

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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WILMINGTON SAVINGS FUND SOCIETY, FSB,

Index No. 14696/2013

Plaintiff,

-against-

NOTICE OF ENTRY

DANIEL FRIEDBERG, if living, or if either or all be dead their wives, husbands, heirs-at-law, next of kin, distributees, executors, administrators, assignees, lienors and generally All persons having or claiming under, by or through said DANIEL FRIEDBERG, by purchase, inheritance, lien or otherwise, of any right, title or interest in and to the premises described in the complaint herein, and the respective husbands, wives, widow or widowers of them, if any, all of whose names are unknown to plaintiff, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, STATE OF NEW YORK, ISADOR FRIEDBERG, ARLENE FRIEDBERG

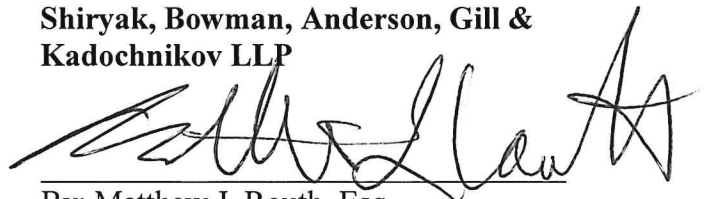
Defendant.

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PLEASE TAKE NOTICE that the within is a true copy of a **DECISION/ORDER** duly entered in the Office of the Clerk of the within named Court on the 26 of June 2019.

Dated: July 3, 2019
Kew Gardens, New York

Yours, etc.,
**Shiryak, Bowman, Anderson, Gill &
Kadochnikov LLP**



By: Matthew J. Routh, Esq.
80-02 Kew Gardens Road, Suite 600
Kew Gardens, New York 11415
(718) 263-6800

At Part FRP3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th of June 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 14696/2013
Motion Cal. No.: 33

P R E S E N T: HON. INGRID JOSEPH, J.S.C

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WILMINGTON SAVINGS FUND SOCIETY, FSB,

DECISION/ORDER

Plaintiff,

-against-

MORTGAGED PREMISES:
6512 Avenue T
Brooklyn, New York 11234
Block: 8408 Lot: 5

DANIEL FRIEDBERG, if living, or if either or all be dead their wives, husbands, heirs-at-law, next of kin, distributees, executors, administrators, assignees, lienors and generally all persons having or claiming under, by or through said DANIEL FRIEDBERG, by purchase, inheritance, lien or otherwise, of any right, title or interest in and to the premises described in the complaint herein, and the respective husbands, wives, widow or widowers of them, if any, all of whose names are unknown to plaintiff, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, STATE OF NEW YORK, ISADOR FRIEDBERG, ARLENE FRIEDBERG,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion,	
Affidavits/Affirmations Annexed.....	1, 2
Notice of Motion and Cross Motion	
Affidavits/Affirmations/Exhibits.....	3
Responsive Papers	
Affidavits/Affirmations.....	4

In this foreclosure action, non-party, Daniel Friedberg, Jr. ("Friedberg Jr."), moves by Notice of Motion to dismiss pursuant to CPLR § 3211 (a)(8). Plaintiff, Wilmington Savings Fund Society, FSB (Plaintiff), moves by Notice of Motion to extend the time to set an Auction Sale pursuant to CPLR § 2004 and to ratify the sale *nunc pro tunc*. Friedberg Jr. opposes Plaintiff's motion and cross moves for leave to amend the caption to insert his name in place and in stead of Defendant Daniel Friedberg (deceased). The court hereby consolidates the applications (Motion Sequences 5, 6, and 7) for purposes of this decision and order.

The court will first address Daniel Friedberg Jr.'s request for leave to be substituted as a party. The substitution procedure, as codified under CPLR § 1021, provides, in pertinent part, that "[a] motion for substitution may be made by the successors or representatives of a party or by any party. The statute provides that "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however such dismissal shall not be on the merits unless the court shall so indicate. The statute provides further, "[w]hether or not [the event requiring substitution] occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action should not be dismissed.

