

<b>Wilmington Sav. Fund v Walters</b>
2025 NY Slip Op 35247(U)
November 3, 2025
Supreme Court, Kings County
Docket Number: Index No. 515445/16
Judge: Cenceria P. Edwards
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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 3rd day of November, 2025.

**P R E S E N T:**

HON. CENCERIA P EDWARDS,  
Justice.

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WILMINGTON SAVINGS FUND,

Plaintiff,

-against-

RICHARD A WALTERS et al,

Defendant,

-----X

**Index No.:** 515445/16  
**MS 3+5+6**  
**Calendar Date:** 6/2/22  
**Calendar No.(s):**  
46+48+49

The following e-filed papers read herein:

NYSEF Nos.:

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

41-48 100-109 113-130

Opposing Affidavits (Affirmations) \_\_\_\_\_

53-81 131-133

Affidavits/ Affirmations in Reply \_\_\_\_\_

82-83 134

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 2177 Straus Street in Brooklyn (Block 3584, Lot 12), Plaintiff Wilmington Savings Fund moves for judgment of foreclosure and sale (MS 3). Defendant Richard Walters opposes. Further, following a traverse hearing, Plaintiff moves for an extension of time to serve Walters and an extension of time to move to reject the Special Referee’s report (MS 5). Defendant opposes and cross-moves to confirm the recommendation and, thereafter, for dismissal (MS 6). Plaintiff opposes.

### *Background Facts and Procedural History*

Plaintiff commenced the instant foreclosure action on September 1, 2016. All defendants defaulted in answering. Conferences were scheduled in the Foreclosure Settlement Conference Part but Defendant failed to appear.

On July 10, 2017, Plaintiff moved for an order of reference. Though no opposition was filed, the requested relief was nonetheless denied by order dated November 16, 2017, the Court finding that Plaintiff failed to demonstrate that it provided additional notice pursuant to CPLR 3215[g].

The following year, Plaintiff again sought default judgment and an order of reference. This time, the relief was granted on default by order dated January 29, 2019.

On April 10, 2019, Plaintiff filed the instant motion for judgment of foreclosure and sale. Defendant opposed and sought dismissal of the action based, among other things, upon a lack of personal jurisdiction over him. By order dated September 17, 2019, the cross-motion was granted to the extent that the matter was set down for a traverse hearing. The remaining of Defendant's motion and the entirety of Plaintiff's motion were held in abeyance pending the outcome of the hearing.

A traverse hearing was held before Special Referee Miriam Sunshine on a hear and determine basis. On November 8, 2020, she issued her written decision, finding that service upon Defendant was not properly effected.

Plaintiff now moves for an order pursuant to CPLR 306-b, extending its time to serve Defendant. As it was unable to get a copy of the transcript prior to the expiration of its time to seek to reject the referee's report, it also seeks an extension of time to seek that relief. In essence, Plaintiff argues that it was diligent in attempting to serve Defendant and believed that it had timely done so. The statute of limitations to file a new action likely lapsed during the pendency of this action and, if it did, a new action would be untimely. Plaintiff further notes that an order of reference was granted in this action, showing that the case has merit. It further claims that the instant motion is timely, having been filed shortly after the referee found service to be improper. Finally, Plaintiff suggests that no prejudice to Defendant would result from the requested extension.

Defendant opposes and cross-moves to confirm Referee Sunshine's report and dismiss the action.<sup>1</sup> He notes that the referee set forth her reasoning and findings of fact supporting her conclusion that service was improper – as does the record in general. Further, Plaintiff took no steps to cure the defective service between 2016 (when the action was commenced) and 2021 (when this cross-motion was filed). This is particularly egregious for the period following Defendant's assertion that service was improper as part of his cross-motion filed in 2019. No explanation for the delay has been offered. Defendant also asserts that Plaintiff did not demonstrate that its cause of action is meritorious as the evidence supporting the motion for order of reference was insufficient. He also contends that non-service and (alleged) fabrication of evidence was prejudicial to him and should preclude the requested extension of time.

Plaintiff replies that the order of reference is sufficient evidence that this action has merit and that Defendant's general, unsubstantiated claims of prejudice are conclusory and entitled to no weight. Plaintiff argues that denial of its motion would be problematic as any future action might be time-barred. Finally, it asserts that it has prosecuted this action in a timely manner and made the instant motion shortly after the referee issued her findings.

In further support of his motion,<sup>2</sup> Defendant asserts that the referee's conclusions are supported by the record and should not be disturbed. The burden of proof at the hearing was upon Plaintiff and it did not meet it. The process server allegedly gave the summons and complaint to a "Doe" but did not establish whether Defendant was likely to actually receive it. More importantly, the referee was unable to produce information from the application used to record data including geotagged, time-stamped photos required to be taken at the time of service. Defendant, on the other hand, produced documentary evidence that he was at work at the time of service and testified that only he and his minor son had access to his apartment.

### *Analysis*

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<sup>1</sup> MS 4 which led to the traverse hearing was withdrawn as moot.

<sup>2</sup> The portions of his papers which were solely in response to Plaintiff's reply as to its motion were properly rejected by Plaintiff as an impermissible sur-reply and were not considered.

The traverse hearing was held on a hear and determine basis. This is explicit both in the transcript (2:2-5<sup>3</sup>) and in the Special Referee's order.<sup>4</sup> It is well established that:

Where an order of reference directs that the referee "hear and determine" (CPLR 4301), rather than "hear and report" on (CPLR 4201), the referee possesses "all the powers of a court in performing a like function" (CPLR 4301), and the determination stands as the decision of a court (CPLR 4319). Since the actions of referees when they are assigned to determine an issue are tantamount to those of any sitting Supreme Court Justice, the Supreme Court may only review whether the referee exceeded the scope of the issues delineated in the order of reference. (*US Bank Natl Assn v Gokhberg*, 187 AD3d 1094, 1094-1095 [2d Dept 2020][case citations omitted])

As such, this Court lacks the authority to review the merits of Referee Sunshine's determination. As there is no claim that she exceeded her authority (and she did not), this Court adopts her finding that Defendant was not properly served with the summons and complaint.

Pursuant to CPLR 306-b, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." The Court of Appeals has noted that "the Legislature gave the courts two separate standards by which to measure an application for an extension of time to serve" (*Leader v Maroney, Ponzini, and Spencer*, 97 NY2d 95, 104 [2001]). The more flexible interest of justice standard requires "balancing of the competing interests presented by the parties" and "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Id.*, 105-106).

Here, service upon Defendant was facially proper. A licensed process server swore that he had done so pursuant to CPLR 308[2] and there were no "red flags" within the affidavit of service that would have suggested to a reasonable plaintiff that service was defective. In fact, the Special Referee found "the process server credible that he served a person who stated that he was

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<sup>3</sup> "This matter was sent at the request of Justice Dear to hear and determine with respect to the issue of traverse. The parties have consented also, again on the record, to a hear and determine."

<sup>4</sup> It begins, "[t]his matter was sent ... to hear and determine as to the issue of a traverse" and concludes with a decision – rather than recommendation – on the issue.

a tenant, which he was ..." – in other words, that service actually occurred – before noting the lack of testimony as to within which unit within the four-family building the "Doe" resided and was served. The apparent propriety of service is a factor in Plaintiff's favor.

Defendant is correct, however, that Plaintiff was on notice of his claim that service was defective no later than when he filed his first cross-motion on June 11, 2019. The Court directing a traverse hearing in September 2019 should have further alerted Plaintiff that it might need an extension of time to serve. Yet, no motion was made until after Referee Sunshine propounded her determination. This militates against the extension.

It is undisputed that a prior action was commenced in 2013 and, thus, that the statute of limitations would likely bar a new action to foreclose upon the lien. Plaintiff notes that it prosecuted this action reasonably diligently, filing motions for an order of reference and for judgment of foreclosure and sale without any large temporal gaps. Both work in its favor.

Defendant offers no specific prejudice to him that would result from the proposed extension. His arguments, really challenges to the merits of Plaintiff's case – its standing and sending of notices, could be included in an answer to the complaint and pursued within the litigation. Contrary to his contentions, the grant of the order of reference is sufficient to show that the action has potential merit.

In light of the foregoing and while the Court is troubled by Plaintiff's delay in moving pursuant to CPLR 306-b, the interest of justice favors the grant of the requested extension of time to serve Defendant.

### *Conclusion*

Accordingly, it is

**ORDERED** that Plaintiff's motion for an extension of time to serve Defendant (MS 5) is granted and Plaintiff's time to serve Defendant is extended until sixty days following entry of the instant order; and it is further

**ORDERED** that Defendant's cross-motion to confirm Referee Sunshine's report<sup>5</sup> and dismiss the action (MS 6) is denied; and it is further

**ORDERED** that, in light of the Special Referee's determination, default judgment against Defendant and the order of reference are vacated and Plaintiff's motion for judgment of foreclosure and sale (MS 3) is denied.

This constitutes the decision and order of the Court.

**ENTER:**



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

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<sup>5</sup> This portion of the motion is unnecessary as she determined rather than recommended.