

**Lynx Asset Servs., LLC v Nestor**

2022 NY Slip Op 31187(U)

April 4, 2022

Supreme Court, New York County

Docket Number: Index No. 850129/2019

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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**  
*Justice*

**PART 32**

-----X  
LYNX ASSET SERVICES, LLC,  
  
Plaintiff,

**INDEX NO. 850129/2019**

**MOTION DATE \_\_\_\_\_**

**MOTION SEQ. NO. 005 006**

- v -

PEGGY NESTOR, MARIANNE NESTOR, JEFFREY DELUCA, PUBLIC ADMINISTRATOR OF NASSAU COUNTY, AS ADMINISTRATOR CTA OF THE ESTATE OF OLEG CASSINI, DECEASED, EMIGRANT MORTGAGE COMPANY, INC., PRIME PLUS LLC, JOSEPH DEFINO, BRIAN CURRAN, PUBLIC ADMINISTRATOR OF NASSAU COUNTY, AS ADMINISTRATOR CTA OF THE ESTATE OF OLEG CASSINI, DECEASED, JOHN J. BARNOSKY, AS EXECUTOR OF THE ESTATE OF CHRISTINA CASSINI AND AS INDIVIDUAL, ALEXANDRE CASSINI BELMONT, AS EXECUTOR OF THE ESTATE OF CHRISTINA CASSINI, NYC PARKING VIOLATIONS BUREAU, JOHN DOES 1-12, INCLUSIVE, THE NAMES OF THE LAST 12 DEFENDANTS BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED, IF ANY, HAVING OR CLAIMING INTERESTS IN OR LIENS UPON THE MORTGAGED PREMISES DESCRIBED HEREIN

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 210, 211, 212, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 266

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 245, 246, 247, 248, 249, 250, 251, 252, 254, 255, 267

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents, the motions are determined as follows:

This is an action to foreclose on an amended, restated and consolidated mortgage encumbering commercial real property located at 15 East 63<sup>rd</sup> Street, New York, New York. The mortgage, given by the record owners, Defendants Peggy Nestor ("Peggy") and Marianne Nestor ("Marianne"), secures a loan in the original amount of \$9,500,000.00 which is memorialized by an amended, restated and consolidated promissory note given by Gemeaux Ltd. ("Gemeaux"). The consolidated note and mortgage were given to Plaintiff Lynx Asset Services, LLC. Defendant Peggy executed the note in her capacity as President of Gemeaux. The subject note consolidated five prior notes that memorialized

loans given Plaintiff and non-party Prime Plus, LLC to Gemeaux and Nestors. Nestor Defendants are also personal guarantors of the indebtedness evidenced by the consolidated note.

It is undisputed that Gemeaux defaulted in repayment of the subject note on or about May 1, 2018, and that Plaintiff unequivocally accelerated the note by letter dated May 22, 2019. Plaintiff commenced this action on June 14, 2019. Defendant Emigrant Mortgage Company (“Emigrant”) answered and raised six affirmative defenses. Defendant Public Administrator of Nassau County, as Administrator CTA of the Estate of Oleg Cassini answered and raised four affirmative defenses. Defendants John J. Bamosky, Esq. and Alexandre Cassini Belmont, as Executors of the Estate of Christina Cassini answered and raised four affirmative defenses.

Plaintiff and Defendants Gemeaux and Nestors entered into a forbearance agreement dated October 2019. Pursuant to that agreement, in lieu of answering, Defendants Gemeaux and Nestors were obligated to make certain installment and other payments in return for Plaintiff foregoing prosecution of this action. Also therein, these Defendants acknowledged an indebtedness of \$12,137,414.05, that they defaulted under the subject note and mortgage, that they “do not have any defenses to the Foreclosure Action and do not contest their default under the Loan Documents, acceleration of the Loan or Lynx’s right to foreclose the Consolidated Mortgage”. Concomitantly with this contract, Nestor Defendants executed affidavits of confession of judgment in this action consenting to entry of judgment against each individually upon their default. In those affidavits, Nestor Defendants “waive[d] all defenses in such actions, including, without limitation, jurisdictional defenses, and defenses based upon set-off, laches, waiver, statutes of limitation, duress, coercion, fraud, fraud in the inducement, accident, or mistake”.

Upon default under the forbearance agreement, and after a cure period, the parties agreed Plaintiff was entitled to a judgment against Defendants Gemeaux and Nestors without any further notice. Plaintiff was also sanctioned to move for a default judgment/summary judgment in this action against Nestors which these Defendants agreed to “not contest directly or indirectly”.

Now, Defendant Peggy Nestor moves (Motion Seq No 5), *pro se*, to vacate her default pursuant to CPLR §5015[a], to dismiss the complaint pursuant to CPLR §§306-b as well as 3211[a][3], [7] and [10], or in the alternative, for leave to file a late answer pursuant to CPLR §3012[d] or a traverse hearing. Plaintiff opposes the motion and moves (Motion Seq No 6) for summary judgment and an order of reference.

Defendant Peggy Nestor’s motion is denied in its entirety as she admitted her responsibility for the indebtedness, her default in answering and unequivocally waived all defenses to this action which necessarily includes filing an answer. Movant was required, but failed, in the first instance to demonstrate a basis to invalidate the forbearance agreement and confession of judgment (*see generally Biener v Hystron Fibers, Inc.*, 78 AD3d 162 [1<sup>st</sup> Dept 1980]). In any event, the motion is without merit as the affidavit of service established *prima facie* that Peggy Nestor was properly served, and she failed to proffer specific proof to rebut same. RPAPL §1304 is inapplicable as this action does not concern a “home loan” and Gemeaux is not a necessary party (*see* RPAPL §1311).

The branch of Plaintiff’s motion for summary judgment against the appearing Defendants is granted without opposition and a default judgment is granted against the non-appearing Defendants.

As to Defendant Peggy Nestor, Plaintiff demonstrated *prima facie* entitlement to a default judgment with submission of proof of the note, mortgage and forbearance agreement as well as the

Mortgagors' default thereunder (*see eg Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]). In opposition, Defendant Peggy Nestor failed to demonstrate a basis to deny Plaintiff's motion as her waiver of all defenses in this matter is enforceable and not against public policy (*see Weiss v Phillips*, 157 AD3d 1, 10 [1<sup>st</sup> Dept 2017]).

Accordingly, it is

ORDERED that Defendant Peggy Nestor's motion to vacate her default and/or dismiss this action is denied in its entirety; and it is further

ORDERED that the branch of the motion for summary judgment against the appearing parties and a default judgment against the defaulting parties is granted; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** is hereby appointed Referee to compute the amount due to Plaintiff and examine whether the premises described in the notice of pendency 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 he is 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 defendants captioned as "JOHN DOES 1-12" are not necessary parties and should be excised from the caption, and the caption hereinafter read as follows, without prejudice to any of the proceedings heretofore had herein; and it is further

ORDERED that the caption shall read as follows:

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

-----X  
LYNX ASSET SERVICES, LLC,

Plaintiff,

Index No. 850129/2019

-against-

PEGGY NESTOR, MARIANNE NESTOR  
a/k/a MARIANNE NESTOR CASSINI,  
JEFFREY DeLUCA, Public Administrator of  
Nassau County, as Administrator CTA of the  
Estate of Oleg Cassini, Deceased, EMIGRANT  
MORTGAGE COMPANY, INC., PRIME PLUS  
LLC, JOSEPH DEFINO, BRIAN CURRAN,  
Public Administrator of Nassau County, as  
Administrator CTA of the Estate of Oleg Cassini,  
Deceased, JOHN J. BARNOSKY, as Executor of  
the Estate of Christina Cassini and as individual,  
ALEXANDRE CASSINI BELMONT,  
as Executor of the Estate of Christina Cassini, and  
NYC PARKING VIOLATIONS BUREAU

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/suptmanh](http://www.nycourts.gov/suptmanh))); 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 **July 6, 2022 at 11:20 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](mailto: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.

4/4/2022  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

  
FRANCIS A. KAHN III  
**HON. FRANCIS A. KAHN III**  
J.S.C.