

Ottaviano v 215 W. 138th St. LLC

2025 NY Slip Op 32059(U)

June 6, 2025

Supreme Court, New York County

Docket Number: Index No. 850295/2024

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

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INDEX NO. 850295/2024

LAWRENCE OTTAVIANO,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

215 WEST 138TH STREET LLC, LEONARD BURNETT JR.,
WARREN REID, AMAL ELSHEEMY, NYC DEPT. OF
HOUSING PRESERVATION & DEVELOPMENT, CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD, JOHN
DOE AND JANE DOE, THE LAST TWO NAMES BEING
FICTITIOUS,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 71

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 a mortgage encumbering a parcel of residential real property located 215 West 138 Street, New York, New York. The mortgage at issue was given by Defendant Leonard E. Burnett, Jr. (“Burnett”) to Plaintiff. The mortgage secures a note with an original principal amount of \$495,000.00. On September 11, 2019, the parties executed a modification and extension agreement wherein, *inter alia*, Plaintiff consented to the conveyance of title to Defendant 215 West 138th Street, LLC (“215 West”) and substituted same as maker of the note. Assent by 215 West was granted by Defendant Warren A. Reid (“Reid”) as Managing Member. Plaintiff commenced this action wherein it pled in the complaint that Defendants defaulted in repayment of the indebtedness beginning on or about February 1, 2023. All Defendants defaulted in appearing. Now, Plaintiff moves for a default judgment against the non-appearing Defendants, to appoint a referee to compute and to amend the caption. Defendants 215 West and Reid oppose the motion and cross-move to vacate their default and/or compel Plaintiff to accept their late answer. 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 his affirmation which, along with the supporting documentation, 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]).

In support of the cross-motion, Defendants proffer the affirmation of Reid on behalf of both Defendants. Reid’s assertion that no mailing from the Secretary of State was ever received by 215 West 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]).

Regarding service on him individually, Reid’s affidavit contained nothing more than a conclusory denial of service which was insufficient to rebut the presumption of proper service (*see Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]; *see also Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819 [2d Dept 2019]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). The claim that the location where service was made only recently became his residence is inadequate since no evidence, documentary or otherwise, was proffered to corroborate this claim (*see Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591 [1st Dept 2020]; *U.S. Bank N.A. v Martinez*, 139 AD3d 548, 549 [1st Dept 2016]; *see also American Home Mtge. Acceptance, Inc. v Lubonty*, 188 AD3d 767 [2d Dept 2020]).

Absent a reasonable excuse, the Court need not determine whether Defendants 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, Defendants failed to establish the existence of a meritorious defense. Indeed, Reid acknowledges a default under the loan documents. The inclusion of Reid as an individual defendant is, at most, an innocuous mistake since the complaint does not contain a request for a deficiency judgment. 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-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 **Elaine Shay, Esq., 800 3rd Avenue, Ste. 2800, New York, New York 10022 (212) 520-2690** 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 defendants and the caption of this action be amended to reflect the removal of same; 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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LAWRENCE J. OTTAVIANO,

Plaintiff,

-against-

215 WEST 138TH STREET LLC, LEONARD E. BURNETT, JR., WARREN A. REID, AMAL ELSHEEMY, NYC DEPT. OF HOUSING PRESERVATION & DEVELOPMENT, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,

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

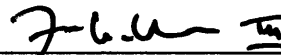
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/suptctmanh)); 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 **October 1, 2025, at 10:00 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.

6/6/2025

DATE



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

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