

**Memphis Downtown Condominium v 140 Charles St.
Oasis LLC**

2021 NY Slip Op 30740(U)

March 9, 2021

Supreme Court, New York County

Docket Number: 160823/2016

Judge: Francis A. Kahn III

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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: HON. FRANCIS A. KAHN, III PART IAS MOTION 32

Justice

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INDEX NO. 160823/2016

MEMPHIS DOWNTOWN CONDOMINIUM BY ITS BOARD OF MANAGERS,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

140 CHARLES STREET OASIS LLC, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ABC CORP.

DECISION + ORDER ON MOTION AND JUDGMENT OF FORECLOSURE AND SALE

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action to foreclose on a lien for common charges on a parcel of commercial real property, Plaintiff's motion for, inter alia, summary judgment against Defendant 140 Charles Street Oasis, LLC ("140 Charles") and an order of reference was granted on default of 140 Charles by order dated April 26, 2019.

Now, Plaintiff moves to confirm the January 22, 2020 report of Referee Paul R. Sklar, Esq. and for the issuance of a judgment of foreclosure and sale. Defendant 140 Charles cross-moved to vacate its default in opposing the motion pursuant to CPLR §5015[a].

As to the cross-motion, to vacate a default in appearing in an action or opposing a motion, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (see CPLR §5015[a][1]; Bear Stern-Asset-Backed Sec. I Trust 2006 v Ceesay, 180 AD3d 504 [1st Dept 2020]; Karimian v Karlin, 173 AD3d 614 [1st Dept 2019]; Estrada v Selman, 130 AD3d 562, 562 [2nd Dept 2015]; Needleman v Chaim Tornhein, 106 AD3d 707 [2d Dept 2013]).

"Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (Harcztark v

Drive Variety, Inc., 21 AD3d 876, 876-877 [2nd Dept 2005]; *see also Glauber v Ekstein*, 133 AD3d 713, 713 [2nd Dept 2015]).

Here, cross-movant has proffered, via the affidavit of Medhat Ibrahim (“Ibrahim”), a member of the LLC, that failure to oppose the Plaintiff’s motion for summary judgment was due to the fault of prior counsel who refused to act because he purportedly was owed unpaid fee and did not move to withdraw. Ibrahim also asserted 140 Charles was “effectively” left unrepresented since it “could not afford new counsel”.

In its discretion, the court may accept a claim of law office failure as satisfying the reasonable-excuse requirement (*see* CPLR §2005; *Hertz Vehicles, LLC v Gejo, LLC*, 161 A.D.3d 549 [1st Dept 2018]). “A party attributing his or her default to a former attorney must provide “a detailed and credible explanation of the default”” (*U.S. Bank Natl. Assn. v Barr*, 139 AD3d 937 [2nd Dept 2016], *citing GMAC Mtge., LLC v Guccione*, 127 AD3d 1136, 1138 [2nd Dept 2015]).

Ibrahim’s affidavit was insufficiently detailed or substantiated (*see Matter of Le Monda v City of New York*, 159 AD3d 470 [1st Dept 2018]; *Perez v. New York City Hous. Auth.*, 47 AD3d 505 [1st Dept 2008]; *Achampong v Weigelt*, 240 AD2d 247 [1st Dept 1997]) and the claims of incompetence were entirely belied by an affidavit from its former counsel (*see Matter of Nieto*, 70 AD3d 831 [2nd Dept 2010]). Moreover, other than to claim, without corroboration, that it could not afford to retain counsel despite being a limited liability corporation possessed of valuable real property (*see Expo Dev. Corp. v 824 S. E. Blvd. Realty Corp.*, 113 AD3d 549 [1st Dept 2014]; *Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602 [1st Dept 2013]; *see also Neely v Felicetti*, 177 AD3d 484 [1st Dept 2019]), 140 Charles’s failed to explain its 10-month delay in moving to vacate its default, which came only after Plaintiff moved to confirm the referee’s report (*see Robinson v. 1068 Flatbush Realty, Inc.*, 10 AD3d 716; *Matter of Nieto*, 70 AD3d 831 [2nd Dept 2010]).

Inasmuch as cross-movant failed to demonstrate a reasonable excuse for its default, it is unnecessary to determine whether 140 Charles has shown the existence of a potentially meritorious defense (*see Buro Happold Consulting Engrs., PC. v RMJM*, *supra* [1st Dept 2013]; *Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). Even if the court were to assume a reasonable excuse were proffered, 140 Charles’s posited defenses to the motion and action lack merit.

Cross-movant’s assertion that Plaintiff procured summary judgment based upon misconduct is not established.

As such, Defendant 140 Charles’s cross-motion to vacate its default and the judgment in this matter is denied.

The branch of Plaintiff’s motion for a judgment of foreclosure and sale is granted as the claims that order granting summary judgment was based upon misrepresentations of the relevant agreements and condominium documentation are without merit. The branch of the motion for an independent money judgment is denied as Plaintiff can not seek foreclosure and money judgment simultaneously (*see RPAPL §1301[3]*).

Accordingly, it is

ORDERED and ADJUDGED that the motion for a judgment of foreclosure and sale and to confirm the referee's report is granted; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of Paul R. Sklar, Esq., who is appointed Referee for this purpose; and it is further

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at foreclosures@nycourts.gov and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions.

ORDERED that after receiving permission from the Auction Part Clerk, the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the **Irish Voice**; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request; 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 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 the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 180 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed.
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
 - a. Amount Due from the Referee's Report: \$154,919.30 inclusive of interest at the note rate from January 22, 2019 until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred.
 - b. Costs and Disbursements: _____ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment.
 - c. The Court declines to award additional allowance.
 - d. Attorneys' Fees: Included in referee's calculation, no additional allowance.
5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be

acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable, and it is further

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within **14 days** after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may place the property for resale without prior application to this Court unless Plaintiff's attorney elects to make such an application; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further identified:

The property is commonly known as the Commercial Unit in the building located at 140 Charles Street, New York, New York and a description of the premises is annexed hereto as schedule A.

3/9/2020
DATE

Francis A. Kahn III

FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE

**First American Title****First American Title Insurance Company**Title No.: **2050-406277****SCHEDULE A**

The Commercial Unit (the "Unit") in the building (the "Building") known as the Memphis Downtown Condominium and by the street number 140 Charles Street, Borough of Manhattan, City, County and State of New York, said Unit being designated and described as Commercial Unit in the Declaration ("Declaration") dated November 18, 1986, made pursuant to Article 9-B of the Real Property Law of the State of New York the "Condominium Act"), establishing a plan for condominium ownership of Building and the land (the "Land") upon the Building is situated, which land is more particularly described as set forth below, which declaration was recorded in the New York County Office of the Register of The City of New York on December 16, 1986, in Reel 1157, Page 2248. This Unit is also designated as Tax Lot 1101 in Block 631 of Section 2 of the Borough of Manhattan on the Tax Map of the Real Property Assessment Department of the City of New York and on the Floor Plans of the Building, certified by Rothzeid Architects, on November 25, 1986, and filed with the Real Property Assessment Department of The City of New York, on December 12, 1986 and filed in the City Register's Office on December 16, 1986, as Condominium Plan No. 376 and as Map No. 4534. The premises within which the Unit is located are more particularly described as set forth below:

TOGETHER with the undivided 11.50500% interest in the Common Elements.

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the easterly side of Washington Street with the southerly side of Charles Street;

RUNNING THENCE easterly along the southerly side of Charles Street 130 feet 6-5/8 inches;

THENCE southerly along a line forming an interior angle of 91 degrees 35 minutes 50 seconds with the southerly side of Charles Street, 97 feet 1 inch to the center line of the block between Charles Street and West 10th Streets;

THENCE westerly along the center line of said block, 73 feet 9-3/4 inches;

THENCE southerly along a line forming an exterior angle of 101 degrees 33 minutes 20 seconds with the last preceding course, 11 feet 4 1/4 inches;

THENCE westerly along a line forming an interior angle of 86 degrees 17 minutes 50 seconds with the last preceding course, 83 feet 3-1/2 inches to the easterly side of Washington Street;

THENCE northerly along the easterly side of Washington Street, 89 feet 4 inches to the point or place of BEGINNING.

Supreme Court, New York County Auction Part Rules for Outdoor Auctions**An auction will not go forward if it is not on the Auction Calendar**

1. Prior to scheduling publication, the plaintiff and referee shall contact the Auction Part clerk at SFC-Forclosures@nycourts.gov to place the auction on the auction calendar.
2. The Referee and all interested parties must be present on the scheduled auction date at 2:15 p.m. on the portico at 60 Centre Street.
3. The Terms of Sale must be posted on the portico before the auction begins. The Referee shall afford prospective bidders time to review the Terms of Sale.
4. At his or her discretion, the Referee *may* choose not to accept cash.
5. A successful bidder must have in his/her possession at the time of the bid the full 10% of the sum bid, in cash (if accepted at the referee's discretion) or certified or bank check to be made payable to the Referee.
6. All persons wishing to bid on properties must register with the Referee and provide proof of identification.
7. Bidders will be required to stand and state their names at the time the bid is made.
8. Bidders are permitted to use cell phones to communicate with business partners via text messages only. Phone calls and video calls (such as FaceTime, Skype or Teams) are not permitted.
9. No sale will be deemed final until the full 10% deposit has been paid to the Referee and the Terms of Sale have been signed; this must be done immediately following the auction.
10. If a successful bidder fails to immediately pay the deposit and sign the Terms of Sale, the property will be promptly re-auctioned the same afternoon.
11. Bidders are cautioned that the failure to furnish the 10% deposit or sign the Terms of Sale after winning an auction may result in the loss of future bidding privileges. The Court reserves the right to impose penalties for inappropriate behavior or other misconduct as it sees fit.
12. Within 10 days of the auction the Referee shall report to the auction clerk via email (SFC-Forclosures@nycourts.gov) the amount of the successful bid (the purchase price) and the name and address of the successful bidder.
13. Within 10 days of the auction the Referee shall report to the auction clerk via email (SFC-Forclosures@nycourts.gov) the sale price, the amount awarded in the judgment of foreclosure and sale and the upset price. The clerk shall record and enter this information in the court's computer system.
14. The Referee conducting the sale shall complete a Surplus Monies Form immediately following the sale. All information must be completed; if there is no surplus, then that must also be indicated.
15. Within 10 days of the auction, the Referee shall deliver the signed Surplus Monies Form to the auction clerk via email (SFC-Forclosures@nycourts.gov). The auction clerk shall upload the form to NYSCEF (if an e-filed case) or provide it to the County Clerk (if a paper case).
16. All bidders must wear a face mask/shield at all times and social distancing must be observed by all bidders at all times. Bidders who do not comply with the face mask and/or the social distancing mandate will be removed from the auction.
17. A copy of these rules will be appended to all Judgments of Foreclosure and Sale.