

Nechadim Corp. v 500 Putnam St. Realty, LLC
2022 NY Slip Op 30673(U)
February 24, 2022
Supreme Court, Kings County
Docket Number: Index No. 522430/21
Judge: Lawrence Knipel
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At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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NECHADIM CORP.,
Plaintiff,

-against-

500 PUTNAM STREET REALTY, LLC,
500 PUTNAM LLC,
VALLEY NATIONAL BANK,
BANKUNITED, N.A., and
"JOHN DOE" #1 through #50, said persons
being fictitious, the person or persons intended
to be tenants or persons or entitled in possession
of the premises being foreclosed or any other
person or party having any interest in said premises,

Defendants.

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DECISION AND ORDER

Index No. 522430/21

Mot. Seq. No. 1 and 3

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion/Cross Motion, Affirmation (Affidavit),
and Exhibits Annexed _____

5-11; 31-51

Affirmation (Memorandum of Law) in Opposition
and Exhibits Annexed _____

53-72; 81-84

Affirmation (Memorandum of Law) in Reply
and Exhibits Annexed _____

77-80; 91-92

In this action to foreclose a mortgage which is allegedly encumbering certain commercial real property, plaintiff Nechadim Corp. (the "plaintiff") moves in Seq. No. 1 for leave under CPLR 3215 to enter a default judgment against defendants 500 Putnam Street Realty, LLC ("Putnam Realty"), 500 Putnam Street LLC ("Putnam"), and Valley National Bank ("VNB"; and collectively with Putnam Realty and Putnam, the

“defendants”).¹ Putnam Realty cross-moves in Seq. No. 3 for an order to vacate its default and to compel acceptance of its late answer, under CPLR 5015 (a) (1) and 3012 (d), respectively. On December 22, 2021, the motion and cross were fully submitted, with the Court reserving decision.

Determination of Plaintiff’s Motion

Under CPLR 3215 (f), “[o]n any [motion] for judgment by default, the [movant] shall file . . . proof of the facts constituting the claim.” Here, the plaintiff’s submissions do not rise to the level of “sufficient proof to enable a court to determine if the claim is viable” as against any defendant (*see Global Liberty Ins. Co. v Gorum*, 143 AD3d 768, 769 [2d Dept 2016]). The plaintiff’s complaint, as verified by counsel, does not constitute an affidavit (*see* CPLR 105 [u]). The plaintiff’s other submissions are similarly deficient.

Contrary to the plaintiff’s contention (in ¶¶ 2-3 of its counsel’s reply affirmation), Putnam’s and VNB’s respective failure to object to the plaintiff’s motion does not give rise to a “mandatory ministerial duty” compelling an immediate entry of a default judgment against them (*see Resnick v Lebovitz*, 28 AD3d 533, 534 [2d Dept 2006] [internal quotation marks omitted]). Irrespective of whether an objection is raised, the Court “retains the discretionary obligation to determine whether the movant has met the burden of stating a viable cause of action” (*Wachovia Mtge. FSB v Macwhinnie*, 175 AD3d 1587, 1588 [2d Dept 2019] [internal quotation marks omitted]). To reiterate, a plaintiff may not obtain a default judgment unless and until it submits the requisite proof as against each defaulting defendant – something that was not done in this case.

¹ Plaintiff seeks no default judgment against the remaining defendant, BankUnited, N.A.

Determination of Putnam Realty's Cross Motion

To vacate its default in answering the complaint and to compel acceptance of its late answer under CPLR 5015 (a) (1) and 3012 (d), respectively, Putnam Realty is required, as relevant herein, to demonstrate a “potentially meritorious” defense (*see Cox v New York State Thruway Auth.*, ___ AD3d ___, 2022 NY Slip Op 01139 [2d Dept 2022]; *Ryan v Breezy Point Coop., Inc.*, 76 AD3d 523, 524 [2d Dept 2010]).² For purposes of both CPLR 5015 (a) and 3012 (d), the defense need not be meritorious but only “potentially” meritorious. Here, Putnam Realty, by way of its member’s affidavit, has set forth potentially meritorious defenses to the plaintiff’s claims (*see Affidavit of Abraham Waldman*, dated November 19, 2021). In particular, the final and binding Post-Hearing Decision/Order, dated October 23, 2017 and entered on October 30, 2017, in the action titled *500 Putnam LLC v Nechadim Corp., et al.*, Index No. 500211/14 (Sup. Ct, Kings County), casts doubt on, among other matters, the validity and enforceability of the plaintiff’s mortgage on the underlying property.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 1 the plaintiff’s motion for leave to enter a default judgment is *denied in its entirety*; and it is further

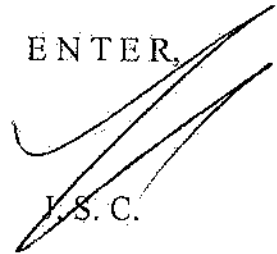
ORDERED that in Seq. No. 3, Putnam Realty’s cross motion is *granted*, and Putnam Realty’s answer, in the form annexed to its cross motion as Exhibit K (NYSCEF

² The plaintiff has conceded (in ¶ 4 of its counsel’s reply affirmation) that Putnam Realty’s default in answering the complaint was excusable within the scope of CPLR 5015 (a) (1) and thus was likewise excusable under CPLR 3012 (d).

Doc No. 44), shall be deemed served upon electronic service of a copy of this decision and order with notice of entry, as more fully set forth below; and it is further

ORDERED that the plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER,

J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**