

**Bank of Am. v Nicholson**

2024 NY Slip Op 34569(U)

June 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 9227/12

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP, 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 11<sup>th</sup> day of June 2024.

PRESENT:

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



Index No.: 9227/12

BANK OF AMERICA,

Plaintiff,

**DECISION AND ORDER**

*-against-*

YOLANDE NICHOLSON et al,

Defendant,

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

Motion:

Papers	Numbered
✓ Motion (MS 7)	<u>1</u>
✓ Opp/Cross (MS 8)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

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

The instant action was commenced on May 2, 2012. Pursuant to the filed affidavits of service, the summons and complaint was served upon the borrowers and one Doe – Lislyne Coard – at the property address. The process server also attests to having sent an RPAPL 1303 notice by first class mail addressed to “ANY AND ALL OCCUPANTS” to the property address. Defendant Yolande Nicholson<sup>1</sup> answered through counsel. After withdrawing its initial motion for summary judgment, Plaintiff again filed a motion for that relief on September 20, 2017. Defendant opposed and cross-moved for summary judgment in her favor asserting, among other

<sup>1</sup> The answer was also on behalf of her mother, Linda Nicholson, who was also originally named as a defendant.

things, that Plaintiff failed to demonstrate its capacity and standing, failed to demonstrate her default, failed to comply with the notice of default provision of the mortgage, and failed to comply with RPAPL 1303 and 1304. Relevantly, Defendant proffered copies of check records reflecting payments made for the two months following the alleged default and an affidavit from her brother, Richard Nicholson, attesting to the fact that he had made those payments, lived in the property with his family, and had not received an RPAPL 1303 notice. By order dated January 31, 2018, the Honorable Lawrence Knipel summarily rejected Defendant's arguments, found that "it is uncontested that the named plaintiff merged into Bank of America" and that the caption should be amended to reflect that, granted Plaintiff's motion, and denied Defendant's cross-motion.

Defendant filed a notice of appeal and a motion to reargue. Therein, her arguments were primarily directed to already-defunct Merrill Lynch's capacity to bring the action and the (alleged) error in merely substituting Bank of America in its stead. Defendant also reiterated that there was no proof of a payment default and that Richard Nicholson had attested to and proffered proof of further payments. Further, she realleged that Plaintiff had not demonstrated that it complied with the mortgage default notice requirement, RPAPL 1303, and RPAPL 1304. By order dated May 31, 2018, Judge Knipel denied Defendant's motion, finding that "[i]t is undisputed that shortly before this action was commenced Merrill Lynch merged into Bank of America, which succeeded to all its rights & liabilities." Defendant's other arguments were not explicitly addressed in the decision.

Plaintiff then moved for judgment of foreclosure and sale. Defendant opposed and cross-moved for a stay due to the death of Linda Nicholson, to compel Plaintiff to comply with A/O 431/11, and/or to toll interest. By order dated July 26, 2019, the Honorable Ingrid Joseph granted Plaintiff's motion and denied Defendant's cross-motion finding, in relevant part, that the matter had already been discontinued against the decedent as part of the order of reference, that Plaintiff's filing of a certificate of merit pursuant to CPLR 3012-b(a) obviated the need to file the A/O 431/11 affirmation, that the referee's report was substantially supported by the record, and that tolling was unwarranted. Defendant again appealed.

On November 9, 2022, the Appellate Division reversed the prior orders and vacated the grant of summary judgment to Plaintiff. More specifically, the panel found that Plaintiff failed

to demonstrate a default by admissible evidence as the business records relied upon by its affiant were not attached to her affidavit. Issues of fact were also found as to Plaintiff's compliance with RPAPL 1303 -- the affidavits of Defendant and Richard Nicholson were held to raise triable issues as to "whether Merrill Lynch was aware of the identity of a tenant at the subject property and failed to comply with RPAPL 1303[4] by sending him the required notice by certified mail." Defendant's remaining contentions were rejected by the panel.

Plaintiff now moves for summary judgment and an order of reference. Therein, it claims that a process server was told in 2022 that Richard Nicholson no longer resides at the property and, thus, the RPAPL 1303 issue is now moot. Defendant opposes<sup>2</sup> and cross-moves for leave to amend her answer to add affirmative defenses that this action should be dismissed pursuant to RPAPL 1301[3] and that Plaintiff failed to comply with the default notice provisions of the mortgage. Thereafter, she seeks dismissal upon those grounds and Plaintiff's alleged failure to comply with RPAPL 1303. Plaintiff opposes.

Plaintiff argues that the proposed amendment to the answer is meritless. "While leave to amend a pleading shall be freely granted (see CPLR 3025[b]), a motion for leave to amend is committed to the broad discretion of the court" (*Yong Soon Oh v. Hua Jin*, 124 A.D.3d 639, 640 [2d Dept 2015]). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Lucido v. Mancuso*, 49 A.D.3d 220, 222 [2d Dept 2008]).

The Court agrees that the proposed RPAPL 1301[3] defense is clearly meritless. It is undisputed that the parties entered into a loan modification agreement in 2010, that the 2008 action was marked disposed in September of that year in light of the modification, that the parties signed a stipulation of discontinuance in early 2011, that Plaintiff filed a copy of the stipulation in the spring of 2011, and that the instant action was not commenced until 2012. While it is true that a motion to discontinue was then filed in the 2008 action in 2013, there were

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<sup>2</sup> Defendant asserts that Plaintiff's motion is an improper successive motion for summary judgment. However, as the merits of the case must be addressed in light of the cross-motion, there would be no judicial economy in denying Plaintiff's motion on that basis. As such, Plaintiff's motion will be considered.

not two actions actually pending at the same time and the instant action results from an alleged default under the modification.

Plaintiff is correct that Defendant does not challenge its compliance with the mailing requirements of RPAPL 1304 in her cross-motion. (In fact, she does not address the issue until her cross-reply.) As the Appellate Division has repeatedly held that service of RPAPL 1304 notices also fulfills the mortgage default notice requirement (*Federal Nat'l v Ambrosio*, 197 AD3d 560, 563 [2d Dept 2021]; *Wells Fargo v Carcano*, 106 AD3d 724, 725 [2d Dept 2013]), Defendant's proposed default notice defense is clearly unavailing.

In light of the foregoing, leave to amend is denied.

The parties dispute whether Richard Nicholson and his wife Lisa were entitled to RPAPL 1303 notices and, if they were, the effect of Plaintiff's admitted failure to serve notices upon them. Plaintiff notes that neither the process server in 2012 nor the process server whom it sent to the property in 2022 found Richard and his family to be residents of the property. Only Coard, allegedly a relative of Defendant, was served as a Doe in this action and an alleged resident denied their occupancy recently. As such, Plaintiff suggests that they do not reside there and that, even if they did, a failure to send notices to them would require dismissal only as to them. Defendant – upon personal knowledge and an affidavit from Richard -- counters that Richard and family have lived at the property throughout and that, as they were not served with the required notices, the action must be dismissed in its entirety. As there appears to be a factual dispute and each side has presented evidence in support of its position, issues of fact remain as to whether Plaintiff complied with RPAPL 1303.<sup>3</sup>

Plaintiff has now proffered ample business records to demonstrate Defendant's default. It also offers a sufficient explanation of the evidence of additional payments proffered by Defendant – the loan was already in default and the amount received was sufficient to change the date of the next payment due but not to bring the loan current. In opposition, Defendant offers no evidence even suggesting that the loan is current.

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<sup>3</sup> While this Court recognizes that *US Bank v 22-33 Brookhaven*, 2129 AD3d 657, 664 [2d Dept 2023] implies that Plaintiff may be correct as a matter of law that any potential dismissal would only be as to the unserved tenants (whom it is not seeking to add as parties), the Appellate Division's decision in the instant matter suggests to the contrary.

Defendant has abandoned her remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

Motion granted to the extent that Defendant's first through seventh, eighth (as to RPAPL 1304) and ninth through twenty-eighth affirmative defenses are stricken. Default judgment is granted against the non-appearing defendants. The caption is amended to reflect Bank of America, National Association as plaintiff and to substitute Lislyne Coard in place of the Doe defendants. The action is again marked discontinued against Linda Nicholson who is deceased. Defendant's cross-motion is denied. Parties to proceed to trial on the remaining issue.

This constitutes the decision and order of the Court.

ENTER:

  
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Hon. Larry D Martin JSC

**HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT**