

U.S. Bank Trust N.A. v Caring Partners, Inc.

2025 NY Slip Op 34344(U)

October 27, 2025

Supreme Court, Kings County

Docket Number: Index No. 517133/2024

Judge: Menachem M. Mirocznik

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At IAS Part FRP5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 27th of October 2025

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

U.S. BANK TRUST NATIONAL ASSOCIATION, A NATIONAL BANKING ASSOCIATION ACTING NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR 510 RESIDENTIAL HOLDING TRUST V

Plaintiff,

-against-

CARING PARTNERS, INC. AS GUARDIAN OF JENNIFER MCLEOD A/K/A JENNIFER R. MCLEOD, AN INCAPACITATED PERSON; NEW YORK CITY PARKING VIOLATIONS BUREAU; JPMORGAN CHASE BANK, N.A.; "JOHN DOE" AND "JANE DOE" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,

Defendants.

Index No. 517133/2024

**Decision and Order
(Motion Seq. 2 and 3)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 42-67
Notice of Cross-Motion	NYSCEF Doc. 77-84
Opposition to Cross-Motion and Reply	NYSCEF Doc. 87-88
Reply to Cross-Motion	NYSCEF Doc. 92-97
Sur-Reply	NYSCEF Doc. 98
Notice of Rejection	NYSCEF Doc. 100

Upon the foregoing papers, the motion and cross-motion are determined in accordance with this Decision and Order as follows:

Procedural History

This action was commenced on June 21, 2024 seeking to foreclose a mortgage executed by Jennifer Mcleod ("Borrower") encumbering the property known as 1356 East 48th Street, Brooklyn, NY 11234 (the "property").

Prior to commencement of the instant action, the Borrower was adjudged to be an incapacitated person and Caring Partners, Inc., was appointed as guardian for the Borrower. Notice of the appointment was recorded with Office of the City Register on March 31, 2022 under CRFN 2022000138182.

Defendant Caring Partners, Inc. as Guardian of Jennifer Mcleod A/K/A Jennifer R. Mcleod, an Incapacitated Person ("Defendant") was purportedly served on July 19, 2024, by service on Jennifer Oppenheimer as purported agent of Defendant.

Plaintiff now moves for a default judgment and order of reference.

Defendant cross-moves to dismiss the action or in the alternative to vacate its default and for leave to submit a late answer. Defendant submits the affidavit of Stephen Oppenheimer the principal of Defendant, who attests based upon personal knowledge that Jennifer Oppenheimer was not an agent or authorized person entitled to accept service on behalf of Defendant. Mr. Oppenheimer further attests that he did not receive notice of the instant action until November 20, 2024. Therefore, defendant contends the Court lacks jurisdiction over defendant. Defendant additionally contends that it has a reasonable excuse for its default in as much as service was defective and defendant did not have notice of the action in time to defend. As to a meritorious defense, defendant contends, inter alia, that plaintiff failed to comply with RPAPL 1304 because it purportedly mailed the RPAPL 1304 notice to the Borrowers PO Box instead of Defendant even though the notice of the appointment and of Borrowers incapacitation were of public record and that plaintiff lacks standing.

Plaintiff opposes defendant's cross-motion arguing that defendant was properly served under CPLR 311(a)(1), failed to answer, and offers no reasonable excuse for its delay in seeking relief. Plaintiff contends that the Oppenheimer affirmation is hearsay and speculative, lacks any affidavit from the person actually served (i.e. Jennifer Oppenheimer), and therefore does not rebut the presumption of proper service. Plaintiff further contends that defendant remains in default, waived all non-jurisdictional defenses-including, inter alia, non-compliance with RPAPL 1304 and cannot obtain affirmative relief under CPLR 3012(d) and any relief is barred by laches. Plaintiff further contends that defendant does not have a meritorious defense, that the note attached to the complaint establishes standing, that RPAPL 1304 notice was properly mailed to the property and last-known address and the burden was on defendant to update its address with plaintiff and that other asserted defenses are unsupported and meritless.

Defendant filed a reply reiterating that the court lacks personal jurisdiction because service of process was defective in as much as Jennifer Oppenheimer was never authorized to receive service for defendant. Defendant further argues that plaintiff bears the burden of proving valid service and has offered no competent evidence establishing proper service. Defendant additionally submits the affidavit of Jennifer Oppenheimer and Stephen Oppenheimer attesting that Jennifer Oppenheimer lacked authority to accept service. Defendant further contends that plaintiff did not comply with RPAPL § 1304 despite a publicly filed notice of appointment and adds that its defenses remain viable no default exists absent jurisdiction. Finally, defendant argues that laches cannot bar a jurisdictional challenge and that any delay in responding was reasonable.

In its sur-reply, plaintiff argues that defendant's reply papers improperly introduce new affidavits and arguments that should have been included in the original cross-motion and should be disregarded. Plaintiff reiterates that defendant's original motion relied on vague, hearsay assertions. Plaintiff further argues the new affidavit from Jennifer Oppenheimer does not deny that service occurred.

Defendant filed a notice of rejection of the sur-reply filed by plaintiff contending the same was not authorized and its reply affidavits merely responded to issues first raised by plaintiff.

Discussion

Initially, the Court reminds the parties that sur-reply papers are not authorized without leave of Court and should not rely on the submission of such papers in the future. The Court expects the parties to comply with requirements of the CPLR in briefing motions. However, in the interest of justice and to have a complete briefing, the Court considered all the parties' papers including defendant's notice of rejection which in reality was a responsive briefing to the sur-reply filed by plaintiff. In any case, in rendering the instant decision and order, the initial briefing and affidavit were sufficient.

"CPLR 311(a) provides that personal service on a corporation may be accomplished by, inter alia, delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (CPLR 311[a] [1]). A process server's affidavit of service constitutes prima facie evidence of proper service on a corporation pursuant to CPLR 311(a)(1)" *Rosario v NES Med Services of New York, P.C.*, 105 AD3d 831 [2d Dept 2013]; *Miterko v Peaslee*, 80 AD3d 736 [2d Dept 2011].

"Although bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing." *Fed Natl. Mtge. Assn v Alverado*, 167 AD3d 987 [2d Dept 2018].

Here, the affidavit of service alleges that Defendant was served with the summons and complaint on Jennifer Oppenheimer as authorized agent. However, the affidavit of service does not state the basis of that assertion and does not claim that Ms. Oppenheimer claimed to be an authorized agent. Additionally, in support of the cross-motion, defendant submitted the affidavit of Steven Oppenheimer, the principal of defendant who attests that Ms. Oppenheimer was never authorized to accept service. Plaintiff's contention that the affidavit is hearsay is without merit. Mr. Oppenheimer's affidavit is expressly based upon personal knowledge. Contrary to plaintiff's further assertion, the question before the Court is not whether papers were in fact served on Ms. Oppenheimer, the issue is whether Ms. Oppenheimer had authority to receive service for defendant.

Indeed, it appears that the assertion in the affidavit of service as to Ms. Oppenheimer's authority to accept service is itself hearsay. Although unnecessary, defendant also submitted a further affidavit of Mr. Oppenheimer and Ms. Oppenheimer both based upon personal knowledge and attest that Ms. Oppenheimer did not have authority to accept service.

Given the factual issue as to whether Ms. Oppenheimer was authorized to accept service, a hearing is necessary. *Rosario v NES Med. Services of New York, P.C.*, 105 AD3d 831 [2d Dept 2013]; *Miterko v Peaslee*, 80 AD3d 736 [2d Dept 2011].

The law is well settled that when a defendant raises a jurisdictional question, "[t]hat jurisdictional question must be resolved before determining whether it is appropriate to grant a discretionary vacatur of the default." *Harrison v 5, 'chottenstein*, 228 AD3d 848 [2d Dept 2024]; See also *Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817 [2d Dept 2019]; *Roberts v Anka*, 45 AD3d 752 [2d Dept 2007].

Furthermore, "[i]t is well established that the burden of proving that personal jurisdiction was acquired rests at all times upon the plaintiff in the action" *Fed Natl. Mtge. Assn. v Castoldi*, 187 AD3d 988 [2d Dept 2020] [emphasis added].

Accordingly, it is hereby

ORDERED, that defendant's motion is GRANTED to the extent that the matter is referred to a JHO or a Court Attorney Referee to conduct a hearing on a hear and report basis, or if the parties so stipulate, on a hear and determine basis as to the issue of whether Jenneifer Oppenheimer was authorized to accept service for defendant; and it is further

ORDERED, that plaintiff's motion and the remainder of defendant's cross-motion shall be held in abeyance until such time as the jurisdictional question is resolved after the hearing ordered herein.

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, J.S.C.

FILED

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