AJY SPE IV LP v Alba Ave LLC
2021 NY Slip Op 30279(U)
January 27, 2021
Supreme Court, Kings County
Docket Number: 510275/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of January, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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AJY SPE IV LP,

Plaintiff,

- against -

Index No. 510275/19

ALBA AVE LLC, PROPERTY INTEL LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY BUILDING DEPARTMENT, PETER SHAW, AND JOHN DOE #1 through JOHN DOE #99, the 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,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	102-109
Opposing Affidavits (Affirmations)	111-123
Reply Affidavits (Affirmations)	124

Upon the foregoing papers in this action to foreclose a mortgage encumbering the premises at 1119 Flatbush Avenue in Brooklyn (Property), defendants Alba Ave LLC (Alba) and Peter Shaw (Shaw) (collectively, defendants) move (motion sequence [mot.

seq.] five) for an order, pursuant to CPLR 2005 and 5015 (a) (1), vacating the March 11, 2020 order, by which this court granted plaintiff's motion to confirm a referee's report and for judgment of foreclosure and sale on default (Default Order and Judgment).

On or about February 11, 2020, plaintiff moved for an order confirming a referee report and for a judgment of foreclosure and sale, which was returnable before this court on March 11, 2020. When defense counsel failed to answer the calendar call, plaintiff's motion was granted on default and the Default Order and Judgment was issued.

Defendants, in support of their instant motion to vacate the Default Order and Judgment, submit an affirmation from their prior counsel, Steve G. Williams, Esq. (Attorney Williams), who affirms that "a judgment of foreclosure was granted on default on March 11, 2020 apparently due to my failure to appear for the calendar call." Attorney Williams affirms that "my failure to appear on that date was due to a calendar error, having inadvertently 'diaried' March 18th instead of March 11th." Attorney Williams requests that his inadvertent default be excused, pursuant to CPLR 2005. Attorney Williams also affirms that "I had intended to appear on the motion return date to at least seek an adjournment to file opposition, defend this case, and to continue my settlement discussions with plaintiff's counsel."

Defendants also submit an affirmation from their new counsel, Steve Okenwa, who defendants retained in place of Attorney Williams. Defense counsel asserts that defendants' default in appearing at the March 11, 2020 calendar call should be excused based on their prior counsel's law office failure. Defense counsel notes that defendants'

default was not deliberate, since "Mr. Williams also averred that his intention was to appear and seek [an] adjournment so as to have enough time to serve and file opposition papers to plaintiff's motion."

Defendant Peter Shaw submits an affidavit attesting that in August 2004, he and his wife took out a residential mortgage from JP Morgan Chase. Shaw attests that on or about November 1, 2016, he and Alba borrowed an additional sum from Habib Bank, and the JP Morgan Chase mortgage and the Habib mortgage were consolidated under a consolidation, modification and extension agreement (CMEA) evidencing a $710,000.00 mortgage loan from Habib Bank encumbering the Property.

According to Shaw, when the CMEA was executed, "Habib Bank insisted on maintaining a RESERVE amount of $26,950.88 covering six (6) monthly mortgage payments." Shaw further alleges that "[y]our deponent was advised that the purpose of maintaining the Reserve was to cure any future lapses in monthly mortgage payments . . ." Shaw asserts that on February 1, 2019, the date of defendants' alleged default, "there was over $26,000.00 in reserve, which plaintiffs were required to reach to cure the alleged default." Shaw also attests that "[p]rior to the commencement of this action, I was not served with any notice to cure the default in payment" and "[t]he only notice I was served with was a 'notice of acceleration.'" Shaw asserts that "being that your deponent was not in default as alleged by plaintiffs, the . . . motion should be granted in the interest of substantial justice."

Defense counsel argues that defendants have a meritorious defense to both the action (based on the Reserve) and to plaintiff's motion to confirm the referee's report because the referee's finding is not supported by the record. Defense counsel argues that there is "no evidence whatsoever substantiating" several charges, including the "negative escrow" charge of $9,489.77, interest on negative escrow of $1,634.61 and pre-payment penalty of $19,804.20. Defense counsel also contends that the referee should not have "accepted a plainly criminally usurious interest rate of 19.5% amounting to a staggering sum of $117,642.47." Defense counsel also notes that plaintiff claims that defendants defaulted on February 1, 2019, however, plaintiff inexplicably seeks to collect interest running from January 1, 2019. Finally, defense counsel notes that plaintiff failed to provide "any explanation as to how it arrived [at] the amount of $660,140.12 as the 'principal balance' as it previously alleged that the principal amount due on the date of default was $669,629.89 . . ." Defense counsel asserts that "[a] conclusory written statement of a servicer cannot suffice to prove the amount due."

Plaintiff, in opposition, argues that defendants' motion to vacate the Default Order and Judgment fails to provide a reasonable excuse for: (1) their failure to oppose plaintiff's motion; (2) their failure to appear in court on the return date of the motion; and (3) waiting seven months to file this motion to vacate. Plaintiff also argues that defendants lack a meritorious defense since the Reserve was returned and defendants failed to dispute the amounts due in opposition to plaintiff's motion to confirm the referee report. Plaintiff's counsel argues that "Defendants missed their opportunity to oppose the proposed

computation . . ." by the referee. Plaintiff's counsel further argues that defendants were properly charged for the January 1, 2019 through February 1, 2019 period and that the 19% default interest rate was not usurious, as a matter of law.

Plaintiffs submit an opposing affidavit from Jeffrey Fleischmann (Fleischmann), a member and authorized signatory of plaintiff, who attests that "[w]hile Defendants provided the Lender's predecessor with the Reserve in November 2016, the Defendants fail to explain that the Reserve was returned to the Borrower in September 2017." Fleischmann further explains that, "based on the books and records of the Lender and its assigner, Habib, on September 12, 2017, Habib returned the Reserve, plus the accrual of interest in the amount of $27,077.26 to the Borrower and said amount was deposited into the Borrower's checking account . . ." Notably, Fleischmann fails to produce any documentary evidence that the reserve amounts were returned.

Defendants, in reply, argue that "plaintiff fails to address the fact that . . . the referee report was not supported by corroborating documentary evidence or any record of plaintiff." Defense counsel notes that "Mr. Fleischmann averred that plaintiff's predecessor-in-interest refunded the reserve of $27,077.26 to the defendants in 2017, yet a copy of the check or written acknowledgement of receipt was not exhibited to corroborate this conclusory assertion." Defense counsel further argues that plaintiff failed to corroborate or substantiate certain charges, including the $9,489.77 for "negative escrow," the $1,634.61 in interest on negative escrow or the pre-payment penalty of $19,804.20.

A party seeking to vacate a default in appearing pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*92-18 149th Street Realty Corp. v Stolzberg*, 152 AD3d 560, 562 [2017] [internal quotations omitted]). Furthermore, where a default in appearing results from law office failure, the court may "exercise its discretion in the interest of justice to excuse delay or default . . ." pursuant to CPLR 2005 (*see JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048, 1049 [2014]).

Here, defendants have demonstrated a reasonable excuse for their default based on their prior counsel's law office failure. Defendants have also established a potentially meritorious defense to this foreclosure action based on the reserve funds and a potentially meritorious opposition to plaintiff's motion to confirm the referee's report. In the court's discretion, and in the interest of justice, defendants' motion to vacate the Default Order and Judgment is granted since defendants' failure to appear in court and oppose plaintiff's motion was neither willful nor deliberate, and the validity of the referee's findings should be determined on the merits. Accordingly, it is

ORDERED that Defendants' motion (in mot. seq. five) is granted, and the March 11, 2020 Default Order and Judgment is hereby vacated.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE