

**SRP Funding Trust 2011-5 v De La Cruz**

2015 NY Slip Op 31457(U)

August 3, 2015

Supreme Court, New York County

Docket Number: 850139/14

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

**SRP FUNDING TRUST 2011-5,**

Plaintiff,

-against-

INDEX NO. 850139/14  
MOTION DATE 07-01-15  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

**LUIS DE LA CRUZ, 3472 BROADWAY REALTY CORP.,  
CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,  
CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT  
ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, and JOHN DOE 1 through  
JOHN DOE 99, said names being fictitious parties intended being  
possible tenants or occupants of premises, and corporations,  
other entities or persons who claim, or may claim a lien against  
the premises.**

Defendants.

The following papers, numbered 1 to 8 were read on this motion to/for summary judgment pursuant to CPLR §3212 granting a commercial foreclosure and a reference to a referee and the cross-motion for summary judgment and related relief:

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

Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1 - 2	_____
3 - 4, 5 -6	_____
7 - 8	_____

**Cross-Motion:    X    Yes        No**

Upon a reading of the foregoing cited papers, it is ordered that SRP FUNDING TRUST 2011-5's motion pursuant to CPLR §3212 for summary judgment in this commercial foreclosure action, is granted on default. Defendants, LUIS DE LA CRUZ and 3472 BROADWAY REALTY CORP.'s cross-motion pursuant to CPLR §3212 for summary judgment on the counterclaim, is denied on default.

Plaintiff brought this action seeking to foreclose on a commercial mortgage which encumbers the real property located at 3472 Broadway, New York, New York, identified as Block 2073, Lot 163. On October 29, 1997, 3472 Broadway Realty Corp. executed and delivered to American Business Credit Inc. a promissory note and mortgage for \$100,000.00 which had a final payment date of November 1, 2012. Luis De La Cruz, as an individual executed and delivered to American Business Credit Inc. a surety agreement dated October 29, 1997, which identified him as a guarantor for the payment of the promissory note. On February 29, 2012, after a series of assignments, the mortgage and note were assigned and delivered to the plaintiff.

Plaintiff's motion seeks summary judgment against 3472 Broadway Realty Corp. and Luis De La Cruz (hereinafter referred to collectively as "defendants"), striking their answer and counterclaim, and dismissing the affirmative defenses asserted. The motion also seeks an Order of Reference in favor of plaintiff; the appointment of a Referee to determine the amount due and ascertain whether the premises can be sold in one parcel; granting a default judgment pursuant to CPLR §3215 against all of the other remaining defendants; and amending the caption to

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

strike the names of defendants sued as "John Doe No. 3" through "John Doe No. 99" inclusively and substitute "John Doe 1" with "Dental Care of Richmond Hill" and "John Doe 2" with "Signs R Us Print Shop."

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Plaintiff establishes its prima facie case through the production of mortgage and the note together with proof of the default in making payments (Hypo Holdings, Inc. v. Chalasani, 280 A.D. 2d 385, 721 N.Y.S. 2d 35 [1<sup>st</sup> Dept., 2001] and 2010-1 SFG Venture LLC v. 34-10 Development, LLC, 106 A.D. 3d 455, 965 N.Y.S. 2d 863 [1<sup>st</sup> Dept., 2013]).

Plaintiff provides copies of the promissory note, mortgage, surety agreement and the assignment of those documents to plaintiff on February 29, 2012, which was recorded and filed with the City Register of the City of New York on December 20, 2013 (Mot. Exhs., A-C & F). The affidavit of Kelly Marling, vice-president of Seneca Mortgage Servicing, plaintiff's loan servicer, states that defendants defaulted in making payments on November 1, 2012, with \$42, 553.98 due on the principal balance of the note. It is plaintiff's contention that the principal balance remains unpaid and due under the note and mortgage. Plaintiff argues that defendants' affirmative defenses and counterclaim, have no merit. Plaintiff has established its prima facie case for summary judgment.

Defendants failed to appear at oral argument and are in default on their cross-motion and in opposition to this motion. This Court will not address the merits of defendants arguments since they failed to appear in opposition.

A party seeking to obtain a default judgment is required to provide proof of service of the summons and complaint, as well as an affidavit stating the facts constituting the claim and the default. (KPG Inc. v. Salinas Group Limited, 11 A.D. 3d 338, 783 N.Y.S. 2d 543 [1<sup>st</sup> Dept., 2004] and Garcia v. City of New York, 71 A.D. 3d 503, 895 N.Y.S. 2d 817 [1<sup>st</sup> Dept., 2010]). An affidavit of service by a process server is prima facie evidence of sufficient service (Ananda Capital Parnters, Inc. v. Stav Electrical Systems (1994) Ltd., 301 A.D. 2d 430, 753 N.Y.S. 2d 488 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]).

Defendants are the only parties to have served an Answer to the Summons and Complaint in this action. Plaintiff has provided affidavits of service from a process server attesting to service upon the remaining named co-defendants and has stated a basis to obtain a default judgment.

Plaintiff seeks to amend the caption to include "Dental Care of Richmond Hill" for "John Doe 1" and "Signs R Us Print Shop" for "John Doe 2," and to otherwise strike all references to "John Doe 3" through "John Doe 99." Plaintiff claims that the entities sought to be substituted have been served with copies of the Summons and Complaint, and are necessary parties to this action.

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (*McCaskey, Davies & Associates, Inc. v. New York City*, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party in the preparation of the case or support of their position (*Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [1<sup>st</sup> Dept, 2011]).

There has been no objection to the relief sought and plaintiff has stated a basis to amend the caption.

Accordingly, it is ORDERED that, plaintiff's motion pursuant to CPLR §3212, for summary judgment seeking to strike the affirmative defenses and counterclaim asserted in the Answer of LUIS DE LA CRUZ and 3472 BROADWAY REALTY CORP., is granted on default, and it is further,

ORDERED, that defendants, LUIS DE LA CRUZ and 3472 BROADWAY REALTY CORP.'s cross-motion pursuant to CPLR §3212 for summary judgment, is denied on default, and it is further,

ORDERED, that LUIS DE LA CRUZ and 3472 BROADWAY REALTY CORP.'s Answer is stricken, including the affirmative defenses and counterclaim, and it is further,

ORDERED, that plaintiff is granted a default judgment, pursuant to CPLR §3215, against defendants, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, and THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and it is further,

ORDERED, that plaintiff is directed to settle order on notice by serving upon the General Clerk's Office (Room 119 - Order Section) for review, and the named defendants, with reference to a Referee to hear and report on a computation and to ascertain the amount due on the lien, as well as whether the premises should be sold in separate parcels, and it is further,

ORDERED, that plaintiff is granted leave to amend the caption, and it is further,

ORDERED, that the caption is amended and shall read as follows,

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SRP FUNDING TRUST 2011-5

Plaintiff,

-against-

LUIS DE LA CRUZ, 3472 BROADWAY REALTY CORP.,  
CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,  
CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT  
ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, DENTAL CARE OF RICHMOND  
HILL, and SIGNS R US PRINT SHOP,

Defendants.

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and it is further,

**ORDERED**, that plaintiff is to serve a copy of this Order with Notice of Entry with proof of service upon the General Clerk's Office (Room 119) and upon the Clerk of the County (Room 141-B), within twenty (20) days of entry of this order pursuant to e-filing protocol, and said clerks shall mark their records to reflect the amended caption.

**ENTER:**

  
\_\_\_\_\_  
**MANUEL J. MENDEZ,**

**Dated: August 3, 2015**

**J.S.C. MANUEL J. MENDEZ**  
J.S.C.

**Check one:**     **FINAL DISPOSITION**     **NON-FINAL DISPOSITION**  
**Check if appropriate:**     **DO NOT POST**                       **REFERENCE**