

<b>LRD Funding, LLC v Wolk</b>
2022 NY Slip Op 34415(U)
December 23, 2022
Supreme Court, New York County
Docket Number: Index No. 160033/2020
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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LRD FUNDING, LLC,

Plaintiff,

- v -

JUSTIN WOLK, LARRY WOLK, WOLK FAMILY  
PROPERTIES 251 W 89, LLC, ICON REALTY CAPITAL  
LLC, and LOAN TRUST, LLC,

Defendants.

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**INDEX NO.** 160033/2020  
**MOTION DATE** 11/16/2022  
**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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

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

In this action for a judgment, inter alia, declaring that the mortgage held by the plaintiff on certain real property is superior to two other mortgages, the defendant Loan Trust, LLC (Loan Trust), moves pursuant to CPLR 317 and 5015(a) to vacate this court's December 10, 2021 decision, order, and judgment (the order and judgment) insofar as the court declared therein that Loan Trust's August 12, 2019 consolidation mortgage was subordinate to the plaintiff's mortgage. Loan Trust also seeks to vacate its default in answering the complaint, and requests leave to appear and answer the complaint. In the August 22, 2022 order to show cause initiating the instant motion, this court temporarily restrained the plaintiff from engaging in any proceeding to the detriment of Loan Trust, pending hearing of this motion. The plaintiff opposes the motion. The motion is denied and the temporary restraining order is dissolved.

The plaintiff alleged that several of the defendants committed fraud in connection with the repayment of its mortgage loan and the filing of a satisfaction of the mortgage securing repayment of that loan. In the order and judgment, this court granted, without opposition, that branch of the plaintiff's motion seeking leave to enter a default judgment against the defendants

Justin Wolk, Wolk Family Properties 251 W 89, LLC (WFP), ICON Realty Capital, LLC (ICON), and Loan Trust, and thereupon vacated the satisfaction of mortgage, reinstated the plaintiff's mortgage on the subject real property, and declared that two subsequent mortgages on that real property, the loans underlying those mortgages, and a related assignment of one of the mortgages, are subordinate to the plaintiff's mortgage. The court also granted that branch of the plaintiff's motion seeking leave to enter a default judgment against Justin Wolk and WFP, jointly and severally, in the principal sum of \$273,000.00 on its fraud cause of action. On December 31, 2021, the Clerk entered a money judgment against Justin Wolk and WFP, jointly and severally, in the total sum of \$331,496.70.

The underlying facts of this dispute are described in the order and judgment. The plaintiff, a limited liability company, contended that, on or about December 21, 2018, it originated and funded a mortgage loan to WFP in the face amount of \$273,000.00 in connection with Unit 6E in an apartment building located 251 West 89th Street in Manhattan (the property). The plaintiff asserted that WFP tendered it a mortgage in connection with the loan, that the plaintiff recorded it with the New York City Register on January 11, 2019, and that, in or about July 2019, Justin Wolk, a member of WFP, requested that the plaintiff provide him with a satisfaction of mortgage as part WFP's plan to refinance the property. On August 8, 2019, Justin Wolk sent an e-mail to the plaintiff's managing member attaching certain documents, including a proposed satisfaction of mortgage, and requested that the plaintiff execute the documents necessary to satisfy the mortgage. The plaintiff sent a payoff letter dated August 12, 2019 to Justin Wolk, the defendant Larry Wolk, and WFP (collectively the Wolk defendants), informing them of the total sum needed to satisfy its mortgage, with wiring instructions, and told them that, although no payments had yet been made to amortize the loan, the mortgage loan could be satisfied by the immediate payment of \$100,000.00. Unbeknownst to the plaintiff, on August 12, 2019, the Wolk defendants, without paying the \$100,000.00, executed a satisfaction of mortgage, signing it "LRD Funding LLC – Justin A. Wolk," and recorded the satisfaction piece

with the New York City Register on August 14, 2019, despite the fact that none of those defendants was a member of the plaintiff LLC, and none had authority to sign the satisfaction on behalf of the plaintiff. On or about August 12, 2019, WFP obtained two additional mortgage loans secured by the property from the defendant ICON in the face amounts of \$460,000.00 (the gap mortgage loan) and \$1,260,000.00 (the mortgage consolidation loan), respectively. WFP thereafter assigned the mortgage and note referable to the mortgage consolidation loan (the consolidation mortgage and note) to Loan Trust, and the underlying mortgages and assignment were recorded with the New York City Register on or about September 4, 2019.

The crux of the plaintiff's claim against Loan Trust is that the satisfaction of the plaintiff's mortgage was effectuated by fraud, that the satisfaction thus was a nullity, that its mortgage remained superior to any other subsequent mortgage on the property, that the gap mortgage and consolidation mortgage thus were subordinate to its own mortgage, and that Loan Trust, which now holds the consolidation mortgage and note, is subject to that priority of liens.

On January 21, 2021, the plaintiff served process upon Loan Trust by personally delivering of copies of the summons and complaint to its registered agent for service of process, a corporate services company known as A Registered Agent, Inc., in Dover, Delaware (see CPLR 311[a][1] [authorizing service by delivery of process to an "agent authorized by appointment . . . to receive service"]). Since the plaintiff did not serve Loan Trust pursuant to Business Corporation Law § 306(b), the plaintiff was not required to provide it with the additional notice described in CPLR 3215(g)(4). Because Loan Trust did not answer, appear, or move with respect to the complaint within 20 days after service upon it (see CPLR 3012[a]), the order and judgment was entered against it upon its default.

In support of the instant motion, Loan Trust submitted the affidavit of its chief executive officer, Allen Shayanfekr, who asserted that, on July 11, 2018, WFP obtained an \$800,000.00 loan from nonparties Gauntlet Funding, LLC (Gauntlet), and PS Funding, Inc. (PSF), and tendered a mortgage on the property and related promissory note to PSF. He averred that this

first mortgage (the PSF mortgage) was recorded on August 7, 2018, that PSF assigned the PSF mortgage and related note on August 5, 2019 to the defendant ICON, and that the assignment of mortgage was recorded on September 4, 2019. Shayanfekr asserted that, on August 12, 2019, after WFP obtained the \$460,000.00 gap mortgage loan from ICON, WFP entered into a consolidation/extension/modification agreement with ICON that consolidated the 2019 gap mortgage into the \$800,000.00 2018 PSF mortgage, creating one consolidation loan and underlying mortgage in favor of ICON in the sum of \$1,260,000.00. According to Shayanfekr, even though the consolidation mortgage and the related agreement physically were recorded on September 4, 2019, the legal recording date related back to the date that the PSF mortgage was recorded, that is, August 7, 2018, and the consolidation mortgage thus is superior to the plaintiff's mortgage, which was recorded on January 11, 2019. Inasmuch as ICON assigned the consolidation mortgage to Loan Trust on August 12, 2019, and Loan Trust recorded that assignment on September 4, 2019, Shayanfekr asserted that Loan Trust's interest in the property, as memorialized by the consolidation mortgage, is superior to the plaintiff's interest.

With respect to the reason why Loan Trust did not oppose the plaintiff's motion for leave to enter a default judgment against it, Shayanfekr asserted that Loan Trust's address was 45 North Station Plaza, Suite 400, Great Neck, New York 11021, that the plaintiff indicated both on the summons and the affidavit of service referable to the service of the motion papers that Loan Trust's address was 11 Middle Neck Road, Suite 314, Great Neck, New York 11021, that Loan Trust had moved from that address in May 2019, and thus long before this action was commenced on November 19, 2020, and that, consequently, "did not receive any mailing by plaintiff herein to that address." With respect to why Loan Trust did not appear in the action, answer the complaint, or move with respect thereto, he averred that it

"was unaware of this action until recently, as we were not served with a copy of the summons and complaint in New York, nor did we receive a copy of such filing from our agent who was alleged to have been served in Delaware.

“When our agent in Delaware is served, we are supposed to receive an email with a copy of the service papers. However, we checked the inbox of the email account that should have received an email when service was allegedly made on our agent in Delaware and could not locate any email from them on or near the date service was allegedly made. Had an email been properly received, we would have appeared in the instant action and defended our interest.”

In opposition to the motion, the plaintiff argued that, in the absence of an affidavit from a representative of Loan Trust’s registered agent in Delaware, the court is left to guess at what that agent did to forward the summons and complaint to Loan Trust, and that, inasmuch as Loan Trust conceded that it expected to receive legal papers from its agent via email, and not through the mail or personally, the COVID-19 pandemic cannot be a basis for a reasonable excuse. The plaintiff further provided extensive proof that Loan Trust learned about the pendency of this action no later than February 22, 2022, but did not make the instant motion until August 19, 2022, and accused Loan Trust of selling the property to itself at a foreclosure sale on March 16, 2022, despite the December 13, 2021 entry of the order and judgment declaring that the consolidation mortgage was subordinate to the plaintiff’s mortgage.

In reply, Loan Trust disputed the plaintiff’s accusations, and asserted that any delay in moving to vacate its default cannot be a basis for denying the motion, inasmuch as CPLR 317 provides that, where a defendant establishes that it did not personally receive notice of the commencement of the action in time to defend it, the defendant has one year after the entry of the default judgment in which to make the motion. Loan Trust argued that, since it made the instant motion within one year after learning of the entry of the order and judgment, it need not establish a reasonable excuse for its failure to answer within the time otherwise required by the CPLR. Loan Trust also countered that the plaintiff itself failed to inform the court that the consolidation mortgage was the product of the consolidation of the gap mortgage and the PSF mortgage, the latter of which antedated the plaintiff’s mortgage. Loan Trust characterized this omission as an intrinsic fraud upon the court within the meaning of CPLR 5015(a)(3) that would also entitle it to vacate the order and judgment.

A party seeking to vacate a default judgment pursuant to CPLR 5015(a)(1), based on an “excusable default,” must demonstrate a reasonable excuse for the default and a potentially meritorious defense (see *Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 401 [1st Dept 2022]; *U.S. Bank Trust, N.A. v Rivera*, 187 AD3d 624, 624-625 [1st Dept 2020]; *US Bank, N.A. v Brown*, 147 AD3d 428, 429 [1st Dept 2017]). Thus, where a party seeks relief pursuant to CPLR 5015(a)(1), “[a]bsent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense” (*Citibank, N.A. v K.L.P. Sportsware, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016]). Loan Trust’s conclusory denial of receipt of process from its appointed agent does not constitute a reasonable excuse within the meaning of CPLR 5015(a)(1) (see *Country-Wide Ins. Co. v Power Supply, Inc.*, 179 AD3d 405, 407 [1st Dept 2020] [denial of receipt from Secretary of State]; *Dove v 143 School St. Realty Corp.*, 172 AD3d 1315, 1317 [2d Dept 2019] [same]; *Jing Shan Chen v R & K 51 Realty, Inc.*, 148 AD3d 689, 691 [2d Dept 2017] [same]; *State Farm Mut. Auto. Ins. Co. v Dr. Ibrahim Fatiha Chiropractic, P.C.*, 147 AD3d 696, 697 [1st Dept 2017] [same]). Moreover, for the purposes of CPLR 5015(a)(1), Loan Trust’s six-month delay in seeking to vacate the order and judgment after learning of its entry warrants the denial of relief on that ground as well (see *Bank of New York v Terrapin Indus., LLC*, 189 AD3d 620, 621 [1st Dept 2020] [unreasonable delay in bank’s effort to vacate default judgment triggered doctrine of laches and warranted denial of motion to vacate default]; *John Wiley & Sons, Inc. v Grossman*, 132 AD3d 559 [1st Dept 2015] [four-month delay]).

The court rejects Loan Trust’s alternative contention that CPLR 317 provides a basis for vacatur of the order and judgment. CPLR 317 provides that

“[a] person served with a summons *other than by personal delivery to him or to his agent for service designated under rule 318* . . . who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment . . . upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense”

(emphasis added). Here, Loan Trust was, in fact, served by personal delivery to its designated agent for service within the meaning of CPLR 318. Hence, CPLR 317 is inapplicable to the

service upon Loan Trust, and it may not avail itself of the protections of that statute (see generally *Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009] [CPLR 317 is available only to defendant who was not served by personal delivery]; *Parts Auth., Inc. v Grand Performance, Inc.*, 35 Misc 3d 141[A], 2012 NY Slip Op 50876[U], \*2, 2012 NY Misc LEXIS 2273, \*2 [App Term, 2d Dept, 1st, 11th, & 13th Jud Dists, May 11, 2012] [CPLR 317 inapplicable to corporation that was served by personal delivery to a managing agent]; *Government Empls. Ins. Co. v Molnar Med. Servs., P.C.*, 2020 NY Misc LEXIS 21690, \*9 [Sup Ct, Nassau County, Oct. 20, 2020] [personal delivery to natural person rendered CPLR 317 inapplicable]).

In any event, although no showing of a reasonable excuse is necessary where a defendant seeks to invoke CPLR 317 (see *Eugene Di Lorenzo, Inc. v A. C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *John v Arin Bainbridge Realty Corp.*, 147 AD3d 454, 455 [1st Dept 2017]), and CPLR 317 permits a defendant to seek a vacatur within one year of learning of the default (see *Olivaria v Lin & Son Realty, Corp.*, 84 AD3d 423, 424 [1st Dept 2011]), the mere denial of receipt of the summons and complaint is insufficient to establish lack of notice of the action in time to defend for the purpose of CPLR 317 (see *Hamilton Pub. Relations v Scientivity, LLC*, 129 AD3d 1025 1025-1026 [2d Dept 2015]; *Capital Source v AKO Med., P.C.*, 110 AD3d 1026, 1027 [2d Dept 2013]; *Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012]; *Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1081-1082 [2d Dept 2011]; *Thirty-One Co. v Truisi Design Group, PLLC*, 2019 NY Slip Op 33028[U], \*2, 2019 NY Misc LEXIS 5469, \*2 [Sup Ct, N.Y. County, Oct. 4, 2019]).

As with motions pursuant to CPLR 5015(a)(1), “[a] defendant moving pursuant to CPLR 5015(a)(3) to vacate a default based on intrinsic fraud, i.e., on the basis that the plaintiff’s allegations in the complaint are false, must establish both a reasonable excuse for the default and a potentially meritorious defense to the action” (*3331 102 St. LLC v Newport Beach Holdings LLC*, 205 AD3d 497, 497 [1st Dept 2022], quoting *JPMorgan Chase Bank, N.A. v Multani*, 196 AD3d 549, 550 [2d Dept 2021]; see *Chevalier v 368 E. 148th St. Assoc., LLC*, 80

AD3d 411, 413 [1st Dept 2011]). Thus, even if the court credits Loan Trust's allegation that the plaintiff's omission of certain facts from its complaint and motion papers fraudulently created a false impression that permitted the plaintiff to secure the order and judgment, Loan Trust's failure to establish a reasonable excuse for its default requires denial of relief pursuant to CPLR 5015(a)(3). In addition, Loan Trust's failure to seek vacatur of the judgment within a reasonable time after discovery of the alleged fraud warrants denial of relief under that provision as well (see *Matter of 4042 E. Tremont Café Corp v Sodono*, 177 AD3d 456, 457 [1st Dept 2019]).

The court concludes that, in any event, the plaintiff committed no fraud by omitting to inform the court that the PSF mortgage antedated its own, as the existence of that mortgage, and its consolidation with the later gap mortgage to create the consolidation mortgage, have no bearing on the priority of mortgages or the outcome of this action. New York is a "race-notice" state when it comes to the recording of mortgages (see *2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 161 [1st Dept 2008]), "whereby the mortgage recorded first by a mortgagee without notice of any other mortgages will maintain priority over such other mortgages" (*Alliance Funding Co. v Taboada*, 39 AD3d 784, 784 [2d Dept 2007], citing Real Property Law § 691). Crucially,

"[t]he courts recognize the well-settled principle that a consolidation agreement is an instrument of convenience for the contracting parties only. A consolidation agreement, however, cannot adversely affect, impair or derogate the priorities of any lien which has intervened between the respective dates of execution and delivery of the two consolidated mortgages. Rather, for purposes of determining priority when there is an intervening lien, the mortgages retain their separate-lien status. In that scenario, the consolidation agreement would not be considered the 'first mortgage of record'"

(*Plotch v Citibank, N.A.*, 27 NY3d 477, 483 [2016] [citations and some internal quotation marks omitted] [emphasis added]; see *Dime Sav. Bank of N.Y. v Levy*, 161 Misc 2d 480, 482 [Sup Ct, Rockland County 1994]). Applying that established rule of law to the instant dispute, neither the gap mortgage nor the consolidation mortgage, both of which were recorded in September 2019, can adversely affect the priority of plaintiff's mortgage, which was recorded in January 2019,

and intervened between the August 2018 recording of the PSF mortgage and the September 2019 recording of the gap and consolidation mortgages. Since all of these mortgages retain their "separate-lien status" for the purposes of determining priority, the plaintiff's mortgage has priority over the gap and consolidation mortgages, and the existence of the PSF mortgage is irrelevant to the court's determination in the order and judgment.

For the same reason underlying the court's determination that the plaintiff committed no fraud in obtaining the order and judgment, the court concludes that Loan Trust failed to demonstrate a potentially meritorious defense to the plaintiff's claims against it, as required to succeed on a motion pursuant to CPLR 317, CPLR 5015(a)(1), or CPLR 5015(a)(3). Inasmuch as Loan Trust presented no proof that the satisfaction of mortgage that was signed and recorded by Justin Wolk was valid, when the court invalidated that satisfaction piece, the plaintiff's mortgage was restored to its priority over the gap and consolidation mortgages. Although the plaintiff's mortgage remains subordinate to the 2018 PSF mortgage, the plaintiff did not request, and this court did not grant, any relief that reversed the priorities of those two mortgages.

Accordingly, it is

ORDERED that the motion is denied and the temporary restraining order contained in the August 22, 2022 order to show cause is dissolved.

This constitutes the Decision and Order of the court.

12/23/2022  
DATE

\_\_\_\_\_ JOHN J. KELLEY, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

GRANTED  DENIED  GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE