

OCWEN Loan Servicing, LLC v Francis

2025 NY Slip Op 33874(U)

October 1, 2025

Supreme Court, Kings County

Docket Number: Index No. 521668/2022

Judge: Menachem M. Mirocznik

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At IAS Part FRP5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 1st of October 2025

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

OCWEN LOAN SERVICING, LLC

Plaintiff,

-against-

ANGELA FRANCIS; 670 GREENE HOLDING, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR TERWIN MORTGAGE TRUST 2007-3SL, ASSETBACKED SECURITIES, SERIES 2007-3SL; SALVANITA FOSTER, if living, and if she/he be dead, any and all persons unknown to plaintiff, claiming, or who may claim to have an interest in, or general or specific lien upon the real property described in this action; such unknown persons being herein generally described and intended to be included in the following designation, namely: the wife, widow, husband, widower, heirs at law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors, and assignees of such deceased, any and all persons deriving interest in or lien upon, or title to said real property by, though or under them, or either of them, and their respective wives, widows, husbands, widowers, heirs at law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors and assigns, all of whom and whose names, except as stated, are unknown to plaintiff; EVELYN MILES, if living, and if she/he be dead, any and all persons unknown to plaintiff, claiming, or who may claim to have an interest in, or general or specific lien upon the real property described in this action; such unknown persons being herein generally described and intended to be included in the following designation, namely: the wife, widow, husband, widower, heirs at law, next of kin, descendants, executors, administrators, devisees, le atees, creditors, trustees, committees, lienors, and

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**Decision and Order
(Motion Seq. 4 and 5)**

assignees of such deceased, any and all persons deriving interest in or lien upon, or title to said real property by, though or under them, or either of them, and their respective wives, widows, husbands, widowers, heirs at law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors and assigns, all of whom and whose names, except as stated, are unknown to plaintiff; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF FINANCE; THE PEOPLE OF THE STATE OF NEW YORK; UNITED STATES OF AMERICA; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #1; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #2; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #3; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #4; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #5; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #6; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #7; RUBY "DOE" (REFUSED LAST NAME) AS JOHN DOE #8; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #9; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #10; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #11; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #12; "JOHN DOE" (REFUSED NAME) AS JOHN DOE #13,

Defendants.

Papers	Numbered
Order to Show Cause	NYSCEF Doc. 180-192
Notice of Cross-Motion/Opposition	NYSCEF Doc. 199-202

Upon the foregoing papers, the order to show cause and cross-motion are determined in accordance with this Decision and Order as follows:

Procedural History

Prior to commencement of the instant action defendants Salvanita Foster and Angela Francis purportedly conveyed the subject property known as 670 Greene Avenue, Brooklyn, NY 11221 to defendant 670 Greene Holding, Inc. A prior action was commenced by defendants against defendant 670 Greene Holding, Inc. claiming that the subject conveyance was procured by fraud.

This action was commenced on July 28, 2022 seeking to foreclose a mortgage encumbering the subject property. By order dated January 31, 2023, the Court granted plaintiff's motion to serve defendants Salvanita Foster and Evelyn Miles by publication, to amend the caption and appoint a guardian ad litem. Defendants defaulted and by order dated February 29, 2024, the Court granted plaintiff a default judgment and order of reference and by order and judgment dated November 14, 2024, the Court granted plaintiff a Judgment of Foreclosure and Sale.

Defendant Salvanita Foster now moves by order to show cause to vacate her default, the judgment of foreclosure and sale pursuant to CPLR 5015(a)(1), CPLR 5015(a)(3), CPLR 5015(a)(4), CPLR 317 and CPLR 1015 and to dismiss the action as barred by the statute of limitations. Defendant contends that the action is time barred because a prior foreclosure action commenced under Index No. 5215/2008 was dismissed, and this action was commenced more than six years later after commencement of the prior action. Defendant further contends she was never served and that the Borrower Defendant Angela Francis died on September 23, 2020, prior to commencement of this action and therefore the action and proceedings against the Borrower Defendant are a nullity.

Plaintiff cross-moves to strike defendants Salvanita Foster and Angela Francis from the case as not being necessary parties because the subject property was purportedly conveyed to defendant 670 Greene Holding, Inc. prior to commencement of the action and plaintiff affirmatively waives the right to seek a deficiency judgment against the deceased defendant Angela Francis. Plaintiff also seeks to amend the caption to correct the name of the plaintiff. Plaintiff further contends that defendant's affirmation is not signed, the action is not time barred because the prior action was dismissed due lack of standing and therefore did not accelerate the loan, defendant was properly served by publication and does not proffer a reasonable excuse or meritorious defense to the action and does not attest not having notice of the action in time to defend. Although stipulating to adjourn the motions, defendant defaulted in opposing plaintiff's cross-motion.

Discussion

Initially, given that defendant's motion is not supported by a signed affidavit or affirmation the same will not be considered. In the absence of a signed affidavit or affirmation, defendant failed to substantiate any of her alleged contentions including any contention that she was not served, lacked notice or has a reasonable excuse for defaulting in this action.

As noted above, and as noted by plaintiff, defendant was served by publication in accordance with the Court's order dated January 31, 2023 and submitted affidavits of service by publication demonstrating prima facie that defendant was properly served. The law is well settled that an "affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service" *Citimortgage, Inc. v Cardali*, 230 AD3d 467, 468 (2d Dept 2024). "A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit" *PennyMac Corp. v Barbosa*, 189 AD3d 863 [2d Dept 2020]

Here, even if the affirmation was signed, defendant failed to rebut the presumption of proper service.

A defendant seeking vacate a default in answering or appearing pursuant to CPLR 5015 must demonstrate a reasonable excuse for the default and meritorious defense to the action. See *US Bank NA. v Dedomenico*, 162 AD3d 962, 964 [2d Dept 2018]; Additionally, "CPLR 317 permits a defendant who has been served with a summons other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense ... However, the defendants' "mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317" *Deutsche Bank Natl. Tr. Co. v Benitez*, 179 AD3d 891, 892-93 [2d Dept 2020]

Here, as noted above, defendant failed to establish lack of notice in time to defend or a reasonable excuse for the default. In the absence of a reasonable excuse this Court need not consider whether defendant has a meritorious defense to the action. See *LaSalle Bank, NA v Bernard*, 184 AD3d 816, 818 [2d Dept 2020][*"Since the defendant failed to demonstrate a reasonable excuse for her default, it is not necessary to determine whether she demonstrated a potentially meritorious defense"*]; See also *US Bank NA. v Dedomenico*, 162 AD3d 962, 964 [2d Dept 2018][*"Moreover, since the appellants failed to demonstrate a reasonable excuse for their default, it is unnecessary to consider whether they sufficiently demonstrated the existence of a potentially meritorious defense"*]

However, regardless of defendant's showing, as acknowledged by plaintiff, the dead cannot be sued. "A party may not commence a legal action or proceeding against a dead person... Thus, where a mortgagor dies prior to the commencement of a foreclosure action, the action is a "legal nullity," insofar as asserted against the deceased mortgagor" *Fed. Natl. Mtge. Assn. v Tudor*, 185 AD3d 905, 906 [2d Dept 2020][internal citations omitted]

Therefore, proceedings against defendant Angela Francis are a nullity and must be vacated.

"Pursuant to RPAPL 1311(1), "necessary defendants" in a mortgage foreclosure action include, among others, "[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein." *Nationstar Mtge., LLC v Foltishen Inst.*, 199 AD3d 1011 [2d Dept 2021]

However, "[w]here, as here, a mortgagor has made an absolute conveyance of all her interest in the mortgaged premises, including her equity of redemption, she is not a necessary party to foreclosure, unless a deficiency judgment is sought against .. In light of the plaintiffs express waiver of the right to seek a deficiency judgment against the borrower, the borrower is not a necessary party to foreclosure." *PNC Bank, NA. v Lefkowitz*, 185 AD3d 1069, 1070 [2d Dept 2020][internal citations omitted]; See also *Nationstar Mtge., LLC v Foltishen Inst.*, 199 AD3d 1011 [2d Dept 2021]

Here, the decedent Angela Francis purportedly conveyed her interest in the subject property prior to her death to defendant 670 Greene Holding, Inc., plaintiff affirmatively waives the right to seek a deficiency judgment against the deceased defendant Angela Francis and seeks to, in effect, vacate the default judgment, judgment of foreclosure and discontinue the action as against the deceased defendant as well as defendant Salvanita Foster as neither purportedly have an interest in the subject property and are therefore not presently necessary parties to the subject action. Defendant does not dispute or oppose plaintiff's requested relief. Therefore, the relief is granted.

However, at this time, the Court need not reach plaintiff's contentions regarding the impact of the resolution of the action commenced by deceased defendant Angela Francis and defendant Salvanita Foster against defendant 670 Greene Holding, Inc. on this case or on any potential sale, as the same would amount to an impermissible advisory opinion. The issues surrounding the subject transfers shall be resolved in said action and the Courts findings herein shall have no impact on the other action.

Therefore, plaintiffs cross-motion seeking to in effect, vacate the default judgment, judgment of foreclosure and discontinue the action as against the deceased defendant Angela Francis as well as defendant Salvanita Foster is granted. Lastly, plaintiffs request to correct a misnomer in the named plaintiff is also granted.

The parties' remaining contentions need not be addressed m light of the Court's determinations.

Accordingly, it is hereby

ORDERED, that defendant's motion by order to show cause is DENIED; and it is further

ORDERED, that plaintiff's cross-motion is GRANTED; and if further

ORDERED, that plaintiff is directed to settle an amended judgment of foreclosure consistent herewith, including the removal of defendants Angela Francis and Salvanita Foster within (20) days of entry of this order.

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

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