

**JPMorgan Chase Bank, N.A. v Toju Realty Corp.**

2024 NY Slip Op 33758(U)

October 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 533945/22

Judge: Lawrence Knipel

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At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18 day of ~~September~~ 2024.

*1 Oct.*

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X  
JPMORGAN CHASE BANK, N.A.,

Plaintiff,

DECISION

-against-

Index No. 535945/22

Mot. Seq. Nos. 3-4

TOJU REALTY CORPORATION;  
1495 EAST 46<sup>TH</sup> STREET CORP.;  
1499 EAST 46<sup>TH</sup> STREET CORP.;  
1495-99 EAST 46<sup>TH</sup> STREET CORP.;  
NEW YORK CITY DEPARTMENT OF FINANCE;  
DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT;  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;  
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;  
"JOHN DOE" and "JANE DOE," Said  
Names Being Fictitious, It Being the Intention of  
Plaintiff to Designate Any and All Occupants,  
Tenants, Persons or Corporations, If Any, Having or  
Claiming an Interest in or Lien upon the Premises  
Being Foreclosed Herein,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion/Cross Motion, Supporting Affirmations,  
(Affidavits) and Exhibits Annexed \_\_\_\_\_  
Affirmations (Affidavits) in Opposition \_\_\_\_\_  
Reply Affirmations \_\_\_\_\_

74-116; 122-126  
118-121  
132-133

This is an action to foreclose a mortgage on the multi-family residential building located at 1495-1499 East 46<sup>th</sup> Street, Brooklyn, New York 11234, also known as 1960 East 46<sup>th</sup> Street, Brooklyn, New York 11234 (the "underlying property"), currently owned by defendant 1495-99 East 46<sup>th</sup> Street Corp. ("1495-99 Corp") and formerly owned by defendant Toju Realty Corporation ("Toju"). Nonparty Francisca Gbenebitse ("Francisca") is an officer and sole

shareholder of 1495-99 Corp. Francisca is also the surviving spouse of her late husband, Edwin Gbenebitse (“Edwin”), who was Toju’s sole officer and shareholder.<sup>1</sup>

In Seq. No. 3, plaintiff JPMorgan Chase Bank, N.A. (“plaintiff”), moved for an order: (1) pursuant to CPLR 3212, granting it summary judgment as against 1495-99 Corp, striking and dismissing with prejudice 1495-99 Corp’s Verified Answer, dated August 8, 2023 (“1495-99 Corp’s answer”) (NYSCEF Doc No. 46); (2) pursuant to CPLR 3215, granting plaintiff leave to enter a default judgment as against each of defendants Toju, 1495 East 46<sup>th</sup> Street Corp. (“1495 Corp”), 2323 Avenue X Corp., formerly known as 1499 East 46<sup>th</sup> Street Corp. (“1499 Corp”), New York City Department of Finance, Department of Housing Preservation & Development, New York City Environmental Control Board, and New York State Department of Taxation and Finance; (3) amending the caption to delete defendants “John Doe” and “Jane Doe” therefrom and to amend the name of 1499 Corp to “2323 Avenue X Corp., formerly known as 1499 East 46<sup>th</sup> Street Corp.”; (4) appointing a referee to compute the amounts due; and (5) reforming, nunc pro tunc, the Customer 2002 Mortgage<sup>2</sup> and the Customer 2002 CEMA<sup>3</sup> to replace the erroneous legal descriptions therein to include the Full Property Description;<sup>4</sup>

<sup>1</sup> See Francisca Gbenebitse’s Affirmation in Opposition to Motion and in Support of Cross-Motion, dated April 9, 2024 (“Francisca’s affirmation”), ¶¶ 1-2 (NYSCEF Doc No. 123).

<sup>2</sup> The term “Customer 2002 Mortgage” means the Mortgage Between Greenpoint Mortgage Funding, Inc. and Toju Realty Corporation, dated February 22, 2002, which secured an indebtedness in the original principal amount of \$29,070.76, and which was recorded in the Office of the City Register of the City of New York on May 28, 2002, at Reel 5641, Page 1585 (NYSCEF Doc No. 102).

<sup>3</sup> The term “Customer 2002 CEMA” means the Consolidation, Modification, and Extension Agreement Between Greenpoint Mortgage Funding, Inc. and Toju Realty Corporation, dated February 22, 2022, which consolidated the Customer 2002 Mortgage (among other mortgages) into a consolidated mortgage lien in the amount of \$690,000, and which was recorded in the Office of the City Register of the City of New York on May 28, 2002, at Reel 5641, Page 1593 (NYSCEF Doc No. 103).

<sup>4</sup> The term “Full Property Description” means the metes and bound description of the underlying property, as more fully set forth in ¶ 3 of plaintiff’s Statement of Material Facts, dated March 22, 2024 (plaintiff’s SOM) (NYSCEF Doc No. 115). Defendants, in opposition, have taken no position as to the accuracy of the Full Property Description. See Response to Plaintiff’s Statement of Material Facts, dated April 10, 2024

(6) reforming, nunc pro tunc, the 2005 Assignment<sup>5</sup> by replacing the erroneous partial schedule of mortgages attached thereto to include the Correct Schedule of Mortgages;<sup>6</sup> and (7) determining that plaintiff has a first lien on the underlying property.

In Seq. No. 5, defendants 1495-99 Corp and Toju (collectively, defendants) cross-moved for an order: (1) pursuant to CPLR 3212, dismissing plaintiff's complaint, dated December 8, 2022 (the complaint) (NYSCEF Doc No. 76): (a) on account of plaintiff's failure to serve Toju with a 30-day notice to cure the underlying default and/or with a notice to accelerate the underlying debt, as required by the mortgage documents; and (b) as time-barred by the six-year statute of limitations as applicable to the first and second reformation causes of action in the complaint and upon which the third (or remaining) cause of action for foreclosure is predicated; and (2) pursuant to 22 NYCRR § 130-1.1, imposing sanctions on plaintiff.

### Procedural Chronology

On December 9, 2022, plaintiff commenced this action against 1495-99 Corp and Toju (among others) and filed a notice of pendency against the underlying property (NYSCEF Doc Nos. 1-2 and 35, respectively).

On January 17, 2023, plaintiff served Toju via the Secretary of State (NYSCEF Doc No. 36). On March 6, 2023, plaintiff served 1495-99 Corp also via the Secretary of State (NYSCEF Doc No. 43).

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("defendants' response to plaintiff's SOM"), ¶ 3 (NYSCEF Doc No. 126).

<sup>5</sup> The term "2005 Assignment" means the Assignment of Mortgage without Covenant, dated October 14, 2005, from Greenpoint Mortgage Funding, Inc. to Washington Mutual Bank, F.A., which was recorded in the Office of the City Register of the City of New York on November 29, 2005, at CRFN 2005000659308 (NYSCEF Doc No. 106).

<sup>6</sup> The term "Correct Schedule of Mortgages" means a list of mortgages and their modifications as to the underlying property, as more fully set forth in NYSCEF Doc No. 34. See Plaintiff's SOM, ¶¶ 26-27; Defendants' response to plaintiff's SOM, ¶¶ 26-27 (taking no position as to the accuracy of the Correct Schedule of Mortgages).

On August 8, 2023, 1495-99 Corp interposed its answer (NYSCEF Doc No. 46).

On August 16, 2023, plaintiff rejected 1495-99 Corp's answer as untimely (NYSCEF Doc No. 47).

On September 11, 2023, 1495-99 Corp and Toju (collectively, "defendants") moved (in Seq. No. 1) for (among other relief) an order compelling plaintiff to accept 1495-1499 Corp's answer and for leave to interpose a proposed answer on behalf of Toju (the prior motion).

By order, dated October 11, 2023, the Court held, in relevant part, that "[t]his action is stayed through 12/31/23 for [Francisca] [to] seek [an] expedited appointment of [a] personal representative for nonparty decedent [Edwin] in Nassau Surrogate's Court" (the "initial order") (underlining in the original omitted) (NYSCEF Doc No. 64).<sup>7</sup>

On January 2, 2024, defendants moved (in Seq. No. 2) for leave to renew their prior motion and, upon renewal, an order, once again, compelling plaintiff to accept 1495-1499 Corp's answer and for leave, once again, to interpose a proposed answer on behalf of Toju (the "renewal motion").

By order, dated February 9, 2024, the court held, in relevant part, that "[r]enewal [is] granted only to the extent that the instant action [is] stayed for a period of 60 days from the date of entry of this order to obtain appointment of a personal representative for [Edwin]" (the "renewal order"). Approximately two months later, on April 12, 2024, the renewal order was entered (NYSCEF Doc No. 127).

In the interim, plaintiff moved (in Seq. No. 3) on March 22, 2024, and defendants (through Francisca acting in the dual capacity as the officer/shareholder of 1495-1499 Corp and as the

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<sup>7</sup> See *Matter of Edwin Gbenebitse, Deceased*, File No. 2021-2189 (Sur Ct, Nassau County) (listing February 2, 2021 as the date of Edwin's death).

petitioner for the appointment of a personal representative for Edwin's estate which owns shares in Toju) cross-moved (in Seq. No. 4) on April 10, 2024 (as applicable), for summary judgment and for ancillary relief, as set forth above. Upon the expiration of the 60-day stay set forth in the renewal order, the parties completed their briefing on the motion and cross motion. On July 10, 2024, the motion and cross motion were fully submitted, with the Court reserving decision. As of July 10, 2024, Francisca did not receive letters of administration for Edwin's estate.<sup>8</sup>

### Discussion

“The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding” (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). “The law of the case doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision and to the same questions presented in the same case” (*U.S. Bank N.A. v Moss*, 186 AD3d 1753, 1753 [2d Dept 2020] [internal quotation marks and citations omitted]). The doctrine “forecloses reexamination of [an issue previously determined] absent a showing of newly discovered evidence or a change in the law” (*Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 116 AD3d 667, 669 [2d Dept 2014]).

Here, the Court previously held – not once, but twice, by way of its initial and renewal orders – that 1495-1499 Corp and Toju are both in default. A defendant in default “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages” (*Rokina Opt. Co., Inc. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]). As defendants in default, 1495-1499 Corp and Toju are deemed to have admitted liability as to all three causes of action asserted in the complaint which are for the

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<sup>8</sup> See Francisca's affirmation, ¶ 3.

reformation of the aforementioned documents (the first and second causes of action) and for foreclosure (the third and final cause of action). Their only recourse before the Court<sup>9</sup> is to respond (if they be so advised) to the confirmation of the referee's report and to the entry of a judgment of foreclosure and sale (*see Bank of New York Mellon Tr. Co., N.A. v Ahmed*, 204 AD3d 972 [2d Dept 2022]).

To the extent that plaintiff seeks summary judgment as against 1495-1499 Corp, such relief is improper because a default judgment (rather than summary judgment) may be sought against a defendant in default (*see CPLR 3212 [a]; Russo v Crisona*, 219 AD3d 920, 921 [2d Dept 2023]). As noted, 1495-1499 Corp was twice denied leave to interpose its belated answer.

A long-form order is issued concurrently herewith.

This constitutes the decision of the Court.

ENTER FORTHWITH,



J.S.C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE

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<sup>9</sup> Defendants have appealed the initial and renewal orders to the Second Judicial Department (NYSCEF Doc Nos. 70 and 131, respectively; Appellate Division, Docket Nos. 2024-00615 and 2024-07529, respectively).