Wilmington Trust, N.A. v Rausher

2025 NY Slip Op 32948(U)

July 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 525568/2019

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

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 8th day of July, 2025.

P R E S E N T:
HON. CENCERIA P. EDWARDS, CPA,
Justice.

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WILMINGTON TRUST, NATIONAL ASSOCIATION NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2015-2,

Plaintiff(s),

-against-

DANIEL RAUSHER, et. al,

Defendant(s).

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ORDER

Motion Calendar: 10/16/2024
Motion Cal. #(s): 12

Index #: 525568/2019
Mot. Seq. #(s): 5
(and motion #4 from the 1/31/24 calendar)

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Order to Show Cause, Affidavits (Affirmations), and Exhibits ___	___111, 119_____
Opposing Affidavits (Affirmations) and Exhibits _____	__112-113, 120____
Reply Affidavits (Affirmations) and Exhibits _____	____N/A_____

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 4584 Bedford Street in Brooklyn (Block 7441, Lot 59), defendant DANIEL RAUSHER ("Defendant") moves, in motion sequence ("mot. seq.") #5, for an order vacating the judgment of foreclosure and sale and dismissing this action based upon a lack of personal jurisdiction over him, staying the scheduled sale of the property, and issuing or continuing a temporary restraining order. Plaintiff opposes the requested relief.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on November 21, 2019. All defendants were allegedly served with the summons and complaint but defaulted in answering. Plaintiff's motions for an order of reference and judgment of foreclosure and sale were granted, on default, on June 21, 2022 and February 6, 2023, respectively. The auction scheduled for June 28, 2023,

did not go forward because the Honorable Devin Cohen, J., signed an order to show cause filed by Defendant, staying the sale (mot. seq. #3). Therein, Defendant sought dismissal, alleging that he was not properly served with the summons and complaint. After Plaintiff filed opposition, the motion was marked off upon Defendant's failure to appear on the adjourned return date.

A second auction was scheduled for January 4, 2024. This time, the Honorable Robin K Sheares, J., signed an order to show cause brought by Defendant, staying the sale (mot. seq. #4). Upon updated papers, Defendant again asserted a lack of personal jurisdiction. Plaintiff opposed and the motion was marked fully submitted on January 31, 2024 but remains undecided.[1]

Plaintiff again sought to sell the property, scheduling an auction for September 5, 2024. This Court signed the instant order to show cause, however, on September 3, 2024. Defendant, again, asserts a lack of personal jurisdiction as the service location – his office suite – clearly included multiple law firms and the individuals allegedly served were unaffiliated with him. He further argues that the stay from the second order to show cause on mot. seq. #4 is still in effect and should have prevented Plaintiff from scheduling an auction. In the alternative, he suggests that a stay is necessary until his jurisdictional claims have been actually adjudicated.

In opposition, Plaintiff argues that the prior stay expired upon hearing – submission – of the prior motion and that a new stay is unwarranted as Defendant has no chance of success on the merits and equities favor Plaintiff which has been paying the taxes and insurance on the property. Counsel further argues that Defendant's jurisdictional defenses have previously been raised – albeit, never adjudicated – and lack merit.

Analysis

Plaintiff claims to have served Defendant twice, both times pursuant to CPLR § 308 (2), which

> "authorizes service of process to be made by delivery to a person of suitable age and discretion at the defendant's actual place of business, dwelling place, or usual place of abode, and by mailing process to the defendant at either his or her last known residence or actual place of business. Jurisdiction is not acquired pursuant to CPLR 308 (2) unless both the delivery and mailing requirements have been

[1] The instant decision and order will dispose of mot. seq. #4 from the January 31, 2024 calendar, as well.

strictly complied with" (*Gray-Joseph v Shuhai Liu*, 90 AD3d 988, 989 [2d Dept 2011]; *see also Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1174-1175 [2d Dept 2015]).

"The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff" (*Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). "A process server's affidavit of service constitutes prima facie evidence of proper service" (*Nationstar Mtge., LLC v Kamil*, 155 AD3d 966, 967 [2d Dept 2017]). "Where, however, there is a sworn, nonconclusory denial of service by defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing" (*E. Sav. Bank, FSB v Campbell*, 167 AD3d 712, 714 [2d Dept 2018]).

Plaintiff's first affidavit of service was filed on December 19, 2019, reflecting that three days earlier "Kantisha Doe" accepted service at "Markhoff & Mittman PC: 186 Joralemon Street, Suite 701, Brooklyn, NY 11201" and that a copy was thereafter mailed to Defendant "at Markhoff & Mittman PC: 186 Joralemon Street Suite 701, Brooklyn, NY 11201" (*see* NYSCEF Doc. #15). The second affidavit of service was uploaded on January 29, 2020. This time, "Romina Doe" was allegedly served at "186 Joralemon Street, Suite 701, Brooklyn, NY 11201" on January 27, 2020. The appended affidavit of mailing states that a copy was mailed to Defendant at that address the following day. (*See* NYSCEF Doc. #19.)

Defendant avers that Suite 701 at 186 Joralemon Street housed five different law firms at the relevant time. One office within it was his. Another belonged to Markhoff & Mittman, a firm with which he was unaffiliated. Nameplates for each business were on the interior door to the suite, making it clear that there were multiple separate entities contained therein. Defendant further asserts that there was no common reception desk – each office had its own separate staff. As such, he argues that the alleged service upon Markhoff & Mittman – a separate business with its own employees – was improper. Likewise, service upon "Romina" at an unspecified location within the suite was not necessarily at his place of business. Defendant further swears that he does not know either of the individuals who allegedly accepted service and never received the summons and complaint.

The Court finds that Defendant has sufficiently rebutted the affidavit of service, calling into question whether service occurred at his actual place of business. Issues remain as to whether

the entire suite was his place of business (or whether the signage was such that the server needed to serve his specific office) and where within the suite the alleged service actually occurred.

The prior stay, by its terms expired, upon the hearing of mot. seq. #4 on January 31, 2024. However, this Court agrees that insofar as a colorable issue exists as to whether it has personal jurisdiction over Defendant, no foreclosure auction should take place until a determination made after a traverse hearing is held. This conclusion necessarily renders mot. seq. #4 academic.

Conclusion

Accordingly, the above referenced motions by defendant DANIEL RAUSHER, each brought by order to show cause, are decided as follows: **mot. seq. #4** is **DENIED as moot**, and **mot. seq. #5** is **GRANTED to the extent** that it is

ORDERED, that the parties shall schedule the matter for a traverse hearing; and it is further

ORDERED that Plaintiff is barred from holding a foreclosure auction in this matter until a determination is made as to whether the Court has jurisdiction over Defendant.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: July 8, 2025

Hon. Cenceria P. Edwards, JSC, CPA