

<b>Gustavia Home LLC v 105-86 Flatlands Realty 1 Corp</b>
2022 NY Slip Op 35032(U)
January 8, 2026
Supreme Court, Kings County
Docket Number: Index No. 528152/19
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 17th day of August, 2022.

**PRESENT:**

HON. CENCERIA P. EDWARDS,  
Justice.

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GUSTAVIA HOME LLC,

Plaintiff,

-against-

105-86 FLATLANDS REALTY 1 CORP et al,

Defendant,

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**Index No.:** 528152/19  
**Mot. Seq.:** 3  
**Calendar No.:** 21

**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 \_\_\_\_\_

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57-71  
79-95 96-100  
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Upon the foregoing papers in this action to foreclose upon the residential property located at 105-86 Flatlands 1<sup>st</sup> Street in Brooklyn (Block 8233, Lot 38), Defendants 105-86 Flatlands 1 Realty Corp (“Flatlands”) and Ghislain Ladjouan move for an extension of time to respond to Third-Party Defendant Wilmington Savings Fund Society FSB’s (“Wilmington”) motion to dismiss and Plaintiff Gustavia Home LLC’s cross-motion for summary judgment. Defendants further seek a stay of the determination of those motions. Plaintiff and Wilmington separately oppose.

### *Background Facts and Procedural History*

The instant foreclosure action was commenced on December 30, 2019. Flatlands answered through counsel, asserting four affirmative defenses, a quiet title counterclaim, and a quiet title crossclaim against a co-defendant JPMorgan Chase Bank NA. Flatlands also asserted a third-party complaint against Wilmington, seeking to discharge its mortgage. Wilmington then appeared and answered through counsel.

On August 31, 2020, Wilmington moved for dismissal of the third-party claims as there was an active foreclosure case seeking to foreclose its lien. Arguing that any challenge to the enforceability of its mortgage needed to be raised in the other action and that Flatlands acquired its interest in the property subject to that case, Wilmington asserted that Flatlands is barred from raising its claims herein. It further suggested that, if the Court declines to dismiss the third-party action, that Flatlands' claims should be severed and joined with the foreclosure action.

On December 23, 2020, Plaintiff filed a cross-motion for summary judgment against Flatlands, default judgment against the non-answering defendants, and an order of reference. Therein, Plaintiff argued that it met its prima facie case through the proffered documents and affidavits and that Flatlands' affirmative defenses lacked merit. Relevantly, Plaintiff noted that the alleged prior acceleration of its lien was its claim to potential surplus in an earlier action brought by Wilmington. Plaintiff argued that doing so did not accelerate the loan and that the instant action was timely filed.

Like Wilmington, Plaintiff also sought dismissal of the third-party complaint. Citing CPLR 1007, Plaintiff argued that the claims against Wilmington were improperly asserted in this action as third-party claims must be directed "against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant" – and Wilmington, the senior lienholder, has no obligation under the mortgage held by Plaintiff.

Wilmington replied to Plaintiff's filing, noting that it should be dropped entirely from the action rather than deemed to have appeared in this action as Plaintiff (likely erroneously) requested.

Neither Flatlands nor Ladjouan nor any other defendant filed opposition to the pending motions and both were taken on submission on June 23, 2022. By order signed one week later

and uploaded to NYSCEF on July 12, 2022, the Court addressed the arguments raised by Plaintiff and Wilmington, dismissed the third-party complaint in light of the co-pending foreclosure action, and granted summary judgment and an order of reference as requested by Plaintiff.

#### Flatlands' and Ladjouan's Motion [MS 3]

On July 1, 2022, Flatlands and Ladjouan<sup>1</sup> moved by order to show cause<sup>2</sup> for an extension of time to respond to Wilmington's motion and Plaintiff's cross-motion and to stay decision of those motions. Asserting that Flatlands' former counsel was occupied with family health issues and thus functionally disabled from the practice of law starting in or around November 2021, the movants argue that they have meritorious statute of limitations arguments as to each loan and should be allowed to assert them in opposition to the prior motions.

In support of its claim that its former counsel was disabled from the practice of law, Flatlands submits an affirmation filed by that attorney in another matter. In that January 2022 motion to withdraw as counsel, the attorney explained that due to issues relating to his wife's and son's health he had not been in his office since mid-October 2021 and was unable to continue the representation.

#### Plaintiff's Opposition

Plaintiff argues that Defendants failed to offer a reasonable excuse for their failure to timely oppose its motion. Even assuming arguendo that former counsel was functionally disabled for several months at the end of 2021 and early 2022, the motions were filed in 2020 and not taken on submission until June 2022. There is no evidence in the record that he was unable to work for the remainder of that time. Indeed, though a Consent to Change Attorney was

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<sup>1</sup> Ladjouan had not previously appeared in the action and is not substantively mentioned in the moving papers. It is unclear what Flatlands' prior counsel's failure to oppose the motions has to do with Ladjouan's default.

<sup>2</sup> The order to show cause was signed four days later.

signed by Flatlands' outgoing counsel, he submitted no affirmation herein addressing his ability to practice.

Noting that the earliest action filed to foreclose its lien was brought in 2017, Plaintiff argues that the instant action was timely filed in 2019. It also maintains that, contrary to Defendants' contention, appearing in Wilmington's action and seeking surplus did not accelerate its loan. Thus, Plaintiff asserts, no potentially meritorious opposition to its motion for summary judgment has been advanced.

### Wilmington's Opposition

Wilmington, adopting an argument made in Plaintiff's cross-motion, asserts that the third-party claims are grossly improper. The lien that it held is totally separate from and senior to Plaintiff's. Flatlands' crossclaims are, thus, unrelated to Plaintiff's cause of action and could not be brought herein. Rather, they should have been raised in Wilmington's co-pending foreclosure action with which they are inexorably intertwined. Further, Wilmington argues that it no longer holds a lien having transferred its interest to another entity.

### *Analysis*

Wilmington's motion and Plaintiff's cross-motion were both decided prior to the instant motion being filed – albeit, the decision was entered thereafter. As such, Defendants' request for leave to file late opposition and to stay determination of those motions is moot.

This Court will nonetheless address Defendants' arguments in the interest of judicial economy. Ladjouan did not previously appear in the action and does not appear to have been represented by Flatlands' prior counsel – as such, Defendants' arguments are clearly unavailing as to her.

Plaintiff is correct that counsel's unavailability for a portion of the pendency of the motions does not constitute a reasonable excuse for his failure to file opposition – nothing in the record demonstrates that he was effectively disabled at the time the motions were taken sub judice.

No precedent has been offered for the proposition that filing a notice of appearance and request for surplus accelerates the filer's lien. Logic dictates to the contrary. Doing so merely puts others on notice of the claim were the action to proceed to foreclosure. Such a filing can be made even when its borrower is current on her obligations to it and payments continue to be accepted. Nothing therein calls the entire debt due – it merely reflects that there remains an interest in the property. Further, were it an acceleration, a junior lienholder would be faced with the option of filing a potentially unnecessary action to foreclose on its lien or risk its discharge if the action on the senior mortgage terminates via any means other than auction.

Pursuant to CPLR 1007:

*After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, by filing pursuant to section three hundred four of this chapter a third-party summons and complaint with the clerk of the court in the county in which the main action is pending, for which a separate index number shall not be issued but a separate index number fee shall be collected. [emphasis added]*

“[T]he liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action” (*Sunbelt Rentals, Inc v Tempest Windows, Inc*, 94 AD3d 1088, 1089 [2d Dept 2012], quoting *BBIG Realty Corp v Ginsberg*, 111 AD2d 91, 993 [2d Dept 1985]). Here, the third-party claims pertain to a different mortgage and there is no claim that Wilmington is obligated to satisfy Plaintiff's claims. In fact, it is the senior lienholder and its interest in the property has priority to that of Plaintiff. Wilmington is, thus, correct that Flatlands' claims were improperly asserted herein.

The Court also agrees with Wilmington that claims against it could have and should have been raised against it in its co-pending foreclosure action and, even notwithstanding CPLR 1007, could not be raised herein.

### *Conclusions*

Accordingly, it is

**ORDERED** that Defendants' motion for an extension of time to file opposition and for a stay of the determination of the prior motions (mot. seq. #3) is denied in its entirety.

January 8, 2026

**ENTER:**



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