

**U.S. Bank N.A. v Georgina Falu Co. LLC**

2023 NY Slip Op 31083(U)

April 4, 2023

Supreme Court, New York County

Docket Number: Index No. 850010/2019

Judge: Francis A. Kahn III

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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

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2017-2, Plaintiff,

INDEX NO. 850010/2019
MOTION DATE
MOTION SEQ. NO. 003

- v -

GEORGINA FALU CO. LLC, GEORGINA FALU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, COMMISSIONER OF LABOR, NEW YORK STATE DEPARTMENT OF LABOR, LANORA BELTON, HAAJAR JOHNSON, ROQUELLA ORTEGA, RUBY ORTEGA, SYLVINA LEON, MELISSA JUAREZ, YONY ORTEGA, ELOY ORTEGA, Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

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

Upon the foregoing documents, the motions are determined as follows:

The within action is to foreclose on a mortgage encumbering a parcel of commercial real property located at 329 East 118th Street, New York, New York. The mortgage secures a loan with an original principal amount of \$1,050,000.00 memorialized by an adjustable term note. The note and mortgage, both dated September 13, 2017, were given by Defendant Georgia Falu Co., LLC ("Falu LLC") to non-party Velocity Commercial Capital, LLC ("Velocity") and were executed by Defendant Georgina Falu ("Georgina"), as Managing Member of Falu LLC. All Defendants herein, including Georgina and Falu LLC, defaulted in appearing. Plaintiff's ex parte motion for a default judgment and order of reference was granted by order dated December 13, 2019. A motion on notice for a judgment of foreclosure and sale was granted without opposition by order dated August 22, 2022.

Between issuance of the order of reference and judgment, Defendants Georgina and Falu LLC appeared by multiple different counsel at six [6] status conferences with the Court. Further, Defendants Georgina and Falu LLC sought and received three adjournments of the motion for a judgment of foreclosure and sale which extended the return date nearly three months.

Now, Defendants Defendants Georgina and Falu LLC move to vacate their default pursuant to CPLR §§317, 5015[a][1] and 5015[a][4], to compel Plaintiff to accept a late answer pursuant to CPLR §3012[d] and for an order tolling interest. Plaintiff opposes the motion.

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 [1<sup>st</sup> Dept 2019]; *Needleman v Chaim Tornhein*, 106 AD3d 707 [2d Dept 2013]). However, a defendant is not required to meet these requisites if there is a lack of jurisdiction (*see* CPLR §5015[a][4]; *Avis Rent A Car Sys., LLC v Scaramellino*, 161 AD3d 572 [1<sup>st</sup> Dept 2018]). Thus, a court is required to resolve the jurisdictional issue before considering whether to grant a discretionary vacatur of the default (*see eg Caba v Rai*, 63 AD3d 578, 581, n.1 [1<sup>st</sup> Dept 2009]; *Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 779 [2d Dept 2017]).

Defendants' assertion that Falu LLC was not properly served is without merit. "A process server's affidavit of service constitutes prima facie evidence of proper service and, therefore, gives rise to a presumption of proper service" (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]). Plaintiff filed two affidavits of service attesting to service of the summons and complaint on Falu LLC. In an affidavit dated February 8, 2019, the process server, Stef Marie, avers that on February 7, 2019, he served, among other things, a summons and verified complaint, by delivering it to an authorized agent of the New York State Secretary of State. This affidavit is sufficient on its face to establish a presumption of proper service on Falu LLC pursuant to BCL §306 (*see eg Residential Bd. of Managers v Rockrose Dev. Corp.*, 17 AD3d 194 [1<sup>st</sup> Dept 2005]). Plaintiff also filed an affidavit of service from Michael Mangual, dated March 19, 2019, wherein he avers that on March 8, 2019, he personally delivered, among other things, a summons and verified complaint to Georgina at 175 West 95<sup>th</sup> Street, Apt 25B, New York, New York. This affidavit is also sufficient on its face to establish a presumption of proper service on Falu LLC pursuant to CPLR §311 (*see Hayden v Southern Wine & Spirits of Upstate N.Y., Inc.*, 126 AD3d 673 [2d Dept 2015]).

To rebut this presumption and be entitled to a hearing, an affidavit of the person served containing a nonconclusory denial of service which specifically contradicts the process server's version of events must be proffered (*see Bank of Am., N.A. v Diaz*, 160 AD3d 457, 458 [1<sup>st</sup> Dept 2018]; *NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1<sup>st</sup> Dept 2004]). As to the service under BCL §306, Defendants' assertion that Falu LLC's address on file with the Secretary of State is incorrect does not defeat service as it was Falu LLC's obligation to update its address with the Secretary of State (*see Salish Lodge LLC v Gift Mgt. Inc.*, 192 AD3d 410, 411 [1<sup>st</sup> Dept 2021]; *Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407 [1<sup>st</sup> Dept 2020]).

Concerning the service on March 8, 2019, Georgina submitted an affidavit wherein she claimed she "was never served with a copy of the papers . . . [n]or was I personally served with any papers for my company". Georgina also claimed the process server's description of the recipient was distinct from her appearance. She also denied receipt of the certified mailing. Georgina's denial of in hand receipt of the pleadings is entirely conclusory and insufficient to defeat the process server's affidavit (*see Wells Fargo Bank, N.A. v Tricarico*, 139 AD3d 722, 723 [2d Dept 2016] *cf. American Home Mtge. Servicing, Inc. v Gbede*, 127 AD3d 1004, 1005 [2d Dept 2015]). The claimed discrepancies in the appearance of the recipient and Georgina are both too minor and entirely unsubstantiated (*see PNC Bank, N.A. v Bannister*, 161 AD3d 1114, 1116 [2d Dept 2018]; *cf. Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2d Dept 2013]). Moreover, the naked denial of receipt of the mailing is insufficient to rebut the presumption of regularity of the mails (*see City of New York v Melamed (In Rem Tax Foreclosure Action No. 47)*, 19 AD3d 547, 548 [2d Dept 2005]).

As to service on Georgina, Plaintiff filed an affidavit, dated March 19, 2019, wherein Mangual attested that service of the summons and complaint, and other documents, was also made on Georgina by personal delivery at the same address and at the time as the service on Falu LLC. Georgina's arguments in rebuttal fail for the reasons stated supra.

As to the branch of Defendants' motion to vacate their default in appearing pursuant to CPLR §5015[a][1], the sole excuse offered by Defendants is law office failure. It is within the court's discretion to credit a claim of law office failure but only where there is a detailed and credible explanation for the default (*see Hudson City Sav. Bank v Augustin*, 191 AD3d 774 [2d Dept 2021]). However, "mere neglect is not a reasonable excuse" (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]). Movant's proof in this regard was insufficient as the affidavit of Georgina was conclusory and based upon hearsay statements attributed to Movants' prior attorneys which ultimately constituted nothing more than bare allegations of incompetence by former counsel (*see Vizelter v Strogov*, 170 AD3d 917 [2<sup>nd</sup> Dept 2019]; *Edwards v Feliz*, 28 AD3d 512 [2<sup>nd</sup> Dept 2006]; *Achampong v Weigt*, 240 AD2d 247 [1<sup>st</sup> Dept 1997]).

Absent a reasonable excuse, the Court need not determine whether Defendants have presented a meritorious defense to the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). In any event, Movants failed to establish the existence of a meritorious defense as the affidavit of Georgina is silent on the issue (*see Peacock v Kalikow*, 239 AD2d 188, 190 [1<sup>st</sup> Dept 1997]) and the proposed answer annexed to the motion is insufficient as it is not verified by a person with knowledge of the facts (*see Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 708 [2d Dept 2013]). For the same reasons, the branch of the motion to compel Plaintiff to accept a late answer from Defendants pursuant to CPLR §3012[d] fails (*see Bank of N.Y. Mellon v Tedesco*, 174 AD3d 490, 491 [2d Dept 2019])["To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action"].

Defendants also seek to vacate their default under CPLR §317 which provides that if a 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]; *Simon & Schuster v Howe*, 105 AD2d 604, 605 [1st Dept 1984]).

Although service on Falu LLC pursuant to BCL §306 did not constitute personal delivery within the meaning of CPLR §317 (*see eg Figueroa v Relgold*, 178 AD3d 425, 426 [1st Dept 2019]), the unrebutted service of the pleadings on Georgina, the sole corporate officer, was personal delivery to Falu LLC and Georgina (*see Fernandez v Morales Bros. Realty, Inc.* 110 AD3d 676 [2d Dept 2013]). This unrebutted service likewise demonstrates Falu LLC, and Georgina did receive notice in time to defend the action as did Defendants' six appearances at conferences with this Court. Also unrefuted was an affidavit dated March 26, 2019, attesting to an additional mailing of the summons to Georgina pursuant to CPLR §3215[g].

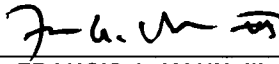
Since Defendants have not established a basis to vacate the judgment, the branch of the motion requesting an interest toll fails. Even if the Court were to consider this application on its merits it would still deny same. "In 'an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by particular facts in each case,' including

wrongful conduct by either party” (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1<sup>st</sup> Dept 2021], *citing South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]). Here, the delays incurred during this litigation were predominantly due to Defendants’ filing of a hardship declaration under the COVID-19 Emergency Protect Our Small Business Act of 2021 (L. 2021, c. 73). Any other delays in the litigation do not smack of having been the result of bad faith.

Accordingly, it is

ORDERED that Defendants’ motion is denied in its entirety and the foreclosure sale in this matter may proceed as scheduled.

4/4/2023  
DATE

  
FRANCIS A. KAHN, III, A.J.S.C.  
**HON. FRANCIS A. KAHN III**  
NON-FINAL DISPOSITION  
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	