

Raza Dev. Fund, Inc. v Sobro Dev. Corp.

2023 NY Slip Op 31330(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 850237/2021

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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INDEX NO. 850237/2021

RAZA DEVELOPMENT FUND, INC.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

SOBRO DEVELOPMENT CORPORATION, SOUTH
BRONX OVERALL ECONOMIC DEVELOPMENT
CORPORATION, APEX SKYLINE DEVELOPMENT
LLC, MOVIMIENTO MISIONERO MUNDIAL, INC. (WORLD
WIDE MISSIONARY MOVEMENT, INC.), NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK
CITY DEPARTMENT OF TRANSPORTATION, NEW YORK
STATE OFFICE OF THE ATTORNEY GENERAL, JOHN
DOE 1 THROUGH JOHN DOE 10

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 59, 60, 61, 83, 84, 87, 89, 90, 92, 93, 94, 95, 96, 99, 105, 106, 107, 108, 111

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 79, 80, 81, 82, 85, 86, 88, 91, 97, 98, 101, 102, 103, 104, 109, 110

were read on this motion to/for LEAVE TO FILE

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

This is an action to foreclose on a mortgage encumbering two parcels of commercial real property, located at 1769 Fort George Hill and 1759-1771 St. Nicholas Avenue, New York, New York, given by Defendant Sobro Development Corporation (“Sobro”) to Plaintiff. The mortgage is evidenced by a consolidation, extension and modification agreement (“CEMA”) dated May 19, 2020. The CEMA merged prior notes, mortgages and modifications given by Sobro to Plaintiff. The initial note and mortgage were executed on November 30, 2015. As of the date of the CEMA, the principal amount due under the notes secured by the mortgages was \$5,389,000.00. Concomitantly with an earlier note and mortgage, Defendant South Bronx Overall Economic Development Corporation (“South Bronx”) executed a repayment guarantee of a portion of the indebtedness.

Sobro acquired the properties by deed dated May 17, 2007, from Defendant Mivimiento Misionero Mundial, Inc. (“MMM”), an entity organized under the Religious Corporation Law and the Not-for-Profit Corporation Law. The transfer of title was part of a Site Development Agreement

(“SDA”), dated January 26, 2006¹, wherein Sobro and MMM agreed, *inter alia*, to construct substantial improvements on the parcels several of which, a church and residential condominiums, would be conveyed back to MMM by bargain and sale deed[s] upon completion of the project. As part of the project, Sobro would subdivide the two lots into three lots, one of which would be approximately 4,000 square feet improved with the church.

Development of the site was to be at Sobro’s “sole cost and expense” and Sobro’s obligations under the agreement were conditioned on procurement of “a construction loan in an amount and upon terms and conditions acceptable to” Sobro. The SDA was also conditioned on MMM obtaining the necessary “court and Attorney General” approvals “for the sale of the property”. Annexed to the moving papers is a copy of an order, entered June 28, 2006, issued by Justice Phyllis Gangel-Jacob which approved the sale of these properties under RCL §12 and N-PCL §511 (*see In re Movimiento Misionero Mundial, Inc.*, NY Cty Index No 108661/2006). On the face of the order is what appears to be the required endorsement of the sale from the Office of the New York State Attorney General, dated June 9, 2006 (*see* N-PCL § 511[b]). The order was not recorded with the Office of the City Register until June 15, 2021. The order describes the consideration for the deed transfer due MMM as follows:

a newly constructed church with a development budget of approximately \$2,500,000.00; the conveyance to Movimicata Misionero of 3 residential condominium units with an anticipated market value of \$400,000.00 a piece; the conveyance of the newly constructed church to Movimicata Misionero Mundial Inc.; the pay off and satisfaction of the existing \$250,000.00 mortgage on the property and the payment of a sum of \$ 25,000.00 upon the completion of the site development project less sums paid by SOBRO for legal fees on behalf of Movimiento Misionero Mundial, Inc.

It is undisputed that the property has not been fully developed as planned and title to properties agreed upon have not been conveyed to MMM. On July 27, 2020, MMM commenced an action against Sobro and others (*see Movimiento Misionero Mundial, Inc. v Sobro Development Corporation, et al*, NY Cty Index No 155728/2020), pled fourteen causes of action and sought as relief, *inter alia*, rescission of the SDA, restoration of MMM’s title free of encumbrances, imposition of a constructive trust on Sobro’s loan proceeds and foreclosure of an equitable lien on the premises. Sobro and South Bronx answered in that action and counterclaimed for the imposition of sanctions. MMM’s motions for summary judgment as well as Sobro and South Bronx’s cross-motion to dismiss pursuant to CPLR §3211[a][5] and [7], made before the within motions, are *sub judice*. The action is not assigned to this Court.

Plaintiff commenced this action wherein it is alleged Sobro default in repayment under the loan and South Bronx breached the guaranty. Plaintiff also seeks declaratory relief as follows:

a judicial declaration that the subject mortgages are not subject to the requirements of the RCL § 12 because the owner of the property, Sobro, is not a “Religious Corporations Law corporation” as defined in RCL § 2; or in the alternative, that the Supreme Court grant an confirmatory order of the subject mortgages under subdivision 9 of section 12 of the RCL and for a judicial declaration that (i) the terms and consideration of subject mortgages were not unwise; and (ii) the subject mortgages would benefit the defendant or that the best interests of its members would be promoted thereby

¹ Later amended December 10, 2015.

Plaintiff also named MMM as a Defendant in this action but did not plead a specific cause of action against it except to say in the declaratory judgment cause of action that “Movimiento is made a party defendant based upon any interest in the Property claimed in a separate action filed in the New York State Supreme Court, County of New York, under Index Number 155728/2020”. Defendants Sobro and South Bronx answered and pled three affirmative defenses. Defendant MMM defaulted in appearing in this action. MMM’s late answer, filed on July 26, 2022, was rejected by Plaintiff.

Now, Plaintiff moves (Mot Seq No 1) for summary judgment against Sobro and South Bronx, a default judgment against the non-appearing parties, including MMM, an order of reference and to amend the caption. Defendants Sobro and South Bronx oppose the motion. Defendant MMM also filed opposition and moved (Mot Seq No 2), by order to show cause, to vacate its default, and to consolidate this matter with its previously commenced action. Plaintiff opposed this motion.

In moving for summary judgment on the foreclosure cause of action, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants’ default in repayment (*see eg U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Based upon Defendants’ affirmative defense, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff’s motion was supported with an affidavit from Scott Richter (“Richter”), the Chief Credit Officer for Plaintiff, as well as annexed documentation. Richter’s affidavit laid a proper foundation for the admission of Plaintiff’s records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The affidavit established the mortgage, note, and evidence of mortgagor’s default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

As to the non-appearing Defendants, “[a]n 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 need “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 on its foreclosure cause of action against the other Defendants, including MMM, based upon the above cited evidence as well as proof of service on each Defendant and 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]).

Concerning the cause of action for declaratory relief, a claimant must establish, akin to any other cause of action, *prima facie* entitlement to the relief sought (*see Public Serv. Mut. Ins. Co. v AYFAS Realty Corp.*, 234 AD2d 226, 228 [1st Dept 1996]). However, unlike other claims, “[a] default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary against that plaintiff establish a right to a declaration against * * * a defendant” (*Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 [3d Dept 1986], *citing National Sur. Corp. v Peccichio*, 48 Misc 2d 77, 78 [Sup Ct Albany Cty 1965]; *see also Mount Vernon Fire Ins Co. v NIBA Constr. Inc.*, 195 AD2d 425, 427 [1st Dept 1993][concurring opinion]; *Merchs. Ins. Co. v Long Island Pet Cemetery*, 206 AD2d 827 [4th Dept 1994]).

Contrary to Plaintiff’s assertion, it has not established, as a matter of law, that pre-approval of the mortgages was not required because RCL §12 is not applicable to Sobro. That Sobro is not “a corporation created for religious purposes” (RCL §2) does not appear to be in dispute. Defendants assert that MMM’s right to reconveyance of a portion of the property contained in the SDA “derivatively obligated [Sobro] to comply with the RCL § 12(1) requirement to obtain leave of Court”. Plaintiff has not established that the retained interest in the property created by the SDA was not property of a religious corporation for which prior court approval was required before the mortgage at issue could attach (*see generally Berlin v New Hope Holiness Church of God*, 93 AD2d 798 [2d Dept 1983][RCL §12[1] “requires a religious corporation to apply for and obtain the court’s permission in order to mortgage any of its property”]). Parenthetically, the Court notes that MMM’s alleged retained interest was not in the entire mortgaged premises, only that part encompassing the church and four condominiums. As such, Defendant Sobro’s interest in the parcels may be subject to the mortgage notwithstanding MMM’s claims (*cf. Kwang Hee Lee v Adjmi 936 Realty Assoc.*, 34 AD3d 646, 648 [2d Dept 2006][“A co-owner can only encumber its own interest in property without the consent of the other co-owners”]). Plaintiff also failed to demonstrate *prima facie* entitlement to its alternative declaratory relief, confirmation of the transaction pursuant to RCL §12[9]. The Court is not persuaded, on the evidence presented, that the multiple loan transactions engaged in by Sobro were “fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted” (N-PCL §511[d]).

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]).

Here, Defendant MMM established a reasonable excuse, unintentional oversight resulting from law office failure, that the default was not willful and that delay in answering was relatively minor (*see Wilmington Trust, N.A. v Pape*, 192 AD3d 947 [2d Dept 2021]). Further, MMM demonstrated that vacating its default would not surprise or prejudice Plaintiff. In the 2020 action, the parties executed a stipulation on January 6, 2022, which acknowledged that a challenge to “validity and/or priority” of

Plaintiff's mortgage was a possibility. A meritorious defense based upon RPL §12 and N-PCL §511 and on the reasoning noted supra exists. Based on the affidavit of Ismael Trinidad ("Trinidad"), the Secretary for MMM, it has, preliminary, demonstrated that an equitable lien on the premises may exist with possible priority over Plaintiff's mortgage of which Plaintiff knew or should have investigated. There is authority recognizing the existence of equitable liens and mortgages as well as ones having priority over recorded mortgages (*see Boies v Benham*, 127 NY 620 [1891]; *Payne v Wilson*, 74 NY 348 [1878]; *Citibank, N.A. v Kenney*, 17 AD3d 305 [2d Dept 2004]; *Giragosian v Clement*, 199 AD2d 656 [3d Dept 1993]; *Kaufman v Jared Flagg Corp.*, 227 AD 98 [1st Dept 1929]). Whether MMM will ultimately be able to prove such a claim is not relevant on these motions.

With respect to Defendants Sobro and South Bronx, no argument as to Plaintiff's *prima facie* case on the mortgage foreclosure cause of action against them was proffered. Rather, most of their opposition piggybacks the arguments raised by MMM which may or may not work to their benefit (*see Kwang Hee Lee v Adjmi 936 Realty Assoc.*, supra; *Citibank, N.A. v Kenney*, supra). In conclusory fashion, they also assert "questions of material fact exist as to whether Raza has tortiously interfered with Sobro's ability to enter into a deal with a developer willing to reposition the loan or to take over the loan in order to develop the project" but proffer no affidavit to support same. Nevertheless, Trinidad's affidavit adequately addresses this claim, albeit vaguely.

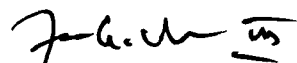
Accordingly, it is

ORDERED that the branches of Plaintiff's motion (MS# 1) for summary judgment against Sobro and South Bronx, a default judgment against MMM, and an order of reference are denied, and it is

ORDERED that the branch of Plaintiff's motion for a default judgment against the other non-appearing parties is granted as to the cause of action for foreclosure, and it is

ORDERED that the branch of Defendant MMM's motion (MS#2) to vacate its default is granted and MMM shall file an answer in the form annexed to the moving papers within 10 days of e-filing of a copy of this order, and it is

ORDERED the branch of Defendant MMM's motion for consolidation of the proceeding under NY Cty Index No 155728/2020 is denied without prejudice to a new motion properly made in the earlier commenced action after the *sub judice* motions thereunder are decided.

4/13/2023					
DATE			FRANCIS A. KAHN, III, A.J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE