

216 Lenox Ave. Funding Inc. v Isaiah Owens LLC
2018 NY Slip Op 31797(U)
July 25, 2018
Supreme Court, New York County
Docket Number: 850011/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

Part 57

-----X
216 LENOX AVENUE FUNDING INC.

Plaintiff(s)

Index no. 850011/2018

-against-

**DECISION/ORDER
Motion Sequence No. 1**

**ISAIAH OWENS LLC
NEW YORK CITY DEPARTMENT OF FINANCE
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE
OWENS FUNERAL HOME, INCORPORATED
ISAIAH OWENS
JOHN DOE NO. 1 THROUGH JOHN DOE NO. 10,
THE LAST TEN (10) NAMES BEING FICTITIOUS
AND UNKNOWN TO THE PLAINTIFF, THE PERSONS
OR PARTIES INTENDED BEING THE TENANTS,
OCCUPANTS, PERSONS OR PARTIES, IF ANY,
HAVING OR CLAIMING AN INTEREST IN OR LIEN
UPON THE PREMISES DESCRIBED IN THE VERIFIED
COMPLAINT**

Defendant(s)

-----X
**Recitation, as required by CPLR § 2219(a), of the papers considered on the
review of this motion for summary judgment, default judgment, dismissal and
to amend the caption**

PAPERS

NUMBERED

**Notice of Motion and Affidavits
and Exhibits Annexed
Answering Affidavits and
Exhibits Annexed**

**1
2**

Replying Affidavits and Exhibits Annexed**3**

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The motion of 216 Lenox Avenue Funding Inc. (the **Plaintiff**) for (i) default judgment against the non-appearing parties, (ii) summary judgment against pursuant to CPLR § 3212 against defendants Isaiah Owens, LLC, Isaiah Owens, and Owens Funeral Home, Incorporated by striking their Answer and dismissing their affirmative defenses on the ground that no material issues of fact exist requiring a trial of Plaintiff's claim or precluding judgment for Plaintiff, (iii) appointment of a referee to compute, (iv) amendment of the caption and (v) such other and further relief that the court deems necessary and proper is granted solely to the extent that the caption is amended as set forth below but is otherwise denied in its entirety.

The Facts Relevant to the Motion

Reference is made to a (i) Building Loan Promissory Note (the **Original Note**), dated August 29, 2005, by Isaiah Owens, as borrower, in favor of Tuthill Finance (**Tuthill**) in the original principal amount of \$575,000, (ii) a Mortgage (the **Original Mortgage**), dated of even date therewith, by Mr. Owens in favor of Tuthill pursuant to which Mr. Owens mortgaged the premises known as 216 Lenox Avenue, New York, New York 10027 (the **Premises**) which Original Mortgage was duly recorded in the Office of the City Register of the City of New York (the **Register's Office**) on September 26, 2005 under CRFN 2005000537645, and which Original Mortgage was assigned pursuant to a Collateral Assignment of Mortgage (the **Collateral Assignment**), dated September 1, 2005, by and between Tuthill Finance and People's Bank pursuant to which Tuthill Finance, as assignor, assigned all of its right title and interest in the Original Mortgage to People's Bank, as assignee, which Collateral Assignment was recorded in the Register's Office on September 26, 2005, under CRFN 2005000537647, and which Original Mortgage was further assigned pursuant to an Assignment of Mortgage (the **Assignment of Mortgage**), dated as of September 13, 2013, by and between People's United Bank (f/k/a People's Bank as assignor, to Tuthill, as assignee and recorded in the in the Register's Office on October 24, 2013, under CRFN 2013000439931, and which Original Mortgage was further assigned pursuant to an Assignment of Mortgage (the **Third Assignment of Mortgage**), dated as of September 26, 2013, made by Tuthill Finance, as assignor, to VFC Partners 27, LLC, as assignee and recorded in

the Register's Office on October 24, 2013 under CRFN 2013000439929, and which Original Mortgage was further assigned pursuant to an Assignment of Mortgage (the **Fourth Assignment of Mortgage**; the Original Mortgage, together with the Collateral Assignment, the Assignment of Mortgage, the Third Assignment of Mortgage and the Fourth Assignment of Mortgage, hereinafter, collectively, the **First Mortgage**), dated as of April 28, 2015, made by VFC Partners 27, LLC as assignor to Carver Federal Savings Bank as assignee and recorded in the Register's Office on May 22, 2015 under CRFN 2015000172053, (iii) a Note (the **Second Note**), dated April 29, 2015, by Isaiah Owens, LLC as borrower to Carver Federal Savings Bank in the original principal sum of \$671,317.64 which Second Note was consolidated and restated with the Original Note, pursuant to a Restated Mortgage Note (the **Restated Note**; the Original Note, the Second Note, and the Restated Note, hereinafter, the **Consolidated Note**), dated April 29, 2015, by Isaiah Owens and Isaiah Owens, LLC in favor of Carver Federal Savings Bank, which by its terms consolidated and restated the Original Note and the Second Note in the original principal amount of \$1,200,000 and (iv) a Mortgage (the **Second Mortgage**), dated April 29, 2015, by Isaiah Owens to Carver Federal Savings Bank, which Second Mortgage was duly recorded in the Register's Office on May 22, 2015 under CRFN 2015000172054 and which Second Mortgage was consolidated was the First Mortgage pursuant to an Assumption, Consolidation, Extension and Modification Agreement (the **Mortgage Consolidation Agreement**), dated April 29, 2015, by Isaiah Owens in the principal amount of \$1,200,000 as collateral for the Consolidated Note and which Mortgage Consolidation Agreement was duly recorded in the Register's Office on May 22, 2015 under CRFN 2015000172055 and which Mortgage Consolidation Agreement was assigned pursuant to an Assignment of Mortgage (**Assignment of Mortgage Consolidation Agreement**; the First Mortgage, the Second Mortgage, the Mortgage Consolidation Agreement, the Assignment of Mortgage Consolidation Agreement, hereinafter the **Mortgage**), dated as of August 17, 2017, made by Carver Federal Savings Bank, as assignor, to 216 Lenox Ave Funding, as assignee, and which Assignment of Mortgage Consolidation Agreement was duly recorded in the Register's Office on August 23, 2017.

The Plaintiff alleges that as of August 1, 2017, there was a default under Consolidated Note and Mortgage and that on August 17, 2017 (the **Acceleration Notice**), the Plaintiff elected to accelerate the Consolidated Note and subsequently brought this action to foreclose the Mortgage.

I. Branch of the Motion for Summary Judgment Denied Without Prejudice

In order to establish a prima facie entitlement to summary judgment in an action for foreclosure the Plaintiff must show the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment. *PNC Bank National Association v. Salcedo*, --- N.Y.S.3d ---, 161 A.D.3d 571, 2018 WL 2247649, 2018 N.Y. Slip Op. 03628 (1st Dept. 2018); *Witelson v. Jamaica Estates Holding Corp. I*, 40 A.D.3d 284, 835 N.Y.S.2d 179, 2007 N.Y. Slip Op. 03971 (1st Dep't. 2007); *North Fork Bank v. Hampton Mist Management Corp.*, 225 A.D.2d 595, 639 N.Y.S.2d 452 (2nd Dep't. 1996).

The affidavit of Frank T. Chiarello, the President of the Plaintiff, submitted in support of the motion (i) refers among other documents, to the Mortgage Consolidation Agreement and the Restated Note, (ii) Plaintiff is the owner of the Mortgage Consolidation Agreement and the Restated Note and (iii) indicates that the defendants are in default by failing to make the payments required under the Restated Note and the Mortgage Consolidation Agreement.¹ The Plaintiff therefore argues that it is entitled to summary judgment.

In its opposition papers, the defendants assert that the Acceleration Notice annexed to the moving papers is defective because the Acceleration Notice is addressed to Borglum Realty Corp., Joseph Fields, Joan Nancy Fields and Barney Joseph Fields, strangers to the transaction contemplated by the Consolidated Note and Mortgage and refers to 106 East 71st Street, New York, New York as opposed to 216 Lenox Avenue, New York, New York which is the correct address that is subject to the Mortgage.

In the Plaintiff's Reply papers, Plaintiff's counsel concedes that the wrong Acceleration Notice was annexed to the motion and submits the correct Acceleration Notice which is addressed to the Defendants and references the correct real property.

The problem however is that new evidence submitted in reply is not entitled to consideration in connection with the motion for summary judgment. See *Lumbermens Mutual Casualty Company v Morse Show Company*, 218 A.D.2d 624, 630 N.Y.S.2d 1003 (1st Dep't. 1995); *Alto v. Firebrauch Realty Corporation, N.V.*, 33 A.D.3d 738, 822 N.Y.S.2d 610, 2006 N.Y. Slip Op. 07435 (2nd Dept. 2006);

¹ Affidavit in Support, dated February 19, 2018, by Frank T. Chiarello. ¶¶3-10.

Jackson-Cutler v. Long, 2 A.D.3d 590, 768 N.Y.S.2d 360, 2003 N.Y. Slip Op. 19464 (2nd Dep't. 2003). Accordingly, the motion for summary judgment is denied without prejudice.

II. Branch of the Motion for Default Judgment

The Plaintiff moves for Default Judgment pursuant to CPLR § 3215 as against “non-appearing parties”. In this case, the non-appearing parties are the New York City Department of Finance and the New York State Department of Taxation and Finance. Among other deficiencies, there is no affidavit of merit which supports the relief requested as against these defendants and this branch of the motion is accordingly denied.

III. Branch of the Motion to Dismiss and Amend the Caption

The Plaintiff moves to dismiss this action as against John Doe No. 1 through John Doe No. 10 and to amend the caption accordingly. There is no opposition. Accordingly, this action is dismissed as to John Doe No. 1 through John Doe No. 10 and the caption is amended to be:

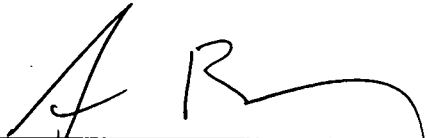
“216 Lenox Avenue Funding Inc., plaintiff

v.

Isaiah Owens LLC, New York City Department of Finance, New York State Department of Taxation and Finance, Owens Funeral Home, Incorporated, and Isaiah Owens, defendants”

Accordingly, it is hereby ordered that the motion is denied in its entirety without prejudice except that the action is dismissed as to John Doe No. 1 through John Doe No. 10 and the caption is amended as set forth above.

July 25, 2018



HON. ANDREW BORROK
J.S.C.

Hon. Andrew Borrok