

US Bank N.A. v Cabrera

2025 NY Slip Op 35013(U)

December 19, 2025

Supreme Court, Kings County

Docket Number: Index No. 505439/19

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

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 19th day of December, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,
Justice.

Motion Calendar Date: 8/17/22
Motion Calendar No.: 60

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US BANK NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO BANK OF AMERICA NATIONAL ASSOCIATION (SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION) AS TRUSTEE FOR MORGAN STANLEY LOAN TRUST 2007-IXS,

Plaintiff,

- against -

Index No. 505439/19
MS2

HEYLIN CABRERA, 690 GREEN AVE., LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ACTING SOLELY AS NOMINEE FOR FIRST NATIONAL BANK OF ARIZONA, TOYOTA MOTOR CREDIT CORPORATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, CATHERINE GUTMAN IN HER CAPACITY AS PRESIDENT OF THE CONDOMINIUM BOARD OF THE UNINCORPORATED CONDO ASSOC THE WASHINGTON CONDO ASSOC MANAGERS OF THE WASHINGTON CONDO LOCATED AT 35 UNDERHILL AVE BK NY 11238, CITIBANK NA, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and JOHN DOE and MARY DOE (Said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or line upon the Premises being foreclosed herein),

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) _____	122-132
Opposing Affidavits (Affirmations) _____	135-136
Reply Affidavits (Affirmations) _____	138

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 690 Greene Avenue in Brooklyn (Block 1801, Lot 22) (Property), Defendant Heylin Cabrera (Cabrera or Defendant) moves (in motion sequence [mot seq.] two) for an order: (1) dismissing the complaint as against her for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8); or, alternatively, (2) setting this matter down for a traverse hearing to determine whether this Court has jurisdiction over her; or, alternatively, (3) extending her time to serve an answer to the complaint, pursuant to CPLR 317, 2004 and 3012 (d) (NYSCEF Doc No. 122).

Background

On March 13, 2019, plaintiff US Bank National Association, as Successor Trustee to Bank of America National Association (Successor by Merger to LaSalle Bank National Association) as Trustee for Morgan Stanley Loan Trust 2007-IXS (US Bank or Plaintiff) commenced this foreclosure action by filing a summons, a complaint verified by counsel and a notice of pendency. The complaint alleges that on July 28, 2006, Cabrera executed and delivered a \$1,144,886.85 promissory note, with a non-interest-bearing balance of \$52,000.00, secured by a mortgage encumbering the Property, which was later modified (Complaint at ¶¶ 4-5 and 7). Allegedly, Cabrera “failed and neglected to comply with the

terms and provisions of said mortgage, bond/note/loan agreement . . . by omitting and failing to pay items of principal and interest or taxes, assessments, water rates, insurance premiums, escrow and/or other charges, all as more fully appears in **Schedule C**” (*id.* at ¶ 8). Schedule C indicates that the alleged payment default date is March 1, 2018 (*id.* at 15).

Plaintiff’s affidavit of service in the record states that Cabrera was served with process on Monday, April 8, 2019, at 7:00 a.m. at her primary residence at 35 Underhill Ave., Apt. 3H, in Brooklyn when the process server, Ebrahim Eliwa, served Cabrera by “nail and mail” service, pursuant to CPLR 308 (4), by posting the summons and complaint to the main, public entrance door of Cabrera’s apartment building and subsequently mailing them to Cabrera at her apartment building by first class mail on April 17, 2019 (NYSCEF Doc No. 37). Notably, the affidavit of service specifically states that the service documents were “posted on *outside door* as unable to access; residence has a glass door, tile floor, brick wall, *multiple bells* and no lock” (*id.* [emphasis added]). The affidavit of service further states that the process server previously attempted service upon Cabrera on March 23, 2019, at 3:23 p.m., on March 28, 2019, at 7:14 p.m. and on March 30, 2019, at 4:14 p.m. (*id.*). Plaintiff filed proof of service upon Cabrera on April 23, 2019, and thus, service was complete 10 days later, or on May 3, 2019 (CPLR 308 [4]).

Cabrera failed to answer or otherwise respond to the complaint, and her time to do so expired on June 2, 2019.

On February 27, 2020, Plaintiff moved for an order of reference, a default judgment against the non-answering defendants and to amend the caption (NYSCEF Doc No. 99).

On April 25, 2022, after Cabrera filed a Chapter 13 Bankruptcy Petition, Plaintiff withdrew its motion for an order of reference (NYSCEF Doc No. 134).¹

Defendant Cabrera's Dismissal Motion

Meanwhile, on November 10, 2021, Cabrera cross-moved for an order dismissing the complaint for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8), or, alternatively, setting this matter down for a traverse hearing, or, alternatively, granting her an extension of time to answer the complaint (NYSCEF Doc No. 122).

Cabrera submits a moving affidavit attesting that “[o]n the dates and times of the alleged service, I do not recall anyone coming to my door or ringing the buzzer to my apartment” and “I would remember if someone came to my apartment with legal papers and I would have surely accepted service, as I understand the importance of appearing in a legal proceeding” (NYSCEF Doc No. 131 at ¶¶ 4-5). Cabrera further asserts that:

“Mr. Eliwa swears that on Monday, April 8, 2019 at 7:00 AM, he ‘posted on outside door as unable to access; residence has a glass door, tile floor, brick wall, multiple bells and no lock.’ See **Ex. A**. This statement is contradictory. If the front door had no lock, Mr. Eliwa should have been able to access the inside of the building to post the summons and complaint on my apartment door. If he had done so, I would have obtained the documents and would have filed an answer in this action.

“If Mr. Eliwa did in fact post the summons and complaint early on a Monday morning, any resident of the building may have taken it. I never saw documents at any time posted on the front door of the building, nor did anyone tell me there were

¹ Plaintiff’s counsel asserts that “upon information and belief the [bankruptcy] case was automatically dismissed pursuant to 11 U.S.C. Section 521 (i) (1) on or about June 6, 2022, so th[is] matter may proceed . . .” (NYSCEF Doc No. 135 at ¶ 5).

documents addressed to me posted on the front door of the building” (*id.* at ¶¶ 6-7).

Cabrera also denies receiving an October 14, 2018 Notice of Default or a July 11, 2018, 90-day notice, pursuant to RPAPL § 1304 and asserts that “I always check and open all mail and packages I receive and never had any issues receiving same” and “[p]er my ordinary routine, I regularly checked the mail which arrived at the Residence” (*id.* at 9-11).

Defense counsel asserts that Plaintiff’s process server’s sworn statement that he “posted [the pleadings] *on outside door* as unable to access; residence has a glass door, tile floor, brick wall, multiple bells and no lock”² “leaves a door open, both figuratively and literally, that Mr. Eliwa could have and should have posted the pleading on Defendant’s apartment door to ensure that she received notice of the commencement of this action” (NYSCEF Doc No. 123 at ¶ 12). Defense counsel notes that if the pleadings were affixed to the outside door of Cabrera’s apartment building on a Monday morning at 7:00 a.m., “any resident of the building may have taken it” (*id.* at ¶ 13). Counsel asserts that dismissal for improper service or, at the very least, a traverse hearing is warranted (*id.* at ¶ 16).

Alternatively, defense counsel argues that Cabrera’s default should be vacated and leave to file a late answer should be granted, pursuant to CPLR 317 and 3012 (d), because Cabrera has a reasonable excuse for her default and a meritorious defense based on Plaintiff’s failure to comply with RPAPL § 1304 (*id.* at ¶¶ 17-33). Defense counsel argues that Cabrera “never received a copy of the alleged 90-day notices” and “even if the alleged

² See Eliwa’s affidavit of service at NYSCEF Doc No. 126 (emphasis added).

90-Day notice was properly mailed to Defendant . . . the notice is defective on its face, as it does not contain the required five housing agencies located in the Defendant’s county” (*id.* at ¶¶ 46-47). Defense counsel asserts that “[w]hile the RPAPL § 1304 notice included a list of five housing agencies in total, none of them serve the region in which the borrower resides, Kings County[,]” and thus, Plaintiff failed to strictly comply with RPAPL § 1304 (*id.* at ¶¶ 50-51). Defense counsel also raises failure to serve a notice of default and Plaintiff’s lack of standing as meritorious defenses to this action (*id.* at ¶¶ 52-76).

Plaintiff’s Opposition

Plaintiff, in opposition, submits an attorney affirmation merely arguing that “Defendant’s contention that the affidavits statement that the residence has a glass door, tile floor, brick wall, multiple bells and no lock required Mr. Eliwa to enter the building and post on the apartment door to complete his due diligence is misplaced” (NYSCEF Doc No. 135 at ¶ 14). Plaintiff’s counsel asserts that “[t]he glass door and intercom on the front entrance requiring electronic access does not render anyone off the street able to just walk in . . .” and submits an undated photograph of the entrance of Cabrera’s apartment building without any indication who took the photograph (*id.* at ¶ 15 and NYSCEF Doc No. 136).

Plaintiff’s counsel argues that Cabrera’s should not be granted leave to file a late answer because “defendant fails to establish she did not receive notice in time to defend the action[,]” “failed to show that the motion at bar was made within a year or obtaining actual knowledge of the action, and fails to show a meritorious defense” because Cabrera does not deny receiving the pleadings by mail (*id.* at ¶¶ 19-21).

Plaintiff's counsel further argues that Cabrera is not entitled to the relief she seeks because she failed to establish that she has a meritorious defense. While arguing that Cabrera was served with a 90-day notice in accordance with RPAPL § 1304 (*id.* at ¶ 31), Plaintiff's counsel also argues that "RPAPL §1304 is not applicable as this is not a home loan . . ." since "Defendant's affidavit itself confirm[s] the Defendant does not reside in the property" (*id.* at ¶¶ 33-34). Plaintiff's counsel contends that Plaintiff has established its standing based on a May 26, 2009, assignment of the note and mortgage (*id.* at ¶ 40).

Defendant Cabrera's Reply

Defense counsel, in reply, asserts that "[p]laintiff misstates the legal requirements for obtaining jurisdiction" because "[s]imply mailing the summons and complaint is not enough for CPLR § 308 (4)" (NYSCEF Doc No. 138 at ¶ 2). Defense counsel also notes that the photograph submitted by Plaintiff's counsel "shows nothing" and "conspicuously missing is a copy of the pleading that the process server allegedly posted to the front door" (*id.* at ¶ 3).

Discussion

"'Nail and mail' service pursuant to CPLR 308 (4) may be used only where personal service under CPLR 308 (1) and (2) cannot be made with due diligence" (*Lemberger v Khan*, 18 AD3d 447, 447 [2d Dept 2005]). CPLR 308 (4) permits personal service on a natural person "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode . . ." of the defendant and by subsequently mailing the summons to the defendant by first-class mail. When the requirements for service of

process have not been met, it is irrelevant that defendant may have actually received the documents (*County of Nassau v Letosky*, 34 AD3d 414, 415 [2d Dept 2006]). The Second Department has held that CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received by defendant (*Gurevitch v Goodman*, 269 AD2d 355, 355 [2d Dept 2000]).

The Second Department has held that “affixing the summons and complaint to the front gate of a property, rather than the front door, is only proper if the “property was clearly marked as private property, did not allow pedestrian access to the front door from the street, and was not open to the public at large” (*Greenwood Realty Co. v Katz*, 187 AD3d 1153, 1154 [2d Dept 2020]; *see also State Higher Educ. Servs. Corp. v Sparozic*, 35 AD3d 1069, 1071 [3d Dept 2006] [affixing summons with notice to outer door of household where defendant resides, rather than the door of the room defendant rented, was proper, since defendant’s room was not “an independent apartment in the property address or otherwise held out as a distinguishable dwelling unit” and the entrance was not open to the public at large]).

Here, Plaintiff’s affidavit of service in the record reflects that the process server served Cabrera, pursuant to CPLR 308 (4), by affixing the documents to the main, public entrance of Cabrera’s apartment building, rather than to the door of Cabrera’s independent apartment unit. Plaintiff’s affidavit of service specifically states that the documents were “*posted on outside door as unable to access; residence has a glass door, tile floor, brick wall, multiple bells and no lock*” (NYSCEF Doc No. 37 [emphasis added]). Thus,

Plaintiff's affidavit of service indicates that there were "multiple bells" for separate dwelling units at Cabrera's apartment building, that the documents were "posted on outside door" of Cabrera's apartment building and were, consequently, accessible to Cabrera's neighbors in the apartment building, to pedestrians and to the public at large. Based on these indisputable facts, Plaintiff's process server failed to strictly comply with CPLR 308 (4), and thus, dismissal is warranted, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction over Cabrera. Accordingly, it is hereby

ORDERED that Defendant Cabrera's motion (mot. seq. #2) is granted and the complaint is dismissed as against Defendant Cabrera for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8).

This constitutes the decision and order of the court.

ENTER:



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