510 Ninth Ave Funding LLC v Eureka Realty Corp.
2022 NY Slip Op 33228(U)
September 21, 2022
Supreme Court, New York County
Docket Number: Index No. 850219/2021
Judge: Francis A. Kahn III
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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. 850219/2021

MOTION DATE ________

MOTION SEQ. NO. 002

510 NINTH AVE FUNDING LLC,

Plaintiff,

- v -

EUREKA REALTY CORP., SILVIA MIGHTY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY OF NEW YORK DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, JOHN DOE 1 THROUGH JOHN DOE 100

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for APPOINT - REFEREE.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a commercial mortgage given by Defendant Eureka Realty Corp. ("Eureka") which encumbers real property located at 510 9th Avenue, New York, New York. The mortgage secures a note which evidences a loan with an original principal amount of $2,100,000.00. The note and mortgage were executed by Defendant Silvia Mighty ("Mighty") as Authorized Signatory of Eureka. Mighty admits she is the "sole shareholder, corporate officer and principal of Eureka". Concomitantly with these documents, Mighty executed an unconditional guaranty of the indebtedness. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment of the subject note. Defendants defaulted in appearing or answering.

Now, Plaintiff moves for a default judgment against all defendants, an order of reference and to amend the caption. Defendants Eureka and Mighty oppose the motion and cross-move to vacate their default pursuant to CPLR §§317, 5015[a][1] and 5015[a][4], to compel Plaintiff to accept a late answer pursuant to CPLR §3012[d], vacating the appointment of a Receiver, denying the Receiver's motion for leave to retain a managing agent (Mot. Seq. 3), dismissing Plaintiff's complaint pursuant to CPLR §3211[a][8] and [10], dismissing Plaintiff's complaint pursuant to CPLR §3211[a][2] and the COVID-19 Emergency Protect Our Small Business Act of 2021, to cancel the notice of pendency and for an award of attorney's fees. Plaintiff opposes the cross-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]). 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 against Eureka, Mighty and the other 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]; *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]). Similarly, to vacate a default in appearing or answering, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see* CPLR §5015[a][1]; *Karimian v Karlin*, 173 AD3d 614 [1st Dept 2019]; *Needleman v Chaim Tornhein*, 106 AD3d 707 [2d Dept 2013]). However, a defendant is not required to meet these requisites if there is a lack of jurisdiction (*see* CPLR §5015[a][4]; *Avis Rent A Car Sys., LLC v Scaramellino*, 161 AD3d 572 [1st Dept 2018]). Thus, a court is required to resolve the jurisdictional issue before considering whether to grant a discretionary vacatur of the default (*see eg Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 779 [2d Dept 2017]; *Caba v Rai*, 63 AD3d 578, 581, n.1 [1st Dept 2009]).

Defendants' assertion that Eureka was not properly served is without merit. "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]). Plaintiff filed two affidavits of service attesting to service of the summons and complaint on Eureka. In the affidavit dated September 16, 2021, the process server avers that on that date he served, among other things, a summons and verified complaint, by delivering it to an authorized agent of the New York State Secretary of State. This affidavit is sufficient on its face to establish a presumption of proper service on Eureka pursuant to BCL §306 (*see eg Residential Bd. of Managers v Rockrose Dev. Corp.*, 17 AD3d 194 [1st Dept 2005]). Plaintiff also filed an affidavit of service from Joseph Donovan, dated September 23, 2021, wherein he avers that he personally delivered, among other things, a summons and verified complaint to Mighty at the mortgaged premises. Donovan also attests that the same documents were delivered by certified mail to the same address. This affidavit is sufficient on its face to establish a presumption of proper service on Eureka pursuant to CPLR §311 (*see Hayden v Southern Wine & Spirits of Upstate N.Y., Inc.*, 126 AD3d 673 [2d Dept 2015]).

To rebut this presumption and be entitled to a hearing, an affidavit of the person served containing a nonconclusory denial of service which specifically contradicts the process server's version of events must be proffered (*see Bank of Am., N.A. v Diaz*, 160 AD3d 457, 458 [1st Dept 2018]; *NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). As to the service under BCL §306, "Defendant does not dispute that it breached its obligation to update its address with its registered agent, which led to its failure to receive service of process" (*Salish Lodge LLC v Gift Mgt. Inc.*, 192 AD3d 410, 411 [1st Dept 2021]). This is not a viable excuse which defeats service (*see Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407 [1st Dept 2020]). Concerning the service on September 22, 2021, Mighty submitted an affidavit wherein she claimed "[n]one of this occurred on the date, nor at the time claimed in Mr. Donovan's affidavit, nor at any other time". Mighty also claimed the process

server's description of the recipient was distinct from her appearance and she denied receipt of the certified mailing. Mighty's denial of in hand receipt of the pleadings is entirely conclusory and insufficient to defeat the process server's affidavit (*see Wells Fargo Bank, N.A. v Tricarico*, 139 AD3d 722, 723 [2d Dept 2016]). The claimed discrepancies in the appearance of the recipient and Mighty are both too minor and entirely unsubstantiated (*see PNC Bank, N.A. v Bannister,* 161 AD3d 1114, 1116 [2d Dept 2018]; *cf. Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2d Dept 2013]). Moreover, the naked denial of receipt of the mailing 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]).

As to service on Mighty, Plaintiff filed an affidavit, dated October 1, 2021, in which a process server, Calvin Chen, who attested that service of the summons and complaint and other documents was made on Mighty by personal delivery at 120-32 167th Street, Jamaica, New York at 1:29 pm on September 25, 2021. The affidavit also contained an alleged physical description of Mighty as female with Black skin and hair, between the ages of 50-59 who is five feet to five foot three inches in height and weighing 125 to 149 lbs. This constitutes prima facie proof of service on Mighty pursuant to CPLR §308[1] (*see HSBC Bank USA v Archer*, 173 AD3d 984, 985 [2d Dept 2019]).

Mighty submitted an affidavit wherein she again denied personal delivery of the pleadings. She claimed the service, this time by Chen, "did not happen" and claimed she did not match the description in the process server's affidavit. Unlike the claims made on behalf of Eureka, Mighty asserted "I was not served with the summons and complaint in the above-captioned action". She went on to expressly deny being at the premises on the day and time of the alleged service and claimed that she was at the mortgaged premises instead. The claimed discrepancies in appearance are, like before, both too minor and entirely unsubstantiated (*see PNC Bank, N.A. v Bannister,* supra). However, Mighty's express denial of receipt of the pleading coupled with the claim she was not at the premises sufficiently rebuts the process server's affidavit and requires a hearing on the sufficiency of the September 25, 2021 service (*see American Home Mtge. Servicing, Inc. v Gbede*, 127 AD3d 1004, 1005 [2d Dept 2015]).

Based on the foregoing, the branch of Plaintiff's motion for a default judgment against Mighty, as well as the branches of Defendants cross-motion to vacate Mighty's default, to compel acceptance of her answer, to dismiss pursuant to CPLR §3211[a][8] and for an award of attorney's fees are held in abeyance until the final resolution of a traverse hearing.

To the extent Eureka seeks to vacate its default in appearing pursuant to CPLR §5015[a][1], it has not proffered any reasonable excuse for failing to appear or answer. By steadfastly denying any notice of this action, despite sworn affidavits, one showing personal delivery of the pleadings, and three mailings of the pleadings, no other credible explanation for failing to answer could be proffered. Absent a reasonable excuse, the Court need not determine whether Eureka has presented a meritorious defense to the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). For the same reasons, the branch of the motion to compel Plaintiff to accept a late answer from Eureka 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"]).

Eureka also seeks to vacate its default under CPLR §317 which provides that if the 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]).

Although service on Eureka pursuant to BCL §306 did not constitute personal delivery within the meaning of CPLR §317 (*see eg Figueroa v Relgold*, 178 AD3d 425, 426 [1st Dept 2019]), the unrebutted service of the pleadings on Mighty, the sole corporate officer, was personal delivery to Eureka (*see Fernandez v Morales Bros. Realty, Inc.* 110 AD3d 676 [2d Dept 2013]). This unrebutted service likewise demonstrates Eureka did receive notice in time to defend the action. Also unrebutted were the two instances of mail service, one contained in the affidavit of service dated September 23, 2021 establishing delivery pursuant to CPLR §311, and the other in an affidavit of service, dated September 29, 2021, attesting to an additional mailing of the summons to Mighty pursuant to CPLR §3215[g][3][i]. Although the latter mailing was not technically made to Eureka, it is sufficient proof that its sole shareholder and officer was on notice of the action in time to defend.

Additionally, Eureka failed to raise a potential meritorious defense to the action. To demonstrate a meritorious defense, the movant must tender "an affidavit from an individual with knowledge of the facts" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]). The affidavit must make satisfactory factual allegations; it must do more than merely make "conclusory allegations or vague assertions" (*see Gorman v English*, 137 AD3d 556 [1st Dept 2015][internal citations omitted]). Ultimately, "[t]he determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (*see U.S. Bank Natl. Assn. v Sachdev*, 128 AD3d 807, 807-808 [2d Dept 2015]).

The proposed answer annexed to the cross-motion that contained numerous affirmative defenses is insufficient as it is not verified by a person with knowledge of the facts (*see Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 708 [2d Dept 2013]). On the other hand, Eureka's affidavit, sworn to by Mighty, is made by a person with knowledge. Only two proposed defenses are raised therein to wit Plaintiff's non-compliance with COVID-19 Emergency Protect Our Small Business Act of 2021 (L. 2021, c. 73) ("CEPOSBA") and financial hardship incurred as a result of the pandemic.

Cross-movants reliance on the CEPOSBA as a potential defense is inapposite. Defendants posit that dismissal of this action is mandated for failure to comply with Sections 4 and 6 of part B, subpart A of the CEPOSBA. Section 4 requires, in part, that the "foreclosing party shall include a 'Hardship Declaration' in 14-point type, with every notice provided to a mortgagor pursuant to sections 1303 and 1304 of the real property actions and proceedings law". Section 6 states that "[n]o court shall accept for filing any action to foreclose a mortgage unless the foreclosing party or an agent of the foreclosing party files an affidavit" attesting to service of a hardship declaration and that the lender did not receive same from the mortgagor. This action was commenced on September 10, 2021, while this legislation was still in effect, and Defendants claim that Plaintiff failed to meet these requirements.

Putting aside Plaintiff's claim CEPOSBA is inapplicable and/or whether it complied therewith, the question to be attended is whether dismissal of the action is required for violation of same. The Court is mindful that, when interpreting CEPOSBA, "remedial statutes are liberally construed to carry out the reforms intended and to promote justice" (McKinney's Statutes §321). Nevertheless, the Court must also ensure that "[a]ll parts of [the] statute [are] harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof" (McKinney's Statutes §98).

Concerning a remedy for failure to adhere to the Act, it is important to note that CEPOSBA does not mandate dismissal for non-compliance. Other statutes using mandatory terms like "shall" (*see eg* RPAPL §§1303, 1304; RPL §§232-a, 735[1]; VTL §313; GML §50-e) and with remedial purposes have been interpreted to be conditions precedent with a consequence of dismissal of the action for non-compliance (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]). Unlike those statutes, CEPOSBA appears to contain a cure provision in Section 6 when a mortgagor has not received a hardship declaration which states:

> If the court determines a mortgagor has not received a hardship declaration, then the court shall stay the proceeding for a reasonable period of time, which shall be no less than ten business days or any longer period provided by law, to ensure the mortgagor received and fully considered whether to submit the hardship declaration.

Having enacted the foregoing as a remedy as opposed to mandatory dismissal would seem consistent with the intended "limited" and "temporary" nature of the legislation (*see* CEPOSBA section 3 ["Legislative intent . . . As such, it is necessary to *temporarily* allow small businesses impacted by COVID-19 to remain in their place of business. A *limited, temporary* stay is necessary to protect the public health, safety and morals of the people the Legislature represents from the dangers of the COVID-19 emergency pandemic] [emphasis added]). That legislative intent differs from the other cited statutes enacted as more permanent solutions to perceived ills. For example, the Home Equity Theft Prevention Act (RPL §265-a) and its statutory progeny were enacted to serve enduring social policies (RPL §265-a[1][b]["it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership"]).

To the extent Defendants' assert Eureka's financial hardship brought about by the COVID-19 pandemic, in and of itself, is a defense to the foreclosure action is misplaced. It is well established that appeals to a Court's exercise of equity and for sympathy are unavailing as application of the former in foreclosure proceedings is rare and the latter cannot undermine the stability of contractual relations (*see L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, 188 AD3d 1180 [2d Dept 2020]). Parenthetically, the Court notes that the loan documents herein were executed on April 22, 2020, over a month after the virtual closure of New York City due to the pandemic was implemented.

The branch of Defendants' cross-motion to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][2] and CEPOSBA is denied based on the reasoning above as is the branch of the motion to vacate the notice of pendency.

The branch Defendants' cross-motion to dismiss for failure to join a necessary party pursuant to CPLR §3211[a][10] is denied. With dismissal of the complaint against Eureka denied, only the absence of Mighty as a party, should personal jurisdiction be found lacking, could serve as a basis to dismiss under CPLR §3211[a][10]. Nevertheless, even assuming her absence from this action would not require dismissal on that basis. Mighty, as "[a] guarantor of the mortgage debt, while not a necessary party, is a permissible party in a mortgage foreclosure action" (2 Bergman, New York Mortgage Foreclosures §12:13[2]; *see also Trustco Bank, N.A. v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797 [3d Dept 1998]; *Bank of E. Asia v Smith*, 201 AD2d 522, 523 [2d Dept 1994]; *Morrison v Slater*, 128 AD 467, 468 [1st Dept 1909]).

The branch of Defendants' cross-motion to vacate the appointment of the receiver is denied. Plaintiff established its entitlement to the appointment of a receiver of the mortgaged premises (*see eg CSFB 2004-C3 Bronx Apts LLC v. Sinckler, Inc.*, 96 AD3d 680 [1st Dept 2012]) and Defendants have not demonstrated that vacating that appointment is an appropriate exercise of the Court's discretion (*see eg Shaw Funding, LP v Bennett*, 185 AD3d 857, 858 [2nd Dept 2020]; *Nechadim Corp. v Simmons*, supra; *Naar v IJ Litwack & Co.*, 260 AD2d 613 [2d Dept 1999]). The branch of Defendants' motion to deny the appointment of a managing agent for the Receiver will be treated as opposition to Motion Sequence Number 3.

The branch of Plaintiff's motion for a default judgment against the parties who have not opposed the motion 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 this matter is set down for an in-person Traverse hearing on **November** 29, 2022 **@ 2:15pm** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street, New York, New York Any evidence to be submitted shall be efiled with any certification by November 1, 2022, and it is

ORDERED that the branch of Plaintiff's motion for default judgment is granted against Defendant Eureka, but held in abeyance against Defendant Mighty, and it is

ORDERED that the branch of Plaintiff's motion for appointment of a referee to compute is held in abeyance, and it is

ORDERED the branches of Defendants' cross-motion to vacate Mighty's default, to compel acceptance of her answer, to dismiss pursuant to CPLR §3211[a][8] and for an award of attorney's fees are held in abeyance, and it is

ORDERED that the branches of Defendants' cross-motion to vacate Eureka's default pursuant to CPLR §§317, 5015[a][1] and 5015[a][4], to compel acceptance of a late answer pursuant to CPLR §3012[d], to vacate the appointment of a Receiver, to dismiss the complaint pursuant to CPLR §3211[a][2] and [10] as well as the COVID-19 Emergency Protect Our Small Business Act of 2021 and to cancel the notice of pendency are denied.

9/21/2022
DATE

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

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE