

CMGHOFF, LLC v Kondo Enters., Inc.

2022 NY Slip Op 32823(U)

August 19, 2022

Supreme Court, New York County

Docket Number: Index No. 850050/2022

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 KAHN, III PART **32**

Justice

-----X

INDEX NO. 850050/2022

CMGHOFF, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

KONDO ENTERPRISES, INC., BOARD OF MANAGERS OF
THE PLAZA CONDOMINIUM, JOHN DOE #1 THROUGH
JOHN DOE #20

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a mortgage encumbering a parcel of real property located at 768 5th Avenue, Unit 1126, New York, New York given by Defendant Kondo Enterprises, Inc. (“Kondo”) and non-party 2904 Carbonell LLC (“Carbonell”).¹ The mortgage secures a note which evidences a loan with an original principal amount of \$1,825,000.00. The note and mortgage were executed on by non-party Jose Benito La Cruz (“La Cruz”), as President of 140 West and Member of Carbonell. Plaintiff commenced this action wherein it is alleged Defendant Kondo defaulted in repayment of the subject note. Plaintiff filed an affidavit of services wherein the process server attests that Defendant Kondo was served via the New York Secretary of State pursuant to BCL §306.

Now, Plaintiff moves for a default judgment against all defendants, an order of reference and to amend the caption. Defendant Kondo 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 has established *prima facie* its entitlement to a default judgment against Defendants by submitting proof of the mortgage, the unpaid note, notice of default, proof of service on each Defendant as well as proof of their failure to appear or answer (*see* CPLR §3215[f]; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]). Accordingly, Plaintiff has demonstrated its entitlement to a default judgment against Kondo, as well as the other Defendants.

¹ The mortgage originally encumbered an additional parcel of real property located at 250 E. 53rd Street, Unit 1901, New York, NY, but according to paragraph 14 of the complaint “on July 6, 2021, pursuant to that certain Partial Release of Mortgage, Plaintiff released 2904 Carbonell LLC from its obligations under the Loan Documents and [this] Parcel I (as defined in the Mortgage) from the Mortgage.”

“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]).

Defendant Kondo’s proffered excuse, that its president La Cruz was in Venezuela and purportedly unreachable due to the limited and archaic technological infrastructure there, is insufficient. At the outset, La Cruz does not expressly state he was in Venezuela when service was made. At best, this is discernable by implication and from the affidavit of Ricardo E. Pines (“Pines”), Kondo’s registered agent for service of process. Further, absolutely no corroborating documentation of this claim was proffered (*see 305 MK Secure Holdings, LLC v Jiang Chen*, 59 Misc. 3d 144[A][App Term 1st Dept 2018]; *cf. Wells Fargo Bank, N.A. v Gore*, 162 AD3d 437 [1st Dept 2018]). Pines, an attorney admitted to practice in Florida, does not explain why he failed to file an answer on behalf of Kondo. He also fails to address any efforts made to contact Plaintiff to obtain an extension of time to answer despite his receipt of the summons and complaint on March 7, 2022, well before Kondo’s time to appear expired (CPLR §320).

Defendant has also demonstrated no potential meritorious defense to the action. No claim is made that the loan is not in default or the existence of any other viable affirmative defense. Defendant’s claim that it is entitled to an accounting under the terms of the mortgage is factually incorrect. Paragraph 32 of the mortgage provides that the “Mortgagee agrees that it will, on request of the Mortgagor furnish a written statement of the amount owing on the obligation which this Mortgage secures and therein state whether or not Borrower is current in its payments and whether Mortgagee has knowledge of any defaults hereunder specifying therein the nature of such defaults, if any”. This provision seems to entitle Kondo to a payoff letter, but it does make this obligation a pre-requisite to acceleration of the debt.

The branch of Plaintiff’s motion for a default judgment against the 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 without opposition (*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 branch of the motion for a default judgment against all Defendants is granted; and it is

ORDERED that **Hayley Greenberg, 521 5th Avenue, Suite 1700, New York, NY 10175, (212) 593-6111** is hereby appointed Referee in accordance with RPAPL § 1321 to 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, 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 be amended strike from the caption of this the names of "JOHN DOE #1" through "JOHN DOE #20" as party Defendants; 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
CMGHOFF, LLC,

Plaintiff,
-against-

KONDO ENTERPRISES, INC.; BOARD OF

MANAGERS OF THE PLAZA
CONDOMINIUM,

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 **December 7, 2022 at 10:20 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.

8/19/2022
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

J. A. Kahn III

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

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