

Wells Fargo Bank v Silberstein
2026 NY Slip Op 31375(U)
April 6, 2026
Supreme Court, Kings County
Docket Number: Index No. 512419/2023
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 2nd day of April, 2026.

P R E S E N T:

HON. CENCERIA P. EDWARDS,
Justice.

-----X

WELLS FARGO BANK

Plaintiff,

-against-

Index No.: 512419/2023
Mot. Seq.: 1+2
Calendar Date: 11/16/2023
Calendar No.: 6+7

DEVORAH SILBERSTEIN et al,

Defendant,

-----X

The following e-filed papers read herein:

NYSCEF No.(s):

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

Annexed _____

31-46 47-53

Opposing Affidavits (Affirmations) _____

57-61 62-65

Affidavits/ Affirmations in Reply _____

67-71 72

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 26 Heyward Street Apt 2D in Brooklyn (Block 2230, Lot 1004), Defendants Devorah Silberstein and Isaac Silberstein, as Trustee of the ADS 1-17 Trust move for dismissal of this action for lack of personal jurisdiction over them and, thereupon, cancellation of the Notice of Pendency filed on April 26, 2023. Plaintiff Wells Fargo Bank, NA opposes and separately moves for an order extending its time to serve Defendants, if necessary. Defendants oppose.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on April 26, 2023. Defendants timely answered through counsel.

Defendants' Motion

Within sixty days thereafter, Defendants filed the instant motion. Devorah was allegedly personally served with the summons and complaint at her residence. She, however, swears that the server did not do so. More specifically, Defendants both attest that one cannot reach the door of Devorah's apartment without either a key to activate the relevant elevator button or via a locked door from the stairwell. Devorah and her son Joel also state that they installed security cameras on the outside of the building, in the lobby, and in the stairwell outside the door leading to her apartment. Proffering the video footage from the relevant time, they argue that the server did not gain access to her front door and, thus, could not have served her. In fact, Defendants proffer an affidavit from Esther Hoffman who resides in Apt 2C wherein she states that the server delivered papers to her outside of her (rather than Devorah's) apartment. Devorah also claims that her head was shaved, and she wore a headwrap – rather than having brown hair as claimed by the process server.

Isaac was allegedly served both at Devorah's apartment and at an apartment on Harrison Avenue. Proffering copies of his driver's license, Isaac unequivocally states that he did not reside on Heyward Street at the relevant time. He further asserts that he resided alone on Harrison Avenue¹ and that no one matching the description of the "John Doe" who allegedly accepted service resided in the building. Stating that he was not home at the time of the alleged service, Isaac avers that he found a copy of the summons and complaint taped to his door when he returned and provides a picture of it in situ. Finally, he notes that his front door is white rather than dark brown as claimed by the process server.

Plaintiff's Opposition

Plaintiff argues that Defendants have not rebutted the affidavits of service. While the videos do not show service being accomplished, they demonstrate that the process server was in

¹ In support, he proffers his lease.

the building at around the time he claimed to have served Devorah. There are temporal gaps and a six-minute period when the server was in the building but not visible. Service upon Ms Hoffman instead of Devorah is not shown. The server claims to have been buzzed into the stairwell by someone within Devorah's apartment and Defendants concede that he was able to reach the second floor and the door of at least one apartment. Finally, Plaintiff asserts that Devorah does not substantially challenge the accuracy of the server's description of "her" physical appearance.

As to Isaac, Plaintiff claims that service was accomplished on Harrison Avenue. Even were he not home, the server could have served someone else at his apartment. Though Isaac claims that the papers were actually taped to his door, Plaintiff proffers an affidavit from the process serving company that to do so was not its practice.

Defendants' Reply

Noting that they provided testimonial, videographic, photographic, and documentary evidence rebutting the affidavits of service, Defendants argue that the Court lacks personal jurisdiction over them. They assert that the videos show that the server was unsuccessful in gaining entry by ringing the bell for Devorah's apartment – he was admitted by someone else after pushing a different button. The footage from the stairwell also reflects that he did not gain entry to her apartment – and there is no explanation as to how the server allegedly reached her apartment door thereafter. While the server was adamant that he never went to Ms. Hoffman's apartment, the lobby cameras reflect that he exited the stairwell on her – rather than Devorah's – side of the building.

Defendants further argue that service upon Isaac was also improper. He did not live in his mother's apartment and had no co-tenant or visitor at his. The pictures support his claim that the papers were taped to his door rather than delivered to an individual – and Plaintiff proffers no affidavit from this process server as to his general procedures and what he did in this case.

Plaintiff's Cross-Motion

To the extent that that Court finds that jurisdiction over Defendants was not acquired, Plaintiff cross-moves for an extension of time to serve Defendants. Arguing that the relief is

warranted under the “good cause” standard, Plaintiff asserts that it diligently hired a process server, that the service was facially proper, and that Defendants received the served copies even if the service is found technically improper. Turning to the more flexible “interest of justice” standard, Plaintiff suggests that it has a meritorious cause of action, that the statute of limitations may have run, and there would be no prejudice to Defendants as they have been on notice of this action throughout.

Defendants’ Opposition

Defendants counter that service was “defective” and “palpably improper” in light of the testimony and documentary evidence and, thus, good cause for an extension does not exist. Likewise, Defendants claim that an extreme lack of diligence on the part of the process servers and falsified affidavits prevent an interest of justice extension – even though the statute of limitations has expired, and Defendants received timely notice of this action. They further note that Plaintiff has not proffered an affidavit of merit from the servicer – relying solely on counsel’s assertion that the cause of action is meritorious. Defendants also contend that Plaintiff delayed in the prosecution of the prior action and, thus, that the expiration of the statute of limitations should not work in its favor.

Plaintiff’s Reply

Plaintiff counters that service upon Defendants was facially valid and allegedly occurred in a timely manner – unlike in the cases cited in opposition, here the alleged service was at correct locations and appeared to have been properly completed pursuant to CPLR 308[2]. Even assuming that service were to be found improper, Plaintiff argues that an extension of time would be in the interest of justice. The server, at a minimum, was present at Defendants’ residences and took actions putting them on notice of the action. Plaintiff further notes that the record from the prior action – which ended in Defendants’ favor due to the now-overruled *Kessler* decision – demonstrates that its cause of action is potentially meritorious. It also argues that it did not delay prosecuting the prior action – the matter spent eight months in the Foreclosure Settlement Conference Part and Plaintiff appealed from the denial of its motion for summary judgment.

Subsequent History

By order dated December 19, 2023, Defendants' motion was granted to the extent that the matter was set down for a traverse hearing and the remainder of the motions was held in abeyance pending the Special Referee's determination.

On March 26, 2024, Plaintiff filed a letter stating that it would not be able to meet its burden at hearing. Instead, it asked the Court to decide its cross-motion for an extension of time to serve. The motions were then taken sub judice by this Court.

Analysis

Plaintiff having conceded that it could not meet its burden at hearing, this Court finds that service upon Defendants was not proper and turns to Plaintiff's cross-motion.

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 Defendants was facially proper. Licensed process servers swore that they had done so pursuant to CPLR 308[2] and there were no "red flags" within the affidavits of service that would have suggested to a reasonable plaintiff that service was defective. Though Defendants proffered testimony, video, and photographs rebutting the process servers' accounts of their actions, the alleged service was at Defendants' actual residences and there was no reason for Plaintiff to believe service to have been improper until the instant motion was filed. Further, Defendants' own evidence reflects that the servers were present where they claimed, when they

claimed even if they did not properly accomplish service. The apparent propriety of service is a factor in Plaintiff's favor.

Likewise, Plaintiff filed the instant cross-motion slightly more than one month after Defendants challenged the Court's jurisdiction over them.² The prompt reaction militates in Plaintiff's favor.

Though Defendants are correct that Plaintiff fails to offer an affidavit from the servicer supporting counsel's assertion that Plaintiff has a potentially meritorious claim, a Certificate of Merit Pursuant to CPLR 3012-b was filed in this action along with copies of the note and mortgage. Further, as noted by counsel, the dismissal of the prior action was not on the merits – rather due to noncompliance with RPAPL 1304. Plaintiff produced an Affidavit of Merit under the prior index number and Defendants have still not denied that the loan is in default.

It is undisputed that a prior action was commenced in 2015 and, thus, that the statute of limitations would likely bar a new action to foreclose upon the lien. Though Defendants are correct that there were gaps in prosecution of that matter, they do not rise to a level of lack of diligence such to be relevant to the instant analysis. Though no motion was filed until 2019, the matter appears to have had numerous appearances on the "Special Control" and "Status" conference calendars without the Court issuing any ninety-day orders. Following the denial of Plaintiff's motion in late July 2019, it appears that it filed a notice of appeal. The Covid-19 pandemic led to a halt of foreclosures in this county from March 2020 until early 2022. In mid-2022, Plaintiff filed a Note of Issue and Defendant successfully moved for summary judgment. All-in-all, the statute of limitations having likely run and Plaintiff not having unduly delayed in prosecution also favors the grant of an extension of time.

In light of the foregoing, the interest of justice favors the grant of the requested extension of time to serve Defendant.

Conclusion

² Though a bare bones jurisdictional defense was raised in Defendants' answer, their motion was the first time they raised specific issues with the alleged service.

Accordingly, it is

ORDERED that Defendants' motion to dismiss [MS 1] is granted to the extent that it is conceded that the Court lacks personal jurisdiction over them; and it is further.

ORDERED that Plaintiff's cross-motion [MS 2] is granted to the extent that Plaintiff's time to serve Defendants is extended pursuant to CPLR 306-b until sixty (60) days following entry of the instant order.

ENTER:



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