

**Board of Mgrs. of Printing House Condominium v
Hudson 805 LLC**

2022 NY Slip Op 33729(U)

November 1, 2022

Supreme Court, New York County

Docket Number: Index No. 151976/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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BOARD OF MANAGERS OF PRINTING HOUSE
CONDOMINIUM,

Plaintiff,

INDEX NO. 151976/2020

MOTION DATE 06/30/2022

MOTION SEQ. NO. 001

- v -

HUDSON 805 LLC, BARNET L. LIBERMAN, PHYLLIS
LIBERMAN, SIGNATURE BANK, N.A., NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK
CITY DEPARTMENT OF FINANCE, INTERNAL REVENUE
SERVICE, ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK, and JOHN DOES 1-200, their heirs,
devisees and personal representatives and his, there or any
of their successors in right, title and interest, the names of
the last defendants being unknown to plaintiff, the persons or
parties intended to be any person in possession of or
claiming interest in or lien against the property described in
the verified complaint, and whose interest may not be
protected under applicable emergency rent laws,

Defendants.

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DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19,
20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 47, 48

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff Board of Managers of Printing House Condominium (plaintiff or the
Condominium) moves, pursuant to CPLR 3215, for a default judgment against defendants
Hudson 805 LLC (Hudson), Barnet L. Liberman (Barnet), Phyllis Liberman (Phyllis), Signature
Bank, N.A. (Signature Bank), New York State Department of Taxation and Finance (State
Finance), New York City Department of Finance (City Finance), Internal Revenue Service (IRS)
and Environmental Control Board of the City of New York (ECB) (collectively, defendants) for
their failure to answer or otherwise appear in this action. Hudson opposes the motion and cross-
moves for an order dismissing the complaint as abandoned pursuant to CPLR 3215 (c); denying

or dismissing the first cause of action to foreclose two liens for unpaid common charges and declaring the liens invalid and extinguished; or extending Hudson's time to answer the complaint and compelling plaintiff to accept its answer.

Background

Plaintiff commenced this action seeking to foreclose upon a lien for unpaid common charges for a commercial unit in a condominium building located at 421 Hudson Street, New York, New York 10014 (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 2, complaint ¶¶ 1 & 3). Under Articles II, Section 2 (ii) and (iii) and Article V, Section 1 (a) of the Condominium's By-laws, plaintiff is charged with determining the common expenses associated with operating and maintaining the Building's common elements and with collecting common charges (NYSCEF Doc No. 19, Patrick O'Toole [O'Toole] aff, Ex 3 at 9 and 26). Under Article V, Sections 1 (b), 4 and 5, unit owners are required to pay the common charges and assessments when due (*id.* at 26-27 and 31-32). If a unit owner defaults in making those payments, Article V, Section 6, titled "Default in Payment of Common Charges," provides that each unit owner:

“shall be obligated to pay interest at the maximum rate permitted by law on such Common Charges or assessments from the due date thereof until paid, together with all expenses, including attorneys' fees and disbursements, incurred by the Board of Managers in any proceeding brought to collect such unpaid Common Charges or Assessments. The Board of Managers shall have the right and duty to attempt to recover such Common Charges or assessments, together with the interest thereon, and the expenses of the proceeding, including attorneys' fees, in an action brought against such Unit Owner, or by foreclosure of the lien on such Unit granted by Section 339-z of the Real Property Law of the State of New York, in the manner provided in Section 339-aa thereof”

(*id.* at 31 [Article V, Section 6]). Article V, Section 7, titled "Foreclosure of Liens for Unpaid Common Charges," also states in pertinent part:

“In any action brought by the Board of Managers to foreclose a lien on a Unit because of unpaid Common Charges, the Unit Owner shall be required to pay a reasonable rental for the use of the Unit and the plaintiff in such foreclosure action shall be entitled to the appointment of a receiver to collect the same.... A suit to recover a money judgment for unpaid Common Charges shall be maintainable without foreclosing or waiving the lien securing the same”

(*id.*).

Hudson is a New York limited liability company with offices at Dune Alpin Farm, 10 Palomino Court, East Hampton, New York 11937 (NYSCEF Doc No. 2, ¶ 5). Hudson is the record owner of unit C-8 (the Unit) (Block 601, Lot 1192), a commercial unit at the Building¹ (NYSCEF Doc No. 17, O’Toole aff, Ex 1). Hudson’s managing members, Barnet and Phyllis, are tenants in possession of the Unit (NYSCEF Doc No. 2, ¶¶ 6-7). On October 11, 2019, plaintiff recorded a lien for \$6,923.13 on the Unit in the Office of the City Register; the amount represents the total unpaid common charges and assessments due from March 1, 2019 through September 12, 2019 (NYSCEF Doc No. 21, O’Toole aff, Ex 5). No part of the outstanding amount has been paid (NYSCEF Doc No. 2, ¶ 21). On December 15, 2020, plaintiff recorded an updated lien for \$37,022.22 in the Office of the City Register, which represents the amount of unpaid common charges through December 2, 2020 (NYSCEF Doc No. 22, O’Toole aff, Ex 6).

Plaintiff commenced this action on February 24, 2020 by filing a summons and complaint asserting a first cause of action against all defendants to foreclose on the lien for unpaid common charges and a second cause of action against Hudson for breach of contract for failing to pay the common charges and assessments on the Unit. Signature Bank, State Finance, City Finance, IRS and ECB were named as parties as they have or may have unpaid loans or unpaid liens on the

¹ The deed shows that unit C-8 has an address of 421 Hudson Street and 29 Clarkson Street.

Unit that are subordinate to plaintiff's lien for unpaid common charges (NYSCEF Doc No. 2, ¶¶ 8-12).

Plaintiff now moves for a default judgment against all defendants.² Hudson opposes the motion and cross-moves to dismiss the complaint or for an extension of time to answer and to compel plaintiff to accept its answer. Although Hudson served and filed its papers after the submission date on the motion, plaintiff was allowed to submit opposition to the cross motion and has done so (NYSCEF Doc No. 46). In a notice of appearance filed October 29, 2021, nonparty Gary M. Rosenberg (Rosenberg) states that he holds a mortgage secured by the Unit, which was recorded in the Office of the City Register on June 17, 2020, and that he adopts and joins Hudson's cross motion (NYSCEF Doc No. 42).

Discussion

A. The Cross Motion to Dismiss under CPLR 3215 (c)

Hudson argues the complaint should be dismissed as abandoned as plaintiff waited more than a year after its default to move for a default judgment. Plaintiff, in opposition, contends that the motion is timely given the toll implemented by Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8).

Pursuant to CPLR 3215 (c), the plaintiff must "take proceedings for the entry of judgment within one year after the default" or else risk dismissal of the complaint as abandoned (CPLR 3215 [c]). An affidavit of service filed September 6, 2021 shows that plaintiff served Hudson with process by delivering duplicate copies of the summons and complaint, notice of pendency and notice of electronic filing to the Secretary of State on March 10, 2020³ (NYSCEF

² Plaintiff has since discontinued its action against Signature Bank (NYSCEF Doc No. 43). DOF filed a notice of appearance (NYSCEF Doc No. 13) but has not served an answer.

³ Plaintiff has not explained why it waited more than a year to file the affidavit of service with the court.

Doc No. 14). Service upon a New York limited liability is complete upon the delivery of process to the Secretary of State (*Darbeau v 136 W. 3rd St., LLC*, 144 AD3d 420, 420 [1st Dept 2016], citing Limited Liability Company Law § 303 [a]). Thus, Hudson, a New York limited liability company (NYSCEF Doc No. 2, ¶ 5), was required to answer or appear within 30 days of March 10, 2020 (*see* CPLR 320 [a]). Ten days later, Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) tolled “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state ... until April 19, 2020.” Subsequent Executive Orders extended the toll through November 3, 2020 (*Brash v Richards*, 195 AD3d 582, 583 [2d Dept 2021]). As a result, Hudson’s time to answer was extended through the end of the tolling period (*see 195-197 Hewes, LLC v Citimortgage, Inc.*, — AD3d —, 2022 NY Slip Op 05065, *2 [2d Dept 2022] [denying vacatur of the defendant’s default for failing to serve an answer after the tolling period created by the Executive Orders issued in response to the COVID-19 pandemic had expired]; *Cengage Learning v 75-26 Soho LLC*, 2022 WL 1090163, *2, 2022 NY Misc LEXIS 4234, *3 [Sup Ct, NY County, April 1, 2022, Ramseur, J., index No. 653502/2020]; *Whitsons Food Serv. (Bronx) Corp v Meglio 1 Corp.*, 2021 NY Misc LEXIS 3212, * 4 [Sup Ct, Suffolk County, April 1, 2021, Luft, J., index No. 607427/2020]). Because only 10 days had passed by the time the first Executive Order was signed, Hudson had 20 days after November 3, 2020 (until November 23, 2022) to timely serve its answer. Hudson did not answer the complaint or otherwise appear.

Plaintiff filed its motion on September 6, 2021 (NYSCEF Doc No. 15) and mailed the motion papers to defendants on September 13, 2021 (NYSCEF Doc No. 30). Thus, plaintiff moved for a default judgment well within a year of Hudson’s default. Moreover, to the extent that the action against Hudson “may have been stayed due to Barnet Liberman’s filing for

bankruptcy” (NYSCEF Doc No. 33, Hudson’s mem of law at 3), the bankruptcy petition is dated April 1, 2021, five months after the tolling period ended. In any event, the bankruptcy stay was conditionally lifted by court order dated July 29, 2021⁴ (NYSCEF Doc No. 27, Salhanick affirmation, Ex D). Accordingly, Hudson’s cross motion insofar as it seeks to dismiss the complaint as abandoned is denied.

To the extent that Hudson moves to dismiss plaintiff’s first cause of action, foreclosure of its lien, because it includes charges other than those permitted pursuant to RPL § 339-z, affording plaintiff the benefit of every possible favorable inference, plaintiff has pleaded a viable cause of action to foreclose upon its lien for unpaid common charges (*accord Harrogate House Ltd. v Jovine*, 2 AD3d 108, 109 [1st Dept 2003]). Accordingly, Hudson’s cross motion in so far as it seeks to dismiss plaintiff’s first cause of action is denied.

B. The Cross Motion for an Extension of Time

Hudson next argues that the court should extend its time to answer the complaint because it has proffered a reasonable excuse for the delay. Barnet attests that he “never received a copy of the Complaint or notice of the Complaint from the Secretary of State or in any other way” and that he had been “informed” the summons and complaint mailed to Hudson by the Secretary of State was returned as “undeliverable” (NYSCEF Doc No. 38, Barnet aff, ¶¶ 7-8). Phyllis avers that she, too, learned that the summons and complaint mailed to Hudson at 10 Palomino Court, East Hampton, New York by the Secretary of State was returned as undeliverable, and that she never received a copy or notice of the complaint from anyone else (NYSCEF Doc No. 39, Phyllis aff, ¶¶ 2-3). Hudson’s counsel states that he confirmed in a telephone conversation with an unnamed person at the Secretary of State’s office in October 2021 that “Hudson 805 had not

⁴ The condition imposed on the Condominium was that it obtain either the consent of the Chapter 7 Trustee or a further order from the Bankruptcy Court before scheduling a foreclosure sale (NYSCEF Doc No. 27).

received actual notice of the filing of the summons and complaint,” and offered to furnish the Court with proof of the Secretary of State’s “status letter” upon receipt (NYSCEF Doc No. 34, Daniel C. Malone affirmation, ¶ 7).

Plaintiff argues that Hudson has failed to demonstrate a reasonable excuse for its default as the affidavit of service constitutes a prima facie evidence of proper service.

CPLR 3012 (d) states that “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” Where a default judgment has not been entered, the defendant seeking an extension of time under CPLR 3012 (d) is not required to demonstrate a meritorious defense (*Pichardo v 969 Amsterdam Holdings, LLC*, 176 AD3d 571, 572 [1st Dept 2019]).

Here, Hudson’s argument that it never received the summons and complaint while questionable, is not determinative in light of the other factors that militate in favor of granting its motion to compel acceptance of its late answer (*Gordon Law Firm, PC v Premier DNA Corp.*, 205 AD3d 416, 417 [1st Dept May 3, 2022]). There is nothing to indicate that Hudson’s delay was willful, there is no showing of prejudice to plaintiff arising from the delay (*id.*) and there is a strong public policy favoring the resolution of disputes on the merits (*Cantave v 170 W. 85 St. Hous. Dev. Fund Corp.*, 164 AD3d 1157 [1st Dept 2018]). Accordingly, Hudson’s motion to compel plaintiff to accept its late answer is granted.

C. The Default Motion

An application for a default judgment must be supported by proof of service of the summons and complaint, proof of the facts constituting the claim, and the default (CPLR 3215 [f]).

Turning to the merits, the first cause of action seeks foreclosure of a lien for unpaid common charges, assessments and late fees. Real Property Law § 339-z states, in relevant part:

“The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all other liens except only (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, (ii) all sums unpaid on a first mortgage of record, and (iii) all sums unpaid on a subordinate mortgage of record held [by specific city or state agencies].”

Real Property Law § 339-aa states that a board of managers may pursue an action to foreclose a lien for unpaid common charges, and that “[s]uch lien may be foreclosed by suit ... in like manner as a mortgage of real property, without the necessity, however, of naming as a party defendant any person solely by reason of his owning a common interest with respect to the property.” The verified complaint and the affidavit from O’Toole, the account manager for plaintiff’s managing agent, Douglas Elliman Property Management, together with the exhibits submitted with his affidavit, constitute sufficient proof of the facts constituting the first cause of action. Furthermore, plaintiff is entitled to recover the amount on the lien filed in October 2019 and the amount of unpaid common charges and assessments that continued to accrue after that date (*see Board of Mgrs. of the Netherlands Condominium v Trencher*, 128 AD3d 452, 453 [1st Dept 2015]).

As to Barnet and Phyllis, the motion is denied. The affidavits of service sworn to June 25, 2020 show that plaintiff served Barnet and Phyllis with process under CPLR 308 (4) by affixing the summons and complaint, notice of pendency and notice of electronic filing to the front door of an apartment at 421 Hudson Street, New York, New York 10014 on March 25, 2020 at 7:50 a.m. after three prior attempts to personally serve them there on March 18 at 10:15 a.m., March 22 at 7:20 a.m. and March 25 at 7:50 a.m. were unsuccessful (NYSCEF Doc Nos. 7-

8 at 1-2). Copies of those papers were then mailed to Barnet and Phyllis at that address on June 25, 2020 (*id.* at 2). When service of process is effectuated pursuant to CPLR 308 (4), CPLR 306 (c) requires that the affidavit for service of process specify the addresses where attempted service was made. The process server's affidavits fail to specify the number for the apartment where Barnet and Phyllis were served.

Nor has plaintiff demonstrated proper service of process upon the IRS. The affidavit of service sworn to September 1, 2020 shows that plaintiff's process server mailed the summons and complaint, notice of pendency and notice of electronic filing to the IRS at an address in Washington, D.C. on August 31, 2020 (NYSCEF Doc No. 12). Service of process by mail upon the IRS does not constitute proper service (*see* Fed Rules Civ Pro rule 4 [i] [1] and [2]; *30 E. 126 Corp. v Green Park One Corp.*, 2018 NY Slip Op 31521[U], *3 [Sup Ct, NY County 2018]).

Plaintiff's motion for a default judgment against State Finance, City Finance and ECB, as subordinate lienors, is granted. The affidavit of service sworn to March 16, 2020 shows that plaintiff served State Finance with process by delivering the summons and complaint, notice of pendency and notice of electronic filing to Billiejo Cannon, Legal Assistant I, a person authorized by appointment to accept service for State Finance, on March 13, 2020 at W.A. Harriman Campus, Building #9, Albany, New York in accordance with CPLR 307 (2) (NYSCEF Doc No. 6). The affidavit of service sworn to August 21, 2020 shows that on March 12, 2020, plaintiff's process server delivered the summons and complaint, notice of pendency and notice of electronic filing to Lemar Reid, a docketing clerk authorized by appointment to receive service for ECB, at 100 Church Street, New York, New York 10007 in accordance with CPLR 311 (a) (2) (NYSCEF Doc No. 10). Plaintiff has demonstrated that State Finance and ECB have not timely answered or appeared in this action or sought an extension of time to do so. Additionally,

plaintiff has established that City Finance has not answered the complaint, despite having served a notice of appearance. Plaintiff's proof, described above, is also sufficient to establish the facts constituting the first cause of action.

As for Rosenberg, he is not named as a defendant in this action and was not served with the summons and the complaint. Although he claims to possess a mortgage lien on the Unit, Rosenberg has not sought to intervene in this action nor has plaintiff sought to join him as a party.

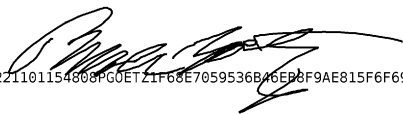
Conclusion

Accordingly, it is

ORDERED that the motion brought by plaintiff Board of Managers of Printing House Condominium for a default judgment (motion sequence no. 001) is granted to the extent of granting a default judgment on liability as against defendants New York State Department of Taxation and Finance, New York City Department of Finance and Environmental Control Board of the City of New York on the first cause of action only, and the balance of the motion is otherwise denied; and it is further

ORDERED that that branch of the cross motion of defendant Hudson 805 LLC to dismiss the complaint as abandoned and to dismiss the first cause of action is denied; and it is further

ORDERED that that branch of the cross motion of defendant Hudson 805 LLC for an extension of time to answer and to compel plaintiff to accept its answer is granted.


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11/1/2022
DATE

PAUL A. GOETZ, J.S.C.

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