

**Sutherland Commercial Mtge. Trust 2018-SBC7 v
Celia Realty Inc.**

2022 NY Slip Op 32810(U)

August 15, 2022

Supreme Court, Kings County

Docket Number: Index No. 516636/21

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

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 15th day of August, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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SUTHERLAND COMMERCIAL MORTGAGE TRUST 2018-SBC7,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 516636/21

CELIA REALTY INC.,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE,
JOSEPH ALERTE, et al.,

Mot. Seq. No. 2-3

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Order to Show Cause,
Affirmations (Affidavits), and Exhibits Annexed _____
Affirmations (Affidavits) in Opposition and Exhibits Annexed _____

47-61; 80-91, 93
70-78; 92, 96-102

In this action to foreclose a mortgage on certain commercial real property, defendants Celia Realty Inc. and Joseph Alerte (collectively, "defendants") jointly move, pre-answer, in Seq. No. 2 for: (1) an order, pursuant to CPLR 5015 (a) (4), vacating each defendant's default and, upon such vacatur, dismissing the action, in effect, pursuant to CPLR 3211 (a) (8), as against each such defendant; or, in the alternative, (2) an order scheduling a traverse hearing. In addition, defendants jointly move, likewise pre-answer, in Seq. No. 3, by order to show cause, dated April 21, 2022, for an order vacating: (1) the Order Appointing Receiver, dated March 4, 2022; and (2) the Order Granting Reference,

dated March 11, 2022 (collectively, the “receiver and referee orders”). Plaintiff Sutherland Commercial Mortgage Trust 2018-SBC7 (“plaintiff”) objects to both motions.

Determination of Defendants’ Motion in Seq. No. 2

Defendants’ contention that defendant Joseph Alerte, also known as Joseph Alerte, D.D.S. (“Dr. Alerte”), was not served with process at his usual place of abode, pursuant to CPLR 308 (2), fails to refute the otherwise uncontested fact that a separately named defendant Celia Realty Inc. (“Celia”) was properly served.¹ Thus, the branch of defendants’ motion in Seq. No. 2 which is for an order, pursuant to CPLR 5015 (a) (4), vacating *Celia’s* default for lack of personal jurisdiction must be denied.

With respect to Dr. Alerte, however, he has raised a triable issue of fact (by way of his son’s affidavit, the latter’s photograph taken one day before the alleged date of service, and the latter’s travel itinerary on the day of the alleged service) as to whether he (through his son) was served with process, pursuant to CPLR 308 (2). Thus, the remaining branch of defendants’ motion in Seq. No. 2 is granted solely to the extent that, as more fully set forth in the decretal paragraph below, a traverse hearing shall be held to determine the validity of service of process on Dr. Alerte.

Contrary to plaintiff’s position, where, as here, Dr. Alerte’s “only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived” (*U.S. Bank N.A. v Cadoo*, 197 AD3d 588, 589 [2d Dept. 2021]; *Cadlerock Joint Venture, L.P. v Kierstedt*,

¹ Dr. Alerte, a New York State-licensed dentist, is president and chief executive officer of Celia.

119 AD3d 627, 628 [2d Dept 2014]). Likewise unavailing is plaintiff's further contention that Dr. Alerte waived "the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss" (*Deutsche Bank Natl. Tr. Co. v Hall*, 185 AD3d 1006, 1010 [2d Dept 2020]). Dr. Alerte's 2½-month-long delay between his notice of appearance filed on December 15, 2021, and the instant pre-answer motion to dismiss filed on March 2, 2022 was not sufficiently extensive (particularly, when viewed in the context of the intervening expiration of the pandemic-related moratorium on January 15, 2022) to constitute a waiver (compare *U.S. Rof III Legal Tit. Tr. 2015-1 v John*, 189 AD3d 1645, 1650 [2d Dept 2020] [an eight-month delay]; *JP Morgan Chase Bank v Jacobowitz*, 176 AD3d 1191, 1193 [2d Dept 2019] [a ten-month-long delay]).

Determination of Defendants' Motion in Seq. No. 3

Celia, as a defendant-in-default which failed to timely answer the complaint or to timely make a pre-answer motion to dismiss the complaint, has waived its principal defense of lack of standing (*see e.g. Nationstar Mtge. LLC v Avella*, 142 AD3d 594, 595 [2d Dept 2016]).

With respect to Dr. Alerte, however, a different conclusion follows. The court is without power, at this stage of litigation, to address Dr. Alerte's objections to the propriety of entry of the receiver and referee orders because of his concurrent request (by way of the aforementioned motion in Seq. No. 2) to dismiss the complaint as against him for lack of personal jurisdiction. It is well-established that "[w]hen a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4) and also

seeks a discretionary vacatur pursuant to CPLR 5015 (a) (1), a court is required to resolve the jurisdictional question *before* determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1)” (*Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 1047 [2d Dept 2015] [emphasis added]).

Conclusion

Accordingly, it is

ORDERED that defendants’ motion in Seq. No. 2 is *granted solely to the extent* that the issue of personal service of process on (and solely on) defendant Joseph Alerte is referred to Part 82 for a traverse hearing, and *the remainder of their motion is denied*; and it is further

ORDERED that defendants’ motion (by order to show cause) in Seq. No. 3 is *granted solely to the extent* that, following (and depending on the outcome of) the aforementioned traverse hearing, defendant Joseph Alerte may (if he be so advised) renew his (but not Celia’s) branch of their motion which is for an order vacating the receiver and referee orders as against him (but not as against Celia); and *the remainder of their motion is denied*.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE