At an IAS Term, Part FRP-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 14th day of February 2023.

P R E S E N T:

HON. LARRY D MARTIN,
J.S.C.

Index No.: 29348/10

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DEUTSCHE BANK,

Plaintiff,

DECISION AND ORDER

-against-

RUBINA CLAXTON et al,

Defendant,

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

Papers	**Numbered**
Motion (MS 3)	1
Opp/Cross (MS 4)[Franco]	2
Reply/Opp to Cross	3
Opposition [259 Broadway]	4
Reply	5

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

The instant action was commenced on December 1, 2010. All defendants – including the borrower, Fernando A Brown, and junior lienholder 250 Broadway Realty Corp – defaulted in answering. On June 3, 2011, Plaintiff filed an RJI and the matter was referred to the Foreclosure Settlement Conference Part. Pre-settlement conferences were noticed for July 21st and August 11th of that year, but no defendant appeared and the matter was released. Though permitted to proceed with motion practice, Plaintiff failed to do so.

A "purge" conference was scheduled for March 10, 2015. Neither Plaintiff nor any other party appeared. Consequently, the Honorable Lawrence Knipel entered an "Order Upon Non Appearance," dismissing the action without prejudice. Plaintiff moved in October 2018 for vacatur of the dismissal order and to amend the caption to correct Plaintiff's name and substitute the executrix of Brown's estate, Rubina Claxton, in his stead. The motion was unopposed and Judge Knipel granted it on December 19, 2018, signing a settled order on March 19, 2019.

On October 27, 2021, 259 Broadway filed an order to show cause seeking dismissal of the action against it pursuant to CPLR 3215[c] or, in the alternative, for vacatur of its default and tolling of interest due to prosecutorial delay. Plaintiff opposed and 259 Broadway replied. Oral argument was scheduled to be held on November 22, 2021 before the Honorable Robin K Sheares. Upon Plaintiff's failure to appear, Judge Sheares granted 259 Broadway's motion by order uploaded February 16, 2022.

On November 18, 2022, Plaintiff moved to vacate the dismissal order pursuant to CPLR 5015[a][1] and, thereafter, for an order of reference. 259 Broadway opposed and Franco cross-moved to intervene in this action and, thereafter, for dismissal pursuant to CPLR 3215[c]. Plaintiff opposed.

I. Vacatur of Judge Sheares' Order

259 Broadway correctly notes that Plaintiff had filed opposition to its motion to dismiss and that the resulting order reflects that it was rendered "upon reading and filing all of the papers submitted on the Order to Show Cause." The CPLR 2219[a] recitation also expressly includes

the opposition and reply. Logic would thus dictate that vacatur pursuant to CPLR 5015[a][1] – which presumes a default – would be inapplicable[1].

As the dismissal order fails to include any analysis and Plaintiff appears to suggest that the motion was granted *based upon its default* rather than a review of the merits, this Court will address its vacatur arguments. "A movant seeking to vacate an order entered upon its failure to appear at oral argument on a motion must demonstrate a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*MERS v Dort-Relus*, 166 AD3d 961, 961 [2d Dept 2018]). Even assuming arguendo that Plaintiff has proffered a reasonable excuse – law office failure – its proposed opposition is clearly meritless. Plaintiff proffers no explanation for its failure to timely advance this action following release from conference. Further, its claim that the filing of an RJI was sufficient to constitute initiation of proceedings for the entry of a judgment is incorrect[2].

Vacatur of Judge Sheares' order is, thus, denied.

II. Intervention

It is undisputed that Franco is the current owner of the property, having acquired title during a lapse in Plaintiff's notice of pendency. Counsel appeared in this action on its behalf by

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[1] See, for example, *Hummel v CILICI, LLC*, 203 AD3d 1591, 1593 [4th Dept 2022][" plaintiff timely opposed defendant's motion on the merits, and his lawyer's failure to appear for oral argument on a fully briefed motion would not constitute a default in the absence of unusual circumstances not present here"]; *Allstate Flooring Dist v MD Floors*, 131 AD3d 834, 835][" We find, however, that Supreme Court erred in finding that plaintiff had "default [ed]" on this motion. We fail to perceive the conduct that constituted plaintiff's default. ... Nothing in the record before us suggests that the parties were on notice that oral argument was indispensable for resolution of plaintiff's motion."]).

[2] While Plaintiff is correct that one panel held that the filing of the specialized RJI requesting settlement conferences is sufficient (*Citimortgage v Zaibak*, 188 AD3d 982, 983 [2d Dept 2020]), it has been recognized that such a holding is an outlier and contrary to the weight of the precedents (see, *Citibank v Kerszko*, 203 AD3d 42, 72 fn 4 [2d Dept 2022][Barros, dissenting]; see also, *Wells Fargo v Jackson*, 208 AD3d 613 [2d Dept 2022][reiterating – post *Zaibak* –that "the one-year deadline of CPLR 3215(c) was tolled by the mandatory settlement conferences" rather than the filing of the RJI barring 3215[c]]; *Deutsche Bank v Lewin*, 205 AD3d 677 [2d Dept 2022][same]).

notice of appearance dated June 27, 2019. Therein, it claimed to be "Defendant," presumably in its capacity as successor-in-interest to Claxton. Plaintiff, agreeing that Franco has an interest in the property, consents to Franco's "intervention" – solely to the extent of formalizing its position in this action as the successor to the defaulting-defendants Claxton and Brown. In light of the notice of appearance and protracted delay thereafter in seeking the instant relief, Plaintiff does not consent to Franco's request to answer the complaint.

This Court agrees with Plaintiff that it would be appropriate to allow Franco to participate in this action as successor to Claxton and that its delay in seeking to intervene and answer bars that relief. As such, Franco is formally substituted in this action in place of Claxton and, like her, remains in default.

III. Dismissal as to Claxton

Franco argues that this action should be dismissed against Claxton and, by extension, pursuant to CPLR 3215[c]. While the Court agrees that dismissal of claims against Claxton would be appropriate were she still a party-in-interest[3], Franco appeared in this action in 2019, waiving its right to seek dismissal under that section (*Bank of America v Rice*, 155 AD3d 593, 594 [2d Dept 2017]).

IV. Default Judgment

Plaintiff moves for default judgment and an order of reference. "On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the

[3] It does not appear that there are any claims remaining against Claxton as the estate no longer owns the property and it does not appear that a deficiency against it is being sought.

defaulting party's default in answering or appearing. To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action" (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). Plaintiff met its burden (see, *Deutsche Bank v Silverman*, 178 AD3d 898 [2d Dept 2019]).

V. Conclusions

Plaintiff's motion is granted to the extent that an order of reference will be issued (see accompanying modified order). Vacatur of its default in opposing Judge Sheares' order is denied. Franco's cross-motion is granted solely to the extent that it is formally substituted in this action in place of Claxton.

This constitutes the decision and order of the Court.

ENTER:

Hon. Larry D Martin JSC

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT