

**SABR Mtge. Loan 2008-1 Reo Subsidiary-1 LLC v
Prescott**

2026 NY Slip Op 31069(U)

March 18, 2026

Supreme Court, Kings County

Docket Number: Index No. 11646/2009

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of March, 2026.

P R E S E N T:

HON. CENCERIA P EDWARDS,

Justice.

-----X

SABR MORTGAGE LOAN 2008-1 REO
SUBSIDIARY-1 LLC,

Plaintiff,

-against-

MARCELLE PRESCOTT et al,

Defendant,

-----X

Index No.: 11646/2009

Mot. Seq.: 4

Calendar Date: 2/7/24

Calendar No.: 6

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations)

Annexed _____

14-30; 48

Opposing Affidavits (Affirmations) _____

31-47 49

Affidavits/ Affirmations in Reply _____

50-51

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 1441 Troy Avenue in Brooklyn (Block 4991, Lot 50), Defendant Marcelle Prescott moves for a stay of the foreclosure sale scheduled for October 19, 2023, to allow for a short sale review and closing. In the alternative, she seeks dismissal of this action for lack of personal jurisdiction or the grant of a traverse hearing to determine whether she was properly served with the summons and complaint. Plaintiff opposes.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on May 12, 2009. Both Defendant and her mother Ismay Prescott were named as defendants. While Defendant was allegedly served with the summons and complaint, Ismay was determined to be deceased.¹

After Defendant failed to timely answer or otherwise appear in the action, Plaintiff filed a Request for Judicial Intervention on August 6, 2009. Therein, “scheduling of the settlement conference required by Rule 3408 of the Civil Practice Law and Rules in a mortgage foreclosure action” was requested. Two conferences were scheduled, and the matter was released on December 8, 2009 upon Defendant’s continued failure to appear.

Following a period with no apparent activity, a status conference was held on April 8, 2014 and an order issued conditionally dismissing the action pursuant to CPLR 3216 unless “plaintiff files a note of issue or otherwise proceeds by motion for the entry of judgment within 90 days from the date hereof.” No timely filing was made.

On January 7, 2015, Plaintiff filed a motion seeking vacatur of the dismissal and to restore the case to the calendar. Arguing that the case had merit and that it did not intend to abandon it, Plaintiff asserted that the conference order was improper. It further noted that, due to Ismay’s death, it would need to file a motion seeking leave to serve her unknown heirs by publication. By order dated March 11, 2015, the motion was denied – the Court finding that “no affidavits of service [were] attached to the motion papers. Accordingly, this matter must be dismissed as the Court has no personal jurisdiction over defendants.” Leave to renew “upon evidence of proper service upon defendants” was granted, however.

On November 18, 2015, Plaintiff again moved for vacatur of the dismissal and restoration of this action to the calendar. It further sought to discontinue the action against Ismay, for default judgment against the remaining defendants, and for an order of reference. Therein, it proffered the affidavits of service of the summons and complaint and stated that Ismay’s estate was not a necessary party as it had no interest in the property. Plaintiff also noted that dismissal pursuant to CPLR 3216 was inappropriate as issue was not joined and no ninety-day notice was served upon it. It further asserted that it had sufficient cause for its delay and that its claims were

¹ Appended to Plaintiff’s first motion to restore as part of Exhibit 5 is an affidavit of due diligence notarized on June 30, 2009 wherein the affiant explains that service upon Ismay could not be completed as a Social Security Death Index search reflected that she died in 2001. Attached thereto as Exhibit H is a copy of her death certificate.

meritorious. The Court granted the requested relief by signing the proposed order on March 23, 2016.

On March 17, 2017, Plaintiff filed a motion to confirm the referee's report and for judgment of foreclosure and sale which was granted on June 20, 2017.

Auctions scheduled for February 14, 2019 and May 23, 2019 were each cancelled after Defendant filed bankruptcy shortly beforehand. A third bankruptcy filing led to the vacatur of the sale held on April 14, 2022. The auction scheduled for March 9, 2023 was also cancelled upon Defendant's filing bankruptcy

The Instant Motion [MS 4]

An auction was scheduled for October 19, 2023. Four days earlier, however, Defendant filed the instant motion via order to show cause which was signed by this Court – again, staying a sale. Therein, Defendant alleges that she submitted a short sale application which was under review by Plaintiff. As such, she argues, the foreclosure sale should be stayed to allow her to resolve this matter without a potential deficiency judgment.² In the alternative, Defendant asserts that she was not properly served with the summons and complaint. At the relevant time, only she and her eight-year-old daughter – and not the ninety-year-old woman who allegedly accepted service – resided at the property. Her mother (Ismay) who would have been about the right age was already deceased. As such, she argues, the case should be dismissed for lack of personal jurisdiction.

In opposition, Plaintiff argues that Defendant failed to rebut the affidavit of service. While her mother was deceased at that time, the affidavit of service merely alleges that a female relative accepted service – and Defendant does not dispute that she had other elderly relatives who might have been present that day. It, thus, suggests that her denial of service is insufficient. In the alternative, Plaintiff asserts that Defendant waived jurisdictional defenses via a 2022 letter from Kafi Harris & Associates wherein the signatory claimed that the firm was representing her and that she had filed bankruptcy. Plaintiff further argues that Defendant has known about this

² If the short sale has not yet occurred, it is unlikely that it will and no further stay is necessary on that basis.

action for many years and has forced the cancellation of prior sales via strategically filed bankruptcy petitions. Finally, Plaintiff suggests that there is no basis for a further stay.

The parties appeared before this Court on December 13, 2023, and were directed to submit supplemental briefing on the issues of whether CPLR 3215[c] is applicable to this matter and whether Defendant waived the defense of personal jurisdiction. Both parties did so.

Defendant argues that Plaintiff failed to take any action concerning this foreclosure action from the release of this matter from the Foreclosure Settlement Conference Part in 2009 until the case was dismissed in 2014. No steps were taken by that period to take proceedings toward the entry of judgment and nothing in the record suggests that Plaintiff did not intend to abandon the case. Plaintiff knew that Ismay was deceased in 2009 but took no steps to substitute her heirs in her stead or discontinue against her until 2015. As such, Defendant suggests that Ismay's death is not a reasonable excuse for the prosecutorial delay.

Defendant further asserts that the 2022 letter was not an appearance in this action. It was sent solely to Plaintiff's counsel and not filed with the Court. In fact, Kafi Harris was Defendant's bankruptcy counsel and was merely apprising Plaintiff of the pendency of her petition. In Defendant's view, that was not an appearance and did not waive jurisdictional defenses.

Citing several Second Department decisions, Plaintiff counters that CPLR 3215[c] cannot be raised post-judgment of foreclosure and sale. It further suggests that the Court already found that it had a reasonable excuse for the delay when it restored the case and granted an order of reference. Additionally, Plaintiff argues that Defendant's appearance in the case waived the right to assert both CPLR 3215[c] and a lack of personal jurisdiction. The 2022 letter states that defendant had retained Kafi Harris and that the firm was appearing on her behalf in "the above-referenced matter." Further, Plaintiff claims that Defendant's repeated strategic bankruptcy filings also constitute an informal appearance in this action. As such, Plaintiff asserts that Defendant's action should be denied and the instant action should not be dismissed.

Analysis

Plaintiff is correct that dismissal pursuant to CPLR 3215[c] does not lie post-judgment of foreclosure and sale (*Wells Fargo v Steward*, 232 AD3d 689, 689 [2d Dept 2024]).

Even were that not so, dismissal pursuant to CPLR 3215[c] would be inappropriate under the facts of this case. “If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” (CPLR 3215[c]). “It is not necessary for a plaintiff to actually obtain a judgment within one year after the default to avoid a CPLR 3215(c) dismissal, so long as proceedings were undertaken to do so during the initial year after the defendant's default” (*Citibank v Kerszko*, 203 AD3d 42, 51 [2d Dept 2022]). “Where, as here, a settlement conference is a necessary prerequisite to obtaining a default judgment (see CPLR 3408[a], [m]), a formal judicial request for such a conference in connection with an ongoing demand for the ultimate relief sought in the complaint constitutes ‘proceedings for entry of judgment’ within the meaning of CPLR 3215(c)” (*US Bank v Jerriho-Cadogan*, 224 AD3d 788, 790 [2d Dept 2024]., quoting *Citimortgage v Zaibak*, 188 AD3d 982, 983 [2d Dept 2020]). Here, Plaintiff timely filed an RJI seeking settlement conferences and, as such, took proceedings towards a judgment. Dismissal pursuant to CPLR 3215[c] is, thus, unwarranted.

The April 14, 2022 letter from Kafi Harris to Plaintiff's counsel reflects the instant action in its re: line and states: “Please be advised that my office has been retained by Marcelle Prescott with respect to the above referenced matter.” However, it neither attempts to litigate the merits nor – as it is reporting the existence of a bankruptcy stay – implies an intention to do so. As such, it did not constitute an informal appearance (see similarly *Whiteside v Manfredi*, 132 AD3d 851, 852 [2d Dept 2015]; see also *HSBC Bank USA v Assouline*, 177 AD3d 603, 605-606 [2d Dept 2019]).

While the timing of Defendant's bankruptcy filings implies that she had knowledge of the action,³ there does not appear to be any precedent for strategic petitions granting jurisdiction over a foreclosure defendant.

³ The Court recognizes that Defendant was likely aware of this action since 2009. Appended to its affidavit of due diligence (Exhibit 5 to its first motion to restore) is an affidavit notarized June 30, 2009 wherein the affiant swore that he went to the premises and spoke to Defendant who refused to provide any information as to Ismay's heirs. All the motions and notices of entry of the orders were also sent to her at the correct address. Nor does she deny knowledge.

Nonetheless, Defendant's jurisdictional arguments fail on the merits. "A process server's affidavit of service gives rise to a presumption of proper service ... A sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat the presumption of proper service" (*Deutsche Bank v O'King*, 148 AD3d 776, 776-777 [2d Dept 2017]). "However, bare and unsubstantiated denials of service are insufficient to rebut the presumption of proper service created by a duly executed affidavit of service, and a hearing is not required where the defendant fails to swear to specific facts rebutting the statements in the process server's affidavit" (*Tuttnauer USA Co, Ltd v Russo*, 216 AD3d 846, 847 [2d Dept 2023])[internal quotation marks omitted]. While Defendant swears that her deceased mother did not accept service on her behalf and that no co-tenant met the description of the individual allegedly served, she fails to deny that such a relative existed and/or that someone of that description could have been present on the date of service. Nor does she deny that she actually received the served copies of the summons and complaint. As such, Defendant's jurisdictional arguments fail.

Conclusions

Accordingly, it is

ORDERED that Defendant's motion for a stay or to dismiss [MS 4] is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:



Hon. Cenceria P. Edwards, J.S.C., CPA