

Christophe v Christophe

2025 NY Slip Op 32987(U)

July 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 512765/2023

Judge: Anne J. Swern

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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 21st day of July 2025.

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

DECISION & ORDER

GLADYS CHRISTOPHE,

Plaintiff(s),

-against-

ALAN CHRISTOPHE, A.M. CHRISTOPHE
REVOCABLE TRUST, and 305 6th LLC

Defendant(s).

Index No.: 512765/2023

Motion Seq.: 1

Return Date: 5/1/2025

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
Notice of Motion and Affidavits (NYSCEF 5-21).....	1, 2
Affirmation and Exhibits in Opposition (NYSCEF 22-31)	3
Reply Affirmation and Exhibits (NYSCEF 32-34).....	4

Upon the foregoing papers, the decision and order of the Court is as follows:

Background

This is an action to recover \$500,000 in damages arising out of an alleged fraud, breach of contract, conversion, and other causes of action in connection with a transfer of real property known as 47 Pinewood Road, Roslyn, New York. Plaintiff has moved for default judgment under CPLR § 3215(a) based on defendant’s failure to timely appear and answer the complaint.

The affidavit of service states that on 5/23/2023, the summons and verified complaint were personally served on Alan Christophe at 305 6th Avenue, Brooklyn, New York 11215, who is described as a black male, age 50, and 64 to 68 inches in height.

In opposition, defendant has submitted an affidavit stating that he is domiciled at 853 Macy Place, Bronx, New York 10455, together with his New York State Driver License that describes him as being 73 inches tall and lists his address as 515 3rd Street, Brooklyn, New York 11215. Defendant argues that assuming someone was served, it was not him as there is a height differential of approximately 5 to 9 inches between him and the person described in the affidavit of service. Therefore, the court should deny plaintiff's motion for a default judgment, dismiss this action and grant such other and further relief as the court deems just and proper. Defendant also submitted a proposed verified answer to the complaint.

In reply, plaintiff contends that defendant has not lived at 853 Marcy Place for more than 10 years and that plaintiff's niece, Arielle Edouard, now lives in the apartment. Although plaintiff admits she received \$300,000.00 from defendant, she denies that the acceptance was in full settlement of her claims.

"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 proper service at a hearing by a preponderance of the evidence. (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588 [2d Dept 2009]).

Plaintiff bears the burden of establishing personal jurisdiction over the defendant before a defendant can be held in default (*see U.S. Bank Nat. Ass'n v Cherubin*, 141 AD3d 514, 514 [2d Dept 2016]).

Where there are significant discrepancies between the age and weight of the person allegedly served and defendant's actual age and weight at the time of the purported service, the defendant is entitled to a traverse hearing on the issue of proper service (*Emigrant Mortg. Co., Inc. v Westervelt*, 105 AD3d 896; *see also Wells Fargo Bank, NA v. v Chaplin*, 65 AD3d 588). However, a traverse hearing is not warranted for minor discrepancies between the appearance of the person allegedly serviced and the description of the person served (*Deutsche Bank Natl. Tr. Co. v Yurowitz*, 181 AD3d 646 [2d Dept 2020]; *U.S. Bank Nat. Ass'n v Cherubin*, 141 AD3d 514 [2d Dept 2016]).

Here, the height discrepancy of approximately 5 to 9 inches, as substantiated by the defendant's driver's license, is not minor. However, the driver's license was issued on 8/02/2023, after service of process was made, raising an issue concerning defendant's residence at the time of service. Therefore, a traverse hearing is required to establish whether service was validly made.

The Court holds in abeyance the decision on plaintiff's motion for a default judgment pending the outcome of a traverse hearing. Accordingly, it is hereby

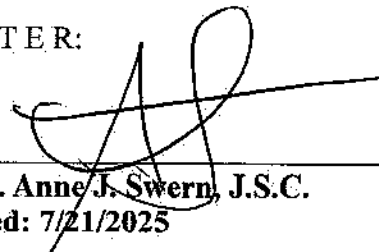
ORDERED that plaintiff's motion for a default judgment is held in abeyance pending the outcome of a traverse hearing, and it is further

ORDERED that this matter is referred to Part 82 for a JHO or Special Referee to conduct the traverse hearing and hear and report its recommendations concerning personal service, and it is further

ORDERED that the parties may stipulate to have the JHO or Special Referee to hear and determine the issue of personal service.

This constitutes the decision and order of the Court.

ENTER:



Hon. Anne J. Swern, J.S.C.

Dated: 7/21/2025

<p>For Clerks use only:</p> <p>MG _____</p> <p>MD _____</p> <p>Motion seq. # _____</p>
