

MTGLQ Invs., LP v BX Rosedale LLC.

2025 NY Slip Op 34816(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 513889/2022

Judge: Menachem M. Mirocznik

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This opinion is uncorrected and not selected for official publication.

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 ~~8th~~^{9th} of December 2025

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

MTGLQ INVESTORS, LP

Plaintiff.

-against-

BX ROSEDALE LLC. ET AL

Defendants.

Index No. **513889/2022**

**Decision, Order and Judgment
(Motion Seq. 1 and 2)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 5-8
Notice of Cross-Motion/Opposition	NYSCEF Doc. 10-14
Reply/Opposition to Cross-Motion	NYSCEF Doc. 15-19

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

Procedural History

This action was commenced on May 12, 2022, seeking to foreclose a mortgage (the "mortgage") executed by non-party decedent Francell Douglas encumbering the real property known as 1386 East 48th Street, Brooklyn, NY 11234 (the "property"). Title to the property is purportedly held by defendant BX Rosedale LLC (the "owner") and defendant ATC2021 Trust (the "defendant") holds a mortgage encumbering the property.

On August 19, 2008, a previous foreclosure action ("first foreclosure action") was commenced by plaintiff's predecessor in interest entitled *HSBC Bank USA, N.A. v. Francell Douglas et al* under Index No. 23902/2008. On September 24, 2013, the first foreclosure action was dismissed due to neglect of prosecution.

On February 10, 2016, a second foreclosure action ("second foreclosure action") was commenced entitled *HSBC Bank USA, N.A. v. Francell Douglas et al* under Index No. 501849/2016 On June 29, 2017, the second foreclosure action was discontinued.

None of the defendants in this action were served, timely or otherwise, with the summons and complaint.

On December 4, 2022, defendant filed an answer asserting various affirmative defenses including lack of jurisdiction due to non-service and that enforcement the mortgage is barred by the statute of limitations.

On February 2, 2023, Defendant filed the instant motion dismiss this action pursuant to CPLR 3211[a][8] and 306-b.

On March 6, 2023, plaintiff filed a consent to change attorney substituting new counsel.

Plaintiff opposes the motion and cross-moves for an extension of time to serve the defendants pursuant to CPLR 306-b. Plaintiff's new counsel asserts that previous counsel diligently attempted to locate the defendants for service but was unsuccessful and there would be no prejudice in granting an extension of time to serve and that plaintiff was diligent in attempting service and in prosecuting this action and defendant does not allege any prejudice. Plaintiff further argues that its application is being made within 30 days of new counsel being substituted, that further delays would be unjust to plaintiff because it may be faced with a statute of limitations bar if the action is dismissed and plaintiff has a meritorious cause of action.

In opposition to the cross-motion and in further support of its motion defendant argues that plaintiff failed to establish that an extension for "good cause" or "in the interest of justice" is warranted by the undisputed facts. Defendant contends that plaintiff was not diligent in serving any of the defendants. Specifically, defendant contends that none of the defendants were served despite defendant, the owner and the various government agency defendants being easily located, that an extension of time would be futile because this action would in any case be barred by the statute of limitations and that plaintiff was dilatory in seeking an extension of time.

Discussion

CPLR 306-b provides in relevant part "Service of the summons and complaint...shall be made within one hundred twenty days after the commencement of the action...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."

Here, it is undisputed that plaintiff did not serve any of the defendants within 120 days of commencing the instant action. Therefore, defendant established prima facie entitlement to dismissal in the absence of an extension of time for good cause or in the interest of justice.

"Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice...Good cause' and 'interest of justice' are two separate and independent statutory standards...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 Mtge. Agency v Braun*, 182 AD3d 63 [2d Dept 2020]

Here, plaintiff failed to show reasonable diligence in its service of any of the defendants and did not file any affidavits of service. Plaintiff's new counsel's conclusory assertion that previous counsel was diligent in attempting service is belied by the record, is not substantiated with an affidavit of prior counsel or any supporting facts. In sum, plaintiff offers zero admissible evidence or testimony of diligence in serving the defendants.

Therefore, plaintiff failed to demonstrate an extension should be granted for good cause.

"If good cause for an extension is not established, courts must consider the broader interest of justice standard of CPLR 306-b...In considering the interest of justice standard, "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 Mtge. Agency v Braun*, 182 AD3d 63, 66-67 [2d Dept 2020]; "No one factor is determinative—the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served" *Wells Fargo Bank, NA v Barrella*, 166 AD3d 711 [2d Dept 2018]

"Where the plaintiff's delay in serving a defendant is protracted, and the defendant has no notice of the action for a protracted period of time, an inference of substantial prejudice arises" *Id*

Here, an extension in the interest of justice is not warranted. Plaintiff does not allege that any of the defendants received actual notice of this action and was extremely dilatory in making its application. Plaintiff waited almost seven months before seeking an extension of time to serve, notwithstanding admittedly being on notice of the lack of service, and only after defendant sought dismissal due to its failure to serve any of the defendants. Furthermore, defendant is correct that an extension would be futile because this action is barred by the statute of limitations and thus lacks a meritorious cause of action.

Accordingly, the Court in its discretion determines that an extension of time in the interest of justice is not warranted. See generally *Pierre v Grueso*, 219 AD3d 1535 [2d Dept 2023]; *Prof-2013-M4 Legal Tit. Tr. 2015-1 v Morales*, 211 AD3d 866 [2d Dept 2022]; *Marrano v Holtsville Fire Dist.*, 210 AD3d 754 [2d Dept 2022]

Therefore, this action is dismissed.

Lastly, given the dismissal of the complaint, the notices of pendency filed herein must also be cancelled. See CPLR 6514; See also generally, *Nationstar Mtge., LLC v Davis*, 240 AD3d 790 [2d Dept 2025]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]

Accordingly, it is hereby


ORDERED AND ADJUDGED, that defendant's motion to dismiss the action is GRANTED and this action is dismissed; and it is further

ORDERED, that plaintiff's cross-motion to for an extension of time to serve defendants pursuant to CPLR 306-b is DENIED; and it is further

ORDERED, the Clerk is directed to cancel Notices of Pendency filed on July 22, 2019 and February 20, 2023

This constitutes the decision, order and judgment of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

FILED

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KINGS COUNTY CLERK'S OFFICE