In this case, the event requiring substitution would be based upon the death of Defendant Daniel Friedberg but there is another problem. Defendant Daniel Friedberg expired on December 19, 2012, prior to the Plaintiff's commencement of this action on August 12, 2013. Since a party may not commence a legal action or proceeding against a dead person, the instant action was a nullity from its inception (*US Bank Nat. Ass'n v Cadeumag*, 147 AD3d 881 [2d Dept 2017] citing *Krysa v Estate of Qyra*, 136 AD3d 760-761[2d Dept 2016]). Generally, a plaintiff is required to commence the law suit against the personal representative of the decedent's estate (*Bank of New York Mellon v Buckowitz*, 164 AD3d 730 [2d Dept 2018] citing *US Bank Nat. Ass'n v Cadeumag*, 147 AD3d at 881). When the action is to foreclose a mortgage, the plaintiff-mortgagee may maintain an action against the executor of the estate of the deceased mortgagor so that the plaintiff-mortgage can obtain a deficiency judgment to be paid out of the estate (*Id.*). Notwithstanding that fact, timing is of particular importance, because a plaintiff is unable to commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate (*Dime Save. Bank of N.Y. v Luna*, 302 AD2d 558 [2d Dept 2003] quoting *Laurenti v Teatom*, 210 AD2d 300, 301 [2d Dept 1994]). A plaintiff who faces the running of the statute of limitations may petition the Surrogate's Court for the appointment of the Public Administrator as the personal representative of the estate (*Laurenti v Teatom*, 210 AD2d 300 [2d Dept 1994]).

In the case at bar, the Plaintiff's inability to ascertain the whereabouts of Defendant Daniel Friedberg is reflected in the record, because the Plaintiff filed a motion for the appointment of a guardian ad litem and to serve Daniel Friedberg, and unknown persons as named herein, by publication. The

motion was granted¹ on June 16, 2014, and the Plaintiff did eventually publish notification of this action in accordance with the court orders providing for such relief. Plaintiff obtained the order of reference appointing a referee to compute on August 29, 2017 and the Judgment of Foreclosure and Sale on May 1, 2018. The Plaintiff was prevented from moving forward with the Auction Sale scheduled on August 2, 2018, because of a bankruptcy filing that was initiated on July 30, 2018 in the decedent's name (Daniel Friedberg) and with his social security number. Although the Plaintiff seeks an extension of time to conduct the auction sale *nunc pro tunc*, a review of the record reveals that no sale has occurred to date.

This court, after careful review of the parties' respective arguments and all of the evidence presented, finds that the Plaintiff commenced this proceeding after Defendant Daniel Friedberg expired on December 19, 2012 but before the Surrogate's Court of the State of New York, Kings County, issued Letters of Administration on December 6, 2018 appointing the decedent's son, Daniel Friedberg², as Administrator of his estate.

Accordingly, Plaintiff's motion for leave to extend the time to set the Foreclosure Auction Sale, and other relief (MS #6), is denied. Daniel Friedberg, Jr.'s cross-motion for leave to amend caption to substitute "Daniel Friedberg, Jr." in place and in stead of Daniel Friedberg, and unknown persons as noted above (MS #7), is granted, and, upon substitution, Daniel Friedberg Jr.'s motion to dismiss (MS #5) is granted. Case dismissed without prejudice.

This constitutes the Decision and Order of the Court.

ENTER


HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

2019 JUN 26 AM 8:18

AMANDA SPINALE CLERK
FILED



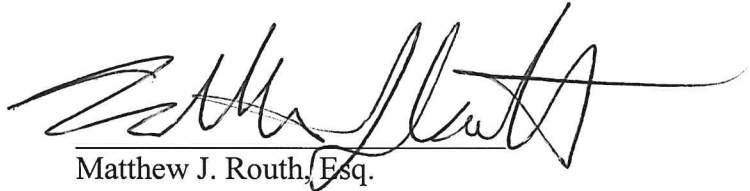
¹The motion was granted initially by order dated June 16, 2014. The June 2014 order was resettled on September 10, 2014, due to the initial guardian ad litem's inability to serve, and, on January 5, 2015, due to expiration of time in which to publish as provided in the September 2014 order.

²The "Name of Decedent" on the Certificate of Appointment of Administrator is listed as "Daniel Friedberg," and the "Fiduciary Appointed" is "Daniel Friedberg; with no designation of "Junior" or "Jr." at the end of the name to show that he is the son of an individual with the same name.

ATTORNEY CERTIFICATION

I, Matthew J. Routh, Esq., hereby certify, under penalty of perjury, and as an officer of the court, that to the best of my knowledge, information and belief, formed after an inquiry reasonably under the circumstances, the presentation of the papers or the contentions herein are not frivolous as defined in 22 NYCRR Section 130-1.1(c).

Dated: July 3, 2019
Kew Gardens, New York



Matthew J. Routh, Esq.

AFFIDAVIT OF SERVICE


STATE OF NEW YORK }
 } SS:
COUNTY OF QUEENS }

I, Emily Thomas, being sworn, say:

I am not a party to the action, am over 18 years of age and reside in Kings, New York.

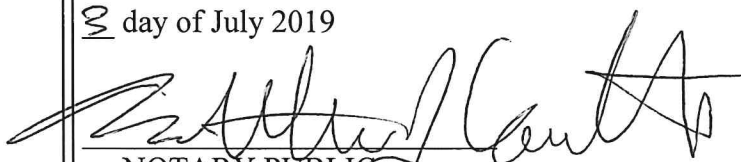
On July 3, 2019, I served the within **NOTICE OF ENTRY**, delivering a true copy thereof enclosed in a post-paid wrapper, under the exclusive care and custody of United States Postal Service within New York State, addressed to the following person at the last known address set forth after each name by first class mail:

KNUCKLES, KOMOSINSKI & MANFRO LLP
Attorneys for Plaintiff
565 Taxter Road, Suite 590
Elmsford, NY 10523



Emily Thomas

Sworn to before me this
3 day of July 2019



NOTARY PUBLIC

MATTHEW J. ROUTH
Notary Public, State of New York
Reg. No. 02R06358862
Qualified in Queens County
Commission Expires 5/15/21

WILMINGTON SAVINGS FUND SOCIETY, FSB,

PLAINTIFF,

-against-

DANIEL FRIEDBERG, if living, or if either or all be dead their wives, husbands, heirs-at-law, next of kin, distributees, executors, administrators, assignees, lienors and generally All persons having or claiming under, by or through said DANIEL FRIEDBERG, by purchase, inheritance, lien or otherwise, of any right, title or interest in and to the premises described in the complaint herein, and the respective husbands, wives, widow or widowers of them, if any, all of whose names are unknown to plaintiff, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, STATE OF NEW YORK, ISADOR FRIEDBERG, ARLENE FRIEDBERG

DEFENDANT,

NOTICE OF ENTRY

Shiryak, Bowman, Anderson, Gill & Kadochnikov LLP

BY: Matthew J. Routh, ESQ.

Attorney(s) for Defendant

Office and Post Office Address, Telephone

80-02 Kew Gardens Road

Suite 600

Kew Gardens, New York 11415

(718) 263-6800

Fax (718) 520-9401

TO

Service of a copy of the within is hereby admitted.

Dated:.....

Attorney(s) for

PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on

NOTICE OF SETTLEMENT

that an order will be presented for settlement to the HON. within named Court, at

of which the within is a true copy one of the judges of the

2019 at M. Dated,

Yours, etc.

Shiryak, Bowman, Anderson, Gill & Kadochnikov LLP.