

**Irabor v Saxon Mtge. Servs., Inc.**

2021 NY Slip Op 32185(U)

November 1, 2021

Supreme Court, Kings County

Docket Number: Index No. 519441/2019

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 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 1st day of November 2021.

**P R E S E N T: HON. INGRID JOSEPH, J.S.C**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
OSARODION IRABOR,

Plaintiff,

Index No.: 519441/2019

-against-

**DECISION/ORDER**

SAXON MORTGAGE SERVICES, INC.,

Defendant.

-----X

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Motion:**

<u>Papers</u>	<u>NYSCEF Nos.</u>
Notice of Motion/Affirmation/Affidavits/Exhibits.....	23 - 43, 44

In this matter, plaintiff, Osarodion Irabor (“plaintiff”), moves for entry of a default judgment against defendant, Saxon Mortgage, LLC (“Saxon”), pursuant to CPLR § 3215 for its failure to respond to the Summons and Verified Complaint filed on September 4, 2019, and for an order cancelling and discharging a mortgage in the amount of \$603,750 filed against the premises known as 16 Roosevelt Place, Brooklyn, New York 11233 (Block 1562, Lot 33), executed on November 20, 2006 by prior owner, Margarita Cabral-Davis (“Cabral-Davis”), in favor of Alliance Mortgage Banking Corp. (“Alliance”) and recorded on December 4, 2006 at the New York City Department of Finance, Office of the City Register at City Register File Number (“CFRN”) 2006000667612.

CPLR § 3215 (a) provides, in pertinent part, that when a defendant has failed to appear, or interpose a pleading, the plaintiff may seek a default judgment against him (CPLR § 3215 (a); *see also, MSMJ Realty, LLC v DLJ Mortg. Capital, Inc.*, 157 AD3d 885, 887 [2d Dept 2018]). A plaintiff is entitled to a default judgment by submitting proof of service of the summons and complaint, proof that the defendant failed to timely answer, or appear, and proof of the facts constituting the cause of action. The plaintiff must further comply with the additional mailing requirement under CPLR § 3215(g)(4) when a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to Section 306 of the Business Corporation Law.

In this case, plaintiff submitted the sworn affidavit of its process server, Steven C. Avery (“Mr. Avery”), who states that he personally delivered two copies of the Summons and Verified Complaint to an agent at the secretary of state who was authorized to accept such service. Mr. Avery provided the date, time, and address where service occurred. Plaintiff also established that the additional mailing requirement under CPLR § 3215 (g)(4) was satisfied, based upon a separate affidavit prepared by Mr. Avery. In that affidavit of service, Mr. Avery states that another copy of the Summons and Verified Complaint was mailed to Saxon via the United States Postal Service on October 14, 2019 at 4700 Mercantile Drive, Fort Worth, TX 76137. Further, a review of the record reveals that more than one year has lapsed since plaintiff effectuated service upon Saxon, and Saxon has failed to interpose an answer, or otherwise appear in this matter. In the context of a motion for the entry of a default judgment, plaintiff is limited to the relief demanded in his verified complaint (*Cukierwar v College Central Network, Inc.*, 148 AD3d 983, 984 [2d Dept 2017] *citing R.D. Smithtown, L.L.C. v Lucille Roberts Figure Salon*, 277 AD2d

439, 440 [2d Dept 2000]). This relief and the evidence submitted by plaintiff in a prior motion was already considered, and denied without prejudice, by a predecessor judge (Sup Ct, Kings County, Montelione, J., 11/30/20). In that order, the court noted that the “basis of [plaintiff’s] action is his claim that the mortgage was satisfied” and ultimately ruled that there was “no proof” of any such satisfaction.

Plaintiff has provided additional information in support of the instant motion; however, the court finds that plaintiff’s first cause of action (ACTION FOR AN ORDER CANCELLING AND DISCHARGING SUBJECT MORTGAGE), merely states the remedy plaintiff seeks and fails to set forth the specific section under which such relief is permitted under the Real Property Actions and Proceedings Law.

Additionally, the totality of evidence submitted is insufficient proof of the facts constituting the cause of action as alleged. Plaintiff merely states, *upon information and belief*, that “[Saxon] was a mortgagee in reference to the subject premises,” and plaintiff sets out a chain of title sequence that covers a two-year period, between November 6, 2006 through October 8, 2008. In paragraph 6, plaintiff states that the prior owner, Cabral-Davis, executed a mortgage on November 20, 2006 in the amount of \$603,750 in favor of Alliance Mortgage Banking Corp. (“Alliance”). In paragraph 7, plaintiff asserts that Alliance assigned the mortgage to GMAC Mortgage, LLC (“GMAC”) on July 23, 2007. In paragraph 8, plaintiff alleges that “an assignment was executed assigning [the] mortgage from GMAC Mortgage, LLC., to Mortgage Electronic Registration System as nominee for Alliance” on February 19, 2008. In paragraph 9, plaintiff states that on September 18, 2008 ... Land America I.J. Inc. (“Land America”), bought the property for \$390,000 *without the benefit of a mortgage*,” and further, that

“upon information and belief,” the Land America purchase was a short sale. In the same paragraph, plaintiff alleges that Land America resold the premises on October 8, 2008 for \$825,000 to another buyer, Payton T. Osazusa (“Osazusa”), who took title to the premises *free of any prior encumbrances and liens*. In the next paragraph, plaintiff asserts that Saxon failed to present a “certificate or discharge for recording within thirty days of the date upon which the full amount of principle and interest was paid on the mortgage.” Plaintiff further asserts that Saxon’s delay has caused him “extreme hardship.”

These facts, as alleged, are not substantiated by the evidence submitted. At Exhibit G, plaintiff submitted a Bargain and Sale Deed dated September 18, 2008 that establishes the prior owner, Cabral-Davis, transferred her ownership interest in the subject property to Land America. At Exhibit H, plaintiff provided a Bargain and Sale Deed dated October 10, 2008 showing that Land America transferred its ownership interest to Osazuwa. Under Exhibit I, plaintiff remitted a copy of the Recording and Endorsement Cover Page from the Office of the City Register showing that Osazuwa provided a mortgage against the premises to Golden First Mortgage Corp. on October 10, 2008 to secure a loan of \$570,000. Plaintiff also provided, at Exhibit O, the order of Hon. Peter Sweeney dated February 18, 2021 (“February 2021 order”), granting plaintiff a default judgment canceling and discharging another mortgage that the previous owner (Cabral-Davis) executed on December 4, 2006 in favor of Alliance Mortgage Banking Corp, to secure a loan of \$201,250. Plaintiff commenced this separate action to obtain an order that cancels and discharges the other mortgage that the previous owner (Cabral-Davis) executed in favor of Alliance on the same day (December 4, 2006) to secure a loan of \$603,750.

The aforementioned documents are insufficient proof to constitute plaintiff’s claim that

the \$603,750 mortgage is satisfied. There are additional exhibits that show Alliance assigned the \$603,750 mortgage to GMAC on July 23, 2007, and GMAC assigned the mortgage to Saxon on February 19, 2008. However, on July 24, 2007, prior to assigning the mortgage to Saxon, GMAC commenced a foreclosure proceeding against Cabral-Davis (Plaintiff's Exh. N). There is indication that GMAC discontinued that foreclosure proceeding but plaintiff provided no corroborating evidence or the discontinuance and basis for such discontinuance. In any event, Cabral-Davis transferred her ownership interest to Land America on September 19, 2008 for \$390,000. Plaintiff alleges that the Cabral-Davis/Land America transaction was a short sale but provides no proof to substantiate that claim. Consequently, this court is without sufficient proof to determine whether a short sale occurred, or if Land America purchased Cabral-Davis's ownership interest subject to the \$603,750 mortgage lien that was assigned to Saxon. Thus, the court finds that plaintiff has failed to proffer facts constituting his claim.

Accordingly, plaintiff's motion for entry of a default judgment (Motion Seq. 3), submitted on default, is denied.

This constitutes the decision and order of the court.

ENTER,

  
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HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph  
Supreme Court Justice