

Wilmington Trust, N.A. v Elmwood NYT Owner, LLC
2022 NY Slip Op 31190(U)
April 6, 2022
Supreme Court, New York County
Docket Number: Index No. 850176/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF CD 2016-CD2 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-CD2, WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF JPMDB COMMERCIAL MORTGAGE SECURITIES TRUST 2017-C5, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-C5, DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE TRUST 2017-P7, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-P7, and WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CD2017-CD3 MORTGAGE TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-CD3,

INDEX NO. 850176/2020
 MOTION DATE _____
 MOTION SEQ. NO. 013

**DECISION + ORDER ON
 MOTION**

Plaintiffs,

- v -

ELMWOOD NYT OWNER, LLC, LANDINGS NYT OWNER, LLC, OAKWOOD NYT OWNER, LLC, WALLKILL NYT OWNER, LLC, BOARD OF MANAGERS 229 WEST 43RD STREET CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, GLOBAL SECURITY GROUP INC., and JOHN DOE NO. I THROUGH JOHN DOE NO. XXX,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 179

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is

In motion sequence number 013, plaintiffs Wilmington Trust, National Association, as Trustee for the benefit of the Holders of CD 2016-CD2 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2016-CD2; Wilmington Trust,

for the benefit of the registered holders of JPMDB Commercial Mortgage Securities Trust 2017-C5, Commercial Mortgage Pass-Through Certificates, Series 2017-C5; Deutsche Bank Trust Company Americas (DB Trust Company), as Trustee on behalf of the Registered Holders of Citigroup Commercial Mortgage Trust 2017-P7, Commercial Mortgage Pass-Through Certificates, Series 2017-P7; and Wells Fargo Bank, National Association (Wells Fargo), as Trustee, on behalf of the Registered Holders of CD2017-CD3 Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2017-CD3 (Lenders) move, pursuant to CPLR 3125, for a default judgment against defendants Elmwood NYT Owner, LLC, Landings NYT Owner, LLC, Oakwood NYT Owner, LLC, Wallkill NYT Owner, LLC (collectively, Borrower Defendants), the Criminal Court of the City of New York (Criminal Court), and Global Security Group Inc. (Global Security) (collectively, Defaulting Defendants). The Lenders also seek to amend the caption to remove "John Doe. No. 1 to John Doe No. XXX" as defendants and to discontinue the action against them. This motion is unopposed.

Background

This action concerns the foreclosure of a mortgage lien on 229 West 43rd Street, New York, NY 10036 (Property). In October 2016, nonparty and original lender Deutsche Bank AG, New York Branch (DB-NY) made a loan to the Borrower Defendants in the principal amount of \$285,000,000 (Loan) and entered into a loan agreement (Loan Agreement). (NYSCEF Doc. No. [NYSCEF] 168, Summons and Verified Complaint ¶¶ 13-14.) The Loan is evidenced by nine promissory notes, each held by one of the Lenders. (*Id.* ¶ 5.) The Loan is secured by a mortgage (Mortgage), encumbering the Property, which was recorded in the land records of the City Register

of New York (CRFN 201600037185). (*Id.* ¶¶ 16-18; NYSCEF 11, Mortgage at 4¹.) DB-NY and the Borrower Defendants also entered into an Assignment of Leases and Rents (ALR), which was recorded in the land records of the City Register of New York (CRFN 2016000371816). (*Id.* ¶¶ 19-20; NYSCEF 12, ALR.)

The Lenders allege that the Borrower Defendants have been in default since February 2020 and have failed to cure despite numerous demands. (*Id.* ¶¶ 39-44.) On November 5, 2020, the Lenders filed a summons and verified complaint against the Borrower Defendants, the Board of Managers 229 43rd Street Condominium, the Criminal Court, Global Security, and John Doe No. I through John Doe No. XXX. The Lenders served the summons and verified complaint on the Borrower Defendants on November 18, 2020, the Criminal Court on November 20, 2020, and Global Security on December 4, 2020. (See NYSCEF 31-36, 54, Affidavits of Service.) To date, the Defaulting Defendants have failed to answer the verified complaint or otherwise appear. The court notes that Janice Mac Avoy, Esq. is listed as counsel for the Borrower Defendants on NYSCEF for e-filing notifications, but Ms. Mac Avoy has not filed a notice of appearance.

Discussion

“On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing.” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, *6-7 [Sup Ct, NY

¹ Pages refer to NYSCEF generated pagination.
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County 2018] [citations omitted].) However, a motion for default judgment must be brought within one year after the default. (CPLR 3215 [c].)

Borrower Defendants

CPLR 311(a)(1) provides, in relevant part,

“[p]ersonal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law.”

The Lenders served the summons and complaint on the Borrower Defendants on November 18, 2020 at 666 Fifth Avenue, 15th Floor, New York, NY 10103 c/o Kushner Companies. (NYSCEF 170-173, Affidavits of Service.) According to the affidavits of service, the summons and complaint was served on Nicole Lockhard, a receptionist. (*Id.*) However, it is not clear if this “person had the authority, or apparent authority, to accept service.” (*American Fed. Group, Ltd. v Union Chelsea Natl. Bank*, 279 AD2d 433, 433 [1st Dept 2001]; *see also Gleizer v American Airlines, Inc.*, 30 AD3d 376, 376 [2d Dept 2006] [finding no evidence that the corporation’s receptionist was an agent authorized by appointment or law to accept service on the corporation’s behalf].) Here, the receptionist’s authority or lack thereof is unknown. For example, did the process server inquire if the receptionist had the authority to accept service or did the receptionist inform the process server that she was authorized to accept. The court cannot determine whether service was proper on the current record. This portion of the Lenders’ motion will be held in abeyance to permit them to supplement the record if they so choose.

If it is found that service was properly effectuated, there is a question as to whether this default motion was timely filed. The time to seek a default judgment is measured from the default in responding to complaint. (See *MTGLQ Investors, L.P. v Shay*, 190 AD3d 527, 528 [1st Dept 2021] [citation omitted].) “Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.” (CPLR 3012[a].) If service of the summons and complaint was effectuated on November 18, 2020, the Borrower Defendants were required to answer or otherwise appear by December 8, 2020. However, according to the Lenders’ counsel, on January 29, 2021, Ms. Mac Avoy contacted the Lenders’ counsel and stated that she was retained by the Borrower Defendants. (NYSCEF 167, Fiander aff ¶ 28.) Ms. Mac Avoy allegedly requested a 30-day extension to respond to the complaint. (*Id.*) There was an alleged agreement to extend the Borrower Defendants’ time to answer until March 1, 2021. (*Id.* ¶ 29.) On March 2, 2021, the Lenders’ counsel reached out via email to Ms. Mac Avoy inquiring if there would be a responsive pleading; the inquiry went unanswered. (*Id.* ¶ 31.) The Lenders filed this default motion on December 20, 2021. Thus, the court requires more evidence as to this alleged agreement to extend the date to answer. The Lenders are permitted to supplement the record if they so choose.

NYC Criminal Court

CPLR 312 provides, in relevant part, “[p]ersonal service upon a court consisting of three or more judges may be made by delivering the summons to any one of them.” On November 20, 2020, the Lenders served the NYC Criminal Court by emailing the New York County District Attorney’s Office at casetrack@dany.nyc.gov. This method of service is not in compliance with CPLR 312, and the Lenders fail to provide any law to

support their method of service. Thus, this motion is denied as to the Criminal Court, and the complaint dismissed against it.

Global Securities

Global Security was named as a defendant because it is believed that it holds a mechanic's lien against the Property. The court finds that Global Securities was properly served in accordance with BCL § 306. (See NYSCEF 176, Affidavit of Service.) However, the default motion will also be held in abeyance as to Global Securities until the issues regarding the Borrower Defendants are resolved.

John Does

Finally, the Lenders move to discontinue this action as against "John Doe No. 1 to John Doe No. XXX" and remove them from the caption on the ground that they are not necessary parties to this action. Upon application to the court, it is within the court's discretion to permit plaintiff to voluntarily discontinue the action. (CPLR 3217 [b].) "While the determination upon such an application is generally within the sound discretion of the court, a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted." (*Bank of America, National Association v Douglas*, 110 AD3d 452, 452 [1st Dept 2013] [citations omitted].) No special circumstance has been shown here, and thus, the court grants the portion of the motion seeking to discontinue this action against "John Doe No. 1 to John Doe No. XXX."

Accordingly, it is

ORDERED that plaintiffs' motion for default judgment against the Defaulting Defendants is denied, in part, and the action is dismissed as to defendant Criminal Court of the City of New York.; and it is further

ORDERED that portion of the motion seeking a default judgment against defendants Elmwood NYT Owner, LLC, Landings NYT Owner, LLC, Oakwood NYT Owner, LLC, Wallkill NYT Owner, LLC, and Global Security Group Inc. is held in abeyance. Plaintiffs have 30 days from the date of this decision to supplement the record in accordance with the foregoing decision; and it is further

ORDERED that the action is discontinued against defendants "John Doe No. 1 to John Doe No. XXX"; and it is further

ORDERED that the action shall bear the following caption:

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF CD 2016-CD2 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-CD2, WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF JPMDB COMMERCIAL MORTGAGE SECURITIES TRUST 2017-C5, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-C5, DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE TRUST 2017-P7, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-P7, and WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CD2017-CD3 MORTGAGE TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-CD3,

Plaintiffs,

- v -

ELMWOOD NYT OWNER, LLC, LANDINGS NYT OWNER, LLC, OAKWOOD NYT OWNER, LLC, WALLKILL NYT OWNER, LLC, BOARD OF MANAGERS 229 WEST

43RD STREET CONDOMINIUM, and GLOBAL SECURITY GROUP INC.

Defendants.

and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the amended caption; 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).

4/6/2022
DATE 

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENC F
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	