

Old Republic Natl. Tit. Ins. Co. v Salomon
2021 NY Slip Op 31631(U)
May 11, 2021
Supreme Court, Kings County
Docket Number: 517742/18
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 11th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, AS SUCCESSOR IN INTEREST TO BEIS CHASIDEI GORLITZ,

Plaintiff,

- against -

Index No. 517742/18

YEHUDA SALAMON and ETTY SALAMON,

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) _____

49-69 110-115

Opposing Affidavits (Affirmations) _____

111-115 116-119

Reply Affidavits (Affirmations) _____

116-119

Upon the foregoing papers in this action to foreclose a mortgage which was converted to an action to recover on a mortgage note, plaintiff Old Republic National Title Insurance Company, as Successor in Interest to Beis Chasidei Gorlitz (Old Republic), moves (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 3215, granting it a default judgment against defendants Yehuda Salamon and Ety Salamon (collectively, defendants or guarantors).

Defendants cross-move (in mot. seq. three) for an order, pursuant to CPLR 3012 (d), extending their time to appear or plead, *nunc pro tunc*, to February 5, 2020, and compelling Old Republic to accept their answer to the amended complaint that was electronically filed at NYSCEF Doc. No. 47 on February 5, 2020.

Background

The Foreclosure Action

On August 30, 2018, Beis Chasidei Gorlitz (Gorlitz) commenced this action to foreclose on real property at 4917/4921 12th Avenue, Units C1 and R1 in Brooklyn (Property) by filing a summons, a verified complaint and a notice of pendency against the Property. On October 22, 2018, defendants answered the complaint.

The Amended Complaint

On August 27, 2019, Old Republic moved for an order substituting it as plaintiff, as successor in interest to Gorlitz, and amending the complaint and the caption. By a December 9, 2019 order, the court (Vaughan, J.) granted the motion and ordered that Old Republic serve the order together with the amended complaint within 60 days.

Old Republic filed an affidavit of service reflecting that it served *defense counsel* with the amended complaint by first class mail on December 18, 2019.

The amended complaint alleges that “[t]his is an action based on an instrument for payment of money” (amended complaint at ¶ 4). Specifically, the amended complaint alleges that: (1) on February 5, 2004, the borrower 4921 12th Avenue LLC (borrower)

executed a promissory note in favor of Flushing Savings Bank, FSB (Flushing) in the principal amount of \$420,000.00 (Flushing Note), and (2) on March 8, 2005, the borrower executed a promissory note in favor of Zev Pollack and Yedida Pollack in the principal amount of \$650,000.00 (Pollack Note) (*id.* at ¶¶ 5 and 6). On May 2, 2006 and April 27, 2006, respectively, the Flushing Note and the Pollack Note were allegedly negotiated to Gorlitz (*id.* at ¶¶ 7-8). On May 4, 2006, the borrower allegedly executed a \$241,358.44 gap note in favor of Gorlitz (*id.* at ¶ 9). On May 4, 2006, the borrower allegedly executed a consolidated and restated mortgage note in the principal amount of \$1,300,000.00 in favor of Gorlitz (Consolidated Note), which consolidated the Flushing Note, the Pollack Note and Gap Note (*id.* at ¶ 10). On May 4, 2006, the borrower also allegedly executed a \$1,200,000.00 building loan note (Building Loan Note) in favor of Gorlitz (*id.* at ¶ 11).

The amended complaint alleges that: (1) on August 15, 2007, the borrower and defendant Yehuda Salamon executed an extension agreement (Extension Agreement) under which Salamon personally agreed to pay the monies then owed, and (2) on February 21, 2010, the borrower and defendants, as guarantors, allegedly executed a forbearance agreement (Forbearance Agreement) under which the Consolidated Note was extended to December 31, 2016, the parties acknowledged \$5,194,948.99 was due and owing Gorlitz and the guarantors guaranteed payment to Gorlitz (*id.* at ¶¶ 12-15).

The amended complaint further alleges that the borrower and guarantors “failed to comply with the terms of the Extension Agreement and Forbearance Agreement by

failing to pay the monthly installment due beginning on December 31, 2016, and the installment due on each subsequent month in accordance with the terms thereof” (*id.* at ¶ 16). On August 30, 2018, Gorlitz allegedly elected to accelerate the entire unpaid principal due under the Consolidated Note, the Building Loan Note, the Extension Agreement and the Forbearance Agreement (*id.* at ¶ 17). The amended complaint alleges that as of November 5, 2018, \$14,442,000.000 is due and owing under the Consolidated Note, the Building Loan Note, the Extension Agreement and the Forbearance Agreement, all of which “were negotiated to Old Republic on or about November 5, 2018” (*id.* at ¶¶ 18 and 19).

Defendants’ Answer

On February 5, 2020, defendants electronically filed their answer to the amended complaint. Notably, defendants admit the allegations in paragraph 16 of the amended complaint regarding their payment default (answer at ¶ 1), deny that Gorlitz “had the ability to ‘accelerate’ any principal or interest” as alleged in paragraph 17 of the amended complaint (*id.* at ¶ 7), deny the allegations regarding the amount due and owing in paragraph 18 of the amended complaint (*id.* at ¶ 3) and admit that the Extension and Forbearance Agreement were executed, “however avers that the same were obtained through fraudulent means and never intended to be accurate or enforceable” (*id.* at ¶ 5). Defendants also asserted affirmative defenses, including that: (1) “[t]he Extension Agreement and the Forbearance Agreement, as defined in the Complaint, were

fraudulently induced” (*id.* at ¶ 8); (2) “[a]ll funds due and owing to . . . Gorlitz by [the borrower] 4921 12th Avenue LLC were paid in full” (*id.* at ¶ 9); and (3) the claims asserted are barred by the applicable statute of limitations.

On February 6, 2020, Old Republic filed a Notice of Rejection of defendants’ answer to the amended complaint, asserting that “[d]efendants[’] time to answer expired on January 22, 2020 and was not extended.”

Old Republic’s Motion for a Default Judgment

Old Republic now moves for a default judgment against defendants in the amount of \$14,442,000.00 with 24% interest accruing from November 5, 2018. Old Republic asserts that “[d]efendants’ time to answer the amended complaint has expired and has not been extended” and “[d]efendants have not timely answered and are in default.” Old Republic’s counsel affirms that “[t]he amended complaint was served on defendants by e-file service and mail upon their attorney of record on December 18, 2019.” Old Republic’s counsel further affirms that “[a]n additional copy of the summons and amended complaint were served on defendants and their counsel by first class mail on January 8, 2020 pursuant to CPLR 3215 (g).”

In support of its motion, and to substantiate the allegations in the amended complaint, Old Republic submits an Affidavit of Merit from Maria Filippelli, a Senior Vice President and Deputy Chief Claims Counsel for Old Republic. Old Republic also submitted an affirmation from Rabbi Isaac Jungreis, the President and a member of the

Board of Directors of Gorlitz.

Defendants' Cross Motion

Defendants oppose Old Republic's motion and cross-move for an order, pursuant to CPLR 3012 (d), extending their time to appear or plead and compelling Old Republic to accept their answer to the amended complaint that was electronically filed at NYSCEF Doc. No. 47 on February 5, 2020.

Defense counsel argues that “[p]laintiff claims to have served its amended complaint (with no summons) on Defendants via *mailing to your affirmant* on December 18, 2019 . . . However, service on the Defendants themselves did not take place until *January 8, 2020*, when Plaintiff caused a copy of the *summons*, and the original complaint, and the amended complaint, to be *mailed* to the individual defendants directly.” Defense counsel argues that “[s]ince the Complaint was not served on the Defendants via personal delivery to them . . . the time to answer the complaint was thirty days from January 8, 2020, and your Affirmant properly calendared it as such.” Defense counsel asserts that he timely filed an answer to the amended complaint on February 5, 2020, “before the thirty-day period had run . . .” Defense counsel notes that the amended complaint asserts “entirely *new* claims against the Individual Defendants that had *not* previously been asserted” since the original complaint sought foreclosure on a mortgage against the corporate borrower and did not seek a money judgment against the Salamon defendants as guarantors.

Even if Old Republic is correct that service of the amended complaint on defense counsel without a summons was good service, defense counsel asserts that the answer was filed a mere *fourteen days after* Old Republic contends that it was due, and therefore, seeks an order compelling Old Republic to accept the answer as filed. Defense counsel argues that “[p]laintiff has not asserted (let alone proved) any prejudice [due to] that short delay.”

Assuming defendants must establish a meritorious defense, they have included a copy of a November 16, 2017 affirmation from defendant Yehuda Salamon which was submitted in a companion, pending case.¹ In that affirmation, Salamon affirmed that the Forbearance Agreement “was not a ‘real’ document, but rather was supposedly being used by Rabbi Jungreis solely in connection with his dealings with the New York Attorney General’s office” in connection with an investigations by the Charities Bureau. Salamon also affirmed and described how the entire \$3.2 million loan from Gorlitz to the borrower had been paid in full.

Old Republic’s Opposition and Reply

Old Republic, in opposition to defendants’ cross motion and in further support of its motion for a default judgment, argues that “[t]he Salamons do not state or even attempt to state a reasonable excuse for their default.” Old Republic asserts that service of the amended complaint upon defense counsel was “authorized and therefore proper.” Old

¹ The companion, pending case is *Beis Chasidei Gorlitz v 4921 12th Avenue LLC*, Kings County index No. 519469/16.

Republic also claims that the defense proffered in the November 2017 Salamon affirmation was rejected by this court in the companion, pending case.

Discussion

CPLR 3012 (d) provides that:

“Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”

“In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (*see* CPLR 2004, 3012 [d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists” (*Yongjie Xu v. JJW Enterprises, Inc.*, 149 AD3d 1146, 1147 [2017]).

Under the circumstances presented here, where there was only a fourteen-day delay in answering the amended complaint and there is no discernable prejudice to Old Republic, defendants’ cross motion to compel Old Republic to accept their answer, which was electronically filed on February 5, 2020, is warranted (*see Leogrande v Glass*, 106 AD2d 431, 432 [1984] [holding that order compelling plaintiff to accept an answer that was only 16 days late was properly excused by the court as a matter of discretion]). Old Republic’s claim that defendants’ defenses are barred by *res judicata* should properly be

considered on a dispositive motion after issue is joined. Accordingly, it is hereby

ORDERED that Old Republic's motion (mot. seq. two) for a default judgment against defendants is denied; and it is further

ORDERED that defendants' cross motion (mot. seq. three) is granted and Old Republic is compelled to accept defendants' February 5, 2020 answer to the amended complaint, pursuant to CPLR 3012 (d).

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE