

510 Ninth Ave Funding LLC v Eureka Realty Corp.

2023 NY Slip Op 32838(U)

August 11, 2023

Supreme Court, New York County

Docket Number: Index No. 850219/2021

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

-----X
510 NINTH AVE FUNDING LLC,
Plaintiff,
- v -
EUREKA REALTY CORP., SILVIA MIGHTY, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
CITY OF NEW YORK DEPARTMENT OF FINANCE,
ENVIRONMENTAL CONTROL BOARD OF THE CITY OF
NEW YORK, JOHN DOE 1 THROUGH JOHN DOE 100,
Defendant.
-----X

INDEX NO. 850219/2021
MOTION DATE _____
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 145, 152, 153, 154, 155, 156, 157, 158, 160, 161, 162 were read on this motion to/for APPOINT - REFEREE.

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

Plaintiff in this action to foreclose on a mortgage encumbering commercial real property moves, *inter alia*, to vacate the stay in this matter, to discontinue the action as against a guarantor of the indebtedness, Sylvia Mighty (“Mighty”), pursuant to CPLR §3217, to appoint a referee to compute, for a default judgment against the non-appearing parties and to amend the caption. Defendants Mighty and Eureka Realty Corp. (“Eureka”), the mortgagor, oppose the motion.

The branch of the motion to lift the stay imposed by this Court is granted as it is unchallenged that the bankruptcy petition filed by Eureka was dismissed.

A motion to discontinue is directed to the sound discretion of the court and may be issued “upon terms and conditions [that] the court deems proper” (CPLR §3217[b]; *US Bank Natl. Assn. v Cockfield*, 143 AD3d 889, 890 [2d Dept 2016]). Moreover, “absent a showing of special circumstances, including prejudice to a substantial right of the defendant or other improper consequences, a motion for a voluntary discontinuance should be granted without prejudice” (*American Tr. Ins. Co. v Roberson*, 114 AD3d 821 [2d Dept 2014]).

Here, Defendant Mighty is neither an indispensable nor even a necessary party to this foreclosure proceeding (RPAPL §1311). As a guarantor, Mighty is nothing more than “a permissible party in a mortgage foreclosure action” (2 Bergman, *New York Mortgage Foreclosures* §12:13[2]; see also RPAPL §1313; *Trustco Bank, N.A. v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797 [3d Dept 1998]; *Bank of E. Asia v Smith*, 201 AD2d 522, 523 [2d Dept

1994]; *Morrison v Slater*, 128 AD 467, 468 [1st Dept 1909]). The Court can discern no reason to deny Plaintiff's request to terminate this action against Mighty and her opposition on this issue is without merit. As Eureka has been determined to be in default and its motion to vacate denied, absent Mighty as a party, there is no impediment to the issuance of an order of reference.

Based on the above, as well as the determinations made by this Court in its decision dated September 21, 2022, which included granting a default judgment against Eureka and the other non-appearing parties, it is

ORDERED that the action is ordered discontinued as against Defendant Sylvia Mighty; and it is further

ORDERED that the branch of Plaintiff's motion for a default judgment against Defendant Eureka and the other non-appearing Defendants is granted; and it is further

ORDERED that that **Tom Kleinberger, Esq., 411 5th Avenue, New York, New York 10016 (917) 326-5523** 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 excising the “Doe” defendants and shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
-----X
510 NINTH AVE FUNDING LLC

Plaintiff,

-against-

EUREKA REALTY CORP., NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, CITY
OF NEW YORK DEPARTMENT OF FINANCE,
ENVIRONMENTAL CONTROL BOARD OF THE CITY
OF NEW YORK,

Defendants.
-----X

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 **December 7, 2023, at 11:20 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.

8/11/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT
				REFERENCE

Francis A. Kahn III
FRANCIS A. KAHN III A.K.A.
HON. FRANCIS A. KAHN III
J.S.C.