SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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W FINANCIAL REIT, LTD,

Plaintiff,

- v -

150-152 EAST 79 LLC,ZIEL FELDMAN, LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING, LANDSCAPE ARCHITECTURE & GEOLOGY, D.P.C.,TETRA ENGINEERS ARCHITECTS & LANDSCAPE ARCHITECTS, P.C.,NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, FIRST REPUBLIC BANK

Defendant.

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INDEX NO. 850128/2021

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109

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

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

This is an action to foreclose on a mortgage encumbering five parcels of commercial real property located at 150 East 79th Street, 152 East 79th Street, 154 East 79th Street, 1131 Lexington Avenue and 1135 Lexington Avenue. The mortgage was given to secure a loan made by Plaintiff to Defendant 150-152 East 79th LLC ("150-152 East") in the original amount of $43,600,000.00 memorialized by a consolidated, amended and restated mortgage note. The mortgage and note, both dated February 28, 2020, are executed on behalf of 150-152 East by Defendant Ziel Feldman ("Feldman"). Concomitantly with the note and mortgage, Feldman executed an unconditional personal guaranty of the loan.

Prior to 150-152 East giving this mortgage, First Republic Bank ("FRB") leased two of the encumbered premises which were, at the times of leasing, owned by two different non-party owners. By lease dated July 21, 2005, FRB became a tenant at the premises located at 1135 Lexington Avenue. A memorandum of that lease was executed on February 1, 2008, and recorded on April 3, 2008. On December 24, 2011, FRB executed a lease to occupy space at 150 East 79th Street.

Plaintiff commenced this action and pled four causes of action, including to foreclose on the subject mortgage. Defendant Langan Engineering, Environmental, Surveying, Landscape Architecture & Geology, D.P.C. ("Langan"), a holder of a mechanic's lien on certain of the mortgaged premises, answered and pled four affirmative defenses, including lien superiority, as well as a counterclaim and three crossclaims. Defendants 150-152 East and Feldman answered both the complaint and crossclaims and pled twenty-one affirmative defenses, including lack of standing.

In an order dated April 26, 2022, this Court granted Plaintiff's motion for summary judgment and an order of reference. Also the Court gave leave to amend the caption to add FRB as a Defendant based upon its receipt of service of the pleadings as a John Doe Defendant. In the decision, the Court held as follows concerning the Mortgagors' arguments regarding non-joinder of FSB as a named defendant in the original complaint:

> Defendants' assertion that Plaintiff's failure to join First Republic Bank ("First Republic"), a tenant at one of the mortgaged premises and necessary party under RPAPL §1311, precludes summary judgment as it is without merit. Although First Republic may be a "tenant in fee" and, therefore, a necessary party under RPAPL §1311[1], it is not an indispensable party and failure to join it herein renders its interest unaffected by the judgment (*see Polish Nat. Alliance of Brooklyn, USA v White Eagle Hall Co., Inc.*, 98 AD2d 400, 406 [2d Dept 1983]; *see also 517-525 W. 45 LLC v. Avrahami,* 202 AD3d 611, 612 [1st Dept 2022]). Indeed, even if First Republic is a lease holding party, it may not be dispossessed by a purchaser at a foreclosure sale without further proceedings (*see 6820 Ridge Realty LLC v Goldman*, 263 AD2d 22, 26 [2d Dept 1999]; *1426 46 St., LLC v Klein*, 60 AD3d 740 [2d Dept 2009]). As such, "[s]ummary judgment [is] not precluded by nonjoinder of [First Republic], who [was a] necessary part[y] only in the sense that their subordinate interests could be adversely affected only if they were joined, and not in the sense of being indispensable" (*John Hancock Mut. Life Ins. Co. v 491-499 Seventh Ave. Assocs.*, 220 AD2d 208 [1st Dept 1995]). In any event, Plaintiff filed an affidavit of service which, on its face, demonstrates First Republic was served in the capacity of a John Doe defendant and defaulted in appearing. (*see eg 21st Mtge. Corp. v Raghu*, 197 AD3d 1212, 1217 [2d Dept 2021][A defaulting party is "not entitled to service of additional papers in the action"]).

By order and judgment dated July 27, 2022, Plaintiff was granted a judgment of foreclosure and sale. Now, Defendant FRB moves to vacate its default and the judgment of foreclosure and sale. 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 [1st Dept 2019]; *Needleman v Chaim Tornhein,* 106 AD3d 707 [2d Dept 2013]). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2nd Dept 2005]; *see also Glauber v Ekstein*, 133 AD3d 713, 713 [2d Dept 2015]). To demonstrate a meritorious defense, the movant must tender "an affidavit from an individual with knowledge of the facts" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]). The affidavit must make satisfactory factual allegations; it must do more than merely make "conclusory allegations or vague assertions" (*see Gorman v English*, 137 AD3d 556 [1st Dept 2015] [internal citations omitted]).

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 [1st 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 [1st Dept 2009]; *Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 779 [2d Dept 2017]).

Defendant FRB offers as an excuse that it was ignorant of the necessity to appear because it was not named in the summons and complaint served and it only became aware of it was a party in this action when it received the judgment of foreclosure and sale.

A summons and complaint served in a "John Doe" form, pursuant to CPLR §1024, "is jurisdictionally sufficient only if the actual defendants are adequately described and would have known, from the description in the complaint, that they were the intended defendants" (*Lebowitz v Fieldston Travel Bur.*, 181 AD2d 481, 482 [1st Dept 1992][citation and internal quotation marks omitted]). In paragraph six, the complaint states that the "John Doe" defendants "are currently unknown to Plaintiff, but, upon information and belief, are *tenants, occupants*, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in this Complaint" (emphasis added). Further, in paragraph 22, it is pled that "John Doe 1 through John Doe 30 are joined as party defendants for the purpose of cutting off possible judgments, liens or other interests in the Properties". Further, a motion to amend, as part of the application for an order of reference, was made some seven months after the service. In an ordinary case, where a leasehold is granted after the mortgage was given/recorded, these recitations in the complaint could constitute sufficient compliance with CPLR §1024 to acquire jurisdiction (*see U.S. Bank N.A. v Losner*, 145 AD3d 935, 937 [2d Dept 2016])

However, it is undisputed that both leases, one of which was recorded, were executed many years before Plaintiff received the mortgage at issue from 150-152 East. Also, absent from the complaint is any reference to these facts and no relief is requested, other than in boilerplate fashion, which would have apprised FRB that Plaintiff was seeking to extinguish its leases despite their priority in time.

"It is entirely clear that if a lease is prior to a mortgage a sale under the latter is but a sale of the reversion" (*Metropolitan Life Ins. Co. v Childs Co.*, 230 NY 285, 290 [1921]). Moreover, "[a]lthough a lease for a term exceeding three years is a conveyance which may be recorded . . . an unrecorded conveyance is void only as against a subsequent good faith purchaser for value" (*1426 46 St., LLC v Klein*, 60 AD3d 740, 743 [2d Dept 2009][internal citation omitted]) and actual possession of real property is notice of any right the occupant may establish (*Phelan v Brady*, 119 NY 587, 591-592 [1890]; *Mortgage Elec. Registration Sys., Inc. v Pagan*, 119 AD3d 749, 753 [2d Dept 2014]).

On the record presented, no conclusion can presently be rendered as a matter of law regarding the viability of FRB's leases after a foreclosure sale (*see* 3 Bergman on New York Mortgage Foreclosures §33.04[4] [2018]["A typical goal of a mortgage foreclosure case is to cause the property to devolve through the action in the *same legal condition which existed when the mortgage was executed.* In other words, at a foreclosure sale, the property should be conveyed free and clear of any interests which attached *after the mortgage was given.*" [emphasis added']). As such, under these unusual circumstances, vacatur of FSB's default is justified in the interests of substantial justice (*see U.S. Bank N.A. v Losner*, supra at 938) and to curtail subsequent litigation (eg. a strict foreclosure action) which would certainly arise were this issue not resolved.

Accordingly, it is

ORDERED that the branch of Defendant's motion to vacate the default of Defendant First Republic Bank is granted, and it is

ORDERED that to the extent judgment of foreclosure and sale may be read as declaring or determining that Plaintiff's mortgage has priority over FRB's leases, that portion only is vacated, and it is

ORDERED that Plaintiff and Defendants are granted leave to file and serve amended pleadings regarding the aforementioned lien/lease priority within 45 days of efiling of this decision, and it is

ORDERED that all parties are to appear for a virtual conference via Microsoft Teams on **May 31, 2023, at 11:20 a.m.**

4/11/2023
DATE

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

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE