

U.S. Bank Trust, N.A. v Rector70 LLC

2021 NY Slip Op 31650(U)

May 5, 2021

Supreme Court, New York County

Docket Number: 850078/2014

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 A. KAHN, III PART IAS MOTION 32

Justice

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INDEX NO. 850078/2014

U.S. BANK TRUST, N.A. AS TRUSTEE FOR LSF11
MASTER PARTICIPATION TRUST,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002 003

- v -

RECTOR70 LLC A/K/A RECTOR70 LLC, DREAMBUILDER
INVESTMENT LLC, DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS CERTIFICATE TRUSTEE ON BEHALF OF
BOSCO CREDIT II TRUST SERIES 2010-A, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NATIONAL CITY
BANK, THE BOARD OF MANAGERS OF THE BATTERY
POINTE CONDOMINIUM, JOHN DOES AND JANE DOES,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 133

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134

were read on this motion to/for DISMISS

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

This action to foreclose on residential real property, to wit a condominium located at 300 Rector Street, Unit 7-O, New York, New York, was commenced by Bank of America, N.A. with the filing of a summons and complaint as well as a notice of pendency on February 20, 2014. At that time, the record owner of the property was Craig Kabot ("Kabot"), the mortgagor, who gave the encumbrance to secure a loan for \$350,000.00. A prior action to foreclose on the same mortgage brought by non-party BAC Home Loans Servicing, LP, Plaintiff's assignor four times removed, was discontinued by order of Justice Shlomo Hagler dated October 15, 2013 (NY Cty Index No 104258/2010). The causes of action for foreclosure in both actions are based upon Kabot's alleged default in re-payment of the mortgage beginning on or about November 1, 2008.

By deed dated November 25, 2014, Defendant Rector70, LLC ("Rector"), a domestic limited liability company, secured title to the property via a referee's deed issued pursuant to a

judgment of foreclosure and sale dated November 13, 2014 in an action to foreclose a lien for common charges. The deed was recorded on December 23, 2014.

It is undisputed that Plaintiff's predecessors never served Kabot nor is there proof they attempted service on the mortgagor. On February 19, 2019, Plaintiff apparently took an assignment of the note and mortgage at issue and moved, by notice of motion, to, among other things, amend the complaint to add it as Plaintiff and Rector as a Defendant. By order dated November 4, 2019, Justice Arlene Bluth granted the motion but precluded Plaintiff from recovering interest after June 14, 2014 based upon the unexplained failure to serve Kabot or to prosecute the action for five years. In the first ordered paragraph, Justice Bluth directed "the proposed amended summons and complaint . . . be personally served on defendants pursuant to the CPLR within 30 days". In the ninth ordered paragraph, Justice Bluth directed "that Plaintiff shall serve all the parties added with the amended summons and complaint by December 15, 2019". Plaintiff filed its supplemental summons and amended complaint on November 6, 2019.

In an affidavit of service dated November 16, 2019, the process server alleges that service of the supplemental summons and amended complaint was made upon Rector pursuant to Business Corporation Law §307. Defendant Kabot was allegedly served pursuant to CPLR §308[2] on December 2, 2019. Defendant The Board of Managers of the Battery Pointe Condominium ("Battery Pointe") filed an answer on November 25, 2019. To date, neither Rector nor Kabot has filed an answer in this action.

Now, Plaintiff moves for an order striking the answer of Defendant Battery Pointe, summary judgment, amending the complaint and appointing a referee to compute. Thereafter, Defendant Rector moved, by order to show cause, pursuant to CPLR §5015[a][3] and [4] to vacate Justice Bluth's order dated November 4, 2019, pursuant to CPLR §306-b dismissing the action for failing to make timely service, pursuant to CPLR §3211[a][8] dismissing the action for lack of personal jurisdiction, pursuant to CPLR §3211[a][5] dismissing the action based upon expiration of the statute of limitations, dismissing the action for failure to join a necessary and indispensable party and to cancel the notice of pendency. Plaintiff cross-moved to the order to show cause pursuant to CPLR §306-b for an order extending Plaintiff's time to effect service.

At the outset, the court must address Defendant Rector's claim of lack of personal jurisdiction. It is undisputed that Rector is a domestic limited liability company. Pursuant to CPLR §311-a, service upon limited liability companies must be made by any of the four methods specified under romanettes i – iv. The statute also provides that service may be made pursuant to "article three of the limited liability company law". Applicable here is LLCL §303 which states that:

[a] Service of process on the secretary of state as agent of a domestic limited liability company . . . shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, *duplicate copies* of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return

receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose [emphasis added].

Here, the affidavit of service for Rector indicates that “a true copy” of the supplemental summons and amended complaint on the Secretary of State of the State of New York “pursuant to Section 307 BCL” (NYSCEF Doc No 42). Further, the process server avers that the documents served on the Secretary of State were mailed in an envelope marked personal and confidential by registered mail return receipt requested.

Plaintiff’s attempt at service on Rector on November 15, 2019 was clearly not in strict compliance with the requisites of either CPLR §311-a or LLCL §303 (*see generally Persaud v Teaneck Nursing Ctr., Inc.*, 290 AD2d 350 [1st Dept 2002]). Only one copy of the documents was served, rather than duplicates as required. Also, the pleadings were delivered to the Secretary of State pursuant to BCL §307 which is applicable to unauthorized foreign corporations. Section 307 of the Business Corporation Law and section 303 of the Limited Liability Company Law are not substantively identical (*cf. Interboro Ins. Co. v Tahir*, 129 AD3d 1687, 1689 [4th Dept 2015]) as the latter requires the Secretary of State to accomplish the mailing to the address it has on file for service of process. Although the statute provides service is complete upon delivery to the Secretary of State (*cf. Claudio v Show Piers on the Hudson*, 82 AD3d 432 [1st Dept 2011]), the court cannot overlook this non-compliance as a “technical infirmity” under CPLR §2001 since it appears the process server’s additional mailing was made to the mortgaged premises instead of the address on file with the Secretary of State, which is the same address contained on the face of Rector’s deed (*see Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010]).

As this court has determined that service on Rector, an indispensable party (*see* RPAPL1311[1]; *Bancplus Mortgage Corp. v Galloway*, 203 AD2d 222 [2d Dept 1994]), was defective and that more than 120 days have elapsed since the filing of the amended complaint, an extension of time must be granted for this action to continue (*see LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept 2018]).

CPLR §306-b requires service of the summons and complaint to be made within 120 days after filing said documents with the Court. An extension of time to serve may be granted in an exercise of the court’s discretion where one of two discrete standards are met, either “upon good cause shown” or “in the interests of justice” (CPLR §306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). To establish good cause, a Plaintiff must demonstrate reasonable diligence in attempting service (*see eg Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] *citing Bumpus v New York City Transit Authority*, 66 AD3d 26, 32 [2d Dept 2009]). Good cause may also be found when the failure to timely serve process is a result of circumstances beyond Plaintiff’s control which does not include “law office failure” (*see eg Bumpus v New York City Transit Authority, supra*).

The interest of justice standard is a broader standard which the Court of Appeals described as follows:

[It] requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant.

(*Leader v Maroney, Ponzini & Spencer*, supra at 105-106).

Here, Plaintiff failed to establish good cause for an extension of time to serve Rector as it offered no evidence that it, or any of its predecessors exercised reasonably diligent efforts to either serve Kabot or join and serve Rector (*see Wells Fargo Bank, N.A. v Kaul*, 180 AD3d 956 [2d Dept 2020]; *Nationstar Mtge., LLC v Wilson*, 176 AD3d 1087 [2d Dept 2019]).

Plaintiff also failed to establish its entitlement to an extension of time to accomplish service on Rector in the interest of justice (*see Nationstar Mtge. LLC v McCallum*, 191 AD3d 480 [1st Dept 2021]; *JPMorgan Chase Bank N.A. v Kelleher*, 188 AD3d 1484 [3d Dept 2020]; *Federal Natl. Mtge. Assn. v Cassis*, 187 AD3d 1145 [2d Dept 2020]; *Chase Home Fin., LLC v Berger*, 185 AD3d 1000 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Kaul*, supra). An overall pattern of delay in attempting to foreclosure on the subject mortgage has occurred which was not justifiably explained. There was a clear lack of diligence in prosecuting this action. The default in repayment forming the basis of this action occurred over 12 years ago in November of 2008. There is no proof that any attempt was made to serve Kabot with the original complaint. This action laid dormant for some 66 months whereupon a request for judicial intervention was finally filed along with Plaintiff's motion to amend. Most of this delay occurred after Rector recorded its title in December 2014. Moreover, as the court is authorized to take in account "any other relevant factor in making its determination" (*Leader v Maroney, Ponzini & Spencer*, supra), it is noted that apparently no action was taken to prosecute the prior foreclosure action for 40 months after issue was joined. That the delays and lack of diligence may be attributed primarily to Plaintiff's predecessors in interest is of no moment (*see Wells Fargo Bank, N.A. v Kaul*, supra).

Plaintiff's attempt to explain its lack of diligence by asserting it was unaware that Rector's name was Rector7O, LLC, utilizing the letter "O", rather than Rector 70, LLC, containing the numeral "0" is unavailing. The caption of Plaintiff's proposed amended pleading and other documents all contain a designation that Rector is "also known as Rector 7O, LLC". Even in the affidavit of service dated November 15, 2019, the process server states service was attempted on "Rector 70, LLC a/k/a Rector 7O, LLC".

Although the statute of limitations appears to have expired by the time Plaintiff filed its cross-motion on January 15, 2021, which ordinarily militates in favor of granting an extension, presently, where there is an un rebutted inference of substantial prejudice to Rector based upon Plaintiff's patent lack of diligence in prosecuting this matter, the application should be denied (*see Nationstar Mtge. LLC v McCallum*, supra; *Federal Natl. Mtge. Assn. v Cassis*, supra; *see also Fink v Dollar Mart*, 186 AD3d 1197 [2d Dept 2020]; *Butters v Payne*, 176 AD3d 1028 [2d

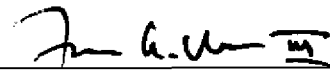
Dept 2019)). Likewise, that Rector may have been on notice of this action via the *lis pendens* that was filed before it took title and that the within action may have been timely commenced are also outweighed by Plaintiff's failure to move this action forward in any manner for over five years (*see Nationstar Mtge., LLC v Wilson, supra*).

Accordingly, Plaintiff's cross-motion for an extension of time to serve Rector is denied and the branch of Rector's motion to dismiss the complaint pursuant to CPLR §3211[a][7] and [10] is granted and Plaintiff's complaint it dismissed.

The remaining branches of Defendant Rector's motion are denied as moot.

5/5/2021

DATE



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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE