

<b>FYM Millbrook LLC v Weinberg</b>
2017 NY Slip Op 31872(U)
August 28, 2017
Supreme Court, New York County
Docket Number: 850003/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED  
*Justice*

PART 2

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FYM MILLBROOK LLC,  
  
Plaintiff,

INDEX NO. 850003/2016

MOTION SEQ. NO. 001

- v -

SARAH WEINBERG, TRACY KENNEDY, PUBLIC  
SERVICE MUTUAL INSURANCE CO., NEW YORK  
STATE DEPARTMENT OF TAXATION, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, JOHN  
DOE#1 THROUGH JOHN DOE#12

**DECISION AND ORDER**

Defendant.

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o  
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The following e-filed documents, listed by NYSCEF document number 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 62, 63, 64

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this action to foreclose on a mortgage, plaintiff FYM Millbrook LLC moves for an order (1) awarding it summary judgment in its favor; (2) striking defendant Sarah Weinberg's answer, along with the affirmative defenses and counterclaims therein, as well as the answer of defendant Tracy M. Kennedy; (3) entering a default judgment against the non-appearing defendants Public Service Mutual Insurance Co., New York State Department of Taxation, and New York City Environmental Control Board; (4) discontinuing the action as against the John Doe defendants; and (5) appointing a referee to compute the sums due to plaintiff. Weinberg opposes.

On October 22, 2010, Weinberg executed a document titled “Restatement of First Mortgage Note (Consolidated Note)” for the principal amount of \$2.88 million. (Doc. No. 34.) The cover of the document recites that it is between “35-28 Realty LLC” and “Capital One, N.A.” (*Id.*) The name “35-28 Realty” appears throughout the document, including in the first paragraph where it is defined as the “Maker” of the note. (*Id.*) The paragraph before Weinberg’s signature states that the “Maker agrees to the terms of this Note by signing below. . . . If the Maker is a limited liability company, this Note is executed by a duly authorized member.” (*Id.*)

On that same date, Weinberg also executed a document titled “Mortgage Consolidation, Modification and Extension Agreement.” (Doc. No. 35.) Unlike the note, the mortgage is unambiguously between Weinberg and Capital One, N.A., with no mention of 35-28 Realty anywhere in the document. Further, the mortgage contains paragraphs indicating that Weinberg, as the mortgagor, “covenant[ed] and agree[d] to pay the principal sum and interest at the times and in the manner hereinabove set forth and not before the maturity thereof as the same is hereby extended, and to comply with all other terms and provisions hereof and to perform all of the covenants and conditions of the Note and the Mortgage as herein modified.” (*Id.*) Indeed, the mortgage generally refers to Weinberg as if she is the person who entered into the note in her individual capacity.

By letter dated April 24, 2013, Capital One Bank notified Weinberg that it considered her in default of her obligations pursuant to the note and mortgage. (Doc. No. 38.) In May 2013, the note and mortgage were assigned to plaintiff. (Doc. No. 37.) Plaintiff now seeks to foreclose.

The movant on a motion for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). Plaintiff’s submissions fail to demonstrate the absence of material issues of fact, inasmuch as there is no indication whatsoever on the face of the note that Weinberg executed it in her individual capacity rather than on behalf of 35-28 Realty LLC. In the absence of “a high order of proof” (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 220 [1978]), this Court cannot overlook an alleged scrivener’s error as important as the identity of the indebted party. *See e.g. Cawley v New York University*, 2007 NY Slip Op 34122(U), 2007 WL 4555813 (Sup Ct, NY County 2007, Kornreich, J.). The affidavit of Charles Yassky, a manager of plaintiff, whose personal knowledge comes as a result of a review of plaintiff’s files, does not suffice to dispel issues of fact. Yassky’s assertion that Weinberg, “upon information and belief, has no affiliation with ‘35-28 Realty’” is of no evidentiary value, and does not suffice to overcome the “heavy presumption that a deliberately prepared and executed written document manifest[s] the true intention of the parties.” *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d at 219; *compare VNB N.Y. Corp. v Chatham Partners, LLC*, 125 AD3d 517, 517 (1st Dept 2015), *lv denied* 25 NY3d 910 (2015).

This Court would have preferred to turn to Weinberg’s opposition and find an affidavit from her, personally, clarifying her version of the events that led to the signing of the note. Instead, there is only an attorney affirmation. Since plaintiff has failed to meet its initial burden, however, the motion must be denied regardless of this omission. *See Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 (2014).

For the same reasons, the branch of plaintiff’s motion seeking to strike the First, Second, Fifth and Sixth Affirmative defenses and the counterclaim appearing in Weinberg’s answer, based on the theory that Weinberg signed the note in a corporate capacity rather than an

individual capacity, must be denied. On the other hand, Weinberg has failed to oppose or demonstrate any reason why this branch of the motion should not be granted to the extent it is directed to the Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Affirmative Defenses. .

Turning to the branch of the motion to strike the answer of defendant Kennedy, plaintiff has failed to give any reason whatsoever why it is entitled to such relief. Kennedy was named as a party in this action because she has a judgment against Weinberg, and her answer speaks to that judgment – nothing more.

With respect to the branch of the motion for a default judgment against non-appearing parties, plaintiff has satisfied its burden of showing that it properly served defendants Public Service Mutual Insurance Co., New York State Department of Taxation, and New York City Environmental Control Board, that they defaulted, and that there is a valid cause of action against them inasmuch as they were named herein to alert them of the foreclosure in light of their judgments against Weinberg. *See generally* CPLR 3215 (a); *Atlantic Cas. Ins. Co. v RJJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Plaintiff also seeks to discontinue the action as to the John Doe defendants. There is no prejudice to such relief, and it is granted.

Accordingly, it is hereby:

ORDERED that the motion is granted to the extent that the Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Affirmative Defenses appearing in Weinberg's answer are stricken; (2) leave to enter a default judgment against Public Service Mutual Insurance Co., New York State Department of Taxation, and New York City Environmental Control Board is granted, except that no judgment shall issue until this action is resolved with respect to the remaining defendants; (3) the action is discontinued as to the John Doe defendants, the caption is amended accordingly, and the Clerk is directed to mark this Court's records to reflect that the John Doe defendants are no longer named parties; and it is further

ORDERED that the motion is in all other respects denied; and it is further

ORDERED that counsel for plaintiff is directed to e-file a completed Notice to County Clerk (Form EF-22, available on the NYSCEF site), with a copy of this order attached thereto, within 20 days after this order is entered; and it is further

ORDERED that counsel for plaintiff is directed to email a copy of this order with notice of entry to the General Clerk's Office, at [genclerk-ords-mot@nycourts.gov](mailto:genclerk-ords-mot@nycourts.gov), within 20 days after this order is entered; and it is further


ORDERED that the parties are directed to appear for a preliminary conference on

\_\_\_\_\_ at 80 Centre Street, Room 280; and it is further

ORDERED that counsel for Weinberg is directed to serve a copy of this order with notice of entry on all parties within 20 days after it is entered.

This constitutes the decision and order of the court.

8/28/2017  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE