

Wilmington Sav. Fund v Mason
2026 NY Slip Op 31330(U)
March 26, 2026
Supreme Court, Kings County
Docket Number: Index No. 505279/2014
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 26th day of March, 2026.

PRESENT:

HON. CENCERIA P EDWARDS,
Justice.

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WILMINGTON SAVINGS FUND,

Plaintiff,

-against-

GRETA MASON et al,

Defendant,

-----X

Index No.: 505279/2014
Mot. Seq. No.: 3+4
Calendar Date: 6/28/2023
Calendar No.: 43+44

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ <u>39-53 54-66</u>
Opposing Affidavits (Affirmations) _____	_____ <u>67-74</u>
Affidavits/ Affirmations in Reply _____	_____ <u>76-77</u>

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 36A Rochester Avenue in Brooklyn (Block 1708, Lot 51), Plaintiff Wilmington Savings Fund moves for nunc pro tunc ratification of the untimely notice of entry and referee’s report and, thereafter, for judgment of foreclosure and sale. Defendant Norman Russell opposes and cross-moves for dismissal, alleging that the Court lacks personal jurisdiction over him and that Plaintiff failed to comply with RPAPL 1304 and 1306. Upon dismissal, he seeks the tolling of interest and the award of attorney’s fees, costs, and disbursements. In the alternative, Defendant seeks to have this action referred to the Foreclosure Settlement Conference Part. Plaintiff opposes.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on June 10, 2014. All defendants failed to timely answer.

On November 4, 2014, Plaintiff filed a motion for default judgment and an order of reference. The motion was marked off, however, on January 23, 2015.

The following year, Plaintiff again sought the same relief. By order dated November 9, 2016, the motion was granted on default and without opposition.

Plaintiff filed the instant motion for judgment of foreclosure and sale [MS 3] on May 3, 2017. Therein, it seeks a nunc pro tunc extension of time to both serve the notice of entry of the order of reference and for the referee to issue his report. Both were accomplished beyond the time frames – twenty and sixty days respectively – provided in the order. Proffering the referee's oath and report, Plaintiff further seeks judgment of foreclosure and sale.

On October 30, 2017, Defendant cross-moved [MS 4], primarily for dismissal of this action.¹ Arguing that he lived at the property-in-suit in Brooklyn rather than the address where he was allegedly served in Elmont, Defendant argues that the Court lacks personal jurisdiction over him. He further challenges the process server's assertion that 36A Rochester is an empty lot, stating that there is a two-family house on it and it is the adjacent property that lacks a structure. Defendant also argues that Plaintiff failed to comply with RPAPL 1304 as Plaintiff failed to demonstrate mailing, he did not receive the notices, and one set was sent to an address where he never resided. Asserting a lack of evidence that the required filings were made, Defendant alleges that Plaintiff failed to comply with RPAPL 1306. Finally, Defendant asserts that Plaintiff did not file an RJI along with proof of service, instead waiting until it filed its first motion, thus preventing this matter from being referred for settlement conferences. As such, he argues that this action must be dismissed and/or interest tolled.

Noting that Defendant solely seeks dismissal and does not request vacatur of his default, Plaintiff asserts that were this action not to be dismissed Defendant should not be permitted to file a late answer. Plaintiff argues that Defendant has not rebutted the affidavit of service,

¹ The referee's computation and Plaintiff's motion were not substantively discussed in Defendant's cross-motion.

merely baldly stating that he was no longer living at the Elmont address at the relevant time but offering no supporting evidence. Nor, it suggests, are Defendant's issues with the affidavit of non-service at the "empty lot" of any relevance. If service was proper in Elmont, it is irrelevant whether the affidavit of the process server who allegedly went to Brooklyn was accurate. Arguing that a defaulting defendant cannot raise non-compliance with RPAPL 1304 and 1306, Plaintiff asserts that it nonetheless demonstrated the required mailing and filings through the affidavits appended to its prior motion and the exhibits thereto.

In reply, Defendant argues that he has not waived his notice defense and reiterates that Plaintiff has not demonstrated that the RPAPL 1304 notices were properly mailed to him. He further notes that Plaintiff has not demonstrated that a settlement conference was scheduled due to Plaintiff's bad faith, depriving him of the opportunity to seek a HAMP modification. Finally, he again argues that he resided at the property rather than in Elmont and, thus, was not properly served with the summons and complaint.

By order dated July 23, 2018, the matter was set down for a traverse hearing to be held before a special referee. The remainder of the pending motions was held in abeyance pending the results of the hearing.

On October 17, 2018, Plaintiff filed a motion for an extension of time to serve Defendant where personal jurisdiction to be found to be lacking [MS 5].

A traverse hearing was scheduled for October 22, 2018. Pursuant to the resulting order, "After 12 noon the defendants have failed to appear and are in default." The matter was referred back to the Court for further determination.

On November 19, 2018, Defendant filed a motion seeking to vacate his default in appearing for the traverse hearing, vacate the order dated October 22, 2018, and restore the hearing to the calendar [MS 6]. Therein, he and his counsel argued that they had mis-calendared the appearance, that his position was meritorious, and that no prejudice resulted from the delay.

After Defendant failed to appear on December 18, 2018 for the return date of MS 3-5, Defendant filed another motion [MS 7] seeking vacatur of that default and to restore the motions to the Court's calendar. This time, counsel argued that she got to Court late due to

transportational difficulties and was unable to reach anyone at the time to let them know that she was on her way.

Plaintiff opposed both of Defendant's motions to vacate. Noting that an unsubstantiated claim of law office failure does not constitute a reasonable excuse for a default, Plaintiff argued that Defendant' repeated defaults and "mere invocation of law office failure" were insufficient to warrant vacatur. As to the December 18th motion date, Plaintiff further asserted that the inability to be present for either of the Court's calendar calls (10 and 11:15 AM) strains credibility.

After Defendant again asserted that he had reasonable excuses for both defaults and that his position was meritorious, the Court – noting counsel's "pattern of failing to appear in this action"² but invoking the interest of justice – granted vacatur of the hearing default and directed that a traverse hearing be held by order dated March 14, 2019.

A hearing was held before a special referee on a hear and determine basis. Having considered the testimony and evidence, she found the process server credible and noted that Defendant still offered no evidence of living elsewhere. As such, service was found to be proper and jurisdiction over Defendant to be present.

In light of the special referee's findings, Plaintiff withdrew its motion for an extension of time to serve Defendant [MS 5]. Following several further adjournments, Plaintiff's motion for judgment of foreclosure and sale [MS 3] and Defendant's motion to dismiss [MS 4] were taken on submission.

Analysis

"Where, as here, a referee was appointed to hear and determine, the referee possesses all the powers of a court in performing a like function, and the referee's decision shall stand as the decision of a court" (*Indictor v Indictor*, 236 AD3d 879, 881 [2d Dept 2025][internal citations omitted]). The special referee's finding that service upon Defendant was properly effected is, thus, binding upon this Court and his jurisdictional arguments are rejected.

² For the traverse hearing, the December 18th motion date, and on the March 5, 2019 return date of MS 7 which was marked off.

Plaintiff is correct that Defendant may not raise noncompliance with RPAPL 1304 and 1306 as he remains in default (*Wilmington Savings Fund v Chishty*, 179 A.D.3d 1147, 1148 [2d Dept 2020][“the defendant failed to move to vacate her default ... and, thus, is precluded from arguing that the plaintiff failed to comply with the applicable provisions of RPAPL 1304 and 1306”]). As such, those portions of his motion also are denied.

While no settlement conferences were held, that is of no moment. It has already been determined at the traverse hearing that Defendant did not reside at the property at the commencement of the action and, thus, that no conferences were required.³ Plaintiff’s failure to file the RJI along with the affidavits of service was consequently also not prejudicial and does not warrant interest tolling.

Defendant offers no opposition to Plaintiff’s motion for judgment of foreclosure and sale despite responding to it with a cross-motion. There is, thus, no challenge to the referee’s calculations and the basis therefor. Further, the Court can and will overlook the delay in filing notice of entry of the order of reference and in securing the referee’s report. The requested relief is, thus, granted.

Conclusion

Accordingly, it is

ORDERED that Plaintiff’s motion for judgment of foreclosure and sale [MS 3] is granted (see accompanying order); and it is further

ORDERED that Defendant’s cross-motion to dismiss [MS 4] is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:



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

³ Per the filed affidavits of service, Co-Defendant Greta Mason was also served at an address other than the premises.