

US Bank v Howell

2025 NY Slip Op 34881(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 504426/16

Judge: Cenceria P. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 December, 2025.

P R E S E N T:

Motion Calendar Date: 10/5/22

Motion Calendar No.: 46

HON. CENCERIA P EDWARDS,
Justice.

-----X

US BANK

Plaintiff,

-against-

Index No.: 504426/16
MS 5

LENNOX D HOWELL et al,

Defendant,

-----X

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations)

Annexed _____

140-145

Opposing Affidavits (Affirmations) _____

146-155

Affidavits/ Affirmations in Reply _____

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 856 Euclid Avenue in Brooklyn (Block 4505, Lot 17), Defendant Suydam St Management Corp moves for a stay of the foreclosure sale scheduled for February 6, 2020¹, vacatur of the judgment of foreclosure and sale, and restoration of its marked-off cross-motion. Plaintiff US Bank opposes.

¹ This portion of the relief was granted upon the signing of the order to show cause.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on March 24, 2016. Suydam was the only defendant to timely answer, asserting thirteen affirmative defenses including three also styled as counterclaims.

On December 27, 2016, Plaintiff moved for summary judgment, default judgment, and an order of reference. Suydam opposed, raising allegations that this action was not timely filed, that Plaintiff lacked standing, and that Plaintiff failed to serve a mortgage default notice. Rejecting Suydam's arguments, the Court granted the relief requested by Plaintiff by order dated September 5, 2017.

Plaintiff then sought the appointment of a substitute referee but quickly withdrew that motion.

On March 14, 2019, Plaintiff moved to confirm the referee's report as to the amount due and for judgment of foreclosure and sale.

Suydam cross-moved for dismissal of this action for failure to comply with Kings County Uniform Civil Term Rules Rule F,8 as Plaintiff failed to move for JFS within one year of the grant of an order of reference. It further asserted that the referee's calculation of interest under the terms of the adjustable-rate note was not supported by proof of the accuracy of the rates used and that the claimed escrows were not substantiated by admissible evidence.

Plaintiff countered that its motion was timely under the CPLR and that it had a reasonable excuse for any delay in moving – as noted in its motion for a substitute referee, the appointed individual was unresponsive despite its best efforts, that it secured a report from him as soon as it was able to, and that it rapidly filed its motion thereafter. Plaintiff further argued that the referee's report was supported by admissible evidence – that he considered an affidavit from the servicer and ample documentary evidence – and that Suydam does not offer any actual challenge to the accuracy of the interest rates and other conclusions reached by the referee.

In reply, Suydam reiterated that Plaintiff was not vigilant in moving for JFS and that the referee's report was not supported by admissible evidence.

The motions were returnable on May 31, 2019. Plaintiff's motion was marked fully submitted and Suydam's marked off. The Clerk's markings unequivocally state that the moving defendant (that is, Suydam) failed to appear on that date. Judgment of foreclosure and sale was granted on default – and seemingly without consideration of Suydam's opposition – on July 8, 2019. Notice of entry was served early the following month. Suydam filed a notice of appeal on September 9, 2019.

Auctions were scheduled for November 7, 2019 and February 6, 2020. Neither went forward.

On February 5, 2020, Suydam filed the instant motion. In essence, its counsel argues that both motions were fully papered and he had correctly diaried the appearance. That Suydam's motion was marked off was either erroneous or the result of an inadvertent failure to appear. The arguments raised in its opposition are, counsel asserts, meritorious and should have been considered. As such, Suydam contends that that judgment should be vacated and the auction be prevented from going forward.

In opposition, Plaintiff's counsel argues that he was not properly served – the order to show cause required personal service, but Suydam utilized Federal Express instead – and, thus, that the Court lacks jurisdiction to hear this motion. Plaintiff further asserts that opposing counsel's claim that he had no recollection of missing the appearance and that, if he did, it was inadvertent is unsupported and does not constitute a reasonable excuse for the default. It proffers its appearing attorney's contemporaneously created report reflecting that Suydam's counsel had not appeared and that his motion was marked off. Plaintiff also notes that Suydam waited eight months until the day before the scheduled auction to address its non-appearance. Finally, Plaintiff argues that Suydam offers no meritorious arguments in opposition to the motion for judgment of foreclosure and sale.

Analysis

“The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with” (*Khan v Khan*, 197 AD3d 1164, 1165 [2d Dept 2021], quoting *US Bank NA v Feliciano*, 103 AD3d 791, 791 [2d Dept 2013]). A “failure to serve the

order to show cause in compliance with the court's directive [is] not a mere 'technical infirmity' that may be overlooked by the court pursuant to CPLR 2001" (*Serrao v Slope Storage*, 223 AD3d 927, 927-928 [2d Dept 2024]). As such, this Court cannot consider Suydam's motion for which there is no proof of service and which Plaintiff's counsel claims was sent by means other than those specified by the Judge who signed the OSC.

Conclusion

Accordingly, it is

ORDERED that Suydam's motion to vacate (mot. seq. #5), is denied.

ENTER:



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