

Bank of Am., N.A. v Rubin

2025 NY Slip Op 31417(U)

April 14, 2025

Supreme Court, Kings County

Docket Number: Index No. 14088/09

Judge: Cenceria P. Edwards

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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 Civic Center, Brooklyn, New York, on the 14th day of April, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,

Justice.

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BANK OF AMERICA, N.A.,

Plaintiff,

- against -

RIVKY RUBIN, WACHOVIA BANK, NATIONAL ASSOCIATION, BOARD OF MANAGERS OF THE GARDEN ESTATES CONDOMINIUM #1, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, MIRIAM RUBIN,

Defendants.

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The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

ORDER

Index No. 14088/09

[Mot. Seq. #s 1 and 2](#)

NYSCEF Doc Nos.

4-16 19-25
20-25 26
26 28

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 268 Wallabout Street, Unit 1A, in Brooklyn (Block 2264, Lot 2201) (Property), plaintiff Bank of America, N.A. (BOA or Plaintiff) moves (in motion sequence [mot. seq.] one) for an order vacating the April 8, 2014 conditional order of dismissal (April 2014 Conditional Dismissal Order), pursuant to CPLR 5015 (a) (NYSCEF Doc No. 4).

Defendant Rivky Rubin (Rivky Rubin or Borrower Defendant) cross-moves (in mot. seq. two) for an order, pursuant to CPLR 3211 (a) (8), dismissing this action for lack of -

personal jurisdiction and granting “such other and further relief as the Court deems just and proper”¹ (NYSCEF Doc No. 19).

Background

On June 8, 2009, BOA commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc No. 7). BOA’s affidavit of service in the record reflects that Rivky Rubin was served with process by delivery of the summons, complaint and other papers to Miriam Rubin, a person of suitable age and discretion, at the Property on September 11, 2009, and the papers were mailed to Rivky Rubin at the Property on September 14, 2009 (NYSCEF Doc No. 8 at 11).

None of the defendants answered or otherwise responded to the complaint, with the exception of Wachovia Bank, National Association, which filed a notice of appearance on or about September 12, 2009.

On February 12, 2010, BOA moved for an order of reference on default. On September 4, 2012, the court (Velasquez, J.) granted BOA an order of reference and a default judgment against the non-appearing defendants, including Rivky Rubin (NYSCEF Doc No. 14 at 3).

Subsequently, the action inexplicably laid dormant. Thus, on April 8, 2014, a status conference was held before the court (Knipel, J.), after which the April 2014 Conditional Dismissal Order was issued providing that:

¹ Defendant Rivky Rubin’s cross-motion will be deemed to seek vacatur of her default, pursuant to CPLR 5015 (a) (4), in addition to dismissal of the complaint, pursuant to CPLR 3211 (a) (8).

“At a Status Conference held this day, it is the finding of this Court that more than one year has elapsed since the joinder of issue and plaintiff has unreasonably neglected to prosecute this action.

“Accordingly, this action is dismissed pursuant to CPLR 3216 and the County Clerk is directed to cancel the Notice of Pendency unless plaintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days from the date hereof.

“Warning: Failure to comply with the terms of this order will result in the dismissal of the action” (NYSCEF Doc No. 15).

BOA failed to file a note of issue or otherwise proceed to judgment within the specified 90-day period, as required by the April 2014 Conditional Dismissal Order.

***BOA’s Instant Motion to Vacate
the April 2014 Conditional Dismissal Order***

On October 5, 2021, *more than six years* later, BOA moved for an order vacating the April 2014 Conditional Dismissal Order (NYSCEF Doc No. 4). BOA submits an attorney affirmation arguing that the court was without power to dismiss the action because the conditions set forth in CPLR 3216 were not met (NYSCEF Doc No. 5 at ¶¶ 13-15). BOA’s counsel further argues that it timely prosecuted this action since BOA moved for an order of reference within one year of defendants’ appearance default (*id.* at ¶¶ 19-20).

Rivky Rubin’s Dismissal Cross-Motion

On February 16, 2022, Rivky Rubin cross-moved for an order, pursuant to CPLR 3211 (a) (8), dismissing the complaint for lack of personal jurisdiction over Rivky Rubin (NYSCEF Doc No. 19).

Rivky Rubin submits a cross-moving affidavit regarding “Plaintiff’s failure to properly serve [her]” (NYSCEF Doc No. 20 at ¶ 2). Rubin attests that “I have lived at the Property with my husband, Joel Rubin, since purchasing it in 2006” and “[n]o other person resided at the Property throughout 2009” (*id.* at ¶ 3). Rivky Rubin attests that “I did not have any relatives or family members named Miriam Rubin on September 11, 2009, the date of service, nor do I now” and “[t]here has never been a Miriam Rubin living at the Property in all the time I have owned and lived at the Property” (*id.* at ¶¶ 5 and 7). Rivky Rubin further attests that “[t]he description of the person served, age 21-35, 100-130 lbs, 5’4”-5’8” does not match me or anyone else living at the Property at the time of alleged service” (*id.* at ¶ 6). Rivky Rubin also denies receipt of the summons and complaint by mail and attests that “I never saw the summons when reviewing my mail, nor was I ever contacted by the US Post Office regarding the summons, nor is the summons in my personal records” (*id.* at ¶ 11).

Defense counsel submits an affirmation opposing BOA’s motion to vacate the April 2014 Conditional Dismissal Order due to BOA’s “extreme delay in prosecuting this action” (NYSCEF Doc No. 21 at ¶ 14). Defense counsel notes that “Plaintiff continued to neglect this action for *seven more years*, only filing the instant motion to vacate the dismissal on October 5, 2021 (*id.*). Defense counsel asserts that “Plaintiff has not offered any excuse for its delay, and it lacks a meritorious cause of action due to its failure to serve Defendants[.]” as required by CPLR 5015 (a) (1) (*id.* at ¶¶ 14-16). Defense counsel also asserts that “Defendant’s sworn denial of service including testimony that no Miriam Rubin resided at

the Property on the date of service rebuts any presumption of service arising from Plaintiff's affidavits of service and a Traverse Hearing is required" (*id.* at ¶ 27).

BOA's Opposition and Reply

BOA, in opposition to Rivky Rubin's dismissal cross-motion, submits an attorney affirmation asserting that "Defendant's motion should be held in abeyance until Plaintiff's motion to vacate the dismissal is decided since the action is dismissed and Defendant's cross-motion is improper unless the dismissal is vacated" (NYSCEF Doc No. 26 at ¶ 17). BOA's counsel also notes that "Defendant having knowledge of this proceedings, defaulted in answering Plaintiff's summons and complaint and only now after [BOA's] filing of the motion seeking to vacate the Conditional Order, does she seek to allege she was not served with the summons and complaint" (*id.* at ¶ 29). BOA's counsel argues that "Defendant, having defaulted in answering and failing to vacate the adjudicated default, is therefore without an entitlement to be heard or to demand affirmative relief" (*id.* at ¶ 31). BOA's counsel also asserts that "Defendant's papers are insufficient to rebut the process server's affidavit of service" because "Defendant does not dispute residing at the mortgaged premises, where service was completed, rather she makes bald, conclusory, and unsubstantiated denials of service" (*id.* at ¶ 41).

Rivky Rubin's Reply

Defense counsel, in reply, asserts that Rivky Rubin "has alleged the specific facts, contradicting the process server's affidavit, that there was no person named Miriam Rubin residing at the property at the time of service, and that the description of the person served

does not match anyone else residing at the property; this meets the requirement to rebut any presumption of proper service” (NYSCEF Doc No. 28 at ¶ 7).

Discussion

(1)

BOA’s Motion to Vacate

In *Deutsche Bank Natl. Trust Co. v Bastelli*, 164 AD3d 748 (2d Dept 2018), the Appellate Division, Second Department, considered an appeal from an order of the Supreme Court, Kings County, which denied the plaintiff mortgagee’s motion to vacate a conditional order of dismissal. The conditional order of dismissal issued in *Bastelli* and the April 2014 Conditional Dismissal Order issued in this foreclosure action are identical.

In *Bastelli*, the Second Department modified the Supreme Court’s order by deleting the provision denying the plaintiff’s motion to vacate the conditional order of dismissal and substituting a provision granting the motion. The Second Department then affirmed the order granting the motion and held that:

“an action cannot be dismissed pursuant to CPLR 3216 (a) ‘unless a written demand is served upon ‘the party against whom such relief is sought’ in accordance with the statutory requirements, along with a statement that the ‘default by the party upon whom such notice is served in complying with such demand within said ninety day period *will serve as a basis for a motion* by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed” (*Cadichon v Facelle*, 18 NY3d 230, 235 [2011], quoting CPLR 3216 [b] [3]; *see Deutsche Bank Natl. Trust Co. v Cotton*, 147 AD3d 1020, 1021 [2017]). While a conditional order of dismissal may have ‘the same effect as a valid 90-day notice pursuant to CPLR 3216’ (*Byers v Winthrop Univ. Hosp.*, 100

AD3d 817, 818 [2012]; *see Griffith v Wray*, 109 AD3d 512, 513 [2013]; *Stallone v Richard*, 95 AD3d 875, 876 [2012]), the conditional order here ‘was defective in that it failed to state that the plaintiff’s failure to comply with the notice “will serve as a basis for a motion” by the court to dismiss the action for failure to prosecute’ (*Deutsche Bank Natl. Trust Co. v Cotton*, 147 AD3d at 1021 [emphasis added], quoting CPLR 3216 [b] [3]). . . . Lastly, the Supreme Court erred in administratively dismissing the action without further notice to the parties and without benefit of further judicial review (*see Cadichon v Facelle*, 18 NY3d at 235-236; *Deutsche Bank Natl. Trust Co. v Cotton*, 147 AD3d at 1021; *US Bank N.A. v Saraceno*, 147 AD3d 1005, 1006 [2017]; *Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 698 [2012])” (*Deutsche Bank Natl. Trust Co. v Bastelli*, 164 AD3d at 749-750 [emphasis added]).

Here, the April 2014 Conditional Dismissal Order, which purported to serve as a 90-day notice pursuant to CPLR 3216, “was defective in that it failed to state that the plaintiff’s failure to comply with the notice ‘will serve as a basis for a motion’ by the court to dismiss the action for failure to prosecute[,]” as expressly required by CPLR 3216 (b) (3) (*Element E, LLC v Allyson Enterprises, Inc.*, 167 AD3d 981, 982 [2d Dept 2018] [holding that “(t)he procedural device of dismissing an action for failure to prosecute is a legislative creation, not a part of a court’s inherent power . . . and, therefore, a court desiring to dismiss an action based upon the plaintiff’s failure to prosecute must follow the statutory preconditions under CPLR 3216”]). Consequently, BOA’s motion to vacate the April 2014 Conditional Dismissal Order is granted.

(2)

Rivky Rubin's Dismissal Cross-Motion

“Ordinarily, a process server’s affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service” (*Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). “However, where there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence” (*id.*).

Here, Rivky Rubin provided an affidavit attesting that there is nobody named Miriam Rubin at her Property who received service of process on September 11, 2009, and that she did not subsequently received the summons and complaint by mail at the Property. Consequently, having rebutted the factual statements in the affidavit of service, a traverse hearing is required to establish whether or not service of process upon Rivky Rubin was proper. Accordingly, it is hereby

ORDERED that BOA’s motion (mot. seq. one) is granted and the April 2014 Conditional Dismissal Order is hereby vacated; and it is further

ORDERED that Rivky Rubin’s dismissal cross-motion (mot. seq. two) is held in abeyance pending the outcome of a traverse hearing; and it is further

ORDERED that the parties shall appear before ~~Referee~~ this Part (FRP1)
Tuesday 6/10/2025 at
on 10:00 am, Room 756 for a traverse hearing regarding service of process upon Rivky Rubin in September 2009, after which ~~the appointed referee shall hear and report, unless~~

the ~~parties agree that the referee can hear and~~ ^{Court shall} determine whether service of process upon Rivky Rubin was proper.

This constitutes the decision and order of the court.

April 14, 2025

E N T E R,



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