

**McCormick 106, LLC v Kelly**

2022 NY Slip Op 34761(U)

August 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 14307/2014

Judge: Cenceria P. Edwards

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.

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 11th day of August, 2022.

P R E S E N T:

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

Justice.

-----X  
McCORMICK 106, LLC,

Plaintiff(s),

-against-

ANNISE KELLY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CAROL KELLY A/K/A CAROL A. KELLY A/K/A CAROL AMES KELLY, et al.,

Defendant(s).  
-----X

The following papers read herein:

Order to Show Cause, Affidavits (Affirmations), and Exhibits _____	<u>1</u>
Opposing Affidavits (Affirmations) and Exhibits _____	<u>2</u>
Reply Affidavits (Affirmations) and Exhibits _____	_____

By order to show cause (“OSC”) presented December 14, 2021, defendant Barbara Kelly (“Defendant”) moves for the following: a stay of execution of a Writ of Assistance directing the Sheriff to evict her and her undertenants/occupants from the subject premises; vacatur of her purported default in this foreclosure action; and dismissal of the action pursuant to CPLR 3211 (a)(3), (a)(4), and (a)(5). For the reasons articulated below, Defendant’s motion is denied.

**PROCEDURAL HISTORY**

In this action to foreclose on the mortgage encumbering the residential property at 627 East 103rd Street, Brooklyn, NY 11236, an Order of Reference was entered on March 8, 2019, followed by entry of the judgment of foreclosure and sale (“JFS”) on October 8, 2019. Plaintiff was the successful bidder at the foreclosure action and sale held on December 19, 2019. The

**ORDER**

Calendar #(s):	45
Index #:	14307/2014
Mot. Seq. #(s):	6

Referee's Deed for the subject premises was issued to Plaintiff on or about January 2, 2020, and it was publicly recorded on January 10, 2020.

In or about May of 2021, Plaintiff moved by OSC, pursuant to RPAPL § 221, for a Writ of Assistance directing the City Marshall and/or Sheriff of Kings County to put Plaintiff into possession of the subject premises and compelling Defendant and all tenants and/or occupants under her, to vacate the premises. By order entered October 22, 2021, the Court (Robin K. Sheares, J.) granted Plaintiff's application for a Writ of Assistance.<sup>1</sup> Plaintiff's counsel delivered a certified copy of the Order for Writ of Assistance in November of 2021, and the Deputy Sheriff subsequently served Defendant and her undertenants/occupants with a 5-Day Notice of Eviction, dated December 8, 2021. Enforcement of the Writ of Assistance and attendant Notice of Eviction has been temporarily stayed pursuant to the provisions of the instant OSC signed by Justice Sheares on December 14, 2021.

#### ANALYSIS

Defendant seeks vacatur of her purported default pursuant to CPLR 5015 (a)(1), arguing that she "has established an excusable default as Defendant was unaware of this action and was never served with any underlying documents . . ." (Attorney's Affirmation in Support of Motion, ¶15). According to Defendant, she is a long-term tenant at the premises and was completely unaware of this foreclosure action until the Sheriff delivered the 5-Day Notice, as she was "never served" with the Summons and Complaint, Plaintiff's motion for a Writ of Assistance, or the Court's order granting the writ (*see* Defendant's Affidavit in Support of Motion, ¶¶ 3-11).

Although Defendant asserts "excusable default" as the ground for vacatur, since the lone excuse proffered is that she was never served with the Summons and Complaint or the motion upon which the Order for the Writ of Assistance was granted, she has really moved pursuant to CPLR 5015 (a)(4) on the ground of lack of jurisdiction. Moreover, despite purporting to seek vacatur of her default in appearing and answering the complaint in this action, the record belies the existence of said default. This Court's files show that the following occurred: Plaintiff's predecessor was granted leave to and did file a Supplemental Summons and Amended Complaint on August 4, 2017; proof of service of these amended pleadings upon Defendant at the subject premises was filed on August 17, 2017; and Defendant filed a *pro se* verified Answer on

---

<sup>1</sup> In the interim, Plaintiff assigned its rights to the subject premises to the current owner, 627 E 103rd LLC, which is represented by the same law firm in this action.

September 6, 2017, along with proof that it was served on August 31, 2017. Since Defendant was served pursuant to CPLR 308 (2), service was deemed complete on August 27, 2017, and her response would have been due 30 days later, *i.e.*, by September 26, 2017. As Defendant served her verified Answer nearly a month before that deadline, there is no default in appearing for her to attempt to vacate even at this belated date, more than a year after the subject premises was sold pursuant to the JFS. Moreover, this also evinces the falsity of Defendant's present claim that she was unaware of this action until being served with the 5-Day Notice of Eviction in December 2021.

To the extent Defendant asserts that the service of the Supplemental Summons and Amended Complaint upon her was improper, this Court must reject it as untimely. A defense of lack of personal jurisdiction based on improper service of process is waived if, having raised the objection in an answer, the defendant does not move to dismiss on that ground within 60 days after serving the answer (*see Wilmington Trust, N.A. v Meyerhoeffer*, 219 AD3d 549, 553 [2d Dept 2023], citing CPLR 3211 [e]). As discussed, Defendant's Answer was served on August 31, 2017, and filed September 6, 2017, and it is noted that she raised the defense of improper service of process therein. However, the instant motion, made more than four years later in December 2021, is the first time she sought relief on this ground. Accordingly, the defense of personal jurisdiction was waived and Defendant cannot obtain dismissal of the action, or vacatur of the JFS and attendant sale of the subject premises, on this basis. In any event, as Plaintiff argues in opposition to this motion, Defendant's denial of service lacks any details controverting the facts set forth in the process server's affidavit of service. Hence, even if the defense was not waived, this Court would deny relief on the merits, as a defendant's conclusory, or bare and unsubstantiated allegations are insufficient to rebut the presumption of proper service arising from the process server's affidavit of service (*see Bank of NY Mellon v Lawson*, 176 AD3d 1155, 1157 [2d Dept 2019]).

Defendant also seeks nullification of the Notice of Eviction on the ground that Plaintiff did not serve her with its motion for an Order for the Writ of Assistance that eventually resulted in issuance of the Notice of Eviction. The failure to properly serve a motion deprives a court of jurisdiction to entertain the motion, rendering the resulting orders and judgments void (*see MTGLQ Invs., L.P. v White*, 179 AD3d 790, 791 [2d Dept 2020]). As Plaintiff notes in its opposition, Defendant's claims are belied by the record, which contains an affidavit of service,

executed October 4, 2021, indicating that the papers comprising Plaintiff's motion for a Writ of Assistance were served upon Defendant on August 20, 2021 via ordinary mail, with certificate of mailing, as directed in the signed OSC, and addressed to Defendant at the subject premises, on the second floor, which is her undisputed home and place of residence. The record also contains an affidavit of service of Notice of Entry of the Court's Order granting the Writ of Assistance, made on October 26, 2021, via regular mail, to Defendant at the same address. As with her allegation concerning the Summons and Complaint, Defendant's bare and unsubstantiated claims that she was never served with Plaintiff's motion for Writ of Assistance, or with the Court's Order granting the Writ, are insufficient to rebut the presumption of proper mailing arising from the affidavit of service by mail (*see Nationstar Mtge., LLC v Yarmosh*, 208 AD3d 885, 887-888 [2d Dept 2022]; *Rizzo v Rizzo*, 176 AD3d 989, 989 [2d Dept 2019]).

Defendant's non-jurisdictional arguments also lack merit. First, her reliance on the filing of a Hardship Declaration as a ground to stay the Writ's enforcement and her ejection from the subject premises is unavailing, as the eviction protections provided by the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPFA) have expired.

Defendant also argues that Plaintiff lacks standing to enforce the Writ of Assistance so as to obtain her eviction because Plaintiff no longer owns the subject premises. In support, Defendant submits a copy of the deed, publicly record on October 8, 2021, showing that Plaintiff conveyed the property to 627 East 103rd LLC as of August 27, 2021. This is of no moment because "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." (CPLR § 1018). There is no record of this Court having directed that 627 East 103rd LLC be substituted as the named plaintiff in this action. Accordingly, although Plaintiff assigned away its interest in the subject premises during the pendency of its motion for an Order for a Writ of Assistance, that does not mean that the resultant order cannot be enforced by the assignee and present owner, 627 East 103rd LLC, even though it has not been formally substituted into the action in place of Plaintiff, particularly since the enforcement is being carried out by the law firm which represents both assignor and assignee.

Lastly, Defendant argues that this action should be dismissed pursuant to CPLR 3211 (a)(4) and (a)(5) because it is duplicative of the holdover proceeding subsequently commenced by Plaintiff in the Kings County Civil Court-Housing Part in 2021. Defendant represents that

she “has appeared in the Holdover Proceeding and is prepared to defend her right to occupy the Premises,” and so, “[i]t would be unjust to require [her] to defend herself before both the Supreme Court and the Civil Court” (Attorney’s Affirmation in Support, ¶¶ 38-39). However, Defendant’s moving papers do not include any proof that she is an actual party to the holdover proceeding. To the contrary, Plaintiff’s opposing papers include an affidavit from 627 East 103rd LLC’s sole member that was submitted in the holdover proceeding. The caption lists the named respondents as “Vanessa Swain” and the unknown “Tenants” and/or “Under/Tenants” of the “Basement” of the subject premises; Defendant is not listed as a respondent.<sup>2</sup> .

As discussed, in this foreclosure action Defendant has been served with papers addressed to her at the subject premises on the “Second Floor.” This aligns with her statement in the Hardship Declaration, submitted to obtain the temporary stay of enforcement of the Notice of Eviction, that she lives in “Apt. 2.” Defendant’s contrary statement in her affidavit in support of the instant motion that she is “the current tenant of the basement and 2<sup>nd</sup> Floor,” thus, presents as a self-serving attempt to justify dismissing this action because the holdover proceeding would, presumably, remain a viable vehicle for the parties to litigate her supposed right to remain in the premises. This Court is not persuaded. Rather, since Defendant was duly served as a named defendant in the instant foreclosure proceeding, all issues between her and Plaintiff (and its successors) have already been determined insofar as any rights she had regarding the subject premises (as a tenant, occupant, or otherwise), were terminated upon entry of the JFS (*see Ciraldo v JP Morgan Chase Bank, N.A.*, 140 AD3d 912, 913 [2d Dept 2016] [“A judgment of foreclosure and sale is final as to all questions at issue between the parties, and concludes all matters of defense which were or could have been litigated in the foreclosure action”]). Hence, the existence of separate holdover proceedings against other occupants of the premises does not provide any basis to dismiss this foreclosure action and vacate the Writ of Assistance and resultant Notice of Eviction.

Accordingly, the above-referenced motion by defendant Barbara Kelly, brought by order to show cause (motion sequence #6), is **DENIED in its entirety**, and any stays previously issued

---

<sup>2</sup> Counsel for Plaintiff and 627 East 103rd LLC explains that prior to the assignment, Plaintiff brought separate holdover proceedings against Ms. Swain, as occupant of the basement unit of the subject premises, and Devon Thompson, as occupant of the first-floor unit. Defendant’s moving papers did not disclose this.

in this action pursuant to the order to show cause signed on December 14, 2021 are hereby vacated.

The foregoing constitutes the Decision and Order of this Court.

**E N T E R,**

**Dated:** August 7, 2024



**Hon. Cenceria P. Edwards, JSC, CPA**