

**Piscionere v Gori**

2022 NY Slip Op 35019(U)

December 21, 2022

Supreme Court, Westchester County

Docket Number: Index No. 50750/2021

Judge: David S. Zuckerman

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
ANTHONY G. PISCIONERE AND JERYL  
PISCIONERE,

Plaintiffs,

**DECISION AND ORDER**

Motion Seq. Nos.:1 and 2  
Index No.: 50750/2021

-against-

KENNETH GORI A/K/A KEN GORI; MILDRED GORI; NEW YORK STATE TAX COMMISSION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FREEMONT INVESTMENT AND LOAN ITS SUCCESSORS AND ASSIGNS; AND JOHN DOE AND JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the Plaintiff, the persons or parties intended being the tenants, occupants, person or parties, if any, having or claiming an interest in or lien upon the premises described in the Complaint,

Defendants.

-----X  
ZUCKERMAN, J.

The papers filed in NYSCEF as documents numbered 19 through 51 were read in connection with these two motions. In motion sequence number 1, Plaintiffs Anthony G. Piscionere and Jeryl Piscionere move for an Order, pursuant to CPLR 3215, granting them a default judgment on their Complaint against Defendants Kenneth Gori a/k/a Ken Gori and Mildred Gori. In the alternative, Plaintiffs move, pursuant to CPLR 3212, for an order granting summary judgment. Defendants oppose Plaintiff's motion and, in motion sequence number

2, cross-move for an Order dismissing the Complaint or, in the alternative, pursuant to CPLR 2201 and CPLR 5240, staying the action.

#### FACTS AND PROCEDURAL HISTORY

On January 20, 2021, Plaintiffs commenced this post-judgment enforcement action by filing a Summons and Complaint<sup>1</sup>. The Complaint contains two causes of action. In the first, Plaintiffs seek a Judgment of Foreclosure and Sale for premises located at 10 Hanford Avenue, New Rochelle, New York 10805 ("the subject property"). In the second, Plaintiffs seek an Order transferring the subject property to them. In support of their allegation that Defendants own the subject property, Plaintiffs merely annex a metes and bounds description.

This action involves Plaintiffs' attempt to satisfy two Judgments (collectively "The Judgment"). The Judgment, dated December 11, 2020 and entered on December 21, 2020, emanates from Rye City Court. In that action, the court (Livingston, J.) granted Plaintiffs, as landlords, a Judgment of Possession against Defendants, as tenants, in the amount of \$41,000.00, and a Non-

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<sup>1</sup>In the Complaint as well as their Affirmation in Support, Plaintiffs erroneously characterize their pleading as a "Verified Complaint." It is not, in fact, verified.

Possessory Judgment in the amount of \$51,250.00, for a total of \$92,250.00. On December 22, 2020, Plaintiffs docketed the Judgment in the Office of the Westchester County Clerk.

As set forth in Affidavits of Service, on January 22, 2021, Defendants were served with the Summons and Complaint. On February 9, 2021, Defendants' counsel filed a Notice of Appearance. Defendants have not filed an Answer or otherwise responded to the Complaint.

On or about March 3, 2021, Defendant Kenneth Gori filed an Amended Chapter 13 Bankruptcy Petition. Pursuant to 11 USC §362, this action was automatically stayed. On July 30, 2021, the bankruptcy petition was dismissed and the stay lifted.

On January 12, 2022, under Case Number 2021-00071 WC, the Appellate Term, Second Department, stayed enforcement of the Judgment pending determination of Defendants' appeals, thus staying this action. On August 26, 2022, that court lifted the stay and ordered that the appeal be perfected on or before September 20, 2022<sup>2</sup>.

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<sup>2</sup>To date, there is no record in this action that Defendants have perfected their appeal.

**CONTENTIONS OF THE PARTIES**

Plaintiffs argue that, pursuant to CPLR 320(a), they are entitled to default judgment. They contend that, notwithstanding counsel's February 9, 2021 Notice of Appearance, Defendants have failed to timely move, answer or otherwise respond to the Complaint.

Plaintiffs also assert that, pursuant to CPLR 5201, a money judgment may be enforced against any property which could be assigned or transferred. Since, "on information and belief," Defendants are the "only owners of the premises," the subject property is real property that could be assigned or transferred (Complaint, ¶¶ 14 and 15). Thus, they have established, prima facie, their causes of action for foreclosure and sale or transfer. Therefore, the court should issue a default judgment.

In the alternative, Plaintiffs argue they have met their burden on summary judgment. Plaintiffs contend it is undisputed that they have a Judgment against Defendants in the amount of 92,500.00 from Rye City Court, have filed that Judgment with the Westchester County Clerk and the Judgment remains unsatisfied.

Defendants respond that Plaintiffs have failed to meet their burden to establish all of the necessary facts to entitle them to summary judgment. As such, notwithstanding their failure to interpose any substantive opposition, summary judgment should be denied.

With respect to their cross-motion to dismiss, Defendants argue that they have "accounted for every dollar of the Judgment amount" (Defendants' Affirmation, ¶ 9). Defendants contend that they satisfied the Judgment with: \$71,000.00 paid by cashier's check, a prior payment of \$10,250.00, and at least \$11,008.70 seized by the Westchester County Sheriff. In support, Defendants have annexed copies of canceled checks made payable to Plaintiffs and a copy of the Westchester County Sheriff ledger showing that \$11,008.70 was seized.

Defendants further contend that Plaintiffs' motions must also be denied because they had the opportunity to collect all of the rent due through both the Emergency Rental Assistance Program and the Landlord Rental Assistance Program but chose to forgo both. Consequently, Plaintiffs' efforts to enforce the Judgment and sell the subject property should be denied.

Additionally, Defendants contend that Defendants' motion

should be denied because CPLR 5236(a) requires an execution be served by a Sheriff. As no execution was ever made by the Sheriff, CPLR 5236 relief is not available as a remedy to enforce the Judgment. Additionally, Defendants argue that Plaintiffs have not provided the equivalent of an Affidavit of Regularity to conclusively establish that a search was conducted for all additional necessary parties in this action. Nor have Plaintiffs provided any information as to the value of Defendants' equity in the subject property to determine a fair sale price.

Alternatively, Defendants contend that, pursuant to CPLR 2201 and 5240, should the court find that any monies are due to Plaintiffs, this action should be stayed to give Defendants a reasonable opportunity to pay whatever else may be due. Defendants add that Plaintiffs' claims regarding rent owed for each month since January, 2021 are "irrelevant" since Plaintiffs do not have a Judgment for those rents.

In reply, Plaintiffs deny that the Judgment has been satisfied. Plaintiff Anthony G. Piscionere refused to accept Defendants' two bank checks, totaling \$71,000.00, claiming that they needed to be made payable to the Westchester County Sheriff's Office. As to the \$10,250.00 check, it is dated August 21, 2020. The Judgment was entered on December 21, 2020, four months later.

Accordingly, that payment cannot be credited towards the balance of the Judgment<sup>3</sup>. Finally, Plaintiffs highlight Defendants' Motion Exhibit D, a copy of the February 21, 2022 Case Debtor Payment Ledger from the Westchester County Sheriff. Plaintiffs assert that, according to Defendants' own Exhibit, as of December 7, 2021, the payoff amount on the Judgment is \$85,303.37. Plaintiffs also reference a November 15, 2021 email from the Westchester County Sheriff's Office. It indicates that the payoff, including costs and interest as of November 15, 2022 is \$86,634.22, with additional accumulated interest at a rate of \$20.21 per day, remains outstanding.

Plaintiffs further argue that Defendants do not deny or provide a reasonable excuse for their default. As such, Defendants have conceded that default judgment is warranted.

Finally, Plaintiffs assert that, because a stay has already been issued by the Appellate Term, Second Department, Defendants' alternative request for a stay should be denied as moot<sup>4</sup>. Plaintiffs add that, if the stay is lifted by the Appellate Term,

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<sup>3</sup>Plaintiffs note that Defendants have made numerous motions in Rye City Court to resettle the Judgment on the grounds that it did not include a credit for the \$10,250.00 payment. All have been denied.

