

<b>U.S. Bank N.A. v Fessler</b>
2022 NY Slip Op 33162(U)
September 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 515708/2015
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRPM-1, 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 8<sup>th</sup> day of July 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS,  
A.J.S.C.

Index No.: 515708/2015

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U.S. BANK NATIONAL ASSOCIATION,

MS#6

Plaintiff,

**DECISION AND ORDER**

*-against-*

ERIC FESSLER, et al,

Defendant,  
\_\_\_\_\_ x

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Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

<b>Papers</b>	<b>Numbered</b>
Motion	<u>1</u>
Opposition/Cross	<u>2</u>
Reply/Opp to Cross	<u>3</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Fessler moves to renew & reargue this Court’s decision dated July 16, 2019, in which the Court, 1) denied Plaintiff’s motion for an order of reference; 2) granted Defendant’s motion to confirm the report of the Referee only to the extent that the report was hereby confirmed; 3) denied Plaintiff’s motion to reject the Referee report; 4) denied Defendant’s motion to dismiss the action; and 5) granted Plaintiff’s unopposed motion to extend time to serve the Defendant pursuant to CPLR §306-b.

Plaintiff commenced this action on or about December 29, 2015, for the property located at 1163 East 100<sup>th</sup> Street, Brooklyn, New York 11236. Plaintiff moved for an ex-parte Default Judgment and Order of Reference on or about August 23, 2016. This Court denied Plaintiff's motion with leave to renew on notice to the Defendants. On or about August 16, 2017, Plaintiff moved for Default Judgment and Order of Reference. Defendant cross-moved seeking dismissal of the foreclosure action arguing Plaintiff did not have personal jurisdiction because Defendant was not properly served. This Court granted Defendant's motion only to the extent that the matter was set down for a traverse hearing. The remaining motions were held in abeyance.

Prior to the traverse hearing, Plaintiff's counsel was allegedly informed that the process server, Ralph Giuglano, was "under the care of a doctor for neuropathy and is permanently disabled" and would be unable to appear for the traverse hearing. The traverse hearing was held without an appearance by the process server on October 4, 2018, over Plaintiff's objection. On or about October 16, 2018, Plaintiff filed the motion to extend time to serve Defendant pursuant to CPLR §306-b. Plaintiff made the motion to the Court prior to the Referee's report being rendered. In their affirmation of support, Plaintiff submitted a doctor's letter dated October 9, 2018, stating that the process server was not in good health and was unable to attend the hearing. Defendant did not oppose the Plaintiff's motion to extend time to serve.

On or about November 29, 2018, the Referee filed her report with the recommendation that, "plaintiff failed to meet its burden of proving by a preponderance of the evidence that service was effectuated". On or about December 17, 2018, Defendant moved by an Order to Show Cause to confirm the Referee Report and to dismiss the action due to lack of personal jurisdiction. Plaintiff opposed the Defendant's OSC and cross-moved for this Court to reject the Referee's Report.

A motion for re-argument, addressed to the discretion of this court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *Mc Gill v. Goldman*, 261 AD 2d 593, (2d Dept. 1999). Such motion should not be used as a vehicle to permit an unsuccessful party to argue once again the very questions previously decided or to present new arguments not previously raised in the prior motion. *Id.* CPLR 2221(d)(2) states that a motion to reargue shall not include any matters of fact not offered on the prior motion. The Court does not believe that it overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.

The Court rendered its July 16, 2018, decision based on the following: The Referee's report stated that, "The Court refused to admit the affidavit of service in evidence as counsel failed to provide any corroborating evidence such as a medical report or an affidavit from the process server to demonstrate that he was ill. Furthermore, plaintiff failed to demonstrate that plaintiff exercised due diligence in attempting to locate the process server." As such, the Referee determined that Plaintiff failed to meet its burden of proving that service was effectuated on the Defendant. The Court agreed with the Referee's report, in so much that service was not effectuated, however, Plaintiff's motion to extend time to serve Defendant was timely filed and unopposed. Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice (see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]; *Emigrant Bank v Estate of Robinson*, 144 AD3d 1084, 1085 [2016]; *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 31 [2009]). "Good cause will not exist where a plaintiff fails to make any effort at service or fails to make at least a reasonably diligent effort at service" (*Bumpus v. New York City Tr. Auth.*, 66 AD3d at 32 [citations omitted]). "If good cause for an extension is not established, courts must consider the

‘interest of justice’ standard of CPLR 306-b” (id.). Under the interest of justice standard, “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, 97 NY2d at 105-106; see A.K. v T.K., 150 AD3d 1091, 1093 [2017]; Bumpus v New York City Tr. Auth., 66 AD3d at 32). Plaintiff made two timely diligent efforts to serve Defendant at the property address in which he reportedly resided and at another address in which he owned. Plaintiff submitted an affidavit from Domenic Lanza, the Supervising Attorney of the Process Server Department regarding their due diligence on locating the Defendant. The Referee’s determination was based solely on non-appearance of the process server. Although “good cause” was shown, the Court also reviewed under the interest of justice standard. In the interest of justice, the Court found that there was a meritorious cause of action, there was diligence in service, promptness in Plaintiff’s request for an extension, the possibility of a statute of limitation issue due to a 2010 prior action which in effect could result in extreme prejudice against the Plaintiff. As such, the Court considered the equities of the case and grounds for the requested relief and opted to allow Plaintiff an extension of time to serve the Defendant in lieu of dismissing the action.

Pursuant to CPLR §2221(e), a motion to renew is designed to afford a party an opportunity to present new facts that were not offered on the prior motion or that demonstrates that there was a change in the law that would change the prior determination. CPLR§2221(e)(3), specifies that the party requesting to renew must provide a reasonable justification for the failure to present such facts on the prior motion.

In the instant case, Defendant has not sufficiently demonstrated that there was a change in the law that would change the prior determination. In *Nationstar Mortg. LLC v. Wilson*, 176 A.D.3d 1087 111N.Y.S.3d 98 (2d Dep't 2019) the extension was denied due to a surveillance video showing the process server never gained entrance to the subject residence. This is dissimilar to the case at bar. In *Williams v. St. John's Episcopal Hosp.*, 173 A.D.3d 1117 N.Y.S.3d 648 (2d Dep't 2019) the Court found that, "failure to demonstrate that the process server could not, with due diligence, be compelled to attend the hearing, requires denial of an extension of time to serve." However, this Court found that Plaintiff did demonstrate that the process server could not be compelled due to his health issues which were substantiated by a letter from Dr. Schefflin and an affidavit from Domenic Lanza. Defendant did not oppose the motion to extend time or proffer any evidence to the contrary. In *Wells Fargo Bank, N.A. v. Figueroa*, 171 A.D.3d987, N.Y.S.3d 113 (2d Dep't 2019), the Court held that, "failure to present evidence or reasonably diligent efforts to serve the defendant requires denial of leave pursuant to CPLR §306-b". However, in this instance, Plaintiff established their reasonably diligent efforts and Defendant failed to rebut the evidence.

The Court is unable to allow Defendant an opportunity to present new facts that were not offered on the prior motion. "While it may be within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the prior motion, a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Dupree v. Westchester Cty. Health Care Corp.*, 164 A.D.3d 1211, 84 N.Y.S.3d 176 (2d Dep't 2018). Defendant did not oppose Plaintiff's motion to extend time and is unable to introduce new information or facts that were available at the time the motion to extend was filed. Moreover, Defendant has not offered a reasonable justification for failing to present these facts on the original motion.

The Court will not address Plaintiff's allegations that is evading service of process based on three other active foreclosure cases with similar arguments, nor will the Court entertain the Defendant's claims of fraud and collusion. Lastly, the Court will not address service at the Florida address as that is irrelevant to this current motion to renew and reargue.

The Court does not believe that it misapprehended law or overlooked facts. The Court does not believe that Defendant provided new facts that were not available at the time of the prior motion or that the changes in law should result in a change of the prior determination. As such, Defendant's motion to renew and reargue is DENIED.

ENTER:



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

9/13/2022

A.S.C.J. Cenceria P. Edwards

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