

HSBC Bank USA, N.A. v Downer

2025 NY Slip Op 31578(U)

April 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 14399/12

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

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 21st day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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HSBC BANK USA, N.A., AS INDENTURE TRUSTEE
FOR THE REGISTERED NOTEHOLDER OF RENAISSANCE
HOME EQUITY LOAN TRUST 2007-1,

Plaintiff,

- against -

Index No. 14399/12

GRACE E. DOWNER, LEONE E. DOWNER, "JOHN DOE"
#1 through "JOHN DOE" #12, the last twelve names
being fictitious and unknown to Plaintiff, the person
or parties intended being tenants or occupants, person
or corporation if any, having or claiming an interest in,
or lien upon the premises described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

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

4, 6-15, 19-22 23-34
24-34 36-38

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 4412 Avenue I in Brooklyn (Property), plaintiff HSBC Bank USA, N.A., As Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2007-1 (HSBC or Plaintiff) moves (in motion sequence [mot. seq.] five) for an order confirming the Referee's Report and granting it a judgment of foreclosure and sale (NYSCEF Doc No. 4).

Defendants Grace E. Downer and Leone E. Downer (Downer Defendants) cross-move (in mot. seq. six) for an order, pursuant to CPLR 5015 (a) (4) and RPAPL § 1304, vacating the court's January 4, 2019 order (NYSCEF Doc No. 24 at ¶ 13) and dismissing the complaint "on the grounds that Plaintiff has failed to serve your affirmant with Notice of Motion and fail[ed] to serve the 90[-]day notice as required" (NYSCEF Doc No. 23).

Background

On July 13, 2012, HSBC commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc No. 13). The complaint alleges that on or about January 9, 2007, defendant Grace E. Downer borrowed \$576,000.00 from Delta Funding Corporation by executing a promissory note, which was secured by a mortgage executed by the Downer Defendants encumbering their Property (*id.* [complaint] at ¶¶ 1 and 3). The complaint alleges that Grace E. Downer "defaulted under the note for \$576,000.00 owing to plaintiff and no payment thereof has been made . . . despite demand, by having failed . . . to make monthly payments on December 1, 2008 to date" (*id.* at ¶ 10).

On November 10, 2012, the Downer Defendants collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses and two counterclaims (NYSCEF Doc No. 30).

By a February 14, 2017, order, the court (Knipel, J.) issued a conditional order dismissing this action, pursuant to CPLR 3216, for failure to prosecute this action in the

event that HSBC fails to file a note of issue or otherwise proceed to litigate within 90 days (NYSCEF Doc No. 31).

On or about August 20, 2018, HSBC moved for an order vacating the court's February 14, 2017, dismissal order, granting it summary judgment against the Downer Defendants and for an order of reference. By a January 4, 2019, order, the court vacated the dismissal, granted HSBC summary judgment and struck the Downer Defendants' answer and granted HSBC an order of reference appointing a referee to compute the amounts due (NYSCEF Doc No. 14 at 13-17).

On March 17, 2020, the referee issued his Oath and Referee's Report, which provides, in relevant part:

"I received evidence in the form of a duly sworn affidavit, executed by Javier Rivera, a Vice President for PHH Mortgage Corporation [PHH], servicer for HSBC . . . and the documentary evidence listed in Schedule B attached hereto.

"I have computed and ascertained the amount due upon the said Note and Mortgage, and I find, and accordingly report, that there is due to the plaintiff on the said Note and Mortgage, as of November 2, 2019, the total sum of \$1,112,181.37, which includes interest through and including November 2, 2019, and all other total advances, costs and expenses, all as more fully set forth in Schedule A attached hereto.

"Plaintiff is entitled to recover any additional monies advanced for taxes, prior to the closing of title of the referee's sale in this action.

"In addition, I have determined that Plaintiff is entitled to recover accrued interest per diem, as well as its advances, costs, and expenses through to date of closing of title of the referee's sale in this action.

“In addition, I have determined that Plaintiff is entitled to recover its legal expenses, including attorneys’ fees, with respect to Defendant’s default on the Mortgage and this foreclosure action. The amount of said legal expenses to be recovered by Plaintiff is to be set by the Court upon the application by Plaintiff for entry of final judgment of foreclosure and sale . . .” (NYSCEF Doc No. 12).

HSBC’s Instant Motion

On July 6, 2021, HSBC moved for an order confirming the 2020 Referee’s Report and for a Judgment of Foreclosure and Sale. HSBC submits an attorney affirmation referencing exhibits, including the affidavit of Javier Rivera and the payment history of the loan, which were relied upon by the referee (NYSCEF Doc Nos. 10 and 14 at 18-103).

The Downer Defendants’ Cross-Motion

On January 13, 2022, the Downer Defendants opposed HSBC’s motion and cross-moved for an order, pursuant to CPLR 5015 (a) (4) and RPAPL § 1304, vacating the January 4, 2019, order granting HSBC summary judgment and an order of reference and dismissing the complaint based on HSBC’s alleged failure to serve defense counsel with a Notice of Motion and HSBC’s failure to properly serve the RPAPL § 1304 notices (NYSCEF Doc Nos. 23 and 24 at ¶ 13).

Defense counsel submits an affirmation arguing that this action should be dismissed for lack of jurisdiction, pursuant to CPLR 5015 (a) (4), because HSBC’s August 20, 2018, motion for an order vacating the court’s February 14, 2017, dismissal order, granting it summary judgment against the Downer Defendants and for an order of reference “was

unopposed because your affirmant was never served with the motion papers” because “the motion papers were allegedly served at an old address known as 6500 Jericho Turnpike, Suite 209, Commack, N.Y. 11725” when counsel’s actual address was purportedly filed with the New York State Unified Court System’s website (NYSCEF Doc No. 24 at ¶ 7).

Defense counsel further argues that “Plaintiff failed to establish its strict compliance with RPAPL 1304, which ‘requires a separate notice to each borrower in a separate envelope’” and “Plaintiff attached a United States Post Office document addressed to Grace E. Downer and Leone Downer, that indicated that the alleged mailing was sent in the same envelope” (*id.* at ¶¶ 8 and 11). The Downer Defendants submit copies of the April 12, 2012 pre-foreclosure notices reflecting that they were mailed in the same envelope (NYSCEF Doc No. 34).

Defense counsel also asserts that “Plaintiff failed to establish, *prima facie*, that it complied with RPAPL 1304” because the “Affidavit by LISA SOAVE, contract management coordinator of Ocwen Loan Servicing, LLC (‘Ocwen’), did not even mention the RPAPL 1304 Notice” (*id.* at ¶ 10). The Soave affidavit merely attests that “[p]aragraph SEVENTEENTH [of the complaint] recites that the Mortgage complies with section 6-m of the Banking Law *as well as the pre-foreclosure notice requirements . . .*” and that “[a]nswering Defendants’ naked denial with respect to this paragraph of the complaint raises no issue” (NYSCEF Doc No. 33 at ¶ 7 [q] [emphasis added]).

Grace Downer and her husband, Leon Downer also submit affidavits attesting that they “never signed” for any certified mailing of the 90-day pre-foreclosure notices (NYSCEF Doc Nos. 25 and 26).

HSBC’s Opposition and Reply

HSBC, in opposition to the cross-motion and in reply, submits an attorney affirmation asserting that the Downer Defendants “do not seek to vacate their default and restore Plaintiff’s prior application, but instead seek to dismiss Plaintiff’s action via Cross-Motion Sequence #6” (NYSCEF Doc No. 36 at ¶¶ 3 and 15), despite the fact that the Downer Defendants’ Notice of Cross-Motion specifically references CPLR 5015 (a) (4) and defense counsel’s affirmation explicitly seeks vacatur of the January 4, 2019 order (NYSCEF Doc Nos. 23 and 24 at ¶ 13). HSBC’s counsel also asserts that “[i]n the absence of a reasonable excuse for a defendant’s default, a defense to the merits of the action does not constitute a basis for vacating a default judgment” (NYSCEF Doc No. 36 at ¶ 18).

Regarding service of HSBC’s August 20, 2018, motion upon defense counsel, HSBC’s counsel at McCabe, Weisberg & Conway, LLC (MWC) asserts that “MWC entered as counsel to the Plaintiff via Consent to Change Attorney (‘CTCA’) on or about July 3, 2019, when a CTCA was filed with the County Clerk” but “[u]pon review of the County Clerk’s records it does not appear that a CTCA was ever filed to relieve Heaven & Associates, PLLC, the listed attorney of record for the Defendants . . .” (*id.* at ¶ 8). HSBC’s counsel asserts that “Defendants have . . . failed to prove that the Plaintiff served the wrong address” (*id.* at ¶ 9).

Discussion

CPLR 2103 (e) requires that “[e]ach paper served on any party shall be served on every other party who has appeared.” “[I]n the context of an action to foreclose a mortgage, a defendant that appears in the action is ‘entitled to service of all papers in the action . . .’” (*21st Mortg. Corp. v Raghu*, 197 AD3d 1212, 1216 [2d Dept 2021], quoting *Pol-Tek Indus. v Panzarella*, 227 AD2d 992, 992 [1996]). Importantly, the Second Department has held that “improper service of a motion provides a complete excuse for default on a motion and deprives the court of jurisdiction to entertain the motion” (*Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 124-125 [2d Dept 2015]). Furthermore, “the failure to provide a defendant with proper notice of a motion renders the resulting order and judgment entered upon that order nullities, warranting vacatur pursuant to CPLR 5015 (a) (4)” (*id.* at 125).

Here, the Downer Defendants seek vacatur of the January 4, 2019, order which restored this action, granted HSBC summary judgment and an order of reference, pursuant to CPLR 5015 (a) (4), on the ground that HSBC’s August 20, 2018, motion was never served upon defense counsel, although the Downer Defendants appeared in this action. While HSBC’s counsel asserts that “Defendants have . . . failed to prove that the Plaintiff served the wrong address” (NYSCEF Doc No. 36 at ¶ 9), HSBC’s counsel at MWC has no personal knowledge of the service of HSBC’s August 20, 2018, motion upon defense counsel, since MWC admits that it was not yet counsel to HSBC at the time of such service (*id.* at ¶ 8). HSBC’s submission of an opposing affirmation from an attorney who lacks personal knowledge of the relevant facts is rejected. Consequently, vacatur of the January

4, 2019, order is warranted because the court lacked jurisdiction to entertain HSBC's motion.

In the absence of a summary judgment cross-motion by the Downer Defendants, the sufficiency of HSBC's 90-day notice, pursuant to RPAPL § 1304, can be raised if and when HSBC renews its motion for summary judgment and an order of reference. Accordingly, it is hereby


ORDERED that HSBC's motion (mot. seq. five) is denied as moot; and it is further

ORDERED that the Downer Defendants' cross-motion (mot. seq. six) is only granted to the extent that the January 4, 2019 order (NYSCEF Doc No. 14 at 13-17) is hereby vacated, pursuant to CPLR 5015 (a) (4), on the ground that the court lacked jurisdiction to hear the underlying motion; the cross-motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

April 21, 2025



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