

**Toorak Capital Partners, LLC v MGM Props.
Ventures LLC**

2025 NY Slip Op 31498(U)

April 18, 2025

Supreme Court, New York County

Docket Number: Index No. 850090/2024

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

“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]).

In support of its cross-motion, MGM proffers the affirmation of Murtajur Rahman (“Rahman”), an authorized member. Rahman’s assertion that no mailing from the Secretary of State was ever received is insufficient to rebut the presumption of regularity of the mails (see *City of New York v Melamed (In Rem Tax Foreclosure Action No. 47)*, 19 AD3d 547, 548 [2d Dept 2005]). The claim that the address on file with the Secretary of State was incorrect also does not defeat service as it was Defendant’s obligation to update its address with the Secretary of State (see *Salish Lodge LLC v Gift Mgt. Inc.*, 192 AD3d 410, 411 [1st Dept 2021]; *Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407 [1st Dept 2020]). MGM’s reliance on a biennial statement containing a change of service of process address is unavailing as it occurred after the service and mailings upon MGM.

Absent a reasonable excuse, the Court need not determine whether MGM 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 Rahman is silent on the issue (see *Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]) and no proposed verified proposed answer was annexed to the motion (cf. *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”]).

CPLR §317 provides that if a non-appearing defendant was not personally served, it may still defend the action within one year after it learns of the default judgment upon the Court finding that it “did not personally 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]). Where, as here, service on a Defendant is accomplished via BCL §306, it does not constitute personal delivery within the meaning of CPLR §317 (see eg *Figueroa v Relgold*, 178 AD3d 425, 426 [1st Dept 2019]). Nevertheless, “[t]he mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317” (*Goldfarb v Zhukov*, 145 AD3d 757, 758 [2d Dept 2016]).

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 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" and "Jane Doe" be removed as a party defendant in this action as no occupants reside at the property and the caption of this action be amended to reflect the removal of "John Doe" and "Jane Doe"; 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

-----X
TOORAKCAPITAL PARTNERS,LLC,

Plaintiff,

-against-

MGM PROPERTIES VENTURES LLC, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, NEWYORKCITY ENVIRONMENTAL
CONTROL BOARD, ZORLU CONSTRUCTION INC.

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 **August 20, 2025, at 10:40 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.

4/18/2025
DATE


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

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER,

REFERENCE