

Morgan v Greig

2023 NY Slip Op 31498(U)

May 2, 2023

Supreme Court, New York County

Docket Number: Index No. 159296/2022

Judge: Mary V. Rosado

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. MARY V. ROSADO PART **33M**

Justice

-----X

MICHAEL MORGAN

Plaintiff,

- v -

ARTHUR GREIG,

Defendant.

-----X

INDEX NO. 159296/2022

MOTION DATE 01/27/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, Plaintiff Michael Morgan’s (“Plaintiff” or “Morgan”) motion for default judgment against Defendant Arthur Greig, Esq. (“Defendant” or “Greig”) is denied without prejudice. This case has a complicated underlying action with a multi-year history. The history of the underlying action, which was only disposed of in March 2022, is pertinent to the Court’s decision in denying default judgment and is therefore set forth below. The overwhelming majority of the pertinent history and prior Court filings are not annexed as exhibits to Plaintiff’s motion for default judgment, which constitute serious omissions regarding Plaintiff’s entitlement to the money he seeks.

The underlying action is captioned *NYCTL 2014-A Trust v Morgan, Michael Brett, et. al.*, Index No: 650980/2015 (Sup. Ct., N.Y. Co.) (the “Underlying Action”). The Underlying Action was a tax lien foreclosure on property owned by Morgan. In the Underlying Action, there were numerous other Defendants besides Morgan because they were determined to possibly have a mortgage lien, judgment lien, or possible interest against the property which was subordinate to

Plaintiff's lien. Because Morgan allegedly defaulted on a tax lien of \$51,184.62, the tax lien foreclosure action was initiated.

Morgan defaulted in the Underlying Action, and in a Decision and Order signed by Justice Joan M. Kenney, dated May 17, 2016, a referee was appointed. Greig was appointed as the referee. In a report dated July 1, 2016, Greig determined that Morgan owed \$61,353.34, plus interest, as of May 19, 2016. Plaintiffs in the Underlying Action then moved for a judgment of foreclosure and sale, which was granted and entered by the Clerk of the Court on December 1, 2016.

On June 19, 2019, Morgan finally appeared in the foreclosure action, after the property had been sold, and moved to set aside the judgment rendered on November 29, 2016. That motion was opposed, and ultimately denied in a Decision and Order dated September 24, 2019, signed by Justice Arlene P. Bluth.

Then, by notice of motion dated January 21, 2020, Morgan moved to have \$607,921.39 which was supposedly deposited with the Clerk of the Court as surplus money from the foreclosure sale, to be disbursed to Morgan. That motion was denied in a Decision and Order dated February 24, 2020, by Justice Bluth, because there was no affirmation, and because there were "many defendants in this action, all of whom might have claims senior to Morgan's claim to the surplus monies. Without an affirmation, the Court simply cannot direct the more than \$600,000 in surplus funds to be paid to Morgan."

On February 28, 2020, Morgan moved again for the same relief. That motion was denied with leave to renew by Justice Francis A. Kahn, III in a Decision and Order dated March 30, 2020. Justice Kahn held that he could not disburse any surplus money without "a proper voucher for the surplus moneys showing that they have been paid into court, a certificate of the clerk specifying

the notices of claim to the surplus moneys, if any, so filed with him, and an affidavit showing any other unsatisfied lien on the property” pursuant to RPAPL § 1355(2).

On August 3, 2021, Morgan then moved for an order compelling Greig to pay the proceeds of the foreclosure sale into Court. According to an affidavit from Morgan’s attorney, various court personnel stated that Greig never deposited the surplus funds into the Court as required by the RPAPL. There was no opposition to this motion. In a Decision and Order dated February 1, 2022, Justice Kahn ordered Greig to immediately deposit all surplus monies in his possession with the Court, and instructed all parties, including Greig, to appear for a status conference on March 9, 2022. According to an order dated March 9, 2022, and signed by Justice Kahn, no party appeared for the status conference, and Justice Kahn ruled that the action remained disposed. Justice Kahn also instructed that “any further relief from this Court must be sought by motion on notice to all parties.”

The last document on the docket in the Underlying Action is a letter from Morgan’s attorney dated March 14, 2022. Morgan’s attorney apologized for not attending the March 9, 2022 conference and blamed the non-attendance on technical difficulties. However, thereafter, Morgan never complied with Justice Kahn’s directive that “any further relief from this Court must be sought by motion on notice to all parties.” Indeed, Morgan never moved to hold Greig in contempt for failure to abide by Justice Kahn’s Decision and Order, nor did Morgan seek any other relief in the Underlying Action.

Rather, Morgan initiated this action on October 31, 2022, asking this Court, in a twelve paragraph Complaint, to award Morgan damages of \$607,921.39 against Greig for breach of fiduciary duty, conversion, or negligence (*see* NYSCEF Doc. 1). Morgan then moved for default judgment against Greig on January 27, 2023 (NYSCEF Doc. 2).

There is no affidavit from Morgan attached, although he did verify the allegations in the Complaint. Missing from the verified pleadings are any allegations that Morgan is first in line to recoup the \$607,921.39 in surplus funds. As noted by Justice Bluth in her decision in the Underlying Action, there may be other lien holders who are entitled to disbursement of the \$607,921.39 before Morgan. The lack of any documentation as to who else might be entitled to the \$607,921.39 was also a reason why Justice Kahn denied Morgan's second motion seeking disbursement of the funds. Indeed, as stated by Justice Kahn, Morgan is solely "the purported owner of the equity of redemption" and Morgan was not entitled to the surplus funds without "notices of claim to the surplus moneys, if any...and an affidavit showing any other unsatisfied lien on the property" pursuant to RPAPL § 1355(2).

Morgan also omits from the instant motion that he was ultimately denied the relief he seeks in this action for his failure to appear for a Court Conference and was directed to file a motion for any relief he sought in the Underlying Action, on notice to all parties in the Underlying Action. The Court cannot now grant Morgan default judgment in this action after he disobeyed and attempted to circumvent Justice Kahn's decision and order in the Underlying Action. Indeed, in this action, there has been no notice provided to the numerous other Defendants named in the Underlying Action who may have superior claims to the \$607,921.39. It is inappropriate for Morgan to seek to vacate his default in the Underlying Action by initiating a new action here (*see* CPLR § 5015(a)(3); *Silvar v Commissioner of Labor of State*, 175 AD3d 95, 101 [1st Dept 2019]; *Peter C. v Lisa F.*, 118 AD3d 631, 631-632 [1st Dept 2014]; *In re New York Diet Drug Litigation*, 47 AD3d 586 [1st Dept 2008] ["remedy for fraud allegedly committed during the course of a legal proceeding must be exercised in that lawsuit...and not by another plenary action collaterally attacking" the underlying judgment]).

In any event, the Court finds that Morgan's failure to show sufficient proof that there are no other lien holders who are entitled to the \$607,921.39 surplus funds mandates denial of default judgment. An applicant for default judgment against a defendant must submit: (i) proof of service of the summons and complaint, (ii) proof of the facts constituting the claim, and (iii) proof of the defaulter's failure to appear (*PV Holding Corp v AB Quality Health Supply Corp*, 189 AD3d 645 [1st Dept 2020]). Affidavits submitted in support of a motion for default judgment only need to allege enough facts to allow a court to assess where a viable cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Morgan's failure to provide supporting evidence that there are no other lien holders who hold superior title to the \$607,921.39 in surplus funds is insufficient to meet the requirements of CPLR 3215(f) (*see also Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Feffer v Malpeso*, 210 AD2d 60 [1st Dept 1994] ["CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action."]) quoting 4 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 3215.22-3215.27)).

Therefore, as the Court does not have before it proof that there are no other lien holders, and because other courts have repeatedly denied him entitlement to the \$607,921.39 at issue for failure to provide necessary documentation, the instant motion is denied. If it is true that Defendant Greig is improperly holding the \$607,921.39, then that is a gross violation of his duties as Court Appointed Special Referee. However, as Morgan was seeking relief against Greig in the Underlying Action, which is the action where Greig remains the Court Appointed Referee, and where all other potentially interested parties are involved in the proceedings, that action is the more appropriate forum for Morgan to seek recoupment of the \$607,921.39.

Accordingly, it is hereby,

ORDERED that Plaintiff Michael Morgan's motion for default judgment against Defendant Arthur Greig, Esq. is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>5/2/2023</u> DATE		<u>Mary V Rosado JSE</u> MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE