

Sachem Capital Corp. v Emrod Constr. & Dev. Corp.

2025 NY Slip Op 30427(U)

January 10, 2025

Supreme Court, New York County

Docket Number: Index No. 850483/2023

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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SACHEM CAPITAL CORP.,

Plaintiff,

- v -

EMROD CONSTRUCTION & DEVELOPMENT CORP.,
ATANDA NURAINA, NEW YORK CITY DEPT. OF
FINANCE, NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE, JOHN DOE ONE THROUGH
JOHN DOE TWENTY-FIVE

Defendant.

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INDEX NO. 850483/2023

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57 were read on this motion to/for JUDGMENT - DEFAULT.

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

The within action is to foreclose on two mortgages encumbering a parcel of real property located 49 Saint Nicholas Place, New York, New York. The mortgages at issue, both dated January 26, 2022, were given by Defendant Emrod Construction & Development Corp. ("Emrod") to Plaintiff. The mortgages secure notes in with original principal amounts of \$1,867,000.00 and up to \$300,000.00. Concomitantly with the notes and mortgages, Defendant Atanda Nuraina ("Nuraina") executed guarantees of the indebtedness. Plaintiff commenced this action wherein it pled in the complaint that Defendants defaulted in repayment of the indebtedness beginning on or about September 1, 2022. Defendants Emrod and Nuraina defaulted in appearing. Now, Plaintiff moves for a default judgment against the non-appearing Defendants, appointing a referee to compute and to amend the caption. Defendants Emrod and Nuraina oppose the motion and cross-move for, *inter alia*, leave to file a late answer pursuant to CPLR §3012[d]. Plaintiff opposes the cross-motion.

As to Plaintiff's motion, "[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 by submitting proof, via the affidavit of John Villano ("Villano"), the Chief Executive Officer of Plaintiff's 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]).

As a reasonable excuse, Defendants claim their prior counsel neglected this action by failing to file an answer. “A party attributing his or her default to a former attorney must provide a detailed and credible explanation of the default. Conclusory and unsubstantiated allegations of law office failure are not sufficient” (*LaSalle Bank, N.A. v LoRusso*, 155 AD3d 706, 707 [2d Dept 2017]; see also *Hertz Vehicles, LLC v Mollo*, 171 AD3d 651 [1st Dept 2019]). However, “mere neglect is not a reasonable excuse” (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]). Nuraina’s affidavit in this regard was insufficient as it was conclusory and constituted nothing more than bare allegations of incompetence by former counsel (see *Vizelter v Strogov*, 170 AD3d 917 [2nd Dept 2019]; *Edwards v Feliz*, 28 AD3d 512 [2nd Dept 2006]; *Achampong v Weigl*, 240 AD2d 247 [1st Dept 1997]). Even if properly supported, this excuse would still fail as Emrod and Nuraina defaulted in appearing in this action months prior to prior to engaging their attorney in this matter (see *Nahar v Awan*, 33 AD3d 680 [2nd Dept 2006]).

Absent a reasonable excuse, the Court need not determine whether Emrod and Nuraina have 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, Movants failed to establish the existence of a meritorious defense as the affidavit of Nuraina is silent on the issue (see *Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]) and the proposed answer annexed to the motion is insufficient as it is not verified by a person with knowledge of the facts (see *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 708 [2d Dept 2013]). For the same reasons, the branch of the motion to compel Plaintiff to accept a late answer from Defendants pursuant to CPLR §3012[d] fails (see *Bank of N.Y. Mellon v Tedesco*, 174 AD3d 490, 491 [2d Dept 2019][“To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action”]).

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 a default judgment against the non-appearing parties and the appointment of a referee to compute is granted; and it is further

ORDERED that Defendants 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; and it is further

ORDERED, that the amended caption shall read as follows:

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

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SACHEM CAPITAL CORP.,

Plaintiff,

-against-

EMROD CONSTRUCTION & DEVELOPMENT CORP.,
ATANDA NURAINA, NEW YORK CITY DEPT. OF
FINANCE, and NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE,

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/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 **May 1, 2025, at 11:20 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.

1/10/2025

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE


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