

Decatur 1147 LLC v Anson St. LLC
2022 NY Slip Op 33276(U)
September 29, 2022
Supreme Court, New York County
Docket Number: Index No. 152253/2018
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JAMES d'AUGUSTE</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>DECATUR 1147 LLC,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>ANSON STREET LLC,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 55</p> <p>INDEX NO. <u>152253/2018</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>002</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 61, 62, 63, 64

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee for PNPMS Trust I (“PNPMS Trust”), assignee of Anson Street LLC and proposed substitute defendant in this action, moves, pursuant to CPLR 317 and CPLR 5015(a)(1), to vacate the default judgment entered by this Court on March 5, 2020, and restoring the defendant’s mortgage to the city register. PNPMS Trust further moves that, upon the vacating of the default judgment, for the Court to dismiss the action pursuant to CPLR 306-b and CPLR 3211(a)(7).

On October 2, 2006, WMC Mortgage Corp. (“WMC”) issued a loan secured by a junior and senior mortgage to Orrin Cumberbatch, encumbering the real property located at 1147 Decatur Street, Brooklyn, NY 11217. The Senior Mortgage (which is not the subject of this action) encumbered the premises for \$488,000, and the Junior Mortgage (the subject of this action) encumbered the property for \$122,000. WMC assigned the Senior Mortgage to Deutsche Bank National Trust Company as Trustee (“Deutsche Bank”) on January 1, 2007. Due to the borrower’s default on the Senior Mortgage, Deutsche Bank commenced a foreclosure proceeding in Supreme Court, Kings County (Index No.

2679//2009). WMC was named as a defendant in the 2009 Kings County Senior Foreclosure action because, at the time, it held the Junior Mortgage on the subject property. On June 1, 2011, while the 2009 Kings County Senior Foreclosure action was pending, WMC apparently transferred the Junior Mortgage to Anson Street LLC (“Anson Street”). On September 19, 2013, the 2009 Kings County Senior Foreclosure action was dismissed by Court order. In 2014, Deutsche Bank commenced a second foreclosure action on the Senior Mortgage, listing Anson Street as a defendant because, at the time, Anson Street held the Junior Mortgage. In 2017, the 2014 Senior Foreclosure action was voluntarily discontinued, and the notice of pendency was cancelled.

On March 13, 2018, plaintiff commenced this action, pursuant to New York Real Property Actions and Proceedings Law (RPAPL) § 1501(4), seeking quiet title and to expunge the Junior Mortgage as time-barred under the applicable six-year statute of limitations. On July 25, 2018, plaintiff properly served Anson Street pursuant to New York Limited Liability Company Law § 303 by delivering a copy of the summons and complaint with the New York Secretary of State. After which, the Secretary of State forwarded the summons and complaint to Anson Street’s registered agent, Corporation Service Company (“CSC”), and CSC uploaded the summons and complaint to their internal portal on July 30, 2018. According to Meghan Emmerich, the General Counsel for Resurgent Capital Services LP (“Resurgent”) (the master servicer to Anson Street), Resurgent receives legal filings through CSC’s internal portal and forwards these filings to a sub-servicer for resolution (for this Junior Mortgage, the sub-servicer was Shellpoint Mortgage Servicing). Emmerich asserts that, due to an internal office error, Resurgent never forwarded the summons and complaint in this action to Shellpoint. On May 14, 2019, plaintiff moved for a default judgment. On July 31, 2019, Anson Street transferred the loan to PNPMS Trust. On March 5, 2020, this Court granted plaintiff’s motion for a default judgment. PNPMS Trust asserts that it discovered the existence of the default judgment on or about

April 27, 2020. On July 2, 2020, PNPMS Trust filed the instant motion. Having given due consideration to this application, PNPMS Trust's motion is denied.

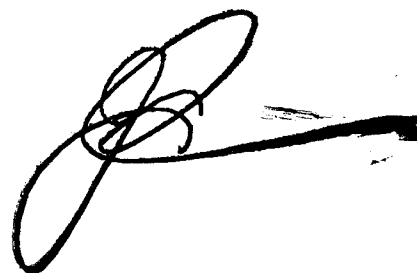
First, PNPMS Trust has not demonstrated an entitlement to vacate the default judgment pursuant to CPLR 317. Here, plaintiff properly served Anson Street on July 25, 2018, via service on the Secretary of State. This notice was not only sent to Anson Street's registered agent, but the notice was then sent to Anson's master servicer, Resurgent. Under such circumstances, Anson is deemed to have received actual notice of the lawsuit. Rifenburg v Liffiton Homes, Inc., 107 AD2d 1015 [4th Dept 1985] [when a corporate defendant receives notice of certified mail, that corporation has effectively received actual notice of the summons contained in that mail even if the corporation left the certified mail unclaimed (internal citations omitted)]. The failure of Anson, and later PNPMS Trust, to seek relief from its 2018 default in appearing until 2020 was not reasonable. *See* Lawrence v Esplanade Gardens, Inc., 213 AD2d 216 [1st Dept 1995] [showing that a corporation failing to update its address with the New York Secretary of State for 2 ½ years after receiving actual notice of plaintiff's accident was not grounds for vacatur of a default under CPLR 317]. Moreover, the loan was transferred to PNPMS Trust on July 31, 2019, and basic due diligence would have disclosed the existence of the instant litigation. *Cf.* KNK Enterprises, Inc. v Harriman Enterprises, Inc., 33 AD3d 872 [2d Dept 2006] [showing that if a party enters a transaction and fails to conduct proper due diligence, reliance on even a misrepresentation by the other party cannot be considered reasonable or justifiable if the truth could have been discovered with proper due diligence (internal citations omitted)]. Accordingly, the branch of the motion seeking to vacate the default under CPLR 317 is denied.

Second, PNPMS Trust has not demonstrated an entitlement to vacate the default judgment pursuant to CPLR 5015. A motion to vacate pursuant to CPLR 5015(a)(1) requires the movant to demonstrate "excusable default." Movant PNPMS Trust has the burden to demonstrate that the conduct

is “excusable.” Here, Resurgent’s affidavit, which PNPMS Trust relies upon, merely states that the summons and complaint was entered into a database and no action was taken until it was addressed almost two years later. This is not a showing that the default was “excusable.” The role of the master servicer of a mortgage is to handle the operations surrounding a mortgage. The registered agent was properly served by the Secretary of State, and Resurgent received the summons and complaint through the internal portal. Resurgent did not provide additional detail about what action should have been taken with the summons and complaint (such as which employees are supposed to check the database and with what frequency). In addition, neither Anson Street nor PNPMS Trust submitted an affidavit stating the respective entity’s procedure for assigning or retaining counsel and defending an action. Notably, Anson Street previously defaulted in the 2014 Senior Mortgage foreclosure action, as well. (NYSCEF Doc. No. 6, para. 19). In addition, the existence of the present action would have also been discovered with basic due diligence that PNPMS Trust could have conducted when it purchased the Junior Mortgage from Anson Street. For the foregoing reasons, the Court cannot grant an “excusable default” under CPLR 5015(a)(1).

Accordingly, as PNPMS Trust has failed to meet its burden in demonstrating an entitlement to the relief requested, the motion is denied.

This constitutes the decision and order of the Court.



9/29/2022
DATE

JAMES D'AUGUSTE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: