

U.S. Bank Trust N.A. v Duggal

2024 NY Slip Op 33858(U)

October 15, 2024

Supreme Court, New York County

Docket Number: Index No. 850480/2023

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

INDEX NO. 850480/2023

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS
INDIVIDUAL CAPACITY BUT SOLELY AS OWNER
TRUSTEE FOR RCF 2 ACQUISITION TRUST,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiff,

- v -

AMAR DUGGAL, SIMARNA DUGGAL, THE RESIDENTIAL
BOARD OF MANAGERS OF MILLENNIUM POINT
CONDOMINIUM, BANK OF AMERICA, N.A., EVAN SACKS,
KEY STAR CAPITAL FUND II L.P., LGBTQ LLC, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for JUDGMENT - SUMMARY

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

The within action is to foreclose on a mortgage encumbering a parcel of real property located 10 West Street, Unit 29C, New York, New York. The mortgage at issue, dated March 10, 2008, was given by Defendant Amar Duggal (“Duggal”) to non-party Bank of America, NA (“B of A”). The within mortgage secures an indebtedness in an original principal amount of \$1,000,000.00 which is memorialized by a note of the same date as the mortgage. By referee’s deed dated March 19, 2024, which as of the date of this decision has not been recorded, Defendant LGBTQ, LLC (“LGBTQ”) took title to the premises as the successful bidder at a foreclosure sale. The auction was authorized by a judgment issued in an action to foreclose on a lien of common charges which was commenced by Defendant The Residential Board of Managers of Millennium Point Condominium (“Board”)(*see Bd of Mgrs of the Millennium Park Condominium v Duggal*, NY Cty Index No 159829/2018).

Plaintiff commenced this action on August 15, 2023, wherein it pled Defendants defaulted in repayment of the indebtedness beginning on or about January 1, 2022. Defendant Board answered and pled six affirmative defenses. Defendant LGBTQ defaulted in appearing. Now, Plaintiffs moves for summary judgment against the appearing parties, a default judgment against the non-appearing Defendants, appointing a referee to compute and to amend the caption. Defendant Board submitted limited opposition. Defendant LGBTQ opposes the motion and cross-moves for, *inter alia*, leave to file a late answer pursuant to CPLR §3012[d]. Plaintiff opposes the cross-motion.

The branch of the motion for summary judgment against Defendant Board is denied as moot. That Defendant's lien was satisfied when its foreclosure action became final. As such, it is no longer a necessary party to this action (RPAPL §1311).

Regarding the defaulting Defendants, “[a]n 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 LGBTQ and the other Defendants by submitting proof, via the affidavit of Korey McGovern, a Document Execution Specialist for Plaintiff's servicer, 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]).

At the outset, LGBTQ's cross-motion is defective as it is not supported by an affidavit or affirmation of someone with personal knowledge of the facts which contains satisfactory factual allegations, rather than conclusory allegations or vague assertions (*see Gorman v English*, 137 AD3d 556 [1st Dept 2015]; *Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]). LGBTQ's assertion of uncertainty as to the outcome of the sale in Board's action as an excuse for defaulting herein is unavailing (*see LaSalle Bank N.A. v Calle*, 153 AD3d 801 [2d Dept 2017]; *Lane v Smith*, 84 AD3d 746 [2d Dept 2011]). At most LGBTQ demonstrated mere neglect which is not a reasonable excuse (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]). Indeed, the cross-motion was not made for over three-months after execution of the referee's deed.

Absent a reasonable excuse, the Court need not determine whether LGBTQ has presented a meritorious defense to the action (*see 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]). In any event, LGBTQ failed to proffer any meritorious defense to the action. The claim that Plaintiff lacked standing is meritless as Plaintiff annexed to the complaint a copy of the note, endorsed in blank on its face. This

is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]). The argument concerning physical delivery of the note is meritless. When a copy of the note, endorsed in blank, is attached to the complaint “[t]here is simply no requirement that an entity. . . must establish how it came into possession of that instrument” (*see JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]; *see also Bank of Am., N.A. v Pennicooke*, 186 AD3d 545 [2d Dept 2020]). The argument Plaintiff failed to demonstrate a *prima facie* case for foreclosure conflates a motion for summary judgment with one for a default judgment. 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]).

The branch of Plaintiff’s motion for a default judgment against the other non-appearing parties is granted (*see CPLR §3215; SRMOF II 2012-I 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 Defendant Board is denied as unnecessary and moot, but the branches for 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 LGBTQ’s cross-motion is denied in its entirety; and it is further

ORDERED that **Paul Sklar, Esq., 551 5th Avenue, Ste 2200, New York, New York 10176-0001- (212) 972-8845** 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 "John Doe" be removed as a party defendant in this action and that the caption of this action be amended accordingly; and it is further

ORDERED, that the caption shall read as follows:

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

-----X
U.S. BANK TRUST NATIONAL
ASSOCIATION, NOT IN ITS INDIVIDUAL
CAPACITY BUT SOLELY AS OWNER
TRUSTEE FOR RCF 2 ACQUISITION TRUST

Plaintiff,

-against-

AMAR DUGGAL, SIMARNA DUGGAL, THE
RESIDENTIAL BOARD OF MANAGERS OF
MILLENNIUM POINT CONDOMINIUM,
BANK OF AMERICA, N.A., EVAN SACKS,
KEY STAR CAPITAL FUND II L.P., LGBTQ
LLC,

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

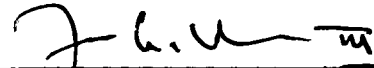
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); 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 **February 6, 2025, at 11:40 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.

10/15/2024

DATE



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

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

CHECK ONE:

CASE DISPOSED

NOT FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE