

**CSAIL 2018-CX11 6-8 W. 28TH St. LLC v
JTRE Nomad 8 W 28TH LLC**

2022 NY Slip Op 34147(U)

December 1, 2022

Supreme Court, New York County

Docket Number: Index No. 850161/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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CSAIL 2018-CX11 6-8 WEST 28TH STREET LLC,

Plaintiffs,

- v -

JTRE NOMAD 8 W 28TH LLC, JACK TERZI, NEW YORK
CITY DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
ABECO CONSTRUCTION LLC, PASQUALE
QUARANTINO INC.

Defendants.

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INDEX NO. 850161/2021

MOTION DATE 08/17/2022,
08/17/2022

MOTION SEQ. NO. 002 002

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion for JUDGMENT - FORECLOSURE & SALE.

Stillwater Asset Management LLC, as trustee of LCB2 Trust, (“Stillwater”) moves for an order (1) amending the caption to reflect the assignment of the subject mortgage from CSAIL 2018-CXII 6-8 West; (2) for a default judgment against the non-appearing parties; (3) appointing a referee to compute the amount due Plaintiff and to examine whether the mortgaged property known as 6-8 West 28th Street, New York, New York can be sold in parcels; (d) pursuant to RPAPL §1321 for renewal of the application for appointment of a receiver; and (e) for attorneys’ fees.

Defendants JTRE Nomad 8 W 28TH LLC and Jack Terzi (“JTRE Defendants”) filed a cross-motion for an order granting the JTRE Defendants’ Motion pursuant to CPLR 3211(a)(8) dismissing Plaintiff’s Complaint for improperly serving the JTRE Defendants while a stay was in effect or alternatively under CPLR 2101, deeming the JTRE Defendants’ answer accepted and/or pursuant to CPLR 3012(d) compelling the acceptance of a late answer, as filed on May 13, 2022.

Defendants New York State Department of Taxation and Finance, New York City Environmental Control Board, or Pasquale Quarantino Inc. have not appeared in this action or responded to this motion.

DISCUSSION

I. Amending Caption

Plaintiff’s motion to amend the caption to reflect the assignment of the subject mortgage from CSAIL 2018-CX11 6-8 West is granted. “The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court” (*NationsCredit Home Equity Services v Anderson*, 16 AD3d 563, 564 [2d Dept 2005]). Contrary to the JTRE defendants’ contentions, the documents submitted by the plaintiff established that the subject note and mortgage were validly assigned to Stillwater, after the commencement of this action, and that Stillwater, is therefore now the real plaintiff in interest (*Citibank, N.A. v Van Brunt Properties, LLC*, 95 AD3d 1158, 1160 [2d Dept 2012]; *see also Aurora Loan Services, LLC v Lopa*, 130 AD3d 952, 952 [2d Dept 2015]).

II. Default Judgment & Order of Reference

a. The New York State Department of Taxation and Finance

Plaintiff has submitted proof that Defendants New York State Department of Taxation and Finance, New York City Environmental Control Board, and Pasquale Quarantino were duly

served with a copy of the Summons and Verified Complaint and Notice of Electronic Filing on or about July 21, 2021 (NYSCEF 78). In Plaintiff's Complaint, it submits that the New York State Department of Taxation and Finance is named as a party solely because of any title or claim it might have against the Property as a result of any unpaid taxes and to extinguish such right, title, claim or interest in the Premises (NYSCEF 1 at ¶10). Plaintiff provides a Tax Report (NYSCEF 105) detailing unpaid taxes, and it is undisputed that the New York State Department of Taxation and Finance has not appeared in this action. Thus, the default judgment against the New York State Department of Taxation and Finance is granted.

The New York State Department of Taxation and Finance may seek a vacatur of the instant default judgment if it can satisfy the requirements of CPLR § 5015, CPLR § 317, or any other relevant law.

b. *New York City Environmental Control Board; Pasquale Quarantino Inc.*

However, default judgment against the New York City Environmental Control Board and Pasquale Quarantino is denied. "While the 'quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered.' The proof submitted must establish a prima facie case" (*Wolff*, 2017 WL 395247, quoting *Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept. 2006]). Here, Plaintiff provides no support for its claim that either party has actually filed any liens against the Property.¹ Accordingly, Plaintiff "lacks sufficient facts constituting their claim

¹ The Complaint provides that both parties are named solely because of any title or claim they might have against the subject premises as a result of liens they hold against the Property and to extinguish such right, title, claim or interest in the Property (NYSCEF 1 at ¶¶11, 15). In the Reply Affidavit of Brad Hrebenar (NYSCEF 103), Hrebenar explains that the JTRE Defendants have allowed two Mechanic's Liens to be filed against the Property on June 18, 2020 which are

for this court to issue a default judgment” (*Transel El. and Elec., Inc. v Times Sq. JV, LLC*, 2021 WL 3124256 [Sup Ct, NY County 2021] [denying default judgment on mechanic’s lien where plaintiff failed to provide sufficient documentation of their mechanic’s lien]). Plaintiff is free to file a new motion providing the requisite support.

c. The JTRE Defendants

Plaintiff has demonstrated its *prima facie* entitlement to a default judgment against the JTRE Defendants by submitting proof of service of a copy of the summons and complaint, proof of the facts constituting the causes of action, including the Mortgage, the Assignments of Mortgage, the Promissory Note with Allonges, and Notice of Default, that the JTRE Defendants defaulted on their payment obligations, and proof that the JTRE Defendants failed to answer within the time allowed (NYSCEF 74-80; *JPMorgan Chase Bank, N.A. v Grinkorn*, 172 AD3d 1183, 1185 [2d Dept 2019]; *U.S. Bank Nat. Ass'n v 1515 Church Ave. Realty, LLC*, 2022 NY Slip Op 32372[U], 10 [Sup Ct, Kings County 2022]).

“Generally, ‘[t]o successfully oppose a facially adequate motion for leave to enter a default judgment and for an order of reference based on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for the delay and a potentially meritorious defense to the action’” (*Nationstar Mtge., LLC v Esdelle*, 186 AD3d 1384, 1386 [2d Dept 2020] [citation omitted]). However, where a defendant raises a jurisdictional objection, the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a default (*see id.*).

matters of public record, citing to Exhibit B (NYSCEF 106). However, the attached exhibit only contains the lien filed by Abeco Construction LLC, not the New York City Environmental Control Board or Pasquale Quaratino.

Here, the JTRE Defendants argue that the foreclosure moratorium issued during the Covid-19 pandemic staying commercial foreclosure actions also prohibited the commencement and service of such an action, and thus the complaint should be dismissed pursuant to CPLR 3211(a)(8) for lack of jurisdiction. The JTRE Defendants do not cite to any authority for this proposition. In fact, several New York cases have already held that the “Executive Orders do not authorize the dismissal of commercial foreclosure actions commenced during the COVID-19 pause period, pursuant to CPLR 3211” (*U.S. Bank Nat. Ass’n v Middle Dam St. Inc.*, 2021 NY Slip Op 30686[U], 6-7 [Sup Ct, Kings County 2021] ; see also *Cabrera v Humphrey*, 192 AD3d 227, 231 [3d Dept 2021] [rejecting the argument that Executive Orders divested the Supreme Court of subject matter jurisdiction or that the Supreme Court lacked the authority to accept the filing of the proceeding]; *U.S. Bank Nat. Ass’n v 1515 Church Ave. Realty, LLC*, 2022 NY Slip Op 32372[U], 12 [Sup Ct, Kings County 2022] [“[I]t has been held that the executive orders do not provide a basis for dismissal of a commercial foreclosure action commenced during the COVID-19 pause period”]; *Corp. v Mayo*, 2022 WL 326395 [Sup Ct, NY County 2022] [same]). Thus, while the actual prosecution of certain foreclosure actions was stayed, nothing in the executive orders or moratorium legislation prohibited or invalidated service.

Moreover, “the Executive Orders at issue do not dictate a remedy for a violation nor has Movant cited a statute or case law supporting same” (*DCC Vigilant, LLC v Nuvo Ciao-Di LLC*, 2021 WL 5027281 [Sup Ct, NY County 2021]; see also *VNO 100 W. 33rd St. LLC v Exp. Fashion Operations, LLC*, 2021 WL 4724257 [Sup Ct, NY County 2021] [“[N]either the Executive Orders nor the Act contain a provision mandating dismissal of such actions, as they exclusively operate to temporarily stay eviction or foreclosure proceedings”). And even if the Court were to accept the JTRE Defendants’ belief that service was improper, or their confusion

as to when an Answer was due, the JTRE Defendants did not file their Answer until May 13, 2022—several months after the expiration of the foreclosure moratorium on January 15, 2022.

Finally, a hearing on an Order to Show Cause filed by Plaintiff seeking a temporary receiver was held in December 2021, and counsel for the JTRE Defendants appeared (*see* NYSCEF 83 [tr. of Dec. 8, 2021 proceedings]), and made no objection to service at that time. A defendant waives an objection to improper service of process by litigating in the action without a formal appearance (*see E. Sav. Bank, FSB v Campbell*, 167 AD3d 712 [2d Dept 2018]). Because the JTRE Defendants have not provided any other reasonable excuse for the delay or a potentially meritorious defense to the action, Plaintiff’s motion for a default judgment against the JTRE Defendants and order of reference is granted.²

III. Appointment of a Receiver

Finally, Plaintiff seeks the appointment of a receiver pursuant to the Mortgage Agreement, which provides that upon the occurrence and during the continuance of any Event of Default, the Lender can “apply for the appointment of a trustee, receiver, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of the Borrower or of any Person liable for the payment of the Debt” (NYSCEF 5 ¶ 10 (a)(vii)). When a receiver agreement exists between the parties, RPL Law § 254(10) applies to a motion seeking the appointment of a receiver, as

² Although default is granted, pursuant to the election of remedies doctrine, Plaintiff’s first cause of action seeking to foreclose on the mortgage and the third cause of action seeking to collect on guaranty cannot be pursued concurrently (*see* RPAPL 1301; *Kodsi v Scotto*, 170 AD3d 1357, 1358 [3d Dept 2019]; *Chase Lincoln First Bank, N.A. v Kesselring-Dixon Inc.*, 147 Misc 2d 12, 14-15 [Sup Ct 1990]). Plaintiff may only pursue the guaranty if there is any deficiency following the completion of the foreclosure process (*see Anron Air Sys. v Columbia Sussex Corp.*, 202 AD2d 460, 461-62 [2d Dept 1994]; *Sudit v Roth*, 35 Misc 3d 1237(A) [Sup Ct, Kings County 2012]).

opposed to CPLR 6401 (*Ridgewood Sav. Bank v New Line Realty VI Corp.*, 24 Misc 3d 1227(A) [Sup Ct, Bronx County 2009]).

Plaintiff's request is granted. In relevant part, RPL Law § 254(10) provides that: "(i)n mortgages of real property. . .the following or similar clauses and covenants must be construed as follows:...A covenant that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee...in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver...in the event of any default or defaults in paying the principal, interest, taxes..." (*Ridgewood*, 24 Misc 3d 1227(A)).

Here, Plaintiff argues that a receiver is necessary because Defendant has defaulted on the mortgage loan and has committed a host of other violations imperiling the property and plaintiffs' rights, including permitting liens on the property, failing to pay taxes and violating the property insurance requirements. Given these circumstances, and the fact that Defendant has defaulted on this motion, the Court finds the appointment of a receiver appropriate.

Accordingly, it is

ORDERED that Plaintiff's motion is **granted in part**, and Plaintiff's motion to amend the caption is granted to remove each "John Doe" as a party Defendant to this action and substituting Stillwater Asset Management LLC as trustee of LCB2 Trust into the caption in the place and stead of the captioned plaintiff, and Plaintiff show notify the Clerk of the Court of the substitution, and following such substitution, that the Clerk of the Court amend the docket and electronic docket of the Court accordingly; it is further

ORDERED that Gregg Williams, Principal, Trident Pacific, 41 Madison Ave. 31st Floor New York, New York 10010 is appointed as temporary receiver of the Property; it is further

ORDERED that default judgment is **granted** against the New York State Department of Taxation and Finance, JTRE Nomad 8 W 28TH LLC, and Jack Terzi; it is further

ORDERED this matter is directed to an Inquest before a Special Referee who shall hear and make a recommendation to the Court as to Plaintiff's damages, if any, and examine whether the mortgaged property known as 6-8 West 28th Street, New York, New York can be sold in parcels, and make his/her computation and report with all convenient speed; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

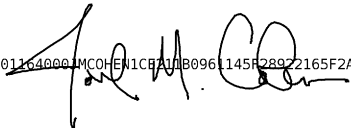
ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on Defendants within five days and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

12/1/2022
DATE


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JOEL M. COHEN, 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"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE