

U.S. Bank Trust N.A. v Any Unknown Heirs, Devisees, Distributees or Successors in Interest of the late Alfred Victor Fiandaca
2023 NY Slip Op 31430(U)
April 27, 2023
Supreme Court, New York County
Docket Number: Index No. 850130/2016
Judge: Francis A. Kahn III
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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. 850130/2016

U.S. BANK TRUST NATIONAL ASSOCIATION, AS
TRUSTEE OF THE CHALET SERIES IV TRUST,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 005

- v -

ANY UNKNOWN HEIRS, DEVISEES, DISTRIBUTEES OR
SUCCESSORS IN INTEREST OF THE LATE ALFRED
VICTOR FIANDACA A/K/A ALFRED V. FIANDACA IF
LIVING, AND IF ANY BE DEAD, ANY AND ALL PERSONS
WHO ARE SPOUSES, WIDOWS, GRANTEEES,
MORTGAGEES, LIENORS, HEIRS, DEVISEES, WELLS
FARGO BANK, NA, THE BOARD OF MANAGERS OF THE
RESIDENCES AT WORLDWIDE PLAZA, CARL BARTELS,
UNITED STATES OF AMERICA BY THE INTERNAL
REVENUE SERVICE, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, PUBLIC ADMINISTRATOR
OF NEW YORK COUNTY, AS ADMINISTRATOR OF THE
ESTATE OF ALFRED VICTOR FIANDACA A/K/A ALFRED
V. FIANDACA, MICHELLE FIANDACA A/K/A MICHELLE
CASSIDY FIANDACA, ALFRED FIANDACA

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

were read on this motion to/for

JUDGMENT - SUMMARY

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

In this action, Plaintiff seeks to foreclose on a mortgage on residential real property located at 350 West 50th Street, Unit 6D, New York, New York. The mortgagor, Alfred Victor Fiandaca, died before the summons and complaint was filed. Plaintiff opted to commence the action against the intestate heirs of the Fiandaca and the complaint does not seek a deficiency judgment (*see Financial Freedom Senior Funding Corp. v Rose*, 64 AD3d 539 [2d Dept 2009]). Defendants Michelle Cassidy and Albert V. Fiandaca, Jr. answered and asserted two affirmative defenses.

Now, Plaintiff again moves for summary judgment against Defendant the appearing Defendants, to strike their answer, for a default judgment against the non-appearing Defendants, for an order of reference. Defendants Cassidy and Fiandaca partially oppose the motion.

In moving for summary judgment, 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 mortgagors' default in repayment (*see 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]). 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]). Plaintiff's motion was supported with an affidavit from Dani Cole ("Cole"), an Asset Manager for SN Servicing Corporation, Plaintiff's servicing agent. Cole's 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*).

In opposition, Defendants sole argument was an objection to accrued interest because of the significant delays in Plaintiff's prosecution of this matter. This argument relates to the amount due and owing which is not a defense to summary judgment and can be addressed during the reference (*see 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]). It is undisputed that Justice Arlene Bluth, by order dated January 28, 2020, stayed the accrual of interest in this matter from November 16, 2018, through the closing of title (NYSCEF Doc No 85). That determination is law of the case and must be adhered to when the Referee does their calculation.

As to the branch of the motion to dismiss Defendants' affirmative defenses, As pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against Defendants Cassidy and Fiandaca, for a default judgment against the non-appearing parties as well as the other relief is granted; and it is further

ORDERED that **Allison Furman, Esq., 260 Madison Avenue, 15th Floor, New York, New York 10016, 212-684-9400** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency 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, 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 that failure to submit objections to the referee may 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 45 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 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/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 10, 2023, at 10:00 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.

<u>4/27/2023</u>		<u>FRANCIS A. KAHN, III, A.J.S.C.</u>	
DATE		HON. FRANCIS A. KAHN III J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☒ GRANTED	☐ DENIED	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ GRANTED IN PART	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ SUBMIT ORDER	
		☒ FIDUCIARY APPOINTMENT	☐ REFERENCE