

241 Norwood, LLC v Burntisland II LLC

2023 NY Slip Op 31325(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 850055/2022

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

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241 NORWOOD, LLC,

Plaintiff,

- v -

BURNTISLAND II LLC, BENJAMIN SHAOUL, THE CITY OF
NEW YORK, PEOPLE OF THE STATE OF NEW YORK,
JOHN DOE NOS. 1-25,

Defendant.

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INDEX NO. 850055/2022

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 108, 109, 110 were read on this motion to/for JUDGMENT - DEFAULT.

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

This is an action to foreclose on a mortgage encumbering commercial real property located at 241 West 14th Street, New York, New York, given by Defendant Burntisland II LLC (“Burntisland”). The mortgage secures a promissory note which evidences a loan with an original principal amount of \$9,200,000.00. The note and mortgage, both dated September 16, 2016, were executed by Defendant Benjamin Shaoul (“Shaoul”) as Authorized Signatory of Burntisland. Concomitantly with these documents, Shaoul executed a limited recourse guaranty of the indebtedness. Plaintiff commenced this action wherein it is alleged Burntisland default in repayment under the loan. All the Defendants defaulted in appearing, but an untimely answer was filed over five months after the default and was rejected by Plaintiff.

Now, Plaintiff moves for, *inter alia*, a default judgment against all Defendants, an order of reference and to amend the caption. Defendants Burntisland and Shaoul 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 Burntisland and Shaoul, 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 [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]).

In opposition, Defendants Burntisland and Shaoul proffered no argument to support that they did not default or to vacate same (*see Wilmington Trust v Ashe*, 189 AD3d 1130 [2d Dept 2020]). Instead, they claimed the motion should be denied as no admissible evidence was submitted to support the branch of Plaintiff’s motion for summary judgment. That branch of the motion was defective as Defendants defaulted and, therefore, issue was never joined (CPLR §3212[a]). By failing to rebut the *prima facie* showing of default, Defendants were precluded from proffering any non-jurisdictional defenses to the motion (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). In any event, on a motion pursuant to CPLR §3215, all that need be proffered is evidence of a viable cause of action which Plaintiff achieved in its moving papers (*see Redbridge Bedford, LLC v 159 N. 3rd Realty Holding Corp*, 174 AD3d 1569 [2d Dept 2019]).

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 the branch of the motion for summary judgment is denied as unnecessary, and it is

ORDERED that that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** 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 if a Defendant contests the amount due, in the discretion of the Referee, a hearing may be held, and testimony taken, otherwise the Referee shall hold no hearing and take no testimony or evidence other than by written submission; 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 deleted from the caption of the action the reference to "John Doe" Nos. 1-25, and the descriptive language thereafter; and it is further

ORDERED that the caption of this action is amended to read as follows:

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

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241 NORWOOD, LLC

Index No. 850055/202

Plaintiff,

-against-

BURNTISLAND II LLC, BENJAMIN SHAOUL, THE CITY
OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK,

Defendants.

-----X

and it is further

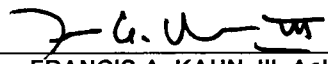
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being removed pursuant hereto; 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 **August 3, 2023, at 11:20 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.

4/13/2023
DATE

<p>CHECK ONE:</p> <p>APPLICATION:</p> <p>CHECK IF APPROPRIATE:</p>	<input type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE	<input type="checkbox"/> OTHER
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 FRANCIS A. KAHN, III, J.S.C.
HON. FRANCIS A. KAHN III
 J.S.C.