

**Nationstar Mtge. LLC v Manou**

2022 NY Slip Op 35041(U)

July 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 502068/16

Judge: Cenceria P Edwards

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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 21st day of July, 2022.

**P R E S E N T:**

HON. CENCERIA P EDWARDS,  
Justice.

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NATIONSTAR MORTGAGE LLC

Plaintiff,

-against-

JOEL S MANOU et al,

Defendant,

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**Index No.:** 502068/16  
**Mot. Seq. No.:** 3+4  
**Calendar No.:** 29+30

The following e-filed papers read herein:

NYSEF Nos.:

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

Annexed \_\_\_\_\_

67-73

Opposing Affidavits (Affirmations) \_\_\_\_\_

83-99

Affidavits/ Affirmations in Reply \_\_\_\_\_

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Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 428 Fenimore Street in Brooklyn (Block 4814, Lot 37), Plaintiff Nationstar Mortgage LLC moves to confirm the referee’s report of the amount due and for judgment of foreclosure and sale. Defendants Joel Manou and Julienne Sialeu cross-move for vacatur of their defaults and, thereafter, for dismissal of this action for Plaintiff’s failure to comply with RPAPL 1304.

***Background Facts and Procedural History***

Plaintiff commenced the instant foreclosure action on February 16, 2016. All defendants failed to timely answer.

The matter was referred to the Foreclosure Settlement Conference Part. An attorney from Goldberg Scudieri & Lindeberg PLLC (“GSL”) appeared there for at least one of Defendants. The matter appears to have been released as no deed from the then-record owner (500 Flatbush Corp) to Defendants had been recorded.

On May 9, 2017, Plaintiff filed a motion for default judgment and an order of reference. Notably, the moving papers were served upon Gelb & Black PC rather than upon GSL.<sup>1</sup> Nonetheless, opposition signed by Sialeu was uploaded by an attorney associated with GSL. Therein, she argued that she was not in default as she had been appearing throughout. Sialeu further asserted that she should be allowed to file a late answer and that her modification application should be considered. In reply, Plaintiff noted that Defendants failed to timely answer the complaint and, thus, were in default. To the extent that Defendants failed to file a motion, Plaintiff asserted that they could not seek affirmative relief. It further argued that no excuse for her default had been advanced and that the defenses in her proposed answer were clearly devoid of merit. While it is unclear whether the opposition and reply were considered, the Court propounded an order of reference dated November 1, 2017.

On June 14, 2018, Plaintiff filed a motion for judgment of foreclosure and sale. Following a series of appearances,<sup>2</sup> the motion was withdrawn and counsel stipulated to hold a computation hearing before the appointed referee.

#### Plaintiff’s Instant Motion for Judgment of Foreclosure and Sale (MS 3)

A hearing was held before the referee on September 24, 2019. Manou appeared through an attorney from GSL. Per the transcript, Sialeu was also present. Plaintiff presented a witness and documentary evidence. Manou’s counsel cross-examined Plaintiff’s witness but presented no evidence or witnesses of his own. On December 26, 2019, the referee issued his findings. Plaintiff then moved to confirm the referee’s post-hearing report and for judgment of foreclosure and sale.

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<sup>1</sup> Despite its prior appearance for conferences, GSL had not formally appeared in this action and had not signed up NYSCEF notifications.

<sup>2</sup> Though Plaintiff filed a reply to opposition allegedly filed by GSL on behalf of Defendants, the opposition does not appear to have been e-filed.

### Defendants' Cross-Motion to Vacate and Dismiss (MS 4)

On May 25, 2021, Defendants cross-moved<sup>3</sup> for vacatur of their default in answering and, thereafter, for dismissal of the action based upon an alleged failure to comply with RPAPL 1304.

More specifically, they argued that Plaintiff filed its motion for default judgment while the matter was still in the Foreclosure Settlement Part and served it solely upon a firm that was not representing Defendants. Though Sialeu served opposition, Defendants maintain that the Court lacked jurisdiction to hear the motion. They also note that it appears that the opposition was not considered.

Defendants further assert that their default should be vacated pursuant to CPLR 5015[a][1]. They hired a multitude of attorneys at different times and none of them sought to answer the complaint. Scudieri, handling this matter on behalf of GSL, was suspended for inappropriate conduct towards clients – including Sialeu. Defendants suggest that they have potentially meritorious defenses – RPAPL 1304 and standing.

Noting that the loan was already accelerated by a prior action at the time the RPAPL 1304 notices were sent, Defendants asserted that the cure amount included therein – which was not the full payoff – was erroneous. As such, they argue that this action must be dismissed.

### Plaintiff's Reply/Opposition to Defendants' Cross-Motion

Noting that Defendants offer no direct opposition to the relief it seeks, Plaintiff focused on Defendants' arguments that they are entitled to vacatur. Plaintiff asserted that Defendants have appeared in this action through a variety of counsel and, until now have not moved to vacate their default. Though Sialeu sought that relief as part of her opposition to Plaintiff's motion for default judgment, when that relief was not granted Defendants continued to participate in the action without again raising the issue. Plaintiff further argued that Defendants' claim of law office failure is not substantiated by admissible evidence and is lacks the necessary

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<sup>3</sup> Having changed counsel to Charles Fine.

specificity. Defendants have participated in this action throughout – GSL appeared at settlement conferences, e-filed opposition to Plaintiff’s motions,<sup>4</sup> and participated in the computation hearing. As such, Plaintiff argued that Defendants have neither proffered a basis to vacate the prior orders nor offered a reasonable excuse for their default in answering.

Plaintiff also asserted that Defendants’ proposed defenses cannot be raised by a party in default and lack merit. It suggested that notices may be sent during the pendency of a prior action, that its mailing took place after it moved to discontinue the prior action, and that the unchallenged affidavit of mailing is sufficient to demonstrate that the mailing occurred.

### *Analysis*

Defendants’ contention that Plaintiff’s motion for default judgment was filed while the matter was still in the Foreclosure Settlement Conference Part is inaccurate. The matter was released pursuant to a directive dated March 23, 2017 (NYSCEF 21). Plaintiff’s motion was not filed until more than a month thereafter. Though it predated the post-release conference in front of the Court by a few days, no stay was in effect and the motion was not taken on submission for a further two months.

It does not appear that Gelb & Black ever appeared in this action. The record reflects that it was substituted in place of GSL as Defendants’ counsel in the prior action – but that it was GSL who thereafter appeared for conferences herein. As such, Plaintiff’s motion for default judgment was served upon the wrong counsel. No prejudice resulted, however, as GSL nonetheless timely uploaded opposition. As such, the failure to properly serve the motion was a mere irregularity and should be overlooked (see, *Ciafone v Queens Center for Rehabilitation and Residential Healthcare*, 126 AD3d 662, 663 [2d Dept 2015]; *Jones v Lefrance Leasing Ltd Partnership*, 81 AD3d 900, 903 [2d Dept 2011]).

It is unclear whether Defendant’s opposition to the motion for default judgment was considered. The Court signed Plaintiff’s proposed order without specifying which papers were

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<sup>4</sup> To the extent that the motion for default judgment was served on Gelb & Black rather than GSL, Plaintiff argues that any jurisdictional problem was waived upon GSL’s filing of opposition.

considered. Nothing in the opposition, however, would have led to a contrary result. Sialeu merely attested that, while she and Manou had failed to answer, they did not miss any appearances and had been trying unsuccessfully to secure a modification. To the extent that she requested affirmative relief, that was not properly before the Court and would have been denied. It further appears that Defendants opposed Plaintiff's prior motion for judgment of foreclosure and sale on the merits – rather than seeking to vacate their default – and stipulated to a computation hearing. As such, not only would no prejudice have resulted from the potential failure to consider the opposition, the right to raise such failure was waived.

Defendants appear to have had counsel throughout. Though Sialeu details the various attorneys who have represented the family in this and other actions, it is clear from the record that GSL was involved in this case from shortly after commencement until 2020 and that Fine was retained not long after. Appearances were made and oppositions filed. It is unclear why Defendants failed to answer and counsel failed to previously move to vacate their default. To chalk it up to law office failure, however, would be inappropriately speculative. As such, Defendants have not proffered a reasonable excuse for their default.

In light of the foregoing, the Court need not reach Defendants' potential defenses. Even were that not so, the Appellate Division recently reiterated that "strict compliance with RPAPL 1304 is satisfied so long as the duration and an amount of the default is contained in the [RPAPL 1304] notice, and . . . any continuing dispute over the specific amount is an issue that must await the parties' later litigation" (*Wilmington Sav Fund Socy, FSB v Azzani*, 2025 NYSlipOp 06219 [2d Dept November 12, 2025], quoting *PNC Bank, NA v Helal*, 210 AD3d 1123, 1124 [2d Dept 2022]). Further, Plaintiff appended to the complaint a copy of the note which includes an endorsement to blank – demonstrating its standing. To the extent that an unendorsed copy was produced in the prior action, that is irrelevant.

Defendants do not challenge the referee's calculations and, as they appear substantially supported by the evidence, this Court confirms his report.

### *Conclusions*

Accordingly, it is

**ORDERED** that Plaintiff's motion for judgment of foreclosure and sale (MS #3) is granted (see accompanying order); and it is further

**ORDERED** that Defendant's motion to vacate and dismiss (MS #4), is denied in its entirety.

This constitutes the decision and order of the Court.

**ENTER:**



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