<sup>4</sup>As previously noted, the Appellate Term did not remove the stay of Plaintiffs' enforcement proceedings until August 26, 2022. Thus, as of the date of filing of this motion and cross-motion, the stay was still in effect.

a further stay should not be issued as Plaintiffs' Judgment has not been satisfied.

#### DISCUSSION

CPLR Article 52 provides the procedure for enforcement of money judgments (see *Cruz v TD Bank, N.A.*, 22 NY3d 61, 66 [2013]).

Pursuant to CPLR 5221:

(1) Court and county in which proceeding commenced.

1. "If the judgment sought to be enforced was entered in the city court of any city outside the city of New York and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which the court is or was located, a special proceeding authorized by this article shall be commenced in that court or in the county court of that county."

CPLR 5232(a) governs the process of levy by service of execution. CPLR 5236, governs the sale of real property on an execution through court order. Pursuant to CPLR 5203(a), a judgment becomes a lien against real property as soon as it is docketed (see, *Cadle Company v Calcador*, 85 AD3d 700 [2d Dept 2011]; see also CPLR 5236(a)). The judgment is attached to any property in which the debtor has an interest at that time (CPLR 5201[b]) and remains effective against such property for a period of ten years (CPLR 5203[a]).

Plaintiff has produced undisputed evidence that it presently holds a Judgment, entered against Defendants, which was filed in the Office of the Westchester County Clerk. If Defendants owned the subject property, upon filing of the Judgment, it became a lien on that property (see, CPLR 5018[a]).

"The language of CPLR 5221 is not permissive; it is mandatory" (*In the Matter of Estate of Raffaele Lupoli*, 275 AD2d 44 (2d Dept 2000)). Thus, "[r]ather than seek a sale, the petitioner's proper remedy is to seek enforcement of its judgment under Article 52 of the CPLR". *In the Matter of the Application of Enquire Printing and Publishing Co, Inc, as creditors of Pamela Turner*, 26 Misc 3d 1035 (Sur Ct Nassau County 2009).

Consequently, Plaintiffs did not commence the proper post-judgment action. The proper remedy is to seek relief under CPLR Article 52.

#### **1. Plaintiff's Motion for Default Judgment**

A party's right to recover upon the opposing party's failure to appear is governed by CPLR 3215. "On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to submit proof of service of the summons and complaint, the facts

constituting the cause of action, and the defendant's default in appearing" (*Clarke v Liberty Mut. Fire ins. Co.*, 150 AD3d 1192 [2d Dept 2017]; see *Ameriprise Ins. Co. v Kim*, 185 AD3d 995, [2d Dept 2020]). Where a verified complaint has been served, it may be used as the affidavit of facts constituting the claim and the amount due. In such case, an affidavit as to the default shall be made by the party or the party's attorney (CPLR 3215[g]). If the complaint is not verified, proof of the facts constituting the claims, the default and amount due shall be made by the party. (CPLR 3215(f)).

"Default judgments are not 'rubber-stamped once jurisdiction and a failure to appear have been shown.'" (*Viviane Entienne Med. Care, P.C. v County-Wide Ins. Co.*, 114 AD3d 33 [2d Dept 2013], citing *Joosten v Gale*, 129 AD2d 531 [1st Dept 1987]). "[S]ome proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*id.*, [internal citation and quotations marks omitted]; see also, *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006] ["[t]he quantum of proof necessary to support an application for a default judgment is not exacting; however, some firsthand confirmation of the facts forming the basis for the claim must be proffered"]). "Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Green v Dolby Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]). Additionally,

"a court does not have a mandatory ministerial duty to grant a motion for leave to enter a default judgment, and retains the discretionary obligation to determine whether the movant has met the burden of stating a viable cause of action" (*Paulas v Chritopher Vacira, Inc.* 128 AD3d 116, 126 [2d Dept 2015]; see also, *Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]).

Here, Plaintiffs submitted, *inter alia*, a copy of the Summons and Unverified Complaint, proof of service, and Affirmation of Facts from Plaintiff with proof that Defendants have not answered. Plaintiffs argue that Defendants have defaulted in appearing notwithstanding their counsel's filing of a Notice of Appearance. Plaintiffs also highlight Defendants' failure to respond to the branch of their motion seeking default judgment, other than to state that they oppose the relief sought.

In general, a plaintiff establishes its prima facie entitlement to judgment in a foreclosure action when it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (*Citibank, N.A. v Van Brundt Props. LLC.*, 95 AD3d 1158 [2d Dept 2012]). In their Complaint, Plaintiffs specifically state that there is a mortgage on the subject property held by Defendant Mortgage Electronic Registration Systems, Inc., As Nominee For Freemont Investment And Loan Its Successors And

Assigns, not Plaintiffs. Plaintiffs fail to annex any proof necessary to satisfy the court as to the prima facie validity of their foreclosure and sale or property transfer causes of action. In addition, Plaintiffs fail to establish that defendants own the subject property.

In sum, Plaintiffs' factual submissions in support of the motion for default judgment fail to state a cognizable cause of action for foreclosure and sale and/or transfer of the subject property. Consequently, Plaintiffs have failed to meet their burden to demonstrate, *prima facie*, their entitlement to the relief sought. Therefore, Plaintiffs' motion for default judgment must be denied.

## **2. Plaintiff's Motion for Summary Judgment**

As Plaintiffs properly note, Defendants have not answered the Complaint. Accordingly, issue has not been joined. "A motion for summary judgment brought before a defendant has answered the complaint is premature, and must be denied" (*SHG Resources, LLC v SYTR Real Estate holdings LLC, Shlomo Rechnitz*, 201 AD3d 610 [1<sup>st</sup> Dept 2022], citing *City of Rochester v Chisrella*, 65 NY2d 92, 101 [1985]). "The Court of Appeals has noted that the rule barring pre-joinder motion for summary judgment is strictly applied" *SHG*

*Resources, supra*, citing *Valentine Tr. v Kernizan*, 191 AD2d 159, 161 [1st Department 1993]). Therefore, Plaintiff's summary judgment must be denied.

Even if the court were to reach the merits of the motion, the result would be the same. "[T]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]; see also, *Gitlin v Chirinkin*, 98 AD3d 561 [2d Dept 2012]). The moving party must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" [*Winrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; see also, *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980)].

Once the moving party makes its prima facie showing, the burden then shifts to the opposing party to "show facts sufficient to require a trial any issue or fact" to defeat the proponent's motion for summary judgment" (*Zuckerman v City of New York, supra* at 562, quoting CPLR 3212[b]; see also, *Alvarez v Prospect Hospital, supra* at 324). Evidentiary proof must be in admissible form and cannot be mere "conclusions, expressions of hope or unsubstantiated allegations or assertions" (*Zuckerman v City of New*

York, *supra* at 562). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBSS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 584 [1<sup>st</sup> Dept 1998]).

As previously noted, to prevail on a foreclosure action, a plaintiff must present evidence of the Note, Mortgage, and evidence of the mortgagor's default in payment. Plaintiffs have failed to annex said proof. Plaintiffs also fail to establish that Defendants are the owners of the subject property.

Additionally, Plaintiffs fail to address whether the subject property constitutes real property with a dwelling thereon which, pursuant to CPLR 5206, is exempt from application to satisfy money judgments. Accordingly, Plaintiffs have failed to establish *prima facie* entitlement to a judgment of foreclosure and sale and/or transfer. Therefore, the summary judgment motion must be denied.

### 3. Defendants' Cross-Motion to Dismiss of the Complaint

Pursuant to CPLR 3211

[a] Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
2. the court has not jurisdiction of the subject matter of the cause of action; or
3. the party asserting the cause of action has not legal capacity to sue; or

4. The is another action pending between the parties for the same cause of action in a court of any state or the United States; or
5. The cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations or statute of frauds; or
6. With respect to a counterclaim, it may not properly be interposed in the action; or
- 7 the pleading fails to state a cause of action; or
8. The court has not jurisdiction of the person of the defendant; or
9. The court has not jurisdiction in an action where service was made under section 314 or 315; or
- 10 The court should not proceed in the absence of a person who should be a party.
11. The party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law.

Pursuant to CPLR 2214, Motion papers, service time:

(a) Notice of Motion. A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the ground therefore. Relief in the alternative or of several different types may be demanded.

Defendants' papers fail to specify which of the eleven subsections of CPLR 32111 they rely on as grounds to dismiss the Complaint. Nor have Defendants cited any case law in support of their motion. Therefore, Defendants' motion to dismiss the Complaint must be summarily denied as procedurally deficient (*Abizadeh v Abizadeh*, 159 AD3d 856 [2d Dept 2018])["...a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of

motion”][internal citations omitted; see also *U.S. Bank National Associates v Rosario*, 65 Misc. 3d 1234(A) [Sup Ct, Kings County 2019] [“although [USBNA] stated the factual basis for the motion, it did not cite any law in support of the relief requested to meet the requirements of CPLR 2214(a)”]).

Assuming that Defendants are relying on CPLR 3211(1) as grounds to dismiss the Complaint, the proffered documents must utterly refute the allegations in the complaint, “conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. Of NY*, 98 NY2d 314, 326 [2002]). Here, Defendants argue the Complaint must be dismissed because they have paid the entire Judgment. In support, Defendants annex copies of cashier’s checks made payable to Plaintiffs’ order showing that they tendered \$71,000.00. Defendants also annex a copy of the Westchester County Sheriff’s Ledger, showing at least \$11,008.70 seized. Defendants also contend that they made a prior payment of \$10,250.00, showing a cancelled check made payable to Plaintiffs’ order.

The \$10,250.00 payment, however, was tendered four months before the Judgment was entered. Moreover, Defendants’ motions to resettle the judgment to reflect the \$10,250.00 were denied by Rye City Court. In sum, the court does not find that the evidence submitted by Defendants is “essentially undeniable.” Nor does it

conclusively refute Plaintiffs' allegations. Therefore, Defendants' motion, even if made pursuant to CLR 3211(a)(1), to dismiss the Complaint must be denied.

#### 4. Defendants' Motion for a Stay

Pursuant to CLR 2201:

Except as otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.

Pursuant to CPLR 5240,

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article.

"Recognizing that innumerable situations can arise that manifest abuse of the enforcement devices, the CPLR does not try to build special protections into each of the devices individually. Instead, it centralizes in one place a broad power to make a "protective order," addressed to the facts of the particular case. This power is embodied in CPLR 5240" (Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, C5240:1).

"CPLR 5240 is perhaps the most practical method to protect judgment debtors from the often harsh results of lawful enforcement procedures" (*Guardian Loan Co. v Early*, 47 NY2d 515, 519 [1979]). "This section grants the Supreme Court broad discretionary power to alter the use of procedures set forth in CPLR article 52" (*Sirotkin v Jordan, LLC*, 141 AD3d 670, 672 [2d Dept 2016]).

This action was previously stayed by Order of the Appellate Term, Second Department as well as Defendant Kenneth Gori's subsequently dismissed bankruptcy action. The court sees no reason to issue a further stay of the proceedings.

The remaining contentions do not compel a different result. Any additional relief requested by any party and not considered herein is denied.

Accordingly, it is hereby

**ORDERED**, that the motion by Plaintiffs, Anthony G. Piscionere and Jeryl Piscionere, for an Order, pursuant to CLR 3211, granting them default judgment is denied; and it is further

**ORDERED**, that the motion by Plaintiffs, Anthony G. Piscionere and Jeryl Piscionere, for an order, pursuant to CLR 3212, granting

them summary judgment is denied; and it is further

**ORDERED**, that the cross-motion by Defendants Kenneth Gori a/k/a Ken Gori and Mildred Gori, for an order denying Plaintiff's motion for default judgment is denied as moot; and it is further

**ORDERED**, that the cross-motion by Defendants Kenneth Gori a/k/a Ken Gori and Mildred Gori, for an Order dismissing the Complaint on the grounds that they have made full payment on the Rye City Court Judgment, or, in the alternative, pursuant to CLR 2201 and CLR 5240, staying this action, is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
December 21, 2022



HON. DAVID S. ZUCKERMAN  
Acting Justice of the Supreme Court

TO: All Parties Via NYSCEF