

**Bank of N.Y. Mellon Trust Co., N.A. v Blasse**

2025 NY Slip Op 34449(U)

November 13, 2025

Supreme Court, Kings County

Docket Number: Index No. 17671/09

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of November, 2025.

**P R E S E N T:**

HON. CENCERIA P. EDWARDS,  
Justice.

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THE BANK OF NEW YORK MELLON TRUST COMPANY,  
NATIONAL ASSOCIATION F/K/A THE BANK OF NEW YORK  
TRUST COMPANY, N.A. AS TRUSTEE,

Plaintiff,

-against-

**Mot. Cal. Date:** 05/24/2022  
**Mot. Cal. #:** 39  
**Index No.:** 17671/09  
**Mot. Seq. #:** 2

KELVIN BLASSE, DEUTSCHE BANK NATIONAL  
TRUST COMPANY AS TRUSTEE FOR FIRST  
FRANKLIN MORTGAGE LOAN TRUST 2006-FF8  
ASSET BACKED CERTIFICATES, SERIES 2006-FF8,  
L&L CONTRACTING, NEW YORK CITY DEPARTMENT  
OF HOUSING DEVELOPMENT AND PRESERVATION,  
NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD, NEW YORK CITY TRANSIT ADJUDICATION  
BUREAU, NEW YORK STATES DEPARTMENT OF  
TAXATION AND FINANCE, JOHN DOE  
(SAID NAME BEING FICTITIOUS, IT BEING THE INTENTION OF  
PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF  
PREMISES BEING FORECLOSED HEREIN, AND ANY PARTIES,  
CORPORATIONS OR ENTITIES, IF ANY, HAVING OR CLAIMING  
AN INTEREST OR LIEN UPON THE MORTGAGED PREMISES),

Defendant(s),

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The following e-filed papers read herein:

NYSEF Nos.:

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

Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Affidavits/ Affirmations in Reply \_\_\_\_\_

2-19  
21-24  
25-29

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 229 Albany Avenue in Brooklyn (Block 1370, Lot 13), Plaintiff The Bank of New York Mellon Trust Company moves for vacatur of the Court's September 24, 2013 order<sup>1</sup> dismissing this action for want of prosecution and restoration of this case to active status. Defendant Kelvin Blasse opposes.

### *Background Facts and Procedural History*

Plaintiff commenced the instant foreclosure action on July 15, 2009. All of the defendants defaulted in answering. On December 1, 2009, Plaintiff filed an ex parte motion for an order of reference. The matter was set down for a pre-settlement conference but was released upon Defendant's failure to appear. Thereafter, in September 2010, Plaintiff filed a notice of withdrawal of its ex parte motion.

On November 16, 2010, Defendant filed a motion to dismiss, alleging that the action was moot as he had executed a quitclaim deed earlier that year conveying the property to Plaintiff. The parties then executed and filed a stipulation of settlement wherein Defendant "admit[ed] to each and every allegation contained in Plaintiff's complaint, waive[d] any and all defenses, claims, or causes of action against Plaintiff in this action, and consent[ed] to Plaintiff being granted an Order of Reference, and further consent[ed] to a Judgment of Foreclosure and Sale." Defendant also withdrew his pending motion.

There appears to be no further activity in the case until May 28, 2013 when a status conference was held and the Honorable Sylvia Ash issued an Interim Order directing Plaintiff to move for an order of reference within ninety days or "this case shall be dismissed pursuant to CPLR 3215 [c]." A further conference was set for September 24, 2013 "to ensure compliance with the foregoing."

No motion was filed in response to the Interim Order. As such, Judge Ash issued an order on September 24, 2013 stating that "Plaintiff having failed to comply with this Court's

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<sup>1</sup> The date in the notice of motion, September 14, 2014, is erroneous.

previous Order and no justifiable excuse having been shown, this action is dismissed without prejudice pursuant to CPLR 3216 for want of prosecution.”

On June 30, 2021, Plaintiff filed the instant motion. Noting that Defendant defaulted in the action, Plaintiff argues that issue was never joined and, thus, CPLR 3216 is inapplicable. It further asserts that the Court did not strictly comply with the statutory preconditions to dismissal under that section – both in terms of the contents and the service of the notice.

In opposition, Defendant challenges Plaintiff’s ability to seek vacatur. After he filed a quiet title action in 2016, Plaintiff responded by sending a letter revoking its acceleration of the loan – thus, he argues, it cannot seek to resurrect the instant action which is based upon the revoked acceleration. He further suggests that issue was joined upon his former counsel’s filing of the motion to dismiss and signing the stipulation consenting to foreclosure. In the alternative, Defendant asserts that this action should be dismissed pursuant to CPLR 3215[c] as Plaintiff’s motion for an order of reference was withdrawn and, thus, as if it never existed.

Noting that the opposition did not contest that the dismissal order was erroneous, Plaintiff posits that the issue is conceded and the order must be vacated. Plaintiff further argues that Defendant waived all defenses to this action and, thus, could not oppose the merits of the merits (or any other aspect of the case). Countering the allegation that its deacceleration letter mooted this action, Plaintiff asserts that the judge in Defendant’s Quiet Title action<sup>2</sup> has already found that the letter did not revoke the prior acceleration. It also suggests that neither the motion to dismiss nor the stipulation joined issue. Finally, Plaintiff argues that dismissal pursuant to CPLR 3215[c] would be inappropriate as Defendant did not seek that relief by motion and as it did timely move for default judgment against him.

### *Analysis*

Plaintiff is not estopped from seeking vacatur of the dismissal of this action. While it is undisputed that it sent a letter in 2016 ostensibly de-accelerating the loan, the Honorable Lawrence Knipel held (in the Quiet Title action) that the letter was not timely sent and, thus,

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<sup>2</sup> Index number 2094/16.

could not revoke the acceleration. He further asserted that its contents were lacking and that the circumstances suggest that it was pretextual. As such, the loan remains accelerated and Plaintiff's motion is proper.

Issue was not joined as Defendant did not file an answer (see, *Siegel*, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:12). A pre-answer motion to dismiss is not a joinder. While a pre-answer motion to dismiss can be treated as a motion for summary judgment (CPLR 3211[c]), that is a statutory exception to the need for the joinder of issue. Nor is the stipulation (see, for example, *Deutsche Bank v Agostinelli*, 230 AD3d 472, 474 [2d Dept 2024] which addresses 3215[c] following a stipulated consent to foreclosure).

Plaintiff is correct that dismissal pursuant to CPLR 3216 was improper. Among other things, issue was not joined precluding dismissal (*HSBC v Assanah*, 237 AD3d 1174, 1175 [2d Dept 2025]). Further, the initial order warned of potential dismissal pursuant to CPLR 3215[c] rather than 3216 and does not spell out the specific conduct constituting the alleged neglect in prosecuting. There is also no evidence that the notice was sent at all, let alone by certified or registered mail. As such, preconditions for dismissal pursuant to CPLR 3216 were not met.

Dismissal pursuant to CPLR 3215[c] would also be inappropriate. "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]). Where, as here, a plaintiff timely files a motion seeking an order of reference, that is sufficient even if the motion is subsequently withdrawn (*Aurora Loan Services, LLC v Colleluori*, 170 AD3d 1097, 1099 [2d Dept 2019]) Further, as in *Agostinelli*, "[b]ased on the terms of the stipulation, the defendants consented to the jurisdiction of the Supreme Court and expressly waived any defenses that they might have had, which necessarily included any right to obtain dismissal pursuant to CPLR 3215(c) for the plaintiff's failure to timely seek a default judgment."

### ***Conclusion***

Accordingly, it is

**ORDERED** that Plaintiff's motion to vacate the sua sponte order dated September 24, 2013 ([mot. seq.] #2), dismissing this action is granted, the dismissal is vacated, and the matter is restored to active status.

This constitutes the decision and order of the Court.

**ENTER:**



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