

LRD Funding, LLC v Wolk
2021 NY Slip Op 32638(U)
December 10, 2021
Supreme Court, New York County
Docket Number: Index No. 160033/2020
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY

PART

56M

Justice

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LRD FUNDING, LLC,

Plaintiff,

- v -

JUSTIN WOLK, LARRY WOLK, WOLK FAMILY
PROPERTIES 251 W 89, LLC, ICON REALTY CAPITAL
LLC, and LOAN TRUST, LLC,

Defendants.

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INDEX NO. 160033/2020MOTION DATE 08/19/2021MOTION SEQ. NO. 001

DECISION, ORDER, AND JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22
were read on this motion to/for JUDGMENT - DEFAULT.

This is an action alleging that the defendants committed fraud in connection with the repayment of a mortgage loan and the filing of a satisfaction of the mortgage securing repayment of that loan. It seeks a judgment vacating the satisfaction of mortgage, reinstating the plaintiff's mortgage on the subject real property, and declaring that two subsequent mortgages on that real property, the loans underlying those mortgage, and a related assignment of one of the mortgages are subordinate to the plaintiff's mortgage. The plaintiff also seeks to recover damages for a fraud and a fraudulent transfer. The plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Justin Wolk, Wolk Family Properties 251 W 89, LLC (WFP), ICON Realty Capital, LLC (ICON), and Loan Trust, LLC (Loan Trust). No party opposes the motion. The motion is granted to the extent that the court shall enter a default judgment against Justin Wolk, WFP, ICON, and Loan Trust awarding the plaintiff the declaratory and other equitable relief sought in its complaint, and a default money judgment against Justin Wolk and WFP, and the motion is otherwise denied.

The plaintiff, by its managing member, Robert Damerjian, Jr., asserted in its verified complaint that, on or about December 21, 2018, it originated and funded a mortgage loan to WFP in the face amount of \$273,000.00 in connection with Unit 6E in an apartment building located 251 West 89th Street in Manhattan (the property). The plaintiff contended that WFP tendered it a mortgage that the plaintiff recorded with the New York City Register on January 11, 2019. The plaintiff averred that, in or about July 2019 Justin Wolk, a member of WFP, requested that the plaintiff provide him with a satisfaction of mortgage as part WFP's plan to refinance the property. As the plaintiff explained it, on August 8, 2019, Justin Wolk sent an e-mail to Damerjian to which certain documents were annexed, including a proposed satisfaction of mortgage, and requested that they be executed to satisfy the mortgage. The plaintiff averred that it sent a payoff letter dated August 12, 2019 to Justin Wolk, the defendant Larry Wolk, and WFP, asserting that, although no payments had yet been made to amortize the loan, the LRD mortgage could be satisfied by payment of \$100,000.00. The letter also provided wiring instructions to those defendants.

As the plaintiff recounted it, on August 12, 2019, the defendants Justin Wolk, Larry Wolk, and WFP, unbeknownst to the plaintiff, executed a satisfaction of mortgage referable to the LRD mortgage by signing it "LRD Funding LLC – Justin A. Wolk,," and recorded the satisfaction piece with the New York City Register on August 14, 2019, despite the fact that none of those defendants was a member of LRD and none had authority to sign the satisfaction on behalf of LRD. The plaintiff further asserted that all of those defendants executed and recorded the satisfaction of mortgage with knowledge that they had no authority to do so.

The plaintiff further alleged that, on or about August 12, 2019, WFP obtained two additional mortgage loans secured by the property from the defendant ICON in the face amounts of \$460,000.00 (the gap mortgage loan) and \$1,260,000.00 (the mortgage consolidation loan), respectively, and that WFP assigned the mortgage and note referable to the

mortgage consolidation loan to LT. The plaintiff asserted that the underlying mortgages and assignment were recorded with the New York City Register on or about September 4, 2019.

The plaintiff commenced this action on November 19, 2020 against Justin Wolk, Larry Wolk, WFP, ICON, and Loan Trust, seeking to recover the sum of \$273,000, as well as the vacatur of the satisfaction of mortgage, the reinstatement of the LRD mortgage, and a judgment declaring that the LRD mortgage has priority over the mortgages related to the gap mortgage and mortgage consolidation loans. The complaint sets forth one cause of action, alleging violation of Debtor and Creditor Law § 273-a and, in effect, common-law forgery and fraud. The court notes that the plaintiff has voluntarily discontinued the action against Larry Wolk.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the defendant's default, and proof of the facts constituting the claim (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.* 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

The affidavits of service filed by the plaintiff establish that Justin Wolk, WFP, ICON, and Loan Trust were properly served with process, as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]). The affirmation of the plaintiff's attorney established that none of those defendants answered the complaint, timely moved with respect to the complaint, or appeared in the action.

With respect to the proof of the facts constituting the claim,

"CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras.

3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts”

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; see *Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the “quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered” (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (see *id.*; *Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [2d Dept 1983]).

“Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default” (*Green v Dolphy Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]; see *Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must “state a viable cause of action” (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating whether the plaintiff has fulfilled this obligation, the defendant, as the defaulting party, is “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (see *Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]).

Proof that the plaintiff has submitted “enough facts to enable [the] court to determine that a viable” cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; see *Gray v Doyle*, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant’s liability (see CPLR 105[u]; *Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc.*, 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371

[1st Dept 2007]; *see also Michael v Atlas Restoration Corp.*, 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522 [2d Dept 2005]; *see generally Mitrani Plasterers Co., Inc. v SCG Contr. Corp.*, 97 AD3d 552, 553 [2d Dept 2012]).

Debtor and Creditor Law § 273-a provides that

“[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.”

A cause of action under Debtor Creditor Law § 273 requires proof that a “conveyance” was “made . . . by a person who is or will be thereby rendered insolvent . . . without regard to his actual intent” and “the conveyance is made . . . without a fair consideration.” At the time that the challenged transactions were effectuated, none of the defendants here was a defendant in an action for money damages, or a judgment debtor in such an action. Hence, the plaintiff failed to establish its entitlement to default judgment pursuant to Debtor and Creditor Law § 273-a. Since the plaintiff submitted no proof that any of the defaulting defendants was or would be rendered insolvent by the challenged transfers, it has failed to establish its entitlement to default judgment pursuant to Debtor and Creditor Law § 273. Accordingly, there is also no basis upon which to award the plaintiff attorneys’ fees pursuant to Debtor and Creditor Law § 276-a.

Nonetheless, the plaintiff, by virtue of the complaint verified by its managing member, along with the documentary evidence that it submitted, established its entitlement to the relief sought based on claims sounding in forgery and common-law fraud. To assert a claim sounding in fraud, a plaintiff must allege an intentional misrepresentation of facts, made to induce the other party to rely on it, reasonable reliance of the damaged party on those facts, and damages (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A cause of action sounding in fraud must be pleaded with sufficient specificity, in that the “circumstances constituting the wrong shall be stated in detail” (CPLR 3016[b]). A civil cause of action premised upon forgery arises from “the fraudulent making of an instrument in writing to the prejudice of another’s rights”

(*Levi v Utica First Insurance Co.*, 2003 NY Slip Op 30097[U]; 2003 NY Misc LEXIS 2075, *12 [Sup Ct, N.Y. County, Sep. 9, 2003], quoting *Marden v Dorthy*, 160 NY 39, 54 [1899]; see *Piedra v Vanover*, 174 AD2d 191 [2d Dept 1992]; see also *Remington Paper Co. v O'Dougherty*, 81 NY 474, 491 [1880] ["[t]he forgery is the very fraud of which the plaintiff complains"]). The complaint adequately pleads a cause of action based on forgery, as the allegations in this regard are sufficiently specific (see *Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017]; *Matter of Kennelly v Mobius Realty Holdings, LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]), and the declaratory and equitable relief sought may properly be characterized as a fraud-rectifying remedy.

Although the plaintiff has established that it sustained monetary damages by virtue of the conduct of Justin Wolk and WFP, it failed to establish any wrongful conduct on the part of ICON or Loan Trust that would subject them to liability for money damages. Hence, the court directs the entry of a default judgment for money damages, but only against Justin Wolk and WFP.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, without opposition, to the extent that a default judgment shall be entered against the defendants Justin Wolk, Wolk Family Properties 251 W 89, LLC, ICON Realty Capital, LLC, and Loan Trust, LLC, awarding the plaintiff the declaratory and injunctive relief sought in the complaint, and awarding the plaintiff the principal sum of \$273,000.00 against the defendants Justin Wolk and Wolk Family Properties 251 W 89, LLC, jointly and severally, and the motion is otherwise denied; and it is

ADJUDGED and DECLARED that the satisfaction of mortgage dated August 12, 2019, and recorded in the office of the New York City Register on August 14, 2019, under document ID number 2019081200043001, which is referable to real property located at Unit 6E of 251 West 89th Street, in the Borough of Manhattan, City of New York, designated as block 1237, lot 1052, Unit 6E on the tax map of the Borough of Manhattan, City of New York, is vacated, discharged, and cancelled; and it is further,

ORDERED that the office of the New York City Register shall make the appropriate entries in its records so as to vacate, discharge, and cancel the satisfaction of mortgage described in the preceding paragraph; and it is further,

ADJUDGED and DECLARED that the mortgage given by the defendant Wolk Family Properties 251 W 89, LLC, to the plaintiff, LRD Funding, LLC, dated December 21, 2018, and recorded in the office of the New York City Register on January 11, 2019, under document ID number 2019011100171001, which is referable to real property located at Unit 6E of 251 West 89th Street, in the Borough of Manhattan, City of New York, designated as block 1237, lot 1052, Unit 6E on the tax map of the Borough of Manhattan, City of New York, is reinstated; and it is further,

ORDERED that the office of the New York City Register shall make the appropriate entries in its records so as to reinstate the mortgage described in the preceding paragraph; and it is further,

ADJUDGED and DECLARED that that, upon reinstatement, the mortgage given by the defendant Wolk Family Properties 251 W 89, LLC, to the plaintiff, LRD Funding, LLC, dated December 21, 2018, and recorded in the office of the New York City Register on January 11, 2019, under document ID number 2019011100171001, which is referable to real property located at Unit 6E of 251 West 89th Street, in the Borough of Manhattan, City of New York, designated as block 1237, lot 1052, Unit 6E on the tax map of the Borough of Manhattan, City of New York, does and shall have priority over the two mortgages given by the defendant Wolk Family Properties 251 W 89, LLC, to the defendant ICON Realty Capital, LLC, both dated August 12, 2019, and both recorded in the office of the New York City Register on September 4, 2019, under document ID numbers 2019081600975002 and 2019081600975003, respectively, in the respective face amounts of \$460,000.00 and \$1,260,000.00, both of which are referable to real property located at Unit 6E of 251 West 89th Street, in the Borough of Manhattan, City of New York, designated as block 1237, lot 1052, Unit 6E on the tax map of the Borough of

Manhattan, City of New York, and the latter of which was assigned by the defendant ICON Realty Capital, LLC, to the defendant Loan Trust, LLC, by written assignment dated August 12, 2019, and recorded in the office of the New York City Register on September 4, 2019, under document ID number 2019081600975004; and it is further,

ORDERED that the office of the New York City Register shall make any appropriate entries in its records so as to reflect the priority of mortgages set forth in the preceding paragraph; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in the principal sum of \$273,000.00, plus statutory interest at 9% per annum from August 14, 2019, in favor of the plaintiff, LRD Funding, LLC, and against the defendants Justin Wolk and Wolk Family Properties 251 W 89, LLC, jointly and severally.

This constitutes the Decision, Order, and Judgment of the court.

12/10/2021

DATE

JOHN J. WILEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE