

**Capital Equity Mgt., LLC v Dass**

2025 NY Slip Op 32857(U)

August 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 26322/2011

Judge: Anne J. Swern

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 7<sup>th</sup> day of August 2025

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

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CAPITAL EQUITY MANAGEMENT, LLC

**DECISION & ORDER**

*Plaintiff,*

Index No.: 26322/2011

*-against-*

Mot. Seq.: 002

BOODRAM DASS,

*Defendant.*

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**Introduction**

This is an action to recover monies owed on a business credit agreement with plaintiff's predecessor in interest, Chase Bank USA NA, who subsequently assigned to plaintiff all rights, title and interest to collect the money due. Defendant defaulted on the agreement. The complaint seeks a judgment of \$36,856.65, plus interest from 11/21/2011 and costs and disbursements of this action. (NYSCEF 1, p.2).

**Procedural History**

The action was commenced on 11/22/2011. The summons and complaint were served on defendant by affixing them to the door of defendant's "actual dwelling place or usual place of abode" on 1/17/2012. The process server was unable to effectuate personal service or service upon a person of suitable age and discretion on 12/12/2011, 12/14/2011 and 1/17/2012. (NYSCEF 1, p.4; CPLR § 308 [4]). The judgment was entered on default on 4/16/2012. The judgment was served with notice of entry on defendant on 6/12/2012. (NYSCEF 1, pp.6 and 13-17).

Defendant moved by Order to Show cause to vacate the judgment on 7/20/2023. (NYSCEF 1, p.20). In support of the application, defendant submitted an affidavit that he did not reside at the address in the affidavit of service in December 2011 and January 2012. (NYSCEF 9). By an order dated 2/29/2024, the application to vacate the judgment was denied with leave to renew upon a “proper showing of where Dass resided at the time of service of the summons and complaint.” (NYSCEF 2). Defendant renewed the Order to Show Cause on 2/27/2025. (NYSCEF 12). By an order dated 4/7/2025, the Court scheduled a traverse hearing for 5/21/2025. (NYSCEF 24).

### **The Hearing**

The plaintiff objected to the traverse hearing because defendant has not come forward with newly discovered evidence or any supporting evidence to establish where he was living at the time of service on 1/17/2012. (CPLR §2221). Therefore, the hearing should be dismissed. In response, defendant argued that the address in defendant’s updated affidavit is in conformity with the Court’s order dated 2/29/2024 because “The first affidavit was too general. You wanted specifics where he was living at the specific times over a ten-year period, and that’s what we did in the second Order to Show.”<sup>1</sup> Defendant also argued that plaintiff raises this argument for the first time at the hearing.

The parties stipulated the affidavit of service into evidence as Exhibit “1” because the process server had passed away by the time of the hearing. Plaintiff did not present witness testimony.

Defendant then called plaintiff’s wife, Victoria Dass, as a witness. The witness testified that she has resided 2726 East 19<sup>th</sup> Street, Apartment B2, Brooklyn, New York 11235 since 2004.

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<sup>1</sup> Transcript, p.3, lines 16-23

The property is a condominium building. On the dates and times in the affidavit of service, Ms. Dass did not recall anyone pressing the buzzer to gain entrance to the building or coming to her door to serve papers or affix anything to her door. She also did not receive the summons and complaint by mail. Defendant was sworn in as a witness and testified in accordance with his affidavits.

### Law & Analysis

“Service of process must be made in strict compliance with statutory ‘methods for effecting personal service upon a natural person’ pursuant to CPLR § 308” (*Emigrant Mortg. Co., Inc. v Westervelt*, 105 AD3d 896 [2d Dept 2013]). Further, “When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR § 5015 [a] [4], the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR § 5015 [a] [1].” Although a process server’s affidavit of service ordinarily establishes a *prima facie* presumption of proper service, where there is a sworn denial of service by a defendant, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence. (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588 [2d Dept 2009]).

A process server exercises due diligence by attempting service on three separate dates and different times of the day when defendant or a person of suitable age and discretion could reasonably be expected to be present at such location before, during or after regular working hours (*See Barnes v New York*, 70 AD2d 580, 580 [2d Dept. 1979], *affirmed* 51 NY2d 906 [1980]).

Defendant’s motion is denied. Plaintiff established a presumption of service through the affidavit of service that was stipulated into evidence. In support of the motion, defendant did not

submit in support of the motion proof through a driver license, utility bill or other documentary evidence to corroborate the affidavits and establish that he did not reside at 2726 East 19<sup>th</sup> Street, Apartment B2, Brooklyn, New York 11235 on 1/17/2012.

A traverse hearing was scheduled so the Court could judge the credibility of the affidavits submitted by defendant and his wife. The Court finds that the affidavits and the testimony elicited at the hearing are not credible as a matter of law. Therefore, the “mere conclusory denial[s] of service” and defendant’s residence at the time of service are insufficient to rebut the presumption of proper service arising from the process server’s affidavit in evidence (*Washington Mutual Bank v Huggins*, 140 AD3d 858, 859 [2d Dept. 2016]). Defendant’s argument relying on alleged off the record statements in February 2024 that only a further affidavit was necessary is of no probative value.

The Court has considered defendant’s remaining arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED that defendant’s Order to Show Cause to vacate the judgment entered on 4/16/2012 is denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Anne J. Swern, J.S.C.  
Dated: 8/7/2025

For Clerks use only:
MG _____
MD _____
Motion seq. # _____