

**U.S. Bank N.A. v Rahimi**

2023 NY Slip Op 32111(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 850111/2020

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. 850111/2020

U.S. BANK, NATIONAL ASSOCIATION AS LEGAL TITLE  
TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

MOSHE RAHIMI, SIGNATURE BANK, BOARD OF  
MANAGERS OF THE ATELIER CONDOMINIUM, JOHN  
AND JANE DOE

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 73, 74, 75

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 79, 80, 81, 82, 83, 84, 85, 86, 87, 92, 93

were read on this motion to/for APPOINT - REFEREE.

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

The within action is to foreclose on a mortgage encumbering a parcel of real property located 627 West 42<sup>nd</sup> Street, Unit 15J, New York, New York. The mortgage, dated October 9, 2007, was given by Defendant Moshe Rahimi (“Rahimi”) to non-party Countrywide Bank, FSB and secures a loan with an original principal amount of \$548,000.00. The loan is memorialized by an adjustable rate note of the same date. Plaintiff commenced this action and alleged that Rahimi defaulted in repayment of the loan on or about December 18, 2018. Defendant Rahimi defaulted in appearing.

Now, Defendant Raimi moves (Mot Seq No 1) for an order “[d]ismissing this foreclosure action due to the Plaintiff’s improper service of the Summons and Complaint causing the Court to lack jurisdiction over the Defendant, Moshe Rahimi; or in the alternative, an order scheduling a traverse hearing or granting Defendant an extension of time to serve an Answer to the Complaint”. Plaintiff opposes the motion and moves (Mot Seq No 2) for *inter alia* for a default judgment against Rahimi and the other Defendants, appointing a referee to compute and to amend the caption.

As to Rahimi’s motion, CPLR §3211[a][8] states in relevant part that, “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the court has no: jurisdiction of the person of the defendant”. “On a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction” (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1<sup>st</sup> Dept 2017]). “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, dated November 19, 2019, of a process server who attested to service of the summons and complaint on Rahimi. In the affidavit, the process server averred that on November 1, 2019, he served a summons and verified complaint, ostensibly pursuant to CPLR §308[2], by delivery to “STELLA RAHIMI”, a person of suitable age and discretion at 3 White Pine Lane, Great Neck, New York, his dwelling place. This affidavit is sufficient on its face to establish a presumption of proper service under CPLR §308[2] (*see eg Rivera v Corrections Officer L. Banks*, 135 AD3d 621 [1<sup>st</sup> Dept 2016]; *Hulse v Wirth*, 175 AD3d 1276, 1277 [2d Dept 2019]).

In support of the motion, Rahimi submitted an affidavit wherein he claimed to be a resident of Israel, that the property was purchased for investment purposes, and that he has never lived at either the mortgaged premises or where service was made. Rahimi also submitted the affidavit of Regine Sivan who claimed to be a resident of the property where service was made. She averred that Rahimi is her brother-in-law and has never resided at the location. However, in this case<sup>1</sup>, Rahimi’s attorney filed a notice of appearance on December 7, 2022 (NYSCEF Doc No 31) but did not move to dismiss at that time or raise the defense of lack of personal jurisdiction in an answer. As such, Rahimi waived his personal jurisdiction defense (*see Capital One N.A. v. Ezkor*, 209 AD3d 823 [2d Dept 2022]). That lack of personal jurisdiction was raised in the notice of appearance is of no moment (*see U.S. Rof III Legal Tit. Trust 2015-1 v John*, 189 AD3d 1645 [2d Dept 2020]). Such “language is not a talisman to protect the defendants from their failure to take timely and appropriate action to preserve their defense of lack of personal jurisdiction” (*JP Morgan Chase Bank, N.A. v Jacobowitz*, 176 AD3d 1191, 1192-1193 [2d Dept 2019]).

“Under CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading ‘upon such terms as may be just,’” (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1<sup>st</sup> Dept 2017]). “To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action” (*Bank of N.Y. Mellon v Tedesco*, 174 AD3d 490, 491 [2d Dept 2019]). When exercising its discretion in determining a motion under this section “a court should consider such relevant factors as the extent of the delay, prejudice or lack of prejudice to the opposing party as well as the strong public policy in favor of resolving cases on the merits (*Orwell Bldg. Corp. v Bessaha*, 5 AD3d 573, 574 [2d Dept 2004][internal citations omitted]).

Here, the only excuse proffered was lack of jurisdiction, is unavailing (*see Citmortgage, Inc. v Barton*, 212 AD3d 706 [2d Dept 2023]; *see also LaSalle Bank, NA v Bernard*, 184 AD3d 816 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Abraham*, 183 AD3d 698 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006 [2d Dept 2020]). Regarding a meritorious defense, Rahimi’s affidavit is silent as to same and the proposed answer is not verified by him.

Accordingly, Defendants’ motion is denied in its entirety.

Plaintiff moves for a default judgment against all Defendants, an order of reference and to amend the caption. 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

<sup>1</sup> Unlike another mortgage foreclosure action, also assigned to this Court, involving Rahimi where virtually identical affidavits were submitted, a notice of appearance was not filed (*see US Bank v Rahimi*, NY Cty Index No 850246/2019 – NYSCEF Doc No 147).

“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 Rahimi and 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 [1<sup>st</sup> 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]). Defendants’ assertion that Plaintiff failed to proffer sufficient evidence to demonstrate their default is without merit. Unlike a motion for summary judgment which requires a movant to establish, *prima facie*, an absence of material issues of fact by admissible evidence (*see eg Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]), a party seeking a default judgment only need demonstrate “evidence of a viable cause of action” (*see Redbridge Bedford, LLC v 159 N. 3rd St. Realty Holding Corp.*, 175 AD3d 1569, 1570 [2d Dept 2019]). This lesser burden of proof exists because a defaulting party “admits all traversable allegations in the complaint” (*Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]). Here the affidavit of Maryann Monteserrato, the Assistant Vice President of Plaintiff, was sufficient to satisfy these requirements (*see eg Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 806 [2d Dept 2013]).

Plaintiff was not required demonstrate its standing prior to issuance of a default judgment (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602 [2d Dept 2020]; *see also Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 830 [2d Dept 2016]) since that is a waivable affirmative defense (*see Wells Fargo Bank, N.A. v Campbell*, 196 AD3d 726, 727 [2d Dept 2021]). Similarly, Defendant Rahimi is precluded from raising non-compliance with RPAPL §1304 as a defense because of his default (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]).

The branch of Plaintiff’s motion for a default judgment against the other non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1<sup>st</sup> Dept 2016]).

The branch of Plaintiff’s motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Defendant Rahimi’s motion (MS #1) is denied and Plaintiff’s motion (MS# 2) is granted, and it is

ORDERED that that **Paul Sklar, Esq., 551 5<sup>th</sup> Avenue, Ste 2200, New York, New York 10176-0001-(212) 972-8845** 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 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 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 the caption of this action is amended by replacing those parties named herein as “JOHN DOE” and “JANE DOE” with “John Doe (Refused Name),” is denied as the New York County Clerk will not accept a judgment with a “Doe” defendant in the caption, and it is further

ORDERED that the caption of this action, as amended, shall read as follows:

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

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U.S. BANK, NATIONAL ASSOCIATION AS LEGAL  
TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE

Index No. 850215/2021

TRUST,

Plaintiff,

-against-

MOSHE RAHIMI; SIGNATURE BANK; BOARD OF MANAGERS OF THE ATELIER CONDOMINIUM,

Defendants.

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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 **October 19, 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](mailto: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.

Mortgage Servicer: Rushmore Loan Management Services, LLC/Mortgage Servicer Phone #: (888) 699-560.

6/23/2023

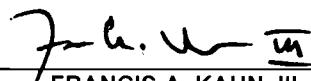
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

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

<input checked="" type="checkbox"/>	NON FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

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