

<b>Bank of Am., N.A. v Karout</b>
2024 NY Slip Op 35092(U)
September 17, 2024
Supreme Court, Richmond County
Docket Number: Index No. 135420/2018
Judge: Desmond A. Green
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
Bank of America, N.A.,

Plaintiff,

PART 26

- against -

Present:  
Hon. Desmond A. Green

DECISION and ORDER

Linda Karout, Individually and as Executrix of the Estate  
of Estate of Noureldin Fares, et al.

Defendants.

Index No. 135420/2018  
Motion Nos. 001, 002  
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The papers numbered NYSCEF Documents "50" to "75" were marked fully submitted on the 1<sup>st</sup> day of August, 2024.

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Upon the foregoing papers, plaintiff's motion (Seq. No. 001) for a Default Judgment and Order of Reference is granted; the cross motion (Seq. No. 002) of defendant Linda Karout, Individually and as Executrix of the Estate of Noureldin Fares, *inter alia*, to vacate the Order of Publication and the Order Appointing a Guardian Ad Litem; and dismiss the complaint pursuant to CPLR §3211(a)(8), or in the alternative, vacate her default pursuant to CPLR §317, is denied in its entirety.

**Background**

Bank of America, N.A. (hereinafter, "BOA") commenced this action on July 17, 2018, to foreclose a mortgage encumbering residential premises located at 171 Silver Lake Road, Staten Island, New York. The mortgage was given to plaintiff's predecessor-in-interest to secure a note executed by Fares Noureldin, defendant Linda Karout's husband. Mr. Noureldin passed away on April 23, 2016, prior to the commencement of this action. Defendant was appointed Executrix of his Estate and granted Letters Testamentary on March 14, 2018.

Service of process upon Ms. Karout, Individually and as Executrix of the Estate of Noureldin Fares, was made by publication in the Staten Island Advance and the New York Post pursuant to the Court's Order dated March 13, 2020. This method of service was warranted upon plaintiff's submission of sufficient proof that a thorough investigation and diligent attempts to locate Ms. Karout were unsuccessful and futile, as set forth in an Affidavit of Due Diligence and Attempted Service.

Although defendant appeared by counsel, who eventually filed a notice of appearance, she failed to answer the complaint. The remaining named defendants have not appeared or answered, and their time to do so has expired.

Plaintiff Bank of America, N.A. moves for a Default Judgment and Order of Reference. Defendant Linda Karout opposes the motion and cross moves, *inter alia*, to dismiss the complaint pursuant to CPLR §3211 for lack of personal jurisdiction, or in the alternative, to vacate her default pursuant to CPLR §317.

**Bank of America's Motion for a Default Judgment and Order of Reference  
(Motion Seq. 001)**

In order to maintain a foreclosure action, the plaintiff/mortgagee is required to demonstrate its standing by showing it was the holder of the underlying note when the action was commenced (*see Freedom Mortgage Corp. v. King*, 215 AD3d 923, 925 [2d Dept 2023]). In this case, BOA establishes standing by attaching to the complaint a copy of the note with an allonge endorsed in blank, upon filing the action (*see Wilmington Sav. Fund Socy., FSB v. Racer*, 217 AD3d 730, 733 [2d Dept 2023]).

The plaintiff/mortgagee bears the initial burden of proving its entitlement to a default judgment pursuant to CPLR §3215(f) and an Order of Reference pursuant to RPAPL §1321. Where, as here, a foreclosure complaint is not verified, CPLR §3215(f) provides, in pertinent part: "upon any application for a default judgment [and Order of Reference], proof of the facts

constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party” (*JPMorgan Chase Bank, N.A. v. Horsfield*, 227 AD3d 790, 793 [2d Dept 2024]; citation omitted)).

To meet this burden, BOA produces the mortgage and the unpaid note; proof of the facts constituting the claim; and evidence of the default, through the submission of an affidavit by an individual authorized to act on plaintiff’s behalf attesting to the borrower’s default (*see PennyMac Corp. v. Bongiovanni*, 212, AD3d 837, 839 [2d Dept 2023]; *JPMorgan Chase Bank, N.A. v. Horsfield*, 227 AD3d at 793).

Bank of America’s Assistant Vice President, Tranelle Martise Thomas, avers that she acquired personal knowledge of the relevant loan documents by examining plaintiff’s business records. She explains in detail how the records attached to her affidavit were compiled, retrieved, mailed, and contemporaneously entered in BOA’s “Track-Right Transaction Detail”, *i.e.*, a computer-based record-keeping system. In particular, Ms. Thomas describes how the prior loan servicer’s records in connection with Ms. Karout’s default under the terms of the mortgage were “integrated and boarded into BOA’s systems” such that necessary information concerning the subject loan is now part of plaintiff’s business records. Such documents include the loan servicer’s payment history, mailing proofs, and required notices pursuant to RPAPL §1303, §1304, and §1306. Ms. Thomas concludes, upon examining the relevant information, that the loan servicer’s records demonstrate BOA’s compliance with the foregoing pre-foreclosure requirements.

The Court finds that plaintiff’s Assistant Vice President laid a proper foundation under the business records exception to the hearsay rule (CPLR §4518[a]) for the admissibility of the documents she relies on to prove Ms. Karout’s default in paying the loan installments due under the terms of the mortgage (*see Deutsche Bank National Trust Company v. Lopresti*, 203 AD3d 883, 884 [2d Dept 2022]; *HSBC Bank v. Bhatti*, 186 AD3d 817, 819 [2d Dept 2020]). Thus, BOA

met its burden by submitting legally sufficient evidence demonstrating plaintiff's entitlement to the entry of a default judgment and an Order of Reference appointing a Referee to Compute.

"[T]o successfully oppose a facially adequate motion for leave to enter a default judgment and for an Order of Reference based on the failure to appear or timely interpose an answer... a defendant must demonstrate both a reasonable excuse for the default in answering the complaint and a potentially meritorious defense to the action" (*US Bank N. A. v. Salvatierra*, 205 AD3d 757, 758 [2d Dept 2022]; see *PennyMac Corp. v. Bongiovanni*, 212, AD3d at 839).

The Court finds that Ms. Karout has not proffered a reasonable excuse for failing to answer the complaint. In an affidavit dated December 12, 2023, defendant avers that she did not appear or answer the complaint because she first learned about "the existence of this case when [she] received notice of this motion [for a default judgment]."

Insofar as it appears in the record before the Court, Bank of America's Notice of Motion for a Default Judgment and Order of Reference was properly served on September 7, 2023, by first-class mail to the Law Office of Ms. Karout's attorney, Morris Fateha, Esq., located at 911 Avenue U, Brooklyn, New York. Mr. Fateha previously appeared before the Court on defendant's behalf when he participated in mandatory foreclosure settlement conferences held on February 20, 2020, and March 10, 2022. Eight months later, on November 16, 2022, Mr. Fateha filed a Notice of Appearance stating that "Defendant, Linda Karout, hereby appears in [this action], and the undersigned [Morris Fateha, Esq.] has been retained as attorney for Linda Karout."

There is no question that defendant was aware of the pending foreclosure action prior to receiving notice of this motion because she was represented by counsel in both the Foreclosure Conference Part and the Residential Foreclosure Part. Thus, Ms. Karout has not proffered a reasonable excuse for her failure to answer the complaint, and for the additional 21-month delay in bringing this cross motion after the case was released to the Residential Foreclosure Part on

March 10, 2022. Her bare and unsubstantiated assertions are insufficient to defeat the mortgagee's facially adequate motion for leave to enter a Default Judgment and Order of Reference.

In view of the Court's determination, Ms. Karout's remaining contentions as to whether she has a potentially meritorious defense to this foreclosure action need not be considered (*see JPMorgan Chase Bank, N.A. v. Horsfield*, 227 AD3d at 794; *U.S. Bank N.A. v. Carucci*, 217 AD3d 894, 895 [2d Dept 2023]).

Plaintiff Bank of America, N.A. has established, *prima facie*, its entitlement to a Default Judgment and Order of Reference.

**Defendant Linda Karout's Cross Motion to dismiss the complaint  
pursuant to CPLR §3211(a)(8) for lack of personal jurisdiction,  
or in the alternative, vacate her default pursuant to CPLR CPLR §317  
(Motion Se. 002)**

In support of her cross motion, Ms. Karout takes the position that the foreclosure action must be dismissed pursuant to CPLR §3211(a)(8) on the grounds that the Court lacks personal jurisdiction because she "was not served the summons and complaint."

Ms. Karout is precluded from challenging personal jurisdiction at this juncture. It is well established that "an appearance of the defendant is equivalent to personal service of the summons and complaint upon him [or her], unless an objection to jurisdiction under CPLR §3211(a)(8) is asserted by motion or in the answer as provided in CPLR §3211 (CPLR § 320 [b])" (*U.S. Bank N.A. v. Chkifati*, 203 AD3d 1213, 1214 [2d Dept 2022]). "By statute, a party may appear in an action by attorney (CPLR §321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction... Thus, the filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR §CPLR (a)(8) for lack of personal jurisdiction" (*Mid-Island Mtge. Corp. v.*

*Johnson*, 175 AD3d 490, 491 [2d Dept 2019] [internal citations and quotation marks omitted]; see *U.S. Bank N.A. v. Chkifati*, 203 AD3d 1213, 1214 [2d Dept 2022]).

On November 16, 2022, Mr. Fateha filed a Notice of Appearance on behalf of Ms. Karout. Neither the defendant nor counsel for defendant raised any objection to personal jurisdiction by either a timely motion to dismiss on that ground, or by interposing a timely answer asserting lack of personal jurisdiction (see *HSBC Bank USA N.A. v. Mohammed*, 209 AD3d at 847). Ms. Karout waived the defense of lack of personal jurisdiction by failing to timely assert it. Consonant with the foregoing, the branch of her cross motion which is for dismissal of the complaint for lack of personal jurisdiction pursuant to CPLR §3211 is denied.

Although “a defendant in default is not entitled to affirmative relief of a non-jurisdictional nature absent vacatur [ ] of his or her default” (*Bank of NY Mellon v. Lawson*, 176 AD3d 1155, 1157 [2d Dept 2019]) the Court is constrained to consider the branch of defendant’s cross motion which is to vacate the Order of Publication. Vacatur of the Order would, in effect, invalidate service of process in this action, thereby depriving the Court of personal jurisdiction.

In disputing the Court’s decision to permit publication of the summons and complaint, Ms. Karout takes the position that “[t]here was no reason why plaintiff had to resort to [such a method]...which is guaranteed not to give notice to anyone...nobody reads the legal notices buried in the Staten Island Advance, or any other papers.” Her opinions in this regard lack relevancy.

Defendant was properly served in accordance with the Court’s Order dated March 13, 2020. Affidavits of Publication were filed verifying compliance with the specific requirements set forth in CPLR §316. Ms. Karout fails to raise questions of fact refuting the contents of plaintiff’s Affidavit of Due Diligence and Attempted Service, which constitutes prima facie proof that personal service of process was not possible; and other methods proved to be impractical in that

defendant's whereabouts could not be ascertained. Particularly, she has not submitted any proof controverting the process server's sworn statements, e.g., that various occupants of the subject premises on different occasions, advised the process server that defendant was "out of the country" for an unknown period of time. In such situations, the Court has statutory authority to allow the method of publication to be implemented in accordance with the procedural details set forth in CPLR §316, which has not been contested in this case. Thus, there is no basis to vacate the Court's Order of Publication.

Finally, Ms. Karout is not entitled to vacatur of her default under CPLR §317 because she has appeared in this action through her counsel. "By statute, a party may appear in an action by attorney (CPLR §321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction" (*Capital One N.A. v. Ezkor*, 209 AD3d 823, 824 [2d Dept 2022]; see *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 NY2 138 [1986]). In this case, CPLR §317 may not be invoked for purposes of vacating Ms. Karout's default in this matter.

In view of the Court's determination, Ms. Karout's remaining arguments are rendered academic.

Accordingly, it is

ORDERED, the motion of plaintiff Bank of America for a default judgment against all non-answering and non-appearing defendants is granted; and it is further,

ORDERED, the branch of plaintiff's motion which is for an Order of Reference appointing a Referee to Compute in accordance with RPAPL §1321 is granted, and it is further,

ORDERED, Linda Karout, Individually and as Executrix of the Estate of Noureldin Fares a/k/a Noureldine Fares a/k/a/ Noureldine Ali Fares, be substituted in place of Linda Karout, Individually and as Executrix of the Estate of Noureldin Fares a/k/a Noureldine Fares a/k/a/ Noureldine Ali Fares, if she be living or dead, her spouse, heirs, devisees, distributees and

successors-in-interest, all of whom and whose names and places of residence are unknown to plaintiff; and it is further,

ORDERED, Rosa Martinez and Seynabou Ndong, tenants of the mortgaged property, shall be substituted in place of “John Doe”, as necessary party defendants to this action; and it is further,

ORDERED, U.S. Bank Trust National Association, as Trustee, for MEB Loan Trust shall be substituted in place of Bank of America, N.A.; and it is further,

ORDERED, the cross motion of defendant Linda Karout to dismiss the complaint, or in the alternative, to vacate her default is denied, and it is further,

ORDERED, the unopposed cross motion of defendant Linda Karout to vacate the Order of Publication is denied; and it is further,

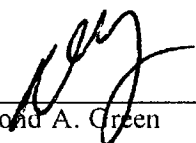
ORDERED, the appointed Guardian ad Litem is hereby discharged from any further duties; and it is further,

ORDERED, the Guardian ad Litem, Toni Ann Cristine Barone, shall be awarded the sum of \$850 for the services rendered; and it is further,

ORDERED, the Clerk shall enter judgment accordingly.

Dated: 9/17/2024

ENTER,

  
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Hon. Desmond A. Green