

Windward Bora, LLC v Zorrilla

2023 NY Slip Op 34895(U)

March 15, 2023

Supreme Court, Bronx County

Docket Number: Index No. 21958/2020E

Judge: Paul L. Alpert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

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Windward Bora, LLC.,

Index No. 21958/2020E

-against-

Hon. Paul L. Alpert

Oscar Zorrilla, Lissette Zorrilla, Office of the Register of the City of New York for the County of Bronx; Citimortgage, Inc., New York City Environmental Control Board.

Justice Supreme Court

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The following papers numbered 1 to _____ were read on this motion (Seq. No. 1) for _____ noticed on _____.

Table with 2 columns: Document Type, No(s). Rows include Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed, Answering Affidavit and Exhibits, and Replying Affidavit and Exhibits.

The plaintiff's motion and the defendants' cross-motion are decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 3/15/23

Hon. [Signature]
HON. PAUL ALPERT J.S.C.

- 1. CHECK ONE... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART:26

-----X Index No.: 21958/2020E
Windward Bora, LLC.,

Plaintiff,

-against-

DECISION/ORDER

Oscar Zorilla, Lissette Zorilla, Office of the Register
of the City of New York for the County of Bronx;
Citimortgage, Inc., New York City Environmental
Control Board.

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the order to
show cause as indicated below:

Papers	Numbered
Notice of Motion, Affirmation in Support & Exhibits.....	1
Notice of Cross-Motion, Affirmation in Support & Exhibits.....	2
Memorandum of Law in Support of Plaintiff's motion and in Opposition to Cross-motion & Exhibits.....	3
Affirmation in Opposition to Cross-Motion and in further Support of Motion for Default Judgment & Exhibits.....	4
Memorandum of Law in Opposition to Cross-Motion and in further Support of Motion for Default Judgment.....	5
Affirmation in Reply in further Support of Defendants Motion to Dismiss.....	6

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action pursuant to Article 15 of the New York Real Property Actions and Proceedings Law. It requests a default judgment and an order declaring that the National City Bank holds a credit line mortgage as of and from September 15, 2005 in the amount of \$143,000.00 against the property with a legal description described in Schedule A of Exhibit A; an order directing the Office of the Register of the City of New York for the Bronx

County to record a copy of the certified order and a copy of the credit line mortgage; declaring that the mortgage has an effective date nunc pro tunc from September 15, 2005; declaring that the credit line mortgage and judgment be indexed against the property identified as parcel #3133-111; and that Citimortgage, Inc., be removed as a defendant because they are no longer a necessary party to the action. The defendants Oscar Zorrilla and Lissette Zorrilla oppose the motion arguing that the matter should be dismissed as the case has been abandoned pursuant to CPLR § 3215(c); the statute of limitations has expired to correct the defects on the recorded mortgage; the affidavit of service of the summons and complaint is defective.

On March 20, 2020 Governor Cuomo signed Executive Order No. 202.8 in response to the public health crisis as a result of the COVID-19 pandemic. “The Executive Order ‘tolled’ any specific time limit for the commencement, filing, or service of any legal action.. . until April 19, 2020” (*Murphy v. Harris*, 210 AD3d 410 [2022]). “That toll was extended through several subsequent executive orders, the last of which remained in effect until November 3, 2020” (*Id.* at 411). Defendants had until March 29, 2020 to Answer the complaint but this time was tolled on March 20, 2020. The defendants had nine days left to answer the complaint when the Governor tolled the time to Answer. This time started to run again after November 3, 2020. Therefore, the defendant’s had until November 12, 2020 to file an answer. The plaintiff had one year after November 12, 2020 to file a motion for a default judgment which would have been November 12, 2021. The plaintiff filed the motion for a default judgment on September 23, 2022.

Although still a little more than ten months late, in filing the motion for a default judgment, the courts have a heavy preference to decide cases on the merits (see *Matter of Murray v. Matusiak*, 247 AD2d 303 [1st Dept 1998]; *Sanford v. 27-29 W. 181st Street Ass’n, Inc.*,

300 AD2d 250 [1st Dept 2002]; *Johnson-Roberts v. Ira Judelson Bail Bonds*, 140 AD3d 509 [1st Dept 2016]; *Gecaj v. Gjonaj Realty & Management Corp.*, 149 AD3d 600 [1st Dept 2017]).

The plaintiff's motion for a default judgment is denied.

The plaintiff's application to discontinue against Citimortgage, Inc., is unopposed and is granted.

The defendants' attempt to challenge the affidavit of service of the summons and complaint on Lissette Zorrilla is without merit. Lissette Zorrilla submits an affidavit and denies being served the summons and complaint. She states that the affidavit of service claims that a 25 year old woman was served at her address and that she was 47 years old at the time of service. The affidavit of service indicates that the process server served a woman whose age is 25 +. CPLR 306(b) requires only approximations as to age, weight, and height (see *Lincoln First Bank-Cent., N.A. v. Bombard Chevrolet, Inc.*, 55 AD2d 1048 [4th Dept. 1977]; *HSBC Bank USA, National Association v. Rahmanan*, 194 AD3d 792 [2nd Dept 2021]). The defendants' motion to dismiss the complaint based on non-service of the summons and complaint is denied. The remainder of the defendants' arguments at this juncture are academic and they may raise them in an answer.

The defendant's motion to dismiss based on the action being abandoned pursuant to CPLR 3215(c) is denied. The defendants shall serve an answer within 20 days of service of this decision/order upon the plaintiff with notice of entry.

Based on the foregoing, it is hereby;

ORDERED AND ADJUDGED, that the plaintiff's motion for a default judgment is denied, and it is further,

ORDERED AND ADJUDGED, that the plaintiff's motion to discontinue against Citimortgage, Inc., is granted, and it is further,

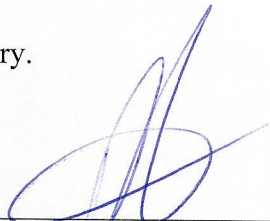
ORDERED AND ADJUDGED, that the defendants' motion to dismiss pursuant to CPLR § 3215 (c) is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants shall serve an answer within twenty (20) days of service of this decision and order, and it is further,

ORDERED AND ADJUDGED, that the defendants shall serve a copy of this decision and order upon the plaintiff within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: March 15, 2023



Hon. Paul L. Alpert, J.S.C.