

Emigrant Funding Corp. v Hershey Chan Realty, Inc.
2022 NY Slip Op 34376(U)
December 16, 2022
Supreme Court, New York County
Docket Number: Index No. 850215/2021
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 850215/2021

EMIGRANT FUNDING CORPORATION,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

HERSHEY CHAN REALTY, INC., GRACE CHAN, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, OWEMANCO MORTGAGE NY LIMITED PARTNERSHIP, JOHN DOE #1 THROUGH JOHN DOE #20

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for APPOINT - REFEREE

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

This is an action to foreclose on a consolidated and modified mortgage encumbering commercial real property located at 44 Bowery, New York, New York that was given by Defendant Hershey Chan Realty, Inc. ("Hershey"). The mortgage secures an amended and restated note which evidences a loan with an original principal amount of \$2,750,000.00. The note and mortgage were executed by Defendant Grace Chan as President of Hershey. Concomitantly with these documents, Chan executed a guaranty of payment of the note. Plaintiff commenced this action wherein it is alleged Defendant Hershey defaulted on its installment payments under the note beginning on October 1, 2019. Defendants Hershey and Chan failed to timely appear, and Plaintiff rejected the answer filed on April 5, 2022.

Now, Plaintiff moves for a default judgment against all Defendants, an order of reference and to amend the caption. Defendants Hershey and Chan oppose the motion and cross-move pursuant to CPLR §§5015[a][4] to vacate their default, or in the alternative, compelling Plaintiff to accept their answer and to dismiss the action "as Plaintiff failed to establish compliance with the notice of default provisions of the mortgage". Plaintiff opposes the cross-motion.

"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]). A plaintiff needs "only [to] allege enough facts to enable a court to determine that a viable cause of action exists" (Woodson v Mendon Leasing Corp., 100 NY2d 62, 71 [2003]).

Plaintiff established *prima facie* its entitlement to a default judgment against Hershey and Chan and the other Defendants by submitting proof of the mortgage, the unpaid note, 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]; *U.S. Bank Natl. Assn. v Wolnerman*, 135 AD3d 850 [2d Dept 2016]; *see also Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]).

“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]).

Defendants’ assertion that Plaintiff failed to proffer sufficient evidence to demonstrate their default is without merit. Unlike a motion for summary judgment which requires a movant to establish, *prima facie*, an absence of material issues of fact by admissible evidence (*see eg Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]), a party seeking a default judgment only need demonstrate “evidence of a viable cause of action” (*see Redbridge Bedford, LLC v 159 N. 3rd St. Realty Holding Corp.*, 175 AD3d 1569, 1570 [2d Dept 2019]). This lesser burden of proof exists because a defaulting party “admits all traversable allegations in the complaint” (*Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]). Here the affidavit of Maryann Monteserrato, the Assistant Vice President of Plaintiff, was sufficient to satisfy these requirements (*see eg Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 806 [2d Dept 2013]).

Further, Plaintiff was not required demonstrate compliance with the contract notice provisions in the mortgage prior to issuance of a default judgment (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602 [2d Dept 2020]; *see also Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 830 [2d Dept 2016]). Failure to satisfy a condition precedent to suit is a waivable affirmative defense Plaintiff (*see Wells Fargo Bank, N.A. v Campbell*, 196 AD3d 726, 727 [2d Dept 2021]) and Defendants were required to show they should be relieved of their default before this non-jurisdictional defense is considered (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]).

Defendants’ notice of cross-motion states that vacatur of their default is sought pursuant to CPLR §5015[a][4] which related to a claim of lack of personal jurisdiction. However, Defendants offered no legal argument on this basis. Rather, their motion is founded in CPLR §5015[a][1], excusable default, and CPLR §317, vacatur where a party is not personally served. Generally, to vacate a default in appearing or answering, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see* CPLR §5015[a][1]; *Karimian v Karlin*, 173 AD3d 614 [1st Dept 2019]; *Needleman v Chaim Tornhein*, 106 AD3d 707 [2d Dept 2013]).

Absent from Chan’s affidavit is a cognizable excuse for not appearing or moving to vacate Defendants’ default for four months after service of their late answer. Moreover, while it is within the Court’s discretion to credit a claim of law office failure, “it was not the Legislature’s intent to routinely excuse such defaults” (*see OneWest Bank, FSB v Singer*, 153 AD3d 714, 716, *quoting Inc. Vill. of Hempstead v Jablonsky*, 283 AD2d 553, 554 [2d Dept 2001]). Therefore, such a claim may be sustained where there is a detailed and credible explanation for the default (*see Hudson City Sav. Bank v Augustin*, 191 AD3d 774, 775 [2d Dept 2021]). Movant’s proof in this regard was insufficient. The affidavit of Chan was conclusory and based upon hearsay statements attributed to Movants’ prior attorney which ultimately constituted nothing more than bare allegations of incompetence by former counsel (*see Vizelter v Strogov*, 170 AD3d 917 [2nd Dept 2019]; *Edwards v Feliz*, 28 AD3d 512 [2nd Dept 2006];

Achampong v Weigt, 240 AD2d 247 [1st Dept 1997]). Also, they failed to demonstrate that this attorney was engaged before their time to appear expired (*cf. Nahar v Awan*, 33 AD3d 680 [2nd Dept 2006]). In the end, Chan's affidavit demonstrates nothing more than "mere neglect" which is not a reasonable excuse (*OneWest Bank, FSB v Singer*, 153 AD3d 714, 716 [2^d Dept 2017]).

Defendants also seek to vacate their default under CPLR §317 which provides that if the non-appearing Defendant was not personally served, it may still defend the action within one year after it learns of the default judgment upon the Court finding that it "did not personally receive notice of the summons in time to defend and has a meritorious defense" (*see* CPLR §317; *Wilson v Kore Method on Gansevoort LLC*, 180 AD3d 486 [1st Dept 2020]; *Arabesque Recs. LLC v Capacity LLC*, 45 AD3d 404 [1st Dept 2007]; *Simon & Schuster v Howe*, 105 AD2d 604, 605 [1st Dept 1984]).

In the present case, the summons and complaint were not personally delivered to either Defendant within the meaning of CPLR §317 (*see eg Figueroa v Relgold*, 178 AD3d 425, 426 [1st Dept 2019] *Taron Partners, LLC v McCormick*, 173 AD3d 927 [2^d Dept 2019]). However, Defendants were required, but failed, to prove they "did not receive actual notice of the summons and complaint in time to defend the action" (*see Jean v Csencsits*, 171 AD3d 1149, 1150 [2^d Dept 2019]; *HSBC Bank USA v Desrouilleres*, 128 AD3d 1013, 1015 [2^d Dept 2015]). At most, Chan's affidavit is a "mere denial of receipt of the summons and complaint [which] is insufficient to establish lack of actual notice for the purpose of CPLR 317" (*see Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2^d Dept 2012]). Additionally, Defendants offered no explanation to rebut the presumption of receipt of the summons and complaint which arose with the mailings associated with the service on each (*see Youngstown Tube Co. v Russo*, 120 AD3d 1409, 1410 [2^d Dept 2014]).

Absent a reasonable excuse or proof the Defendants did not have notice in time to defend, the existence of a cognizable meritorious defense is of no moment (*see Taron Partners, LLC v McCormick*, supra at 930; *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]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2^d Dept 2019]).

Accordingly, the Defendants' cross-motion is denied, the Plaintiff's motion is granted, and it is

ORDERED that Plaintiff is awarded a default judgment against the non-appearing Defendants; and it is further

ORDERED that that **Scott H. Siller, Esq., 706 Equestrian Way, Westbury, NY 11590 -- 516-644-6769** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and 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 or is required to perform other significant services in issuing the report, 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 Kylie Kwok, Shin Sen, John Doe #3, Jane Doe #4 John Doe #5 and Jane Doe #6 be added as named defendant in this action pursuant to RPAPL §1311 and that the caption be amended to add Kylie Kwok, Shin Sen, John Doe #3, Jane Doe #4 John Doe #5 and Jane Doe #6 in place of the “John Doe” defendants as party defendants to this action and the caption should be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Emigrant Funding Corporation,

Index No. 850215/2021

Plaintiff,

-against-

Hershey Chan Realty, Inc., Grace Chan, New York City Department of Finance, New York State Department of Taxation and Finance, Owemanco Mortgage NY Limited Partnership, Kylie Kwok, Shin Sen, John Doe #3, Jane Doe #4 John Doe #5 and Jane Doe #6,

Defendants.

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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/supctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on April 13, 2023, 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.

12/16/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

Francis A. Kahn, III

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

HON. FRANCIS A. KAHN III

J.S.C.