

NYCTL 2019-A Trust v Opulski
2021 NY Slip Op 32572(U)
November 30, 2021
Supreme Court, New York County
Docket Number: Index No. 158238/2020
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

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NYCTL 2019-A TRUST AND THE BANK OF NEW YORK MELLON, AS COLLATERAL AGENT AND CUSTODIAN, <p style="text-align: center;">Plaintiff,</p>	INDEX NO. <u>158238/2020</u> MOTION DATE _____ MOTION SEQ. NO. <u>001 002</u>
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- v -

ALEXIS OPULSKI, BEN BONAVENTURA, BOARD OF MANAGERS OF 207-209 EAST 120TH STREET CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK (NEW YORK), NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, AND JOHN DOE 1 THROUGH JOHN DOE 100, THE NAMES OF THE LAST 100 DEFENDANTS BEING FICTITIOUS, THE TRUE NAMES OF SAID DEFENDANTS BEING UNKNOWN TO PLAINTIFFS,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 72, 73

were read on this motion to/for APPOINT - REFEREE

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for MISCELLANEOUS

Upon the foregoing documents, the motions are determined as follows:

In this action to foreclose on a tax lien, Plaintiff moves for default judgment, for the appointment of a referee to compute and to amend the caption (Motion Seq No 1). Defendant Alexis Opulski ("Opulski"), an owner of the property, moves for an order: [1] excusing her default in timely answering, [2] compelling Plaintiff to accept her answer, [3] deeming the property and indebtedness the sole responsibility of Ben Bonaventura ("Bonaventura"), and [4] dismissing the complaint against Opulski for lack of personal jurisdiction. Plaintiff opposes the motion.

"An 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]). Plaintiff established *prima facie* its entitlement to a default judgment against all

non-appearing Defendants by submitting by submitting the subject tax lien certificate, which is presumptive evidence of a valid and enforceable lien, proof that the outstanding balance due under the lien was not paid, evidence that adequate notice of the sale of the tax lien was provided, and proof the property owners defaulted in appearing or answering (*see eg NYCTL 2009-A Trust v Morris*, 164 AD3d 1249 [2nd Dept 2018]; *NYCTL 1998-2 Trustee v 2388 Nostrand Corp.*, 69 AD3d 594 [2nd Dept 2010]).

Further, the affidavits of the process server demonstrated compliance with the requisites of CPLR §308 concerning service on Bonaventura by personal delivery and on Opulski by service on a person of suitable age and discretion (*see CPLR §308[1] and [2]*). As such, Plaintiff has proffered *prima facie* evidence of proper service giving rise to a presumption of proper service (*see Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]).

Accordingly, Plaintiff has demonstrated its entitlement to a default judgment against Opulski and the other Defendants.

“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]).

With respect to Opulski’s claim of lack of personal jurisdiction, “[a] process server’s affidavit of service constitutes *prima facie* evidence of proper service and, therefore, gives rise to a presumption of proper service” (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]). To rebut the presumption, a defendant may not rely on a conclusory denial of service, but rather must submit an affidavit substantiated by specific, detailed facts denying the process server’s allegations (*id.*; *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]).

Opulski’s affidavit is entirely insufficient on this point. Her entire explanation on this issue is as follows: “I have not resided at the premises in several years”. Presumably, Opulski is claiming that the location where the process server avers service was made on a person of suitable age and discretion was not her “dwelling place or usual place of abode” under CPLR §308[2]. Absent further detail and documentary corroboration, Opulski failed to rebut the presumption of proper service (*see BAC Home Loans Servicing, LP v Carrasco*, 160 AD3d 688 [2d Dept 2018]; *US Bank, N.A. v Peralta*, 412 AD3d 988 [2d Dept 2016]). Opulski’s assertion that the process server was required to attempt to locate where she worked or show a more diligent attempt to serve her personally is inapposite. Those issues are applicable to “affix and mail” service under CPLR §308[4], but not where, as here, the process server claims service was made upon a person of suitable age and discretion at Opulski’s usual place of residence (*see CPLR §308[2]*).

As support for a discretionary vacatur of her default, Opulski proffers as a reasonable excuse that pursuant to a judgment of divorce issued in a matrimonial action by Justice Jeffrey S. Sunshine dated July 31, 2018, Bonaventura, Opulski’s former husband, was made “solely responsible for the property”, including tax and common charge payments. At a conference with the Court pursuant to Administrative Order 157/20, Opulski’s counsel asserted that the only reason she had not transferred her interest in the property to Bonaventura was because full payment of the amount due for her interest was still outstanding. Opulski also claimed that the COVID-19 pandemic hampered her efforts to retain an attorney.

The above establishes neither a reasonable excuse nor a meritorious defense to the action (*see M&T Bank v Ronnermann*, ___AD3d___, 2021 NY Slip Op 06612 [2d Dept 2021]). There is no dispute that as of the time the motions were made, Opulski was a record owner of the property and, therefore, an indispensable party to this action (*see* RPAPL §1311[1]). Opulski also does not challenge the validity of the lien. That a judgment of divorce obligates Bonaventura to make payment of real estate taxes on the property simply gives rise to a potential claim by Opulski against Bonaventura if a deficiency judgment is entered against her.

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, Plaintiff's motion is granted and Defendant Opulski's motion is denied and it is

ORDERED that the motion for a default judgment against the Defendants is granted; 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 they are 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, 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 if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption of this action be amended to correct Plaintiff as Board Of Managers of 207-209 East 120th Street Condominium and to strike defendants Embrace Home Loans, Inc., and JOHN DOE No.1 through JOHN DOE No. 10, so that the action is hereby discontinued as against them; and it is further

ORDERED that the amended caption of the action appears as follows:

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

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NYCTL 2019-A TRUST and THE BANK OF NEW YORK
MELLON as Collateral Agent and Custodian,

Index No. 158238/2020

Plaintiff,
-against-

ALEXIS OPULSKI; BEN BONAVENTURA;
BOARD OF MANAGERS OF 207-209
EAST 120TH STREET CONDOMINIUM;
CRIMINAL COURT OF THE CITY OF
NEW YORK (NEW YORK); NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
NEW YORK CITY DEPARTMENT OF FINANCE;
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD; NEW YORK CITY PARKING VIOLATIONS
BUREAU and NEW YORK CITY TRANSIT AUTHORITY
TRANSIT ADJUDICATION BUREAU,

Defendants.

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and it is further

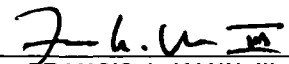
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; 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 **March 23, 2022 at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.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.

11/30/2021
DATE


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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NOTED IN DISPOSITION	<input checked="" type="checkbox"/>	HON. FRANCIS A. KAHN III
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	J.S.C.
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE