

MF1 2022-FL9 LLC v Haikins
2025 NY Slip Op 32591(U)
July 9, 2025
Supreme Court, New York County
Docket Number: Index No. 654647/2023
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48-----X
MF1 2022-FL9 LLC,

Plaintiff,

- v -

SHMUEL HAIKINS, JOSEPH RUBIN, BARUCH C.
MANIES, FRED P. SCHWARTZ, SUSAN HOFFMAN,Defendant.
-----XINDEX NO. 654647/2023

MOTION DATE _____

MOTION SEQ. NO. 002 003**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 66, 68, 69, 70, 71, 72, 78, 84, 86

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 73, 74, 75, 76, 77, 79, 82, 83, 87

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In motion sequence number 002, defendant Joseph Rubin moves pursuant to CPLR 5015(a)(1) and (4), CPLR 317, and CPLR 2004 to vacate the court's April 10, 2024 Decision and Order granting plaintiff MF1 2022-FL9 LLC's (MF1) motion for summary judgment in lieu a complaint in the absence of opposition (3213 Decision) on the ground that Rubin was not properly served and to stay entry of the proposed judgment filed on April 18, 2024 (Proposed Judgment).¹

In motion sequence number 003, defendants Baruch C. Manies, Fred P. Schwartz and Susan Hoffman (collectively, Ohio Defendants) move to (1) vacate the

¹ The Proposed Judgment was "returned for correction" by the County Clerk because of the TRO staying entry of the judgment as to Rubin, Manies, Schwartz, and Hoffman. (NYSCEF 30, Proposed Judgment; NYSCEF 41 & 65, OSC with TRO [mot. seq. nos. 002 & 003].)

3213 Decision, (2) stay the entry of the Proposed Judgment, and (3) deem MF1's CPLR 3213 moving papers a complaint.

Background

On June 17, 2022, nonparties Sterling Apartments FL LLC, Sterling Apartments FL TIC II LLC, and Sterling Apartments FL TIC III LLC (collectively, Borrowers) entered into a Multifamily Loan and Security Agreement with nonparty MF1Capital LLC (Original Lender),² MF1's predecessor-in-interest, to obtain a loan of \$46,000,000 (Loan Agreement). (NYSCEF Doc. No. [NYSCEF] 4, Loan Agreement; NYSCEF 3, Ramsey³ aff ¶ 4-9.) The loan is secured by a Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, encumbering the property located at 2055 Center Avenue Fort Lee, New Jersey (Mortgage). (NYSCEF 6, Mortgage.) Defendants Shmuel Haikins, Rubin, Manies, Schwartz, and Hoffman (collectively, Guarantors) executed a Guaranty of Recourse Obligations of Borrower (Guaranty), guaranteeing the loan. (NYSCEF 7, Guaranty.) The Borrowers defaulted, and in 2023, MF1 commenced a foreclosure action against them in the Superior Court of New Jersey, Bergen County, captioned *MF1 2022-FL9 LLC v Sterling Apartments FL LLC, et al.*, Docket No. F-003924-23; the New Jersey Court granted summary judgment in MF1's favor and remanded the matter to Foreclosure Unit to proceed uncontested. (NYSCEF 74, Summary Judgment Decision [New Jersey Foreclosure Action].)

² Original Lender executed a general assignment which transferred his rights, title and interest in the loan to MF1 Reit II-A, L.L.C. (Interim Holder), then Interim Holder transferred its rights, title and interest to MF1. (NYSCEF 9, Interim Holder General Assignment; NYSCEF 11, MF1 General Assignment; NYSCEF 3, Ramsey aff ¶ 23, 32.)

³ Christopher Ramsey is a portfolio manager at CBRE Loan Services, Inc., MF1's servicer. (NYSCEF 3, Ramsey aff ¶ 1.)

On September 21, 2023, MF1 initiated this action by filing a summons and motion for summary judgment in lieu of complaint. On April 10, 2024, the court granted the motion for summary judgment in lieu a complaint in the absence of opposition against all defendants in the amount of \$46,136,700.55. (NYSCEF 28, Decision and Order [mot. seq. no. 001].) Rubin, Manies, Schwartz, and Hoffman did not appear in this action until May 2024. Haikins has yet to appear.

Discussion

Motion Sequence 002

Service

CPLR 5015 empowers the court to “relieve” a party from a judgment on the grounds of excusable default (CPLR 5015 [a][1]) and “lack of jurisdiction to render the judgment or order” (CPLR 5015[a][4]). “When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a)(1).” (Roberts v Anka, 45 AD3d 752, 753 [2d Dept 2007] [citation omitted], *lv dismissed* 10 NY3d 851 [2008].)

Rubin asserts that MF1 failed to properly serve him at two different locations – at an office located at 36 Airport Rd, S206, Lakewood, NJ 08701, where Rubin no longer operated from or worked (Lakewood Office), and at his home in Howell Township, New Jersey via Rubin’s 12 year-old son.

Section 6.04 of the Guaranty provides that “[a]ll notices required or permitted hereunder shall be given and shall become effective as provided in the Loan

Agreement. Notices to Guarantor shall be sent to it at its address given in or pursuant to the First paragraph hereof.” (NYSCEF 7, Guaranty at 9⁴ [§6.04].) Pursuant to Section 6.13 (b) of the Guaranty, the Guarantors agreed that service of any summons and complaint or any other process in any such action “may be made by registered or certified mail” at the Guarantor’s address listed in the Guaranty, waiving personal service. (*Id.* at 10 [§6.13].) However, MF1 did not comply with this option because it sent the documents to the Lakewood Office via first class mail and not certified or registered mail as required by Section 6.13 of the Guaranty. (*Id.*; NYSCEF 25, Affidavit of Service [office] [“First class mailing was completed on September 29, 2023 by depositing the above listed documents in a USPS Mailbox in an envelope marked personal and confidential”].)

Nevertheless, MF1 argues that it complied with the service requirements of CPLR 308 (2), which provides that personal service may be made

“by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other.”

An affidavit of service is prima facie evidence of proper service pursuant to CPLR 308 (2). (*JP Morgan Chase Bank v Dennis*, 166 AD3d 530, 530 [1st Dept 2018] [citation omitted].) “To rebut this prima facie showing, defendant [is] required to submit

⁴ NYSCEF pagination.

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a sworn, nonconclusory denial of service or swear to specific facts to rebut the statements in the process server's affidavit.” (*Id.* at 531 [citations omitted].)

One of the affidavits of service submitted by MF1 evidences that the summons, notice of motion for summary judgment in lieu of complaint and supporting papers (collectively, Commencement Papers) were left with a “Joseph,” approximately 40 years old with glasses, brown hair, 220 lbs to 240 lbs, 5' 9" to 6' at the Lakewood Office. (NYSCEF 25, Affidavit of Service [office].)

In response, Rubin asserts there are two issues with service at the Lakewood Office. First, that it was no longer his actual place business due to a dispute between him and Haikins involving another joint venture, and second, that the Joseph served was not him as the description does not match his physical features.

Rubin avers that in late December 2022 or early January 2023, he was locked out of the Lakewood Office by Haikins and had not access to the office since. (NYSCEF 46, Rubin aff ¶¶ 9-11.) However, in the Guaranty, Rubin designated the Lakewood Office as his address for notice purposes, as well as for alternative service. (NYSCEF 7, Guaranty at 2 [“**Joseph Rubin**, a natural person, having an address at 36 Airport Road, S206, Lakewood, New Jersey 08701”]; *Id.* §§ 6.04. 6.13.) Rubin offers no evidence that he made any attempt to notify MF1 that he no longer had access to this property or provided MF1 with a new address. Thus, “he may not now reasonably claim he was not properly served” at this designated address. (*Amcojor Realty Corp. v Butter Mgt. LLC*, 232 AD3d 404, 405 [1st Dept 2024] [internal quotation marks and citations omitted] [finding failed to rebut presumption of proper service by claiming that his

designated business address, a nightclub, could no longer be deemed his actual place of business because of Covid lockdowns].)

Rubin also avers that he was not at the Lakewood Office on the date of service and the Joseph who accepted the papers does not fit Rubin's physical description, making it likely it was the other Joseph who worked at the Lakewood Office. (NYSCEF 46, Rubin aff ¶¶ 7-8; NYSCEF 38, Rubin Driver's License.) Even if it was not Rubin, "all that is required under CPLR 308 subdivision 2, with respect to personal service, is that process be served upon a person of suitable age and discretion at the actual place of business, regardless of whether or not that person is an employee or is otherwise officially authorized to accept service on behalf of the defendant." (*Pub. Admr. of County of NY v Markowitz*, 163 AD2d 100, 100-101 [1st Dept 1990] [internal quotation marks and citation omitted].)

The process servers⁵ also affirm that they made additional service via first class mail to the Lakewood Office and Rubin's Howell Township residence. (NYSCEF 25, Affidavit of Service [office]; NYSCEF 26, Affidavit of Service [home].) Rubin's conclusory statement that he "did not actually receive a copy of the summons and motion papers" (NYSCEF 46, Rubin aff ¶ 19) is insufficient to rebut "the veracity or content" of the servers' affidavits. (*371-381 PAS Assoc., LLC v Moss & Moss LLP*, 237 AD3d 588, 589 [1st Dept 2025] [finding defendant's conclusory averment that he never received the summons and complaint insufficient to "dispute the veracity or content of the affidavit"].)

⁵ A different process server went to Rubin's Howell Township residence.
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Accordingly, service at the Lakewood Office was proper. The court need not address service at the Howell Township residence.

Vacatur

“CPLR 317 and 5015 (a) (1) allow a defendant against whom a default judgment has been rendered to move to vacate that default. CPLR 317 provides that [a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318 ... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. Thus, this statute is available only to a defendant who (1) was served by a method other than personal delivery, (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry), and (3) demonstrates a potentially meritorious defense to the action. By contrast, CPLR 5015 (a) (1) is available to any defendant against whom a default judgment was entered, provided that the defendant can demonstrate both a reasonable excuse for the default and a potentially meritorious defense. A defendant seeking relief under section 5015 (a) (1) must move to vacate the default judgment within one year of service on defendant of the default judgment with notice of entry. Both provisions assume personal jurisdiction exists over the defaulting defendant and provide that party with an opportunity to open the default and contest the merits of the plaintiff's claim.” (*Caba v Rai*, 63 AD3d 578, 579-580 [1st Dept 2009] [internal quotation marks and citations omitted].)

“CPLR 317 permits a defendant who has been served with a summons other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense. Although it is not necessary for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for the delay, to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action.”

(*Cumanet, LLC v Murad*, 188 AD3d 1149, 1154 [2d Dept 2020] [internal

quotation marks and citation omitted] [holding that “mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317”].)

Rubin has provided nothing more than a conclusory denial of receipt. Further, Rubin fails to address the additional first class mailing of the Commencement Papers to his Howell Township residence, which the process server affirms was completed on October 19, 2023 (NYSCEF 26, Affidavit of Service [home]), which is particularly important when he acknowledges that he received the Notice of Entry of the 3213 Decision via mail at the same address. (NYSCEF 46, Rubin aff ¶ 19; *Frazier v 811 E. 178th St. Realty Corp.*, 183 AD3d 413, 413 [1st Dept 2020] [finding “the affidavit of defendant's president claiming not to have received the complaint or default order was conclusory, as he did not discuss the address where those mailings were sent, and did not address the fact that the default judgment, which he admitted having received, was sent to the same address” (citation omitted)].)

Regarding CPLR 5015(a)(1), Rubin fails to provide a reasonable excuse for the default. That Rubin was allegedly locked out of the Lakewood Office is not a reasonable excuse. Again, Rubin designated the Lakewood Office as his address for notice purposes, as well as for alternative service, in the Guaranty. He offers no explanation why he failed to notify MF1 that he no longer had access to this property or provide MF1 with a new address for notifications. (See generally *John v Arin Bainbridge Realty Corp.*, 147 AD3d 454, 455 [1st Dept 2017] [holding that “the failure of a corporate defendant to receive service of

process due to breach of the obligation to keep a current address on file with the Secretary of State does not constitute a reasonable excuse” (citation omitted)].) He cannot now use his alleged lack of access as an excuse when he made no attempts to rectify any issue.

Rubin’s motion is denied.

Motion Sequence 003

The Ohio Defendants also seek to vacate the 3213 Decision pursuant to CPLR 2309(c) and CPLR 5015(a)(1), asserting that that MF1 failed to file a certificate of conformity as required by CPLR 2309(c).

CPLR 2309(c) provides that “[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if made in accordance with the provisions of this section.” However, “[t]he absence of such a certificate is a mere irregularity, and not a fatal defect.” (*Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009] [citation omitted].)

The Ohio Defendants also assert that their motion should be granted based on CPLR 5015(a)(1) because they have a reasonable excuse and a meritorious defense.

Reasonable Excuse

Schwartz⁶ affirms that on September 28, 2023, the day he was served with the Commencement Papers, he emailed Yifat Schnur⁷ with copies of the Commencement Papers with the understanding that she would appear on the Ohio Defendants' behalf in this action. (NYSCEF 56, Schwartz aff ¶¶ 2, 4; NYSCEF 57, September 28, 2023 Email.) Manies and Hoffman affirm that they spoke with Schwartz who indicated that Schnur would be representing them. (NYSCEF 61, Manies aff ¶ 2; NYSCEF 62, Hoffman aff ¶ 2.) Schwartz states that the first time he learned that there was a default was when he received the 3213 Decision. (NYSCEF 56, Schwartz aff ¶ 6.) Manies and Hoffman were informed of the decision by Schwartz. (NYSCEF 61, Manies aff ¶ 4; NYSCEF 62, Hoffman aff ¶ 5.) Schnur affirms that she “does not believe that [she] received” Schwartz’s September 28, 2023 emails and “[h]ad [she] received them and been aware of this action, [she] would have filed opposition.” (NYSCEF 59, Schnur aff ¶ 4.)

“The determination as to what constitutes a reasonable excuse is a matter of the court's discretion, but mere neglect will not suffice.” (*Sauteanu v BJ's Wholesale Club, Inc.*, 210 AD3d 922, 923 [2d Dept 2022]; *Dong v Howe*, 219 AD3d 1219 [1st Dept 2023].) First, Schwartz’s email to Schnur makes no request for representation, solicitation for legal advice, etc. The email simply lists the attached Commencement Papers. There is no evidence that Schnur was

⁶ Schwartz is an attorney admitted in Ohio. (NYSCEF 56, Schwartz aff ¶ 5.)

⁷ Schnur affirms that she represents the Ohio Defendants in another action filed in Kings County, *Five Star Equity Investments LLC et al. v Rubin et al.*, Index No. 515582/2023. (NYSCEF 59, Schnur aff ¶ 5.)

retained to represent the Ohio Defendants in this matter. For example, the Ohio Defendants fail to submit a retainer agreement, invoices, or other communications. (See *Plaza Home Mtge., Inc. v Lakeram*, 2025 NY Misc LEXIS 3536, at *6-7 [Sup Ct, Queens County Mar. 14, 2025, No. 704137/2017] [“There is no retainer agreement, documented communication, either a text, email, or other evidence to demonstrate Defendant had a reasonable expectation or that he could rely on the said prior attorney to oppose the motion”].)

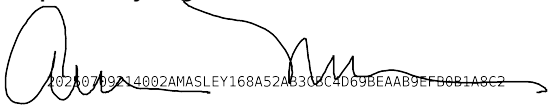
Second, the Ohio Defendant’s excuse that they assumed Schnur would oppose the motion is unreasonable. Schwartz’s email to Schnur was never confirmed. Admittedly, there was zero communication between Schnur and the Ohio Defendants from September 28, 2023 until April 2024 even though Schnur was allegedly representing them in opposing a \$46 million judgment. The Ohio Defendants have provided no reasonable excuse only evidence of neglect in defending a lawsuit they were admittedly aware of.

Accordingly, it is

ORDERED that defendant Joseph Rubin’s motion to vacate the court’s April 10, 2024 Decision and Order and to stay entry of the proposed judgment filed on April 18, 2024 is denied; and it is further

ORDERED that defendants Baruch C. Manies, Fred P. Schwartz and Susan Hoffman’s motion to vacate the court’s April 10, 2024 Decision and Order, to stay entry of the proposed judgment filed on April 18, 2024, and to deem MF1’s CPLR 3213 moving papers a complaint is denied; and it is further

ORDERED that the stay of the entry of the proposed judgment is lifted.



<u>7/9/2025</u>		<u>ANDREA MASLEY, J.S.C.</u>	
DATE			
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE