

NH Smith Lender, LLC v 232 Smith St. LLC
2021 NY Slip Op 31673(U)
May 11, 2021
Supreme Court, Kings County
Docket Number: 516709/20
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X
NH SMITH LENDER, LLC,
Plaintiff,

- against -

Index No. 516709/20

232 SMITH STREET LLC; LOUIS V. GRECO, JR.;
SECOND DEVELOPMENT SERVICES, INC.;
SDS LEONARD, LLC; MIDTOWN-REN
ENTERPRISE INC.; VANGUARD CONSTRUCTION
SOLUTIONS LLC; TRIBORO CONTRACTORS
SUPPLY CORPORATION; HIRANI ENGINEERING
& LAND SURVEYING P.C.; IDEAL STEEL SUPPLY
CORPORATION; ALL SEASONS LANDSCAPING TS
INC.; AHERN RENTALS, INC., and JOHN DOE
#1 through JOHN DOE #10 (said John Doe
Defendants being fictitious, it being intended
to name all other parties who may have some
interest in or lien upon the premises sought to be
foreclosed),

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____

64-72 84-90, 92
84-90, 92 91, 94

Upon the foregoing papers in this action to foreclose a mortgage on the real property at 232/240 Smith Street a/k/a 59/61 Douglass Street in Brooklyn (Property),

plaintiff NH Smith Lender, LLC (NH Smith) moves (in motion sequence [mot. seq.] two) for an order: (1) awarding it a default judgment against defendants 232 Smith Street LLC (232 Smith or borrower), Louis V. Greco, Jr. (Greco or guarantor), Second Development Services, Inc. (SDS or guarantor) and SDS Leonard, LLC (SDS Leonard or guarantor) for the relief sought in the complaint, including a judgment of foreclosure and sale, pursuant to CPLR 3215 (a), and (2) appointing a referee to ascertain and compute the amount due upon the note and mortgage being foreclosed and to determine whether the Property can be sold in parcels, pursuant to RPAPL 1321.

Defendants 232 Smith, Greco, SDS and SDS Leonard cross-move (in mot. seq. three), by order to show cause, for an order, pursuant to CPLR 5015 (a) (1), vacating their default in answering, allowing them to submit a late answer and denying NH Smith's motion for a judgment on liability.

Background

On September 8, 2020, during the COVID-19 pandemic, NH Smith commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. NH Smith seeks to foreclose on: (1) an Acquisition Loan Consolidated Mortgage on the Property, which secures a December 29, 2017 Acquisition Loan Consolidated Note in the amount of \$7,170,574.00 executed by the borrower; (2) a Building Loan Mortgage on the Property, which secures a December 29, 2017 Building Loan Note in the amount of \$2,946,021.00 executed by the borrower; and (3) a Project

Loan Mortgage on the Property, which secures a December 29, 2017 Project Loan Note in the amount of \$1,958,405.00 executed by the borrower.

The complaint alleges that “[p]ursuant to the terms of the Notes and Mortgages, all amounts due and owing under the Notes were due and payable in full on [the] December 29, 2018 [maturity date]” and “[b]orrower failed to pay all amounts due under the Notes on or before the Maturity Date” (complaint at ¶¶ 22 and 36). The complaint alleges that defendants Greco, SDS and SDS Leonard executed guarantees as further security for the loans (*id.* at ¶¶ 33-35). The complaint further alleges that there is now due and owing from borrower and/or the guarantors under the Notes, Mortgages and Guarantees the total amount of \$16,820,930.37 as of June 30, 2020 (*id.* at ¶ 45). The complaint asserts three causes of action for: (1) foreclosure asserted against all of the defendants; (2) breach of contract against the guarantors; and (3) a deficiency judgment against the borrower.

According to NH Smith’s affidavits of service in the record, defendants 232 Smith, SDS and SDS Leonard were served with process by service on the Secretary of State on September 9, 2020, and defendant Greco was personally served with process on September 9, 2020. The foregoing defendants failed to answer or otherwise respond to the complaint.

NH Smith’s Motion for a Default Judgment

On December 23, 2020, NH Smith moved for a default judgment against defendants 232 Smith, Greco, SDS and SDS Leonard and for the appointment of a

referee. NH Smith asserts that defendants 232 Smith, SDS and SDS Leonard's answer to the complaint was due on October 9, 2020, and defendant Greco's answer to the complaint was due on September 29, 2020. NH Smith's counsel asserts that "[t]he original deadline for each of the Defaulting Defendants to respond to the Complaint expired without Defaulting Defendants appearing or contacting Plaintiff or myself." NH Smith's counsel asserts that on November 19, 2020, he granted defendants an additional twenty days to respond to the complaint, making the new deadline December 9, 2020. On November 21, 2020, defense counsel filed a notice of appearance on behalf of defendants, which was electronically filed under NYSCEF Doc. No. 53, and on December 7, 2020, defense counsel re-filed his notice of appearance under NYSCEF Doc. No. 60. NH Smith's counsel claims that "[t]o date, the Defaulting Defendants have not responded to the Complaint."

In support of its motion for an order of reference, and to substantiate the allegations in the complaint, NH Smith submits an affidavit from Jonathan Kloos (Kloos), a principal of NH Smith. In addition to describing the loan documents, Kloos attests that borrower has defaulted under the loan documents in "numerous ways" including: (1) failing to pay all amounts due under the notes on or before the maturity date; (2) performing construction work at the Property in a dangerous and unsafe manner in violation of the New York State Building Code; (3) failing to complete the construction project by the Extended Schedule Completion Date; (4) failing to deliver possession of

the Property to a tenant, causing the lease to terminate; (5) allowing the recording of one or more mechanic's liens against the Property; and (6) failing to maintain a current builder's risk insurance policy.

Defendants' Cross Motion

Defendants oppose NH Smith's motion and cross-move for an order, pursuant to CPLR 5015 (a) (1), vacating their default and granting them leave to submit their proposed answer to the complaint.

Defendants submit their proposed, verified answer to the complaint, which denies the material allegations in the complaint, asserts affirmative defenses, including "payment" and the "maturity date" set forth in the complaint is wrong. Defendants' proposed answer also asserts counterclaims against NH Smith for: (1) breach of contract "by not timely funding the answering Defendants thereby hindering the development of the property . . ."; (2) breach of contract because it "improperly paid directly to . . . suppliers and Contractors . . . in excess of Five Hundred Thousand dollars . . ."; (3) "Plaintiff acted in bad faith during negotiations to settle any alleged default . . ."; (4) "Plaintiff misrepresented certain things, pertinent to the agreement and sought to be enforced herein by Plaintiff, to Defendants such as [their] willingness to settle disputes and mitigate spurious claims alleged by them"; (5) "Plaintiff interfered with the Answering Defendants' development process relevant to the development of [the Property]"; (6) "Plaintiff acted in bad faith and did not deal fairly with these answering

defendants”; and (7) “[b]y its misrepresentation and negligence, Plaintiff breached its alleged contract with the answering defendants and caused economic duress and injury” (proposed answer at ¶¶ 8, 11, 14, 17, 20, 23 and 26). Defendants proposed answer also asserts crossclaims against defendants Vanguard Construction Solutions LLC and Midtown-Ren Enterprise, Inc. for negligence.

Defense counsel asserts that “any default in [a]nswering was due to inadvertent law office failure and my client should not be punished for this.” Defense counsel explains that “[f]our things have combined to delay my submitting a timely Answer in the instant action . . .”: (1) at the age of 74, he has been suffering from a “severe case of depression” caused by self-quarantine for the COVID-19 pandemic, the delay in vaccinations and the loss of income; (2) Greco had to “quarantine because of contact with someone that tested positive for Covid 19 [and] this prevented him from getting to his documents and communicating necessary documents to me”; (3) “[t]he breakdown of my internet connection that resulted in missing and/or lost emails and other communications including E-FILE notifications”; and (4) “the crash of my client’s computer server; resulting in the mixing up of tens of thousands of files, the destruction of some and the loss of emails relevant to the instant proceeding.”

Defense counsel also explains that the alleged failure to satisfy the mortgage “occurred because of many reasons,” including “[a] tenant that was to have occupied the property opted out apparently because of the pandemic, the pandemic stopped

construction, and negligence by co-defendants herein caused the halt to any further construction because of the alleged damage to a neighboring building.” Defense counsel asserts that “allowing the Defendants to submit a late answer will benefit rather than harm Plaintiff” because defendants’ proposed answer contains crossclaims against those co-defendant contractors who are insured. Defense counsel also notes that “the value of the mortgaged property has . . . declined to only a small fraction of the money due under the mortgage.”

Defendants submit an affidavit from Greco, the Manager of both defendants 232 Smith and SDS Leonard, who attests that, due to the COVID-19 pandemic, he was “quarantined during a portion of the period when my attorney was trying to gain information from me to both Answer the allegations of the Complaint herein and oppose Plaintiff’s motion for a default judgment . . .” Greco further explains that “before, during and after my quarantine, because of technical problems . . . I could not retrieve information that my attorney requested.” Defendants also submit an affidavit from Christopher Greco, defendants’ IT manager, who attests that “[i]n April of 2020, the server holding the financial, real[] estate and legal documents of the Defendants . . . crashed[,]” “[f]inding a technician to make an office visit to fix the problem, took an extremely long time” and “the process of recovering files and verifying same is still ongoing . . .”

Defendants also submit defendant Greco’s affidavit to establish a meritorious

defense based on his assertions that: (1) “[w]ithout first checking to see if suppliers had delivered the proper items in the proper amounts, Plaintiff paid directly to said suppliers and Contractors in excess of Five Hundred Thousand dollars (\$500,000.00)”; (2) “Plaintiff did not timely or properly fund the project; thus hindering the development of the property and causing economic duress to Defendants . . .”; (3) “Plaintiff acted in bad faith during negotiations to settle any default . . .”; and (4) “Plaintiff misrepresented certain pertinent things to Defendants . . .”

NH Smith's Opposition

NH Smith, in opposition to defendants' cross motion, argues that “Defaulting Defendants were undoubtedly on notice of the Complaint as their counsel reached out via phone several times to request – and obtain – extensions of time to respond from Plaintiff.” While NH Smith's counsel acknowledges that “this past year has been atypical for everyone . . .” he questions the veracity of defense counsel's claim that his computers did not work during the COVID-19 pandemic. NH Smith's counsel also notes that defendants' payment default occurred well before the COVID-19 pandemic.

Discussion

A party seeking to vacate a default in appearing pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action” (*92-18 149th Street Realty Corp. v Stolzberg*, 152 AD3d 560, 562 [2017] [internal quotations omitted]). Furthermore, where a default in appearing results

from law office failure, the court may “exercise its discretion in the interest of justice to excuse delay or default . . .” pursuant to CPLR 2005 (*see JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048, 1049 [2014]).

Here, defendants have demonstrated a reasonable excuse for their default based on their counsel’s law office failure and difficulties resulting from the COVID-19 pandemic. Defendants have also established a potentially meritorious defense to this foreclosure action based on their claim that NH Smith did not timely or properly fund the construction project at the Property, which hindered the development of the Property and caused defendants to experience economic duress, and improperly paid suppliers and contractors \$500,000.00. In the court’s discretion, and in the interest of justice, defendants’ motion to vacate their default is granted since defendants’ failure to appear was neither willful nor deliberate, and this action should be determined on the merits.

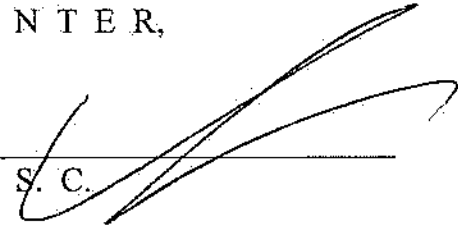
Accordingly, it is hereby

ORDERED that NH Smith's motion (mot. seq. two) for a default judgment against the moving defendants is denied as moot; and it is further

ORDERED that defendants' cross motion (mot. seq. three) is granted, defendants' default is vacated and their answer to the complaint shall be electronically filed and served upon all parties within 15 days after service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE