on the Property on April 15, 2010, Kennelly affirms that he was never served with notice of that proceeding, and submits that such a foreclosure would have been improper in light of the transfer of the Loan Documents to HFZ. Kennelly also affirms that he never received notice of the Complaint in the instant action.

Counsel for Defendant affirms that Defendant served its Answer dated November 16, 2010 but that Plaintiff rejected it (Ex. A to Whitehorn Aff. in Opp.). Counsel requests that the Court compel Plaintiff to accept its Answer.

In his Affidavit in Further Support, Connolly affirms, *inter alia*, that the Units in question

were not among those that were assigned to HFZ and that ARF obtained valid title to those Units. Connolly also disputes Defendant's claim that Plaintiff has not suffered prejudice as a result of Defendant's delay in answering the Complaint. Connolly affirms that Plaintiff has suffered prejudice because it may not continue with the related landlord-tenant actions until the instant action is resolved. Connolly and counsel for Plaintiff also affirm that counsel for Defendant has engaged in similar dilatory conduct in related litigation.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment compelling Housing Corp. to 1) cancel the Shares stocks held by Kennelly; 2) approve and recognize ARSR as the owner of said Shares; and 3) issue new stock certificates for those Shares in the name of ARSR in light of the documentation provided and Defendant's failure to respond to the Complaint in a timely fashion.

Defendant submits that, as Defendant's Answer was submitted only days past the date set forth in the Stipulation, the Court should compel Plaintiff to accept the Answer. Defendant contends, further, that the entry of a default judgment is inappropriate because 1) public policy favors the determination of a matter on its merits; 2) Plaintiff has not demonstrated that it was prejudiced by Defendant's delay in answering; and 3) Defendant's delay in answering was not deliberate.

Defendant contends, further, that it has a meritorious defense because Plaintiff did not obtain ownership of the Property at the foreclosure sale to which it refers, in light of the prior transfer of the Loan and Loan Documents to HFZ prior to the foreclosure sale.

RULING OF THE COURT

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007). Public policy favors the resolution of cases on

the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

Although Defendant did not serve its Answer within the time frame set forth in the Stipulation, the Court denies Plaintiff's motion for a default judgment and directs Plaintiff to accept the Answer. This decision is based on several factors, including the fact that the Answer was served within two (2) weeks of the date agreed to in the Stipulation, and the policy favoring the resolution of cases on the merits. The Court admonishes Defendant and his counsel, however, that the Court will not tolerate further unwarranted delays in this litigation.

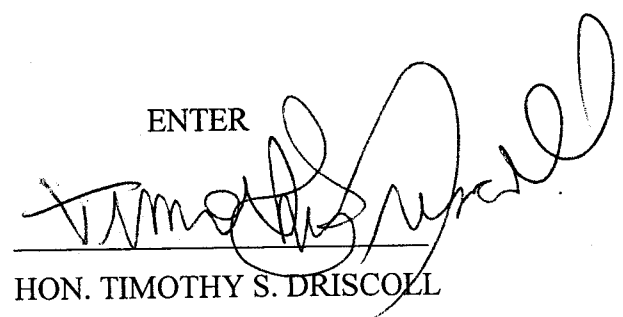
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on April 27, 2011 at 9:30 a.m.

DATED: Mineola, NY
March 21, 2011

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAR 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE