

<b>Wells Fargo Bank, N.A. v Roshe</b>
2013 NY Slip Op 34243(U)
September 12, 2013
Supreme Court, Queens County
Docket Number: 700791/11
Judge: Bernice D. Siegal
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**ORIGINAL**

Short Form Order

**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

-----X

Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Roshe; Avezki,

Defendants.

-----X

Index No.: 700791/11  
Motion Date: 6/14/13  
Motion Cal. No.: 158  
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order vacating defendant’s demand to file a note of issue or extending the time for plaintiff to file a note of issue, granting the plaintiff leave to serve the attached proposed amended complaint.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion- Affidavits-Exhibits.....	5- 9
Affirmation in Reply/Opposition.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff moves for an Order vacating Defendant’s demand to file a Note of Issue or extending the time for Plaintiff to file a Note of Issue. Plaintiff also seeks an Order granting the Plaintiff leave to serve an amended complaint. Defendant cross-moves for an Order dismissing Plaintiff’s complaint.

**Facts**

The within action arises out of Defendant’s alleged default on a Mortgage. On October 13, 2013,

**FILED**  
SEP 13 2013  
COUNTY CLERK  
QUEENS COUNTY

2011, plaintiff filed the summons and complaint. On January 27, 2012, defendant filed his answer. On or about February 27, 2013, Defendant served a 90 day notice upon the Plaintiff.

### **Discussion**

#### **Vacate 90 Day Demand**

Having been served with a 90-day notice pursuant to CPLR §3216, the Plaintiff was required to either file a Note of Issue or move, before the default date, either to vacate the notice or extend the 90-day period. (See, *Brown v. World Financial Properties, Inc.*, 306 A.D.2d 303 [2d Dept. 2003]; *King-Valls v. Mendel*, 756 N.Y.S.2d 875 [2d Dept. 2003]; *Blackwell v. Long Island College Hospital*, 756 N.Y.S.2d 769 [2d Dept. 2003]; *Baczkowski v. Collins Constr. Co.*, 89 N.Y.2d 499, 503 [1997].) Plaintiff brought the within motion to vacate the 90 day demand on May 17, 2013, less than 90 days from the service of the 90 day demand. Based upon the timeliness of the within motion and Plaintiff's attempts to resolve the within action, this court grants Plaintiff's motion to vacate the 90 day demand and extend the time to file a Note of Issue. (See CPLR §2004.)

#### **Amend Complaint**

Plaintiff also seeks to Amend the Complaint to seek judgment pursuant to Article 54 of the CPLR. Plaintiff notes that Wachovia Bank, NA was granted a deficiency judgment by the South Carolina Court of Common Pleas for the County of Horry in the sum of \$131,683.42.

Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party. (See CPLR §3025(b); *Bloom v. Lugli*, 102 A.D.3d 715 [2<sup>nd</sup> Dept January 16, 2013]; *Greco v. Christoffersen*, 70 A.D.3d 769 [2<sup>nd</sup> Dept 2010].) Defendant contends that it will suffer prejudice if the plaintiff is allowed to amend its complaint. However, defendant fails to set forth what prejudice

it will suffer other than having to defend on different legal grounds. As Plaintiff noted, there have *been* no court appearances, motions or discovery conducted in this matter prior to the within motion.

In addition, defendant contends that the proposed amendment must fail because the Deficiency Judgment was authenticated on June 23, 2010, outside of the 90 days proscribed in CPLR §5402. However, in the within action, Plaintiff is seeking to enter judgment and not for “authentication” pursuant to CPLR §4540.

Accordingly, Plaintiff’s motion to amend the complaint is granted.

#### **Cross-Motion to Dismiss**

Defendant contends that RPAPL §1301(3) prohibits Plaintiff from maintaining the within action as Plaintiff failed seek leave of court of the Court of Common Pleas, County of Horry, South Carolina. Defendant argues that Plaintiff seeks a judgment based on the underlying Note and not the deficiency judgment. However, RPAPL §1301(3) is inapplicable to actions where the property is located outside of the State of New York. (*Wells Fargo Bank Minnesota, N.A. v. Cohn*, 4 A.D.3d 189 [1<sup>st</sup> Dept 2004]; *Federal Deposit Ins. Corp. v De Cresenzo*, 207 A.D.2d 823 [2<sup>nd</sup> Dept 1994].) In the within action, the property is located in South Carolina.

Defendant also contends that this court lacks personal jurisdiction over the Defendant because the Defendant was never served with the Summons and Complaint. Initially, the court notes that the Defendant fails to attach an affidavit and merely relies on the inadmissible statements of Counsel. In addition, it is well settled that bare, conclusory and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service. (*US Bank Nat. Ass'n v. Tate*, 102 A.D.3d 859 [2<sup>nd</sup> Dept 2013]; *NYCTL 2009-A Trust v. Tsafatinos*, 101 A.D.3d 1092 [2<sup>nd</sup> Dept 2012].)

### Conclusion

Plaintiff's motion to vacate the 90 day Demand and for an extension is granted only to the extent of extending Plaintiff's time to complete discovery and to file a Note of Issue for a period of 60 days following service of a copy of this order with notice of entry thereon. Plaintiff's failure to file a Note of Issue within the above stated time frame shall serve as a basis for dismissal under CPLR § 3216.

In addition, pursuant to CPLR §3025(b), Plaintiff is granted leave to serve and file an amended complaint within twenty (20) days of entry of this order, in accordance with this order. Defendant shall have the statutorily prescribed time to interpose responsive papers.

Defendant's motion to dismiss is denied in its entirety.

Dated: September 12, 2013

  
Bernice D. Siegal, J. S. C.