

**Moonachi Inc. v Aurora Loan Servs. LLC**

2019 NY Slip Op 33821(U)

December 24, 2019

Supreme Court, Kings County

Docket Number: 508734/18

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 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 24<sup>th</sup> day of December, 2019.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X  
MOONACHI INC.,  
Plaintiff,

- against -

AURORA LOAN SERVICES LLC,  
Defendant,

U.S. BANK TRUST, N.A.,  
as Trustee for LSF9 MASTER PARTICIPATION TRUST,

Proposed Intervenor Defendant.  
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**DECISION AND ORDER**

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Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF No.:

Proposed Intervenor’s Notice of Motion, Supporting Affirmations,  
Memorandum of Law, and Exhibits Annexed \_\_\_\_\_  
Plaintiff’s Affirmation in Opposition and Exhibits Annexed \_\_\_\_\_  
Proposed Intervenor’s Memorandum of Law in Reply \_\_\_\_\_

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In this action to quiet title, the proposed intervenor U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (US Bank), moves in Seq. No. 2 for an order (1) pursuant to CPLR 317 and 5015, to vacate the default of the defendant Aurora Loan Services LLC.(the original defendant), as reflected by the decision, dated Nov. 27, 2018 (NYSCEF #28) (the default)<sup>1</sup>; (2) pursuant to CPLR 3012 (d), directing the plaintiff Moonachi Inc. (plaintiff) to accept US Bank’s proposed answer; and (3) pursuant to, inter alia, CPLR 1013, granting it leave to intervene and/or be substituted as the proper party defendant in this action in lieu of the original defendant.

<sup>1</sup> The decision states in full, “Plaintiff’s motion [is] granted on default. Settle order on notice.” No order related to the decision has been entered to date.

### *Discussion*

“CPLR 317 provides, generally, that a defendant is entitled to vacatur of a default judgment if it is established that [it] did not receive personal notice of the summons in time to defend and that [it] has a meritorious defense” (*Stein v A. Matarasso & Co., Inc.*, 143 AD2d 825, 826 [2d Dept 1988]). Service of process on a limited liability company by delivering the pleadings to the Secretary of State in accordance with Limited Liability Company Law 303 does not constitute personal delivery (*see e.g. Acqua Capital, LLC v 510 W. Boston Post Rd, LLC*, 164 AD3d 1195, 1196 [2d Dept 2018]).

Here, US Bank, by submitting evidence that it was not served with process in this action and that the original defendant was served only through the Secretary of State, has established that neither it nor the original defendant received personal notice in time to defend. Contrary to plaintiff’s contention, the record contains no evidence that either US Bank or the original defendant deliberately attempted to avoid notice (*see Rivera v Triangle Excavators of New York, LLC*, 173 AD3d 1088, 1089 [2d Dept 2019]; *Samet v Bedford Flushing Holding Corp.*, 299 AD2d 404, 405 [2d Dept 2002]). “As has been emphasized in numerous cases, there is no necessity for a defendant moving pursuant to CPLR 317 [unlike pursuant to CPLR 5015 (a)] to show a ‘reasonable excuse’ for its delay” (*Eugene Di Lorenzo v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).

US Bank has also submitted evidence that “sufficiently raises an issue as to the existence of a meritorious defense within the purview of CPLR 317 so as to support a motion to vacate a default” (*Solomon Abrahams, P.C. v Peddlers Pond Holding Corp.*, 125 AD2d 355, 357 [2d Dept 1986]; *see also Franklin v 172 Aububon Corp.*, 32 AD3d 454, 455 [2d Dept 2006]). Plaintiff’s arguments that the underlying debt is time-barred and that US

Bank lacks standing to defend this action, are without merit. US Bank has raised questions of fact as to whether it affirmatively revoked its election to accelerate the underlying debt within the six-year limitations period, and that it is a valid holder of the underlying note (as well as the underlying mortgage) in accordance with the Assignment of Mortgage/Deed of Trust, dated Nov. 21, 2014, to US Bank from the Secretary of Housing and Urban Development (*see Milone v US Bank Natl. Assn.*, 164 AD3d 145, 155 [2d Dept 2018], *lv dismissed* \_\_\_ NY3d \_\_\_, 2019 NY Slip Op 8411 [2019]; *Dyer Trust 2012-1 v Global World Realty*, 140 AD3d 827, 828 [2d Dept 2016]). These issues of fact will be addressed, and resolved, in the course of this action following US Bank's intervention and substitution as the proper party defendant (*see CPLR 1012 [a] [3]; CPLR 1013; JP Morgan Chase Bank, Natl. Assoc. v Kalpakis*, 91 AD3d 722, 723 [2d Dept 2012]). Accordingly, US Bank's motion is granted to the extent set forth in the decretal paragraphs below (*see Rivera*, 173 AD3d at 1089).

### ***Conclusion***

Based on the foregoing and after oral argument, it is

ORDERED that the branch of US Bank's motion which is pursuant to CPLR 317 to vacate the default of the original defendant Aurora Loan Services LLC, as reflected by the decision, dated Nov. 27, 2018 (NYSCEF #28), is *granted*, and such decision is *vacated* pursuant to CPLR 317; and the *alternative* branch of its motion which is for the same relief pursuant to CPLR 5015 (a) is *denied as academic*; and it is further

ORDERED that the branch of US Bank's motion which is to compel plaintiff to accept its answer pursuant to CPLR 3012 (d) is *granted* in the Court's discretion, and US Bank is directed to electronically serve and file its answer to the complaint within 20 days

after service of this decision and order with notice of entry by plaintiff's counsel on US Bank's counsel; and it is further

ORDERED that the remaining branch of US Bank's motion which is for leave to intervene and/or be substituted as the party defendant is *granted*; US Bank is permitted, pursuant to CPLR 1012 (a) (3) and 1013; to intervene and be substituted as the proper party defendant in lieu of the original defendant Aurora Loan Services LLC; and the caption is amended to read in its entirety as follows:

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MOONACHI INC.,

Plaintiff,

- against -

U.S. BANK TRUST, N.A.,  
as Trustee for LSF9 MASTER PARTICIPATION TRUST,

Defendant.

-----X

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; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on US Bank's counsel and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

  
\_\_\_\_\_  
J. S. C.  
HON. LAWRENCE KNIPEL  
Administrative Judge