

**Chang HWA Commercial Bank, Ltd. v
Waterscape Resort II, LLC**

2024 NY Slip Op 32730(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 850050/2021

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

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INDEX NO. 850050/2021

CHANG HWA COMMERCIAL BANK, LTD., IN ITS
CAPACITY AS ADMINISTRATIVE AGENT FOR HUA NAN
COMMERCIAL BANK, LTD. AND ITSELF, THE
SYNDICATED LENDERS,

MOTION DATE _____

MOTION SEQ. NO. 002

Plaintiff,

- v -

WATERSCAPE RESORT II, LLC, 70 WEST 45TH STREET
HOLDING, LLC, HNA HOSPITALITY GROUP CO., LTD.,
THE ASSOCIATED CORPORATION, PAVARINI &
MCGOVERN LLC, I.M.P. PLUMBING & HEATING CORP.,
STANDARD PUMP AND MOTOR INC. INC. D/B/A
SUPERIOR PUMP MOTOR INC., CRIMINAL COURT OF
THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF FINANCE, ENVIRONMENTAL
CONTROL BOARD, JOHN DOE #1 THROUGH JOHN DOE
#50, 45TH STREET BLT RESTAURANT LLC, CASSA NY
RESTAURANT LLC, ELITE GC NY INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175

were read on this motion to/for

JUDGMENT - DEFAULT

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

The within action is to foreclose on a consolidated, extended and modified mortgage encumbering three parcels of real property located 66-70 West 45th Street, Hotel Unit 1, Hotel Unit 2 and Commercial Unit 3, New York, New York. The mortgage at issue, dated August 26, 2016, was given by Defendant Waterscape Resort II, LLC ("Waterscape") to Plaintiff Chang Hwa Commercial Bank, Ltd. ("Chang"). The within mortgage consolidated certain prior mortgages and amendments thereto. The 2016 mortgage secures an indebtedness in an original principal amount of \$63,000,000.00 which is memorialized by a consolidated mortgage note of the same date as the mortgage. The foregoing documents were executed as part of a loan transaction that is documented in a senior secured term loan agreement, also dated August 26, 2016, executed by Waterscape, Chang and Hua Nan Commercial Bank, Ltd. ("Hua Nan"), also Plaintiff herein. In that contract, Chang is identified as "Agent" and "Lender" and Hua Nan is also identified as "Lender". All the loan documents were executed by non-party Ted Chen ("Chen") as Authorized Signatory of Waterscape. Concomitantly, with

these loan documents Defendants 70 West 45th Street Holding, LLC (“70 West”) and HNA Hospitality Group Co. (“HNA”) executed separate guarantees of the indebtedness. Chen executed 70 West’s guaranty as Authorized Signatory. HNA’s guaranty does not identify the signatory on its face.

On August 7, 2017, Plaintiffs, Waterscape and Guarantors executed an amended and restated senior secured term loan agreement. On September 6, 2019, these same entities executed a second amendment to the senior secured term loan agreement. In the latter amendment, Waterscape and Guarantors admitted in section 4[d], they lacked “any defense, off-set, claim, counterclaim or cause of action of any kind or nature whatsoever against Lenders with respect to the Loan, the Guaranties or the Loan Documents to which such party is a party or any debt incurred by such party pursuant to the Loan Documents”.

Plaintiff Chang, itself, and in its capacity as the administrative agent for Hua, commenced this action via filing a summons in complaint on March 18, 2021 wherein it was pled Defendants defaulted in repayment of the indebtedness beginning on or about February 3, 2020. Before service of the pleadings was completed, a motion by non-party Residential Board of Managers of the Cassa NY Condominium to intervene in this action was denied. Thereafter, on January 30, 2023, Plaintiff filed an amended complaint and sought, by *ex parte* motion, an extension of time to effect service pursuant to CPLR §306-b upon Defendants, including Waterscape and Guarantors. That application was granted by order of this Court dated January 31, 2023. Defendant Standard Pump and Motor Inc. D/B/A Superior Pump and Motor Inc. (“Superior”), an alleged mechanic’s lien holder, answered and pled five affirmative defenses. It also pled crossclaims and a counterclaim for foreclosure of its lien claiming its lien has priority over Plaintiff’s mortgage. Defendants 45th Street BLT Restaurant LLC (“BLT”) and Cassa NY Restaurant LLC (“Cassa”) answered and pled four affirmative defenses. All the other Defendants defaulted in appearing.

Now, Plaintiffs moves for a default judgment against Waterscape, Guarantors, and the other non-appearing Defendants, appointing a referee to compute and to amend the caption. Defendant Waterscape opposes the motion and cross-moves for an order denying Plaintiffs’ motion and, to vacate their default pursuant and for an extension of their time to answer. Defendant Pavarini McGovern, LLC (“Pavarini”) opposes the motion and cross-moves to vacate its default and extend its time to answer. Plaintiff opposes the cross-motions.

“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]). Plaintiff established *prima facie* its entitlement to a default judgment against Waterscape and the other Defendants by submitting proof, via the affidavit of David C.Y. Hsieh, Vice President and General Manager for Chang, which demonstrated the mortgage, the unpaid note, proof of service on each Defendant as well as their failure to timely appear or answer (*see* CPLR §3215[f]; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st 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]; see also CPLR §5015[a][1]; *Bear Stern-Asset-Backed Sec. I Trust 2006 v Ceesay*, 180 AD3d 504 [1st Dept 2020]).

Similarly, where an extension of time to answer is sought under CPLR 3012[d], a court, upon such terms as may be just (see *Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]), upon showing “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]). Where, however, a party seeks to vacate its default under CPLR §317, a reasonable excuse is not necessary where, within one year after it learns of the default, a defendant proves it was not personally served, did not “receive notice of the summons in time to defend and has a meritorious defense” (see CPLR §317; *Wilson v Kore Method on Gansevoort LLC*, 180 AD3d 486 [1st Dept 2020]; *Simon & Schuster v Howe*, 105 AD2d 604, 605 [1st Dept 1984]).

In her affidavit support of Waterscape’s cross-motion, Abby Chen (“Chen”), the Movant’s designated representative, failed to offer even a conclusory denial of service and, therefore, the claims in the affidavit established nothing more than “mere neglect [which] is not a reasonable excuse” (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]). With respect to CPLR §317, Waterscape is correct that where, as here, service on a defendant is made pursuant to LLCL §303, such conveyance does not constitute personal delivery within the meaning of CPLR §317 (see *eg Figueroa v Relgold*, 178 AD3d 425, 426 [1st Dept 2019]). However, Defendants were required, but failed, to prove they “did not receive actual notice of the summons and complaint in time to defend the action” (see *Jean v Csencsits*, 171 AD3d 1149, 1150 [2d Dept 2019]; *HSBC Bank USA v Desrouilleres*, 128 AD3d 1013, 1015 [2d Dept 2015]). At most, Chen’s affidavit is a “mere denial of receipt of the summons and complaint [which] is insufficient to establish lack of actual notice for the purpose of CPLR 317” (see *Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012]; see also *Goldfarb v Zhukov*, 145 AD3d 757, 758 [2d Dept 2016]). Additionally, Waterscape offered no explanation to rebut the presumption of receipt of the summons and complaint which arose with the mailings associated with the service under LLCL §303 (see *Youngstown Tube Co. v Russo*, 120 AD3d 1409, 1410 [2d Dept 2014]).

Absent a reasonable excuse or lack of notice, the Court need not determine whether Waterscape has presented a meritorious defense to the action (see *eg Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]; *Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602, 602 [1st Dept 2013]; *Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). In any event, the sole defense proffered, Waterscape’s economic hardship that was purportedly a sequela of the COVID-19 pandemic, is unavailing as these types of claims have repeatedly been “squarely rejected” by the Appellate Division, First Department (see *Pentagon Federal Credit Union v Popovic*, 217 AD3d 480 [1st Dept 2023]). Further, sympathy and equity “cannot be permitted to undermine the stability of contractual obligations” (*L&L Associates Holding Corp. v Seventh Day Church*, 188 AD3d 1180 [2d Dept 2020]).

Pavarini’s motion to vacate its default is also undone by its failure to proffer a viable excuse for its failure to timely appear or answer herein. Pavarini was also served pursuant to LLCL §303, but affiant Eric McGovern, the President and CEO of Pavarini, failed to deny service or notice of the proceeding in time to defend. Like Waterscape, Paravini’s excuse constitutes simple neglect in

answering or moving to dismiss which is an insufficient excuse. Too, without an excuse, examination of any claimed meritorious defense is unnecessary.

To the extent that Paravini may have asserted that Plaintiff's claims against it are deficient, this does not defeat Plaintiff's motion. 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]), which is customarily met because a defaulting party "admits all traversable allegations in the complaint" (*Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]). As such, without vacatur of its default, Paravini's non-jurisdictional defenses fail (*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 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1st 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 the motion for summary judgment against the answering parties, a default judgment against the non-appearing parties and the appointment of a referee to compute is granted; and it is further

ORDERED that Defendant Waterscape and Paravini's cross-motions are denied in their entirety; and it is further

ORDERED that **Jeffrey R. Miller, Esq, 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** 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 is amended by deleting "JOHN DOE #1" through "JOHN DOE #10" and shall read as follows:

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

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CHANG HWA COMMERCIAL BANK, LTD., in its
capacity as the administrative agent for Hua Nan
Commercial Bank, Ltd. and itself, the syndicated lenders,

Plaintiff,

-against-

WATERSCAPE RESORT II, LLC, 70 WEST 45TH
STREET HOLDING, LLC, HNA HOSPITALITY
GROUP CO., LTD., THE ASSOCIATED
CORPORATION, PAVARINI & MCGOVERN LLC,
I.M.P. PLUMBING & HEATING CORP., STANDARD
PUMP AND MOTOR INC. D/B/A SUPERIOR PUMP
AND MOTOR INC., CRIMINAL COURT OF THE
CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF FINANCE, ENVIRONMENTAL
CONTROL BOARD, 45TH STREET BLT
RESTAURANT LLC, CASSA NY RESTAURANT LLC,
ELITE GC NY INC.,

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/suptcmah)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **November 13, 2024, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.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.

7/12/2024
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION


GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE



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

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