

**Board of Mgrs. of 207-09 E. 120th St. Condominium
v Dougan**

2021 NY Slip Op 32409(U)

November 19, 2021

Supreme Court, New York County

Docket Number: 158033/2019

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 KAHN, III PART 32

Justice

INDEX NO. 158033/2019

BOARD OF MANAGERS OF 207-09 EAST 120TH STREET
CONDOMINIUM,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

KWAME DOUGAN, EMBRACE HOME LOANS, INC., JOHN
DOE NO.1 THROUGH JOHN DOE NO. 10

**DECISION + ORDER ON
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 32, 33, 34, 35, 36

were read on this motion to/for ORDER OF REFERENCE/REFERENCE TO

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a lien for unpaid common charges on a residential condominium unit located at 207-209 East 120th Street, Unit 1F, New York, New York. Defendant Kwame Leslie Dougan (“Dougan”), the unit owner, filed an answer on January 19, 2021 which was rejected by Plaintiff as untimely.

Now, Plaintiff moves for a default judgment pursuant to CPLR §3215 against Dougan as well as the other non-appearing Defendants, for the appointment of a referee to compute, and to amend the caption. Only Defendant Dougan opposes the motion.

With respect to an action foreclose a lien for common charges, Real Property Law §339-aa provides that such claims “may be foreclosed by suit authorized by and brought in the name of the board of managers, acting on behalf of the unit owners, in like manner as a mortgage of real property” (*see Board of Mgrs. of the Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership*, 37 AD3d 332 [1st Dept 2007]). “An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 899 [2d Dept 2019]). To foreclose on a lien for common charges, Plaintiff must submit proof of its “authority to collect common charges from the owners of units and, in the event of nonpayment, to add late fees, interest, attorneys’ fees and other costs of collection to the assessment” (*Board of Mgrs. of W. Amherst Off. Park Condominium v RMFSG, LLC*, 153 AD3d 1611 [4th Dept 2017]). In addition, Plaintiff must demonstrate the manner in which the amounts were calculated (*see Board of Mgrs. of Natl. Plaza Condominium I v. Astoria Plaza, LLC*, 40 AD3d 564 [2d Dept 2007]).

In support of the motion, Plaintiff submitted an affidavit from Thomas Lopez (“Lopez”), the treasurer of Plaintiff. Burgess’s affidavit laid a proper foundation for the admission of his employer’s own records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]) and annexed the records he relied on to his affidavit as required (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Contrary to Dougan’s assertion, the affidavit and annexed documents established Plaintiff’s right to collect common charges, late charges and attorney’s fees. Further, the copy of Plaintiff’s ledger for Dougan’s unit demonstrated how the amounts were calculated. Dougan’s arguments that Lopez lacked “credibility” and “qualifications” are without merit.

The affidavit of the process server served demonstrated compliance with the requisites of CPLR §308[4] concerning service on Dougan (*see eg Deutsche Bank Nat’l Trust Co. v Burnett*, 194 AD3d 908 [2d Dept 2021]; *Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047 [2d Dept 2015]). As such, Plaintiff has proffered *prima facie* evidence of proper service giving rise to a presumption of proper service (*see Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]).

Plaintiff has, therefore, has demonstrated its entitlement to a default judgment against Dougan and the other Defendants.

“To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2020], *citing US Bank N.A. v Dorestant*, 131 AD3d 467, 470 [2d Dept 2015]).

Dougan’s assertion that the affidavit of service was not timely filed is without merit. CPLR §308[4] requires that “proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later”. Here, the process server avers the affixing occurred on September 13, 2019 and the mailing occurred on September 16, three-days later. As the affidavit of service for Dougan was filed on October 4, 2019, 18 days after the mailing, it was accomplished timely. In addition, Dougan’s claim that the affidavit of service reveals service at an incorrect address is factually unsupported.

Dougan’s claim that Plaintiff failed to take proceedings to enter a default against him as required by CPLR §3215[c] is misplaced. Service was complete on October 4, 2019 and Dougan’s appearance or answer was required by November 3, 2019 (CPLR §320). Proceedings for entry of a default were, therefore, required to be taken by November 3, 2020. Ordinarily, Plaintiff’s motion, filed on November 6, 2020, would have been untimely. However, this argument overlooks the tolls that were in place because of the COVID-19 pandemic.

As first set forth in Executive Order 202.8 and subsequently continued in Executive Orders 202.14, 202.28, 202.38, 202.48, 202.55, 202.60 and 202.67, “any specific time limit for the . . . commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . . is hereby tolled”. That toll commenced on March 20, 2020 and continued until November 3, 2020 (*see Executive Orders 202.8 and 202.67*). Given the historic nature of the COVID-19 pandemic which resulted the issuance of these Executive Orders, the Court will not give a narrow reading to these edicts (*see Louis Monteleone Fibres, Ltd. v Kejriwal Newsprint Mills LLC*, ___ Misc3d ___, 2020 NY Slip Op 33853(U) [Sup Ct NY Cty 2020]) and finds the toll is applicable here. A toll, by definition, stops the running of a period of time and the duration of a toll is not part thereof (*see Chavez v*

Occidental Chem. Corp., 35 NY3d 492, 506, fn 8 [2020]; see also Black's Law Dictionary [11th ed. 2019]). Here, when the 228 days of the toll are excluded from the one-year period, Plaintiff's motion is indisputably timely.

Dougan's argument that necessary parties have not been joined does not constitute a defense herein. Although Dougan is correct that subordinate lien holders are necessary parties to a foreclosure action (RPAPL §1311[3]), they are not indispensable parties and a judgment may be issued absent their joinder (see *Polish Nat'l Alliance v. White Eagle Hall Co.*, 98 AD2d 400, 406 [2d Dept 1983]).

To the extent Dougan seeks to vacate his default pursuant to CPLR §5015[a][1] and CPLR §317, he has neither established a reasonable excuse for not timely answering nor has he established that he did not receive notice of this action in time to defend.

The branch of Plaintiff's motion to amend the caption is granted without opposition (see generally CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, the motion is granted in its entirety, and it is

ORDERED that the motion for a default judgment against the defaulting Defendants is granted; and it is further

ORDERED that **Elaine Shay, Esq., 300 East 42ND Street Floor 14 New York, NY 10017-5984 (646) 779-8520** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that they are 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 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 himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case 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 if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; 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 further

ORDERED that the caption of this action be amended to correct Plaintiff as Board Of Managers of 207-209 East 120th Street Condominium and to strike defendants Embrace Home Loans, Inc., and JOHN DOE No.1 through JOHN DOE No. 10, so that the action is hereby discontinued as against them; and it is further

ORDERED that the amended caption of the action appears as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
BOARD OF MANAGERS OF 207-209 EAST 120TH STREET
CONDOMINIUM,

Index No. 158033/2019

Plaintiff,
-against-

KWAME LESLIE DOUGAN,

Defendants.

-----X

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 removed pursuant hereto; and it is further

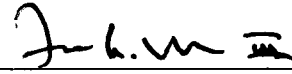
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at 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.

All parties are to appear for a virtual conference via Microsoft Teams on **March 16, 2022 at 11:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

11/19/2021

DATE



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

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