

**USC 171 Bowery LLC v 171 Bowery Prop. Owner  
LLC**

2023 NY Slip Op 30449(U)

February 6, 2023

Supreme Court, New York County

Docket Number: Index No. 850125/2022

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

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

*Justice*

-----X  
 USC 171 BOWERY LLC,  
 Plaintiff,  
 - v -  
 171 BOWERY PROPERTY OWNER LLC, GRANT  
 SHAPOLSKY, ANTARES BONDS S.A., KUTNICKI  
 BERNSTEIN ARCHITECTS PLLC, CITY OF NEW YORK  
 ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY  
 DEPARTMENT OF FINANCE, NEW YORK STATE  
 DEPARTMENT OF TAXATION & FINANCE, JOHN DOE #1  
 THROUGH JOHN DOE #12  
 Defendant.  
 -----X

INDEX NO. 850125/2022  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 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

were read on this motion to/for

APPOINT - REFEREE

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a consolidated, amended and restated mortgage encumbering commercial real property located at 171 Bowery, New York, New York that was given by Defendant 171 Bowery Property Owner LLC ("171 Bowery"). The mortgage secures a consolidated, amended and restated promissory note which evidences a loan with an original principal amount of \$7,000,000.00. The note and mortgage, both dated April 12, 2019, were executed by Defendant Grant Shapolsky ("Shapolsky") as an Authorized Signatory of 171 Bowery. Concomitantly with these documents, Shapolsky executed a guaranty of payment of the note.

Plaintiff commenced this action wherein it is alleged Defendant 171 Bowery incurred a maturity default under the loan. Defendants 171 Bowery and Shapolsky defaulted in appearing or answering. Now, Plaintiff moves for a default judgment against all Defendants, an order of reference and to amend the caption. Defendants oppose the 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 171 Bowery and Shapolsky, as well as 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 [1<sup>st</sup> 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]).

In opposition, Defendants 171 Bowery and Shapolsky proffered no basis to vacate their default. Instead, they posited that the economic and social turmoil and distress that resulted from the Covid-19 pandemic is a sufficient basis for the Court to exercise its equitable power to deny the motion. This nonjurisdictional defense cannot be addressed by the Court because Defendants have not rebutted the *prima facie* showing of their default (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). In any event, equity will only intervene in a foreclosure action in a rare case where there is an element of fraud, exploitive overreaching or unconscionable conduct demonstrated (*see Key International Mfg., Inc. v Stillman*, 103 AD2d 475, 477 [2d Dept 1985]). Further, “[s]ympathy for the defendants cannot be permitted to undermine the stability of contractual obligations” (*L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, 188 AD3d 1180, 1181 [2d Dept 2020]).

Accordingly, 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 **Clark Whitsett, Esq., 108-26 Myrtle Avenue, Richmond Hill, NY 11418-1235 - (718) 850-0003** 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 this action is solely discontinued as against defendants “John Doe #1” through “John Doe #12”, amending the caption to remove their names, and deleting the language appearing thereafter; and it is further

ORDERED that the caption of this action is amended to read as follows without prejudice to any of the proceedings heretofore had herein:

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

-----X  
USC 171 BOWERY LLC,

Index No. 850125/2022

Plaintiff,

-against-

171 BOWERY PROPERTY OWNER LLC, GRANT SHAPOLSKY, ANTARES BONDS S.A., KUTNICKI BERNSTEIN ARCHITECTS PLLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE,

Defendants.

-----X

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/suptctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on June 1, 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.

2/6/2023  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

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

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