

PS Funding, Inc. v Itay Kahiri LLC
2022 NY Slip Op 31934(U)
June 14, 2022
Supreme Court, New York County
Docket Number: Index No. 850131/2021
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART **32**

Justice

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INDEX NO. 850131/2021

PS FUNDING, INC.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

ITAY KAHIRI LLC, ITAY KAHIRI, BOARD OF MANAGERS
OF THE KINGSLEY CONDOMINIUM, UNITED STATES OF
AMERICA - INTERNAL REVENUE SERVICE, JANE/JOHN
DOE NOS. 1-12

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

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

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a mortgage encumbering real property located at 400 East 70th Street, Unit 505, New York, New York given by Defendant Itay Kahiri, LLC (“Kahiri LLC”). The mortgage secures a note which evidences a loan with an original principal amount of \$400,000.00. The note and mortgage were executed by Defendant Itay Kahiri (“Kahiri”) as Managing Member of Kahiri LLC. Concomitantly with these documents, Defendant Itay Kahiri executed an unconditional personal guaranty of the note. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment when the subject note matured on July 9, 2020.

Now, Plaintiff moves for a default judgment against all defendants, an order of reference and to amend the caption. Defendants Kahiri and Kahiri LLC cross-move to vacate Kahiri’s default pursuant to CPLR §5015[a][4] and to dismiss the complaint for lack of personal jurisdiction. In the alternative, Defendants seek to vacate Kahiri’s default pursuant to CPLR §5015[a][1].

“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]). Plaintiff has established *prima facie* its entitlement to a default judgment against Defendants by submitting proof of the mortgage, the unpaid note, notice of default, proof of service on each Defendant as well as proof of their failure to appear or answer (*see* CPLR §3215[f]; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]). Accordingly, Plaintiff has demonstrated its entitlement to a default judgment against Kahiri and Kahiri LLC, as well as 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]).

With respect to Kahiri’s claim of lack of personal jurisdiction, “[a] process server’s affidavit of service constitutes *prima facie* evidence of proper service and, therefore, gives rise to a presumption of proper service” (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]). To rebut the presumption, a defendant may not rely on a conclusory denial of service, but rather must submit an affidavit substantiated by specific, detailed facts denying the process server’s allegations (*id.*; see also *Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819 [2d Dept 2019]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). Here, cross-movants do not contest the process server’s factual allegations, but rather assert the affidavit of service as to Defendant Kahiri is deficient on its face as a matter of law.

Willian Cancroft, the process server avers in an affidavit that on August 18, 2021 at 3:27pm he served, among other things, a summons and complaint on Kahiri, ostensibly pursuant to CPLR §308[2], by delivering those documents to “MAUREEN SHEA, Concierge” as a person of suitable age and discretion at Kahiri’s “dwelling place/usual place of abode”. As the affidavit contains no allegation by the process server that he was denied access serve Kahiri at his unit in the building, the affidavit is deficient on its face (see *Soils Eng'g Servs., Inc. v Donald*, 258 AD2d 425 [1st Dept 1999]; see also *F.I. DuPont. Glore Foman & Co. v Chen*, 41 NY2d 794 [1977]).

In opposition, Plaintiff submitted a supplemental affidavit in an attempt to cure the deficiency in the original affidavit of service. Contrary to Defendants’ assertion, receipt and consideration of such evidence by the Court is permissible (see CPLR §305[c]; *Summitbridge Credit Invs., LLC v Wallace*, 128 AD3d 676, 677 [2d Dept 2015]). The supplemental affidavit indicates that at the place and time stated in the original affidavit of service, the affiant attempted to serve Kahiri but “Maureen Shea . . . would not grant further access into the building”. These averments are conceivably sufficient to cure the defect in the original affidavit of service (see *Summitbridge Credit Invs., LLC v Wallace*, supra), except that the supplemental affidavit is executed by William Moran, not the process server, William Cancroft. Any claim of a typographical error in the names is belied by the significant difference between the signatures and the absence of a license number for Moran.

Accordingly, the branches of Defendants’ motion to vacate Kahiri’s default and dismiss the complaint as to that Defendant are granted. To the extent Defendants sought dismissal of the entire complaint based upon the failure to properly serve Kahiri, that request is denied as Kahiri, as guarantor, is not a necessary party to the cause of action to foreclose on the mortgage given by Kahiri LLC (see RPAPL §1311; *Bank of E. Asia v Smith*, 201 AD2d 522 [2d Dept 1994]).

The branch of the motion for a default judgment against Kahiri LLC and the other non-appearing parties is granted. Defendant Kahiri LLC proffered no excuse whatsoever for failing to appear. Defendants’ misunderstandings with an attorney they attempted to retain are no excuse (see *eg Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116 [2d Dept 2015]). Inasmuch as Kahiri LLC failed to demonstrate a reasonable excuse for its default, it is unnecessary to determine whether it has shown the existence of a potentially meritorious defense (see *Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602, 602 [1st Dept 2013]; *Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]).

Kahiri LLC arguments in opposition to the branch of the motion for a default judgment are unavailing because where, as here, “the plaintiff has demonstrated, prima facie, that a defendant is in default because he or she ‘failed to appear’ within the meaning of CPLR 3215(a), that defendant is generally precluded from raising any nonjurisdictional defense without first rebutting the prima facie showing of default (*Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). Plaintiff’s alleged failure to comply with CPLR §3215[g][4] is no defense as Kahiri LLC failed to establish any excuse for its default and since Plaintiff filed proof of compliance in reply (*see Taylor v Behavioral Solutions Ny*, 194 AD3d 662 [1st Dept 2021]; *Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431 [1st Dept 2017]; *Crespo v A.D.A. Mgmt.*, 292 AD2d 5, 10 [1st Dept 2002]). Kahiri LLC’s request for relief under CPLR 3012[d] also necessarily fails.

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, it is

ORDERED that the branch of the motion for a default judgment against all Defendants, except Itay Kahiri is granted; and it is

ORDERED that the Defendants’ cross-motion is granted to the extent that the complaint is dismissed as to Itay Kahiri, but otherwise denied; and it is further

ORDERED that **Clark Whitsett, Esq., 108-26 Myrtle Avenue, Richmond Hill, NY 11418-1235 (718) 850-0003** is hereby appointed Referee in accordance with RPAPL § 1321 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 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 John Doe (Refused Name) and Jane Doe (Refused Name) be substituted for "John/Jane Doe #1" and "John/Jane Doe #2" as party defendants in the caption of this action and that the caption be so amended; and it is further

ORDERED that John/Jane Doe #3" through "John/Jane Doe #12" be removed as a party defendant in this action as no occupants reside at the property and the caption of this action be amended to reflect the removal of "John Doe" as a party defendant; 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

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PS FUNDING, INC., Index No. 850131/2021

Plaintiff,
-against-

ITAY KAHIRI LLC, BOARD
OF MANAGERS OF THE KINGSLEY
CONDOMINIUM, UNITED STATES OF
AMERICA – INTERNAL REVENUE
SERVICE, JOHN DOE (REFUSED NAME);
JANE DOE (REFUSED NAME);
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)]; 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 **October 5, 2022 at 10:40 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.

6/14/2022
DATE


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

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