SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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STILLWATER ASSET MANAGEMENT, LLC,AS TRUSTEE OF LBC2 TRUST,

Plaintiff,

- v -

3RD AND 36TH STREET LLC,STANLEY GUREWITSCH, ERIC NEMIROFF, ALL STATE LIFE INSURANCE COMPANY, UNITED ACQUISITION LEASING CORP., THE MURRAY HILL TERRACE CONDOMINIUM, BY THE BOARD OF MANAGERS, JOHN DOES (BEING FICTITIOUS, THE NAMES UNKNOWN TO PLAINTIFF INTENDED TO BE TENANTS, OCCUPANTS, PERSONS, OR CORPORATIONS HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PROPERTY DESCRIBED IN THE COMPLAINT OR THEIR HEIRS AT LAW,

Defendant.

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INDEX NO. 850110/2022

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a consolidated, extended and modified mortgage encumbering commercial real property located at 201-205 East 36TH Street, Unit C-1, New York, New York, given by 3rd & 36th LLC ("Mortgagor"). The mortgage secures a consolidated and restated mortgage note which evidences a loan with an original principal amount of $7,500,000.00. The note and mortgage, both dated April 17, 2017, consolidate two prior notes and mortgages, dated June 27, 2003 and April 17, 2017 respectively. These documents were executed by Defendant Stanley Gurewitsch ("Gurewitsch") as Managing Member of non-party 549 Third LLC, the purported Managing Member of Mortgagor. Concomitantly with these documents, Gurewitsch executed a guaranty or recourse obligations of the indebtedness. Plaintiff commenced this action wherein it is alleged Defendant 3rd and 36th Street LLC ("Street") defaulted in repayment under the loan. All the Defendants allegedly defaulted in appearing.

Now, Plaintiff moves for, *inter alia*, a default judgment against all Defendants, an order of reference, to amend the caption and for the appointment of a receiver. Defendant Murray Hill Terrace Condominium ("Murray"), which is the Board of Managers of the condominium building where the subject unit is located, opposes the motion and cross-moves for an order vacating Murray's default pursuant to CPLR §5015[a][1] and [4], dismissing the action pursuant to CPLR §3211[a][1], [3], [8],

and/or [10] or, in the alternative, permitting the Board to interpose an Answer pursuant to CPLR §3012. Plaintiff opposes the cross-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]). However, granting a default judgment is not a mandatory mistrial duty and the Court has the discretion to deny a motion for same absent opposition (*see Newrez, LLC v City of Middletown*, ___AD3d___, 2023 NY Slip Op 02321 [2d Dept 2023]).

At the outset, Plaintiff admits it misnamed the Mortgagor in the complaint and seeks to amend same and substitute Mortgagor in the place of Street. Section 305[c] of the Civil Practice Law and Rules may be utilized to cure a misnomer in the description of a party defendant only where there is evidence that the correct defendant was served, albeit misnamed in the original process, and the correct defendant would not be prejudiced by the granting of the amendment (*see Matter of Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Ave. LLC*, 189 AD3d 524 [1st Dept 2020]). Plaintiff failed to expressly address either of these issues in its moving papers (*see Duncan v Emerald Expositions, LLC*, 186 AD3d 1321 [2d Dept 2020]; *Nossov v Hunter Mtn.*, 185 AD3d 948 [2d Dept 2020]; *Kingalarm Distribs. v. Video Insights Corp.*, 274 AD2d 416 [2d Dept 2000]). Notably, Plaintiff filed an affidavit of service wherein the process server averred that the summons and complaint was served on Street "c/o BN Realty at 3611 Henry Hudson Parkway, Bronx NY" via delivery to "a Secretary with that company". Absent from the papers is any explanation of the relationship between BN Realty and Mortgagor.

As to the proof constituting the claim, the copies of the first and second mortgages appear to be incomplete. Mortgage one has a table of contents indicating the document has sixty-five [65] pages, but the efiled document consists of only twenty-four [24]. Similarly, mortgage two purports to have sixty-five [65] pages, yet only twenty [20] are supplied.

Accordingly, the branches of the motion for a default judgment against Mortgagor, amendment of the summons and complaint and for an order of reference are denied (*see Seidler v Knopf*, 186 A.D.3d 886 [2d Dept 2020]). The branch of the motion for the appointment of a receiver pursuant to RPL §254[10] and RPAPL §1325 is denied as the sections of the mortgage that allegedly authorize the appointment of a receiver were not provided.

As to the branch of Murray's motion to vacate its default in appearing it was required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see* CPLR §5015[a][1]; *Bear Stern-Asset-Backed Sec. I Trust 2006 v Ceesay*, 180 AD3d 504 [1st Dept 2020]; *Karimian v Karlin*, 173 AD3d 614 [1st 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 [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 Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 779 [2d Dept 2017]; *Caba v Rai*, 63 AD3d 578, 581, n.1 [1st Dept 2009]).

Generally, "[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 an affidavit of service from Hector Figueroa, dated June 22, 2022, attesting to service of the summons and complaint and other documents on Murray presumably pursuant to CPLR §311-a. In that affidavit, Figueroa attests that on June 16, 2022, he delivered the above documents to "BRIAN G., who informed deponent that he holds the position of a Mailroom Supervisor with that company and is authorized by appointment to receive service". This affidavit is sufficient on its face to establish a presumption of proper service (*see* CPLR §311-a[a][iv]; *Cowley Holdings Servs. Inc. v Prodigy Network, LLC*, ___AD3d___, 2021 NY Slip Op 51058[U][Sup Ct NY Cty 2021).

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 [1st Dept 2018]; *NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). In support of the cross-motion, Murray proffered the affidavit of its president, Maryann Shegelski, who averred Murray "has never authorized Brian G. to accept service on its behalf for on behalf of the Condominium". Contrary to Plaintiff's assertion, the foregoing attestation is sufficient to warrant a traverse hearing (*see Pappalardo v Madison Sq. Garden Co.*, ____AD3d____, 2015 NY Slip Op 31859[U][Sup Ct NY Cty 2015]).

As to the branches of Murray's motion pursuant to CPLR §3211, it was required, but failed to demonstrate as a matter of law that Plaintiff lacked standing when this action was commenced (*see eg Ditech Fin., LLC v Rapuzzi*, 187 AD3d 715 [2d Dept 2020]; *DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512 [1st Dept 2018]). Murry was required to demonstrate *prima facie* "that the plaintiff was not in direct privity with [the mortgagor], was not in physical possession of the note indorsed to it or in blank at the time of the commencement of the action, and that the assignment of the note . . . to the plaintiff was invalid." (*Wilmington Sav. Fund Socy., FSB v Matamoro,* 200 AD3d 79, 91 [2d Dept 2021]). Murray only demonstrated that Plaintiff was not the original lender. Murray's argument, which was based on an alleged deficiency in a series of recorded assignments of the mortgages, misconstrues the issue to be attended. The salient issue is when and to whom possession of the note passed, not the mortgages (*see eg Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]). "[W]hile assignment of a promissory note also effectuates assignment of the mortgage, the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it" (*see U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012][internal citations omitted]).

The branch of the cross-motion to dismiss pursuant to CPLR §3211[a][10] for failure to join the Mortgagor as a necessary party also fails. "[D]ismissal for nonjoinder is a last resort . . . [and] the factors mentioned in CPLR 1001 (b) [must] tip overwhelmingly in favor of dismissal" (*JPMorgan Chase Bank, Natl. Assn. v Salvage*, 171 AD3d 438, 439 [1st Dept 2019]). In the absence of such a party, the preferred remedy is joinder of the missing party (*see NRZ Pass-Through Trust IV v Tarantola*, 192 AD3d 819 [2d Dept 2021]). At present, all that has been demonstrated is the existence of a misnomer, not that an indispensable party is incapable of being joined.

On the issue of lack of capacity, Plaintiff, a foreign limited liability company, admits in the reply that is lacks a certificate of authority to transact business in this state. However, this deficiency is curable as Limited Liability Company Law §808[a] only effects a suspension of the ability to prosecute

an action "unless and until such limited liability company shall have received a certificate of authority in this state" (*cf. 1700 First Ave. LLC v Parsons-Novak,* 46 Misc. 3d 30, 32 [App Term 1st Dept 2014]; *Acquisition Am. VI, LLC v Lamadore*, 5 Misc. 3d 461, 462 [Sup Ct NY Cty 2004]). However, this Court will not permit obvious disregard of statutory requirements and will stay prosecution of the matter until such time Plaintiff files proof of its compliance.

Accordingly, it is

ORDERED that Plaintiff's motion is denied in its entirety, and it

ORDERED that the action is marked stayed and Plaintiff shall file proof that it has complied with LLCL §802 within 60 days of the date of filing this order, and it is

ORDERED that upon vacatur of the stay, a traverse hearing on the viability of the service on Defendant Murray will be scheduled, and it is further

ORDERED that in lieu of a traverse hearing, the parties may stipulate to vacate Defendant Murray's default on such terms they find agreeable, and it is

ORDERED that the branches of Defendant Murray's motion to dismiss pursuant to CPLR §3211[a][1], [3] and [10] are denied, but the other branches are held in abeyance pending the outcome of any traverse hearing.

5/5/2023
DATE

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

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

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