

HSBC Bank, N.A. v Fleurimond

2025 NY Slip Op 31996(U)

May 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 7453/2006

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 20th day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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HSBC BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF ACE SECURITIES CORP HOME EQUITY LOAN TRUST SERIES 2005-HE2, ASSET BACKED PASS-THROUGH CERTIFICATES c/o Ocwen Loan Servicing, LLC 1675 Palm Beach Lakes West Palm Beach, FL 33401,

Plaintiff,

- against -

Index No. 7453/2006

MARIE L. FLEURIMOND, LOUISE R. DEROSE, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, OCWEN LOAN SERVICING, LLC, ROCIO VIGUERA, SHAKEKA BATHEA,

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) _____
Reply Affidavits (Affirmations) _____

8-21 27-32
25-26 33-34
33-34 35

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 960 Ralph Avenue in Brooklyn (Block 4707, Lot 59), (Property), plaintiff HSBC Bank, N.A., as Trustee for the Registered Holders of Ace Securities Corp.

Home Equity Loan Trust Series 2005-HE2, Asset Backed Pass-Through Certificates c/o Ocwen Loan Servicing, LLC 1675 Palm Beach Lakes, West Palm Beach, FL 33401 (HSBC or Plaintiff) moves (in motion sequence [mot. seq.] five) for an order: (1) restoring this case to the active calendar; (2) substituting Robertson, Anshutz, Schneid, Crane & Partners, PLLC, as attorney of record for Plaintiff; and (3) granting HSBC an extension of its time to effect service upon Defendant Marie L. Fleurimond (Fleurimond), pursuant to CPLR 306-b (NYSCEF Doc No. 8).

Defendant Fleurimond cross-moves (in mot. seq. six) for an order: (1) dismissing this action for failure to serve the summons and complaint within 120 days after filing, pursuant to CPLR 306-b, and (2) awarding her attorneys' fees, pursuant to RPL § 282 (NYSCEF Doc No. 27).

Background

On March 8, 2006, HSBC commenced this foreclosure action by filing a summons, a complaint verified by counsel and a notice of pendency against the Property (NYSCEF Doc No. 1 at pages 1-38). The complaint alleges that on December 20, 2004, Fleurimond borrowed \$305,600.00, which loan was secured by a mortgage encumbering her Property (NYSCEF Doc No. 1 [complaint] at ¶¶ 1, 4 and 5). The complaint alleges that Fleurimond “have/has failed and neglected to comply with the conditions of said mortgage, bond or note by omitting and failing to pay items of principal and interest or taxes, assessments, water rates, insurance premiums, escrow and/or other charges . . .” on August 1, 2005 (*id.* at ¶ 7 and Schedule E).

HSBC's affidavit of service sworn to on March 28, 2006, reflects that Fleurimond was purportedly served with process on March 23, 2006, at 2:45 p.m. at the Property by affixing the summons and complaint to the door and subsequently mailing the documents to Fleurimond at the Property on March 28, 2006 (NYSCEF Doc No. 1 at 52). The affidavit of service states that the process server previously attempted service upon Fleurimond on March 11 at 10:50 a.m., on March 14 at 6:55 p.m. and on March 15 at 7:10 a.m. (*id.*).

A second affidavit of service sworn to on April 10, 2006, reflects that Fleurimond was purportedly served with process again on April 7, 2006, at 9:45 a.m. at 100 S. Central Avenue in Valley Stream, New York, by affixing the summons and complaint to the door and subsequently mailing the documents to Fleurimond at that address on April 10, 2006 (*id.* at 54). The affidavit of service states that the process server previously attempted service upon Fleurimond on March 29 at 6:15 p.m. and on April 1 at 7:05 a.m. (*id.*). Notably, both of HSBC's affidavits of service identified the different service addresses as "the defendant's dwelling place within the State of New York."

Fleurimond failed to answer or otherwise respond to the complaint.

On August 11, 2006, HSBC filed a request for judicial intervention (RJI) and moved for an order of reference, a default judgment and to amend the caption (*id.* at 58-63). HSBC's motion was granted on default, and on October 24, 2006, the court (Schneir, J.) issued an Order of Reference and a default judgment against the non-appearing defendants, including Fleurimond (*id.* at 64-68).

On May 1, 2007, HSBC moved to confirm the March 22, 2007 Referee's Report (*id.* at 165-167) and for a judgment of foreclosure and sale (*id.* at 158). On August 15, 2007, the court (Schneier, J.) granted HSBC's motion without opposition, confirmed the Referee's Report and issued a Judgment of Foreclosure and Sale (*id.* at 169-179).

According to the Referee's Report of Sale (*id.* at 209-214), on March 20, 2008, a foreclosure auction was held at which HSBC emerged as the highest bidder for the sum of \$399,004.56 and the Referee "made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the mortgaged premises sold" (*id.* at 210, ¶ 8).

On October 3, 2008, Defendant Fleurmond moved, by Order to Show Cause (OSC) for an order "permanently restraining HSBC from removing the tenant "pending a determination as to whether HSBC properly served Fleurimond (*id.* at 230-231). Essentially, Fleurimond's OSC sought to vacate the default judgment taken against her and to dismiss the action for lack of personal jurisdiction.

By a November 18, 2008, decision and order, entered on February 6, 2009,¹ the court (Schneier, J.) set aside the foreclosure auction, vacated the August 15, 2007 Judgment of Foreclosure and Sale and held that:

"Fleurimond's assertion that she never resided at 960 Ralph Avenue, Brooklyn, N.Y. or 100 S. Central Avenue, Valley Stream N.Y. or N. Central Avenue, Valley Stream, N.Y. and has only resided at 3035 Brighton 6th Street, Brooklyn, N.Y. remains as un rebutted proof that the place at which she was purportedly served pursuant to CPLR 308 (4) was never her

¹ *Id.* at 416.

actual dwelling nor her usual place of abode (*Bank Nat'l Assn. v. Osorlo*, 26 AD3d 452 [2d Dept 2006]).

The court also held that there was no evidence of proper service upon Fleurimond because HSBC merely submitted a hearsay affidavit as proof of service (*id.* at 234-239). By a February 26, 2009, Order, entered on March 2, 2009,² the court (Schneier, J.) rescinded the foreclosure sale and directed the County Clerk to expunge the Referee's Deed to HSBC (*id.* at 243 and 404-405).

On December 30, 2008, HSBC moved for renewal "requesting that the Court reverse its determination that the [s]ervice upon the Defendant [Fleurimond] was not proper service and . . . vacating the foreclosure sale and Judgment of Foreclosure and Sale" (*id.* at 247-253). By a February 6, 2009 order, the court (Schneier, J.) denied HSBC renewal motion and held that:

"Plaintiff's motion to renew is denied. The Plaintiff's argument that the defendant did not live at 3035 Brighton 6th Street is irrelevant because the *Plaintiff has not offered any proof that the defendant was validly served at any address*" (*id.* at 245 [emphasis added]).

The action inexplicably laid dormant for six years.

On March 19, 2015, Fleurimond moved, by OSC, for an order "pursuant to CPLR 2221 (a) modifying the prior Order . . . entered on March 2, 2009 . . . so as to include in said Order a direction to the City Register of Kings County to effect cancellation of the referee's deed by making a proper notation in the books, records and indices maintained

² *Id.* at 419.

by the City Register's office . . ." (*id.* at 452 and 454-455). By a May 7, 2015, order, the court (Baynes, J.) granted Fleurimond's motion to the extent that it directed the City Register to expunge the Referee's Deed that was recorded against the Property and held that "Marie L. Fleurimond remains the owner of the subject Premises . . ." (*id.* at 453).

HSBC's Instant Motion

On June 14, 2022, *more than 15 years after* commencement, HSBC moved for an order: (1) restoring this action to the active calendar; (2) substituting its new counsel of record; and (3) granting it leave to extend its time to effect service upon Fleurimond, pursuant to CPLR 306-b (NYSCEF Doc No. 8). HSBC submits an attorney affirmation, which does not explain the extensive delays in prosecuting this action, except that the Covid-19 pandemic "prevented the filing of this instant application" until the restrictions were lifted (NYSCEF Doc No. 10 at ¶¶ 12-16).

Notably, by a July 27, 2022 letter, HSBC's counsel requested that HSBC's motion "be held in abeyance until such time that it would be appropriate to proceed with the underlying foreclosure" since "the borrower is currently being reviewed for a Loss Mitigation workout" (NYSCEF Doc No. 23).

Fleurimond's Opposition

On October 12, 2022, Fleurimond opposed HSBC's motion with an attorney affirmation asserting that "the Court cannot restore this action because it does not have jurisdiction over defendant" and "[w]ith respect to plaintiff's application to extend its time to serve the summons and complaint, plaintiff's **delay of close to fourteen (14) years**

before making the instant motion cries out for denial” and “plaintiff did not put forward any excuse for this most inordinate delay” requiring denial of HSBC’s untimely motion (NYSCEF Doc No. 25 at ¶¶ 2-3 and 20 and 24).

Fleurimond’s Dismissal Cross-Motion

On October 12, 2022, Fleurimond also cross-moved for dismissal based on a lack of personal jurisdiction and an order awarding her attorneys’ fees (NYSCEF Doc No. 27). Defense counsel submitted an affirmation asserting that dismissal is warranted because “[i]t has been more than sixteen years since the action was commenced and Defendant has not been [s]erved” (NYSCEF Doc No. 28 at ¶ 8).

Discussion

Here, the court previously determined *over a decade ago* that Fleurimond was not served with process. Because HSBC failed to establish personal jurisdiction over Fleurimond, she is entitled to an order dismissing this action for failure to serve the summons and complaint within 120 days after filing, pursuant to CPLR 306-b.

CPLR 306-b provides that:

“Service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding, provided. . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, *shall dismiss the action without prejudice as to that defendant*, or upon good cause shown or in the interest of justice, extend the time for service” (emphasis added).

“To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service . . . or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control” (*State of New York Mortg. Agency v Braun*, 182 AD3d 63, 66 [2d Dept 2020], quoting *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31-32 [2d Dept 2009]). Regarding the interest of justice standard, The Second Department has held that:

“the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the *length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant*” (*State of New York Mortg. Agency v Braun*, 182 AD3d 63, 66-67 [2d Dept 2020], quoting *Leader v Maroney, Ponsini & Spencer*, 97 NY2d 95, 105-106 [2001] [emphasis added]).

HSBC’s untimely motion for an extension of time within which to serve Fleurimond with process, pursuant to CPLR 306-b, which was filed *more than a decade after* service of process was held by the court to be improper, is denied. HSBC failed to establish good cause for its failure to properly serve Fleurimond with process, nor did it establish due diligence in its attempt to serve Fleurimond. The inexplicably late timing of HSBC’s motion for an extension of time to serve Fleurimond precludes the extension sought in the interest of justice (*US Bank Nat’l Ass’n v Fink*, 206 AD3d 858, 860 [2d Dept 2022] [holding that “plaintiff failed to establish that an extension of time to serve the defendant was

warranted in the interest of justice” since “plaintiff failed to offer any reasonable excuse for its delay of more than 7½ years in moving to extend the time to serve the defendant, after the expiration of the 120-day service period”]). Accordingly, it is hereby

ORDERED that HSBC’s motion (mot. seq. five) is only granted to the extent that the action is restored to the active calendar and Robertson, Anshutz, Schneid, Crane & Partners, PLLC are substituted as attorneys of record for HSBC; Plaintiff motion seeking an extension of time within which to serve Fleurimond with process, pursuant to CPLR 306-b, is denied; and it is further

ORDERED that Fleurimond’s cross-motion (mot. seq. six) is only granted to the extent that this action is dismissed as against Fleurimond, pursuant to CPLR 306-b, without prejudice; the cross-motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



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