

**57th St. Vacation Owners Assn., Inc. v Kong**

2023 NY Slip Op 34431(U)

December 11, 2023

Supreme Court, New York County

Docket Number: Index No. 850081/2019

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12**

*Justice*

X

INDEX NO. 850081/2019

MOTION DATE 12/21/2022

MOTION SEQ. NO. 003

57TH ST. VACATION OWNERS ASSOCIATION, INC., BY  
AND THROUGH ITS BOARD OF DIRECTORS,

Plaintiff,

- v -

KENNY KONG, if living, and if they be dead, any and all persons unknown to plaintiff, claiming, or who may claim to have an interest in, or generally or specific lien upon the real property described in this action; such unknown persons being herein, and assignees of such deceased, any and all persons deriving interest in or lien upon, or title to said real property by, through or under them, or either of them, and their respective wives, widows, husband, widower, heirs-at-law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors and assignees of such deceased, any and all persons deriving interest in or lien upon, or title to said real property by, through or under them, or either of them, and their respective wives, widows, husbands, widowers, heirs-at-law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors and assigns, all of whom and whose names, except as stated, are unknown to Plaintiff,

Defendants.

**DECISION + ORDER ON  
MOTION**

X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

**ORDER OF REFERENCE/REFERENCE TO  
COMPUTE**

were read on this motion to/for

Plaintiff 57<sup>th</sup> St. Vacation Owners Association, Inc. (plaintiff) commenced this action to foreclose on a lien for unpaid and delinquent Timeshare Owners Association Assessments dated February 15, 2019 and recorded in the New York County Clerk's Office on March 19, 2019 under CRFN #2019000089087 (NYSCEF Doc. No. 1, Complaint, ¶ 2; NYSCEF Doc. No. 45, Exhibit C, [the lien]). The lien, for "Unpaid and Delinquent Timeshare Owners Association Assessments," is for \$12,346.08 (NYSCEF Doc. No. 1 at

¶ 8; NYSCEF Doc. No. 45). Plaintiff's motion to appoint a referee to compute the amount due to plaintiff pursuant to RPAPL § 1321 and CPLR Rule 4311 is granted for the reasons stated below.

### BACKGROUND

On April 5, 2019, plaintiff filed the summons, complaint and notice of pendency alleging that defendant Kenny Kong (defendant) is the owner in fee of a .009864% undivided tenant in common interest in the timeshare unit 57<sup>th</sup> Street Vacation Suites, which is located at 102 West 57<sup>th</sup> Street, in Manhattan (NYSCEF Doc. 1, ¶ 3).<sup>1</sup> Plaintiff alleges that pursuant to its declaration and by-laws defendant is "bound and obligated to pay all taxes, assessments, and other charges, fines and impositions attributable to the property" (*id.* at ¶ 4). Plaintiff avers that defendant has not made payments upon the subject unit since January 1, 2018 (*id.* at ¶ 5). Further, plaintiff alleges that, as of February 15, 2019, defendant owed \$12,346.08 in unpaid assessment charges and related fees (*id.* at ¶ 6). Plaintiff claims that defendant has failed to make payments despite due demand being made of him (*id.* at ¶ 7).

On July 22, 2019, plaintiff filed an *ex parte* motion for an order of publication and leave to file a supplemental summons, amended complaint and amended notice of pendency (NYSCEF Doc. No. 7). Plaintiff alleged that it could not effectuate personal or substituted service of the summons and complaint on defendant or ascertain the location of defendant or his personal representatives (*see* NYSCEF Doc. No. 8, Affirmation of Regularity; *see also* NYSCEF Doc. No. 10, Affidavit of Due Diligence).

On February 7, 2020, after the Court denied an earlier motion because of deficiencies in the documents submitted as proof of service (*see* NYSCEF Doc. No. 15, Second Supplemental Affirmation of Regularity, ¶ 15), plaintiff filed a second supplemental affirmation in support of the order of publication with proof of responses from the U.S. Postal Service searches, in addition to the proofs it had previously

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<sup>1</sup> According to Exhibit A annexed to the Lien of Common Charges, attached to this motion as Exhibit C (NYSCEF Doc. No. 45), defendant has a fee simple ownership interest consisting of a .009864% undivided tenant in common interest in 57<sup>th</sup> Street Vacation Suites.

provided regarding its searches in the Surrogates Courts throughout the five boroughs of New York County (NYSCEF Doc. No. 15-22). On July 22, 2021, this Court granted plaintiff's motion, granting service by publication and leave to file the supplemental summons, amended complaint and amended notice of pendency. In the same order, the Court appointed Kristin White, Esq. as Guardian ad Litem (GAL) for non-appearing defendant Kenny Kong. Plaintiff duly e-filed the supplemental summons, amended complaint and amended notice of pendency on July 29, 2021 (NYSCEF Doc. No. 28-30).

On August 10, 2021, plaintiff filed an *ex parte* application for an order designating a successor newspaper for the publication of the supplemental summons due to the high cost of publication for the two newspapers authorized by the court order (*see* NYSCEF Doc. No. 32; NYSCEF Doc. No. 35). On November 29, 2021, this Court issued an order designating the Irish Echo, in place of the New York Law Journal, and the New York Daily News for publication of the supplemental summons upon defendant (*see* NYSCEF Doc. No. 37). Plaintiff duly served defendant by publication in both newspapers on December 15, 2021, December 22, 2021, December 29, 2021 and January 5, 2022 (*see* NYCSEF Doc. 38, Affidavits of Service by Publication).

On September 29, 2022, Kristen White, Esq. executed the consent, affidavit, answer report and waiver in her role as the GAL for defendant and, *inter alia*, all unknown heirs (*see* NYSCEF Doc. No. 42, Affirmation of Regularity, ¶ 18; *see* also NYSCEF Doc. No. 49, Exhibit G, Guardian's Consent). In her consent, Ms. White agreed to become GAL for the defendant and "if (s)he or either of them be dead, his or her or their respective heirs at law . . ."

In her qualifying affidavit, Ms. White stated that she has no adverse interest to that of the defendant. In her guardian answer, Ms. White stated that, *inter alia*, on behalf of defendants, "they are strangers to all matters and thing[s] set forth in the Amended Complaint in this action, and that they claim such right, estate and interest in the real property and premises described in the Amended Complaint as

they are entitled to, and that they submit their rights and interests in the matters in question in this action to the protection of this Court” (NYSCEF doc. no. 49). In her GAL report, Mr. White stated that she was appointed as GAL for the absentee defendants, that she reviewed the file and found that the Court has jurisdiction over her wards, that she knew of no other reasonable methods of locating the absentee defendants and that she waived notice or service of all papers in this action except the notice of sale, referee’s report of sale and notice of any surplus money proceedings. In her waiver, Ms. White waived notice of application for the appointment of a referee to compute the amount due and waived notice of application for the entry of judgment.<sup>2</sup> The defendant never appeared in this action. On December 21, 2022, plaintiff filed the instant motion for an order of reference.

### DISCUSSION

Pursuant to RPAPL § 1321, as relevant here, “[i]f the defendant fails to answer within the time allowed . . . the court shall . . . direct a referee to compute the amount due to plaintiff . . . .” A referee to compute the amount due is “prescribed when the defendant is in default in answering the complaint within the time allowed, or the right of the plaintiff is admitted by the answer” (*Perla v Real Prop. Holdings, LLC*, 23 Misc 3d 697, 700 [Sup Ct, Kings County 2009], citing *Scharaga v Schwartzberg*, 149 AD2d 578, 578-578 [2d Dept 1989]). Here, plaintiff has taken the “preliminary step toward obtaining a default judgment of foreclosure and sale” by moving for an order of reference (*Wells Fargo Bank, N.A. v Lopez*, 214 AD3d 844, 845 [2d Dept 2023]).

In order to show entitlement to an order of reference, plaintiff must submit “proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the remaining defendants’ failure to answer or appear” (*U.S. Bank N.A. v Auteri*, 191 AD3d 729, 731 [2d Dept 2021]). Here, plaintiff submits proof of service of a copy of the supplemental summons and amended complaint by its affidavit

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<sup>2</sup> The Court notes that plaintiff served a copy of the instant motion on the GAL (*see* NYSCEF Doc. No. 53, Affidavit of Mailing).

of publication along with copies of the newspaper publications (NYSCEF Doc. No. 52, Exhibit J). Plaintiff also submits proof of the timeshare bargain and sale deed, the lien and the complaint (NYSCEF doc. nos. 44-46). In addition, plaintiff submits other proof setting forth the facts establishing the claim through its counsel's affirmation of regularity and an affidavit by Rafael Orrego who is the asset recovery manager for plaintiff's servicing agent Portfolio Services and an individual authorized to attest to the default on the note (NYSCEF Doc. Nos. 42-43; see *Aurora Loan Servs., LLC v Colleluori*, 170 AD3d 1097, 1098 [2d Dept 2019] [stating that plaintiff demonstrated entitlement to an order of reference through the submission of, *inter alia*, the affidavit of an employee of the loan servicer]). As already mentioned above, defendant has not appeared nor filed an answer in this matter.<sup>3</sup>

### CONCLUSION

In light of the foregoing, plaintiff has demonstrated its entitlement to an order of reference. Therefore, in accordance with RPAPL § 1321, this Court hereby appoints Helene E. Blank, Esq., Blank & Star, PLLC, 387 New Lots Ave, Brooklyn, NY 11207-6311 at (718) 498-3333 as Referee to hear and report on the amount due to plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that by accepting this appointment the referee certifies that the referee is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), in including, but not limited to, section 36.2(c) ("Disqualifications from appointment"), and section 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the referee take proof of the facts and circumstances stated in the complaint and examine the plaintiff or its agent, on oath, as to any payments which have been made in accordance with CPLR § 1321 (1); and it is further

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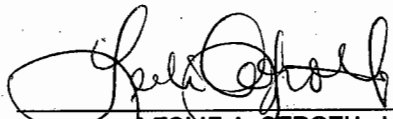
<sup>3</sup> Plaintiff has complied with CPLR § 3215(c) by moving for an order of reference within one year of the default (*Onewest Bank, FSB v Kanapathipillai*, 187 AD3d 928, 929 [2d Dept 2020]).

ORDERED that the hearing shall be completed within ninety (90) days of the date of this decision and order and a report then submitted to the Court – on notice to counsel – within thirty (30) days of the date of completion of the hearing; and it is further

ORDERED that upon receipt of said report, either party may make a motion to confirm; and it is further

ORDERED that upon submission of the referee’s report, plaintiff shall pay \$350.00 to the Referee as compensation for his/her services, which sum may be recouped as cost of litigation. These fees shall then be paid by plaintiff within thirty (30) days of the date of written approval of the same by the Court, with the Court to add the amount thereof to the Judgment ultimately issued against Defendants:

The foregoing constitutes the Decision and Order of this Court.



LESLIE A. STROTH, J.S.C.

12/11/2023  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: