

Capital One, N.A. v Laub
2019 NY Slip Op 31685(U)
June 12, 2019
Supreme Court, New York County
Docket Number: 19315/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART IAS MOTION 32

Justice

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INDEX NO. 159315/2017

CAPITAL ONE, N.A.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

KENNETH LAUB, STARWEAR DISTRIBUTORS LLC, BIL-MAN ASSET MANAGEMENT LLC, DAVID SUTTON, VMJV LLC, VIP BLVD ASTORIA LLC

DECISION AND ORDER OF REFERENCE

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 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, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment is granted.

Background

In this foreclosure action, plaintiff seeks to recover on a \$9 million loan secured by property located at 163 East 64th Street in Manhattan. Plaintiff alleges that defendant Laub failed to make the monthly payments starting in December 2016.

In opposition, Laub claims that the RPAPL 1304 notice sent to him was deficient. He claims that plaintiff did not sufficiently prove that it mailed the notice. Laub also claims that plaintiff failed to send the default notice required to be sent in the mortgage.

Defendant Starwear, a junior mortgagee, complains that delays in this case have eroded the equity in the property. Starwear also contends it cannot be in default because it has filed a notice of appearance, claim for surplus monies and demand for a deficiency judgment.

Discussion

The Court finds that the Zachary affidavit submitted by plaintiff (NYSCEF Doc. No. 45) is sufficient to establish that the proper mailings were sent. Zachary, a senior manager in the Home Loan Servicing Department for plaintiff, explains how the RPAPL 1304 notice was prepared and sent (*id.* ¶ 3). Zachary contends that he reviewed plaintiff's document management system, which contains digital images of the letters that are sent, and this indicated that the notices were mailed (*id.* ¶ 4). He also attaches copies of the notices (NYSCEF Doc. No. 47) and of the return receipt cards for the mailings (NYSCEF Doc. No. 48). This is enough to establish the presumption of mailing. Plaintiff detailed its procedure for mailing the notices and attached evidence showing that the notices in this case were sent.

With respect to Starwear's opposition, the Court finds that the delays that occurred were not significant nor do they justify tolling interest. As Starwear points out, this case was subject to mandatory foreclosure settlement conferences. And the fact is that plaintiff filed the instant motion within the time required by the Court's order (NYSCEF Doc. No. 44 [requiring plaintiff to file the instant motion on or before October 12, 2018]). While the foreclosure settlement part invariably delays a case if no settlement is reached, the Court cannot ignore CPLR 3408. Moreover, there is no basis to find that plaintiff did any delaying—rather it appears that Laub requested adjournments. Contrary to Starwear's argument, this is not a case where tolling interest would be appropriate. Finally, plaintiff is entitled to a default judgment against Starwear because Starwear never answered—plaintiff cannot obtain summary judgment over a defendant where issue was never joined (i.e., the filing of an answer).

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment against defendant Kenneth Laub is granted and his answer and affirmative defenses are severed and dismissed; and it is further

ORDERED that plaintiff is granted a default judgment against the non-appearing defendants; and it is further

ORDERED that Doron Lieby, Esq. 32 Broadway,
13th floor, NY NY 10004 212-227-4200, is

hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the

computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added and removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties

and persons entitled to notice, including the Referee appointed herein.

Next Conference: November 26, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

6/12/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE