At an IAS Term, Part FRP1, of the Supreme Court of the State of York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of October, 2025.

P R E S E N T:
HON. CENCERIA P. EDWARDS,
Justice.

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US BANK,

Plaintiff,

-against-

VERNA THOMPSON et al,

Defendant,

----------X

Calendar Date: 5/25/2022
Index No.: 8514/11
Motion Seq: 3
Cal. No.: 25

The following e-filed papers read herein: NYSEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	2-41
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Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 1514 East 96th Street in Brooklyn (Block 8279, Lot 61), Defendant Verna Thompson moves for dismissal of this action for lack of personal jurisdiction over her, pursuant to CPLR 3215[c] as abandoned, or for failure to timely move for judgment of foreclosure and sale. In the alternative, Defendant seeks to vacate her default in this action and compel the acceptance of her proposed answer. Plaintiff opposes.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on April 13, 2011. All defendants failed to timely answer. A Foreclosure Shadow Conference was scheduled for October 17, 2012 but Defendant did not appear. After Plaintiff filed a Request for Judicial Intervention including

the Foreclosure RJI Addendum on December 19, 2012, two Pre-Settlement Conferences were scheduled for March of 2013.[1]

On January 17, 2014, Plaintiff filed a motion for default judgment and an order of reference which was "Granted Settle Order on Notice" three months later. A proposed order was settled and was signed and uploaded in September of 2015.

A status conference was held on July 28, 2016 and the Honorable Peter P Sweeney issued an order stating "that unless good cause is shown, the plaintiff will be precluded from making any dispositive motions in this matter unless a dispositive motion is made within 90 days hereof." Plaintiff having not done so, Judge Sweeney held another conference on November 22, 2016, this time issuing a conditional order of dismissal directing Plaintiff "to make a motion for an Order of Reference within 90 days hereof" and that the failure to do so would "result in dismissal of the action." On February 28, 2017, the case was marked dismissed based upon the conditional order. Defendant, through counsel, then served and filed a Notice of Entry of the November order.

On March 26, 2018, Plaintiff filed a motion to vacate the sua sponte dismissal of the action. Defendant opposed through counsel. Therein, she argued that she had served Notice of Entry of the conditional order of dismissal, thereby placing Plaintiff on notice of it. Thus, she asserted, its unexplained delay thereafter in moving for vacatur was inexcusable. Defendant further posited that Plaintiff moved under the wrong section – 2221[a], rather than 2221[d], 2221[e], or 5015.

By order dated May 9, 2018, the Honorable Lawrence Knipel denied Plaintiff's motion, noting that "Pltf. was served with a copy of Justice Sweeneys order and waited 1 ½ years to make this motion. This is too late." Plaintiff appealed and, on December 30, 2020, the Appellate Division, Second Department reversed and granted the motion to vacate the conditional order and restore the action to the active calendar.

Defendant's Instant Motion

Defendant now moves for dismissal of this action on several grounds. First, Defendant asserts that the Court lacks personal jurisdiction over her. Pursuant to the filed affidavits of

[1] It is unclear from the record whether Defendant attended these conferences.

service, the process server ostensibly served Defendant by delivering a copy to her daughter "Tameika Thompson" at the property address and mailing a copy to Defendant thereafter. Tameka[2] was also served as a Doe. Oddly, the same process server allegedly re-served Tameka at the same location several weeks later via "affix-and-mail" service. Both Defendant and Tameka submitted affidavits swearing that they were never served with the summons and complaint, explaining that Tameka would have already been on her way to work at the time of the alleged service.

Second, Defendant argues that Plaintiff failed to timely move for default judgment against her and, thus, its case should be dismissed pursuant to CPLR 3215[c]. While this action was commenced in April 2011, no RJI was filed until December 2012 and Plaintiff took no further action to advance this case until early 2014. Though Plaintiff might claim that Defendant waived the right to raise 3215[c], she asserts that she has not appeared in this action even "informally" as the case was already dismissed at the time she opposed the motion to restore.

Finally, Defendant notes that Kings County Uniform Civil Term Rules Part F Rule 8[3] requires a plaintiff to move for judgment of foreclosure and sale within one year of the entry of an order of reference – and that Plaintiff did not do so (and still has not done so), warranting dismissal.

Were the case to not be dismissed, Defendant seeks vacatur of her default in the interest of substantial justice and to compel the acceptance of her proposed answer. Citing to CPLR 2221[a] – applied by the Appellate Division to vacate the dismissal order – Defendant asserts that the order of reference was "defective" and "erroneous"[4] as the underlying motion relied on hearsay and that the order of reference should be vacated. She further argues that she had no notice of this action until she found a copy of the motion for an order of reference on her porch in 2014. Defendant claims to have taken action at that time – retaining a mortgage broker and

[2] Per Defendant and her daughter, this is the correct spelling of her name.
[3] Now, Rule F,7.
[4] Defendant's argument – that CPLR 2221[a] allows vacatur of any "erroneous" or "defective" order – misapprehends the Appellate Division's holding. Plaintiff appealed from the denial of vacatur of a sua sponte order. The Panel found that Plaintiff's motion had correctly been brought under 2221[a] as the underlying order was non-appealable. Upon consideration of the order, vacatur was found to be appropriate. Defendant is now challenging the result of a motion made on notice and would need to vacate her default in opposing it in order to challenge the merits of the decision as she now seeks to do.

attorney to assist her – but that the individuals whom she hired do not appear to have done anything. Defendant further notes that notice of entry of the order of reference was not served upon her until a year after the action was dismissed and, thus, she could not seek to vacate it until the action was restored. Finally, Defendant asserts that in light of Plaintiff's prosecutorial delay there would be no prejudice were she allowed to answer and that she has potentially meritorious defenses to the action.

Plaintiff's Opposition

Plaintiff argues that Defendant appeared in this action by filing a notice of entry of the dismissal order and opposing the subsequent motion to vacate. Consequently, it posits, she waived the right to assert a lack of personal jurisdiction and that Plaintiff failed to proceed toward judgment.

Plaintiff also asserts that Defendant raised the right to assert violations of CPLR 3215[c] and UCTR F,8 by omitting them from her prior papers. That she opposed restoration of the case but did not include these arguments, in Plaintiff's view, creates a form of res judicata barring her from doing so now. Plaintiff additionally notes that Defendant did raise CPLR 3215[c] before the Appellate Division but that it nonetheless vacated the dismissal – and, thus, law of the case bars this Court from revisiting the issue.

Even were she able to assert her arguments, Plaintiff suggests that Defendant fails to sufficiently rebut the affidavits of service – offering only general asserts of lack of service and proffering no supporting evidence. Though Tameka claims that she would have already been on her way to work at the time of the alleged service nearly a decade earlier, she proffers no evidence that she was working that day, what time she arrived at work, etc. Plaintiff further notes that the description of the individual allegedly served substantially matches the information on Tameka's driver license (height, age) and she does not challenge the accuracy of other characteristics noted (skin color, approximate weight). Though Tameka claims that her hair was black rather than brown, that is not a significant difference.

Plaintiff also notes that Defendant admits to being aware of this action since 2014 but did not seek to vacate her default until she filed the instant motion, suggesting that an estoppel might apply.

Defendant's Reply

In reply, Defendant asserts that her participation in this action was post-dismissal and that it would have been ridiculous for her to argue to dismiss the no longer active case on jurisdictional grounds or upon the other arguments now being raised. Defendant also suggests that she rebutted the affidavits of service with specificity – denying receipt and asserting that Tameka would not have been home at the time. She further notes that Plaintiff offers no explanation for the subsequent attempts to serve Tameka and for its delaying in seeking a judgment of foreclosure and sale. Defendant also asserts that the order of reference should not have been granted due to the insufficiency of the evidence and should be vacated.

Analysis

It is well established that:

> [A] defendant may appear informally by actively litigating the action before the court. When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court. Thus, absent a formal "appearance" by a defendant, a defendant may nevertheless appear in an action where his or her counsel communicates a clear intent to participate (*Taveras v City of NY*, 108 AD3d 614, 617 [2d Dept 2013][internal citations omitted])

However, "[c]ertain types of limited involvement in an action by a defendant do not waive jurisdictional defenses, such as where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, or, as most relevant here, cross-moving to dismiss the complaint pursuant to CPLR 3215(c)" (*US Bank v Cadoo*, 197 AD3d 588, 589-590 [2d Dept 2021][internal quotation marks and citations omitted]). Indeed, similarly to our case[5], the Appellate Division Second Department has held that "by opposing the plaintiff's motion to vacate the conditional order of dismissal which was, in effect, pursuant to CPLR 3215(c), the defendants did not demonstrate a 'clear intent to participate' in the litigation, nor did they participate in the lawsuit 'on the merits,' and therefore they did not

[5] Here, the Appellate Division treated the dismissal as being pursuant to CPLR 3216 rather than 3215[c]. As to the "informal appearance" issue, that is irrelevant. As the Panel did not address Defendant's 3215[c] arguments, however, Plaintiff's "law of the case" argument fails.

formally or informally appear in the action" (*Id*, at 590). As such, Defendant did not waive her jurisdictional defenses and the right to assert CPLR 3215[c].[6]

Personal Jurisdiction

"A process server's affidavit of service gives rise to a presumption of proper service ... A sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat the presumption of proper service" (*Deutsche Bank v O'King*, 148 AD3d 776, 776-777 [2d Dept 2017]). "However, bare and unsubstantiated denials of service are insufficient to rebut the presumption of proper service created by a duly executed affidavit of service, and a hearing is not required where the defendant fails to swear to specific facts rebutting the statements in the process server's affidavit" (*Tuttnauer USA Co, Ltd v Russo*, 216 AD3d 846, 847 [2d Dept 2023][internal quotation marks omitted]). "A minor discrepancy between the appearance of the person allegedly served and the description of the person served contained in the affidavit of service is generally insufficient to raise an issue of fact warranting a hearing" (*PNC Bank v Bannister*, 161 AD3d 1114, 1115 [2d Dept 2018]). "Further, the discrepancies must be substantiated by something more than a claim by the parties allegedly served that the descriptions of their appearances were incorrect" (*US Bank v Cherubin*, 141 AD3d 514, 516 [2d Dept 2016]).

Here, Defendant and her daughter offer little more than a bare denial of receipt nearly a decade earlier. Each swears that she was not served and that Tameka would not have been at home as she would have left for work already. However, in the absence of any evidence that she actually was at work that day – let alone that she arrived on time – that is insufficient to rebut the affidavit of service (see similarly, *Deutsche Bank v Kenol*, 205 AD3d 1004, 1005 [2d Dept 2022][claim that would have been in class insufficient]; see also, *HSBC Bank USA v. Rahmanan*, 194 AD3d 792, 794 [2d Dept 2021][unsubstantiated discrepancies in appearance and claim that would have been elsewhere at the time of service deemed insufficient]). Likewise, Tameka's claim that she had black rather than brown hair is a de minimis difference in appearance,

[6] This Court sees no reason to treat a Notice of Entry of a dismissal as an informal appearance.

particularly where the rest of the description appears substantially accurate. As such, Defendant's jurisdictional challenge fails.[7]

CPLR 3215[c]

"If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." (CPLR 3215[c]). "It is not necessary for a plaintiff to actually obtain a judgment within one year after the default to avoid a CPLR 3215(c) dismissal, so long as proceedings were undertaken to do so during the initial year after the defendant's default" (*Citibank v Kerszko*, 203 AD3d 42, 51 [2d Dept 2022]). Here, it is undisputed that Plaintiff took no actions within one year of Defendant's default and offers no excuse for the failure.

Plaintiff argues that Defendant should have raised here CPLR 3215[c] arguments in opposition to its motion to vacate. As the matter was already dismissed – and, per the Appellate Division, that dismissal was based upon CPLR 3216 – there was no obligation to seek dismissal on alternate grounds. To the extent that the Appellate Division did not accept Defendant's argument that the Court could have dismissed the action under CPLR 3215[c] or 22 NYCR 202.27, that was a determination of the basis for the order not a finding that Plaintiff timely advanced the action.

[7] The Court recognizes that no explanation has been given for why the same process server attempted to re-serve Tameka the following month but declines to infer from the attempt that the prior service did not occur.

In light of the foregoing, this action must be dismissed pursuant to CPLR 3215[c].[8]

Conclusion

Accordingly, it is

ORDERED that Defendant's motion to dismiss ([mot. seq.] #3) is granted and the instant action is dismissed pursuant to CPLR 3215[c].

This constitutes the decision and order of the Court.

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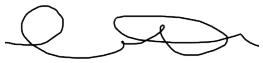

Hon. Cenceria P. Edwards, J.S.C., CPA

[8] Consequently, the Court need not reach Defendant's remaining arguments.