

Hon: Debra Silber
for
Hon: Francois A. Rivera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

72 for
52 of the Supreme Court
of the State of New York, Kings County Borough
of Brooklyn, City of New York, on the 27 day of Dec,
2019

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| <p>Brett Wynkoop, Plaintiff, -against- Michael T. Yonker Defendant</p> | <p>Index Number: 3863-2019 Order to Show Cause MS-2 Oral Argument Requested Court Reporter Requested CPLR 2201 Stay Requested</p> |
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Upon the annexed affidavit of Brett Wynkoop dated 2019-12-27, Memorandums Of Law dated 2019-12-27 and exhibits;

Let Defendant, Michael T. Yonker, show cause before this court at the courthouse thereof located at 360 Adams Street – Part 52, Brooklyn, NY on the 30 day of Jan., 2020 at 9:30 in the forenoon or as soon thereafter as counsel may be heard, why an order should not be made and entered:

1. Striking Defendant's motion to dismiss as having been properly and timely rejected. (cpl 3022 & common law)
2. Striking those portions of the Defendant's motion to dismiss which are scandalous and prejudicial unrelated matter. (cpl 3024)
3. Striking Defendant's motion for failure to attach an affidavit in support (cpl 2214)
4. Other such relief as the court may deem just and proper.

SUFFICIENT CAUSE BEING ALLEGED THEREON, IT IS;

Ordered that pending a hearing and determination on this motion that a cpl 3024 stay of Defendant's motion to dismiss is in effect.

Ordered that service of this order to show cause and the papers upon which it is made on Defendant by

~~personal delivery pursuant to CPLR 2103(b)(1)~~ ~~office delivery pursuant to CPLR 2103(b)(3)~~
court by Ben Oxenburg, attorney for defendant

~~by electronic mail pursuant to CPLR 308(5)~~ ~~overnight delivery pursuant to CPLR 2103(b)(6)~~

on or before Dec 30, 2019 shall be deemed sufficient service thereof.

Dated: Brooklyn, New York
_____, 2019

ds
Justice Kings County Supreme Court
HON. DEBRA SILBER
JSC

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| 3863-2019-ms-3-strike-osc.odt | Court Reporter Requested Oral Argument Requested | Page 1 of 1 |
|-------------------------------|---|-------------|

KINGS COUNTY CLERK
FEE PD \$ 45.00

San Juan - Di Pietro

From: Brett Wynkoop <wynkoop@tekhq.com>
To: yonker@fresnostate.edu, myonker@fresnostate.edu,
michaelyonker@fresnostate.edu, michaely@fresnostate.edu,
michael_yonker@fresnostate.edu, michael@fresnostate.edu,
yonkerm@fresnostate.edu, mtyonker@yonkerlaw.com
Bcc:
Subject: Order to Show Cause 2019-12-27 at 1400
Date: Thu, 26 Dec 2019 16:52:28 -0500
Reply-To: wynkoop@tekhq.com
X-Mailer: Claws Mail 3.17.4 (GTK+ 2.24.32; x86_64-apple-darwin14.5.0)

Greeting-

I hope this finds you in good health.

I have been told by third parties that you would prefer I not communicate directly with you. I am afraid I must continue to communicate things to you directly as no attorney has appeared in the action I have brought against you. I am sure you know the CPLR has technicalities about what an appearance is in the state of New York.

To make sure you can not say you were not informed of the Order To Show Cause which I intend to present here are the details.

Date: 2019-12-27
Time: 1400
Place: Ex-Parte Office
Kings County Supreme Court
360 Adams Street
Brooklyn, NY

I will of course have papers for you when you or your authorized representative arrives.

The order to show cause is to strike your pleading.

Should you desire I no longer communicate these things to you directly please execute the attached document before a notary public and return it to me.

-Brett Wynkoop
--

wynkoop@tekhq.com
917-642-6925

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

[yonker-communications-cert.pdf application/octet-stream (71566 bytes)]

From: Brett Wynkoop <wynkoop@tekhq.com>
To: yonker@fresnostate.edu, myonker@fresnostate.edu,
michaelyonker@fresnostate.edu, michaely@fresnostate.edu,
michael_yonker@fresnostate.edu, michael@fresnostate.edu,
yonkerm@fresnostate.edu, mtyonker@yonkerlaw.com
Bcc:
Subject: Order to Show Cause 2019-12-27 at 1400
Date: Thu, 26 Dec 2019 20:12:51 -0500
Reply-To: wynkoop@tekhq.com
X-Mailer: Claws Mail 3.17.4 (GTK+ 2.24.32; x86_64-apple-darwin14.5.0)

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michael_yonker@fresnostate.edu, michael@fresnostate.edu,
yonkerm@fresnostate.edu, mtyonker@yonkerlaw.com
Cc: boxenburg@fkblaw.com, akowIowitz@fkblaw.com, ajavaid@fkblaw.com
Bcc:
Subject: Order to Show Cause 2019-12-27 at 1400
Date: Thu, 26 Dec 2019 21:36:53 -0500
Reply-To: wynkoop@tekhq.com
X-Mailer: Claws Mail 3.17.4 (GTK+ 2.24.32; x86_64-apple-darwin14.5.0)

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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|---|---|
| <p>Brett Wynkoop, Plaintiff, -against- Michael T. Yonker Defendant</p> | <p>Index Number: 3863-2019 Memorandum of Law In Support of Statutory Stay of ms-1 MS-3 Oral Argument Requested Court Reporter Requested</p> |
|---|---|

No Waiver of Rejection

Defendant's motion to dismiss the instant action was properly and timely rejected (EX-A) and as such is not properly before the court. Plaintiff does not waive his rights with respect to the rejection of motion sequence 1 and informs the court that the clerk erred in accepting a NON-Verified pleading in response to a verified complaint. The court therefore has a duty to strike Defendant's motion to dismiss for Plaintiff did not and never will waive his right to verified pleadings.¹² CPLR 3022 provides that pleadings with defective or missing verification may be rejected and treated as a nullity. CPLR 3020 describes an acceptable verification statement in New York Courts.

Judge Rivera Makes This Memo Necessary

1. During the pendency of KSC 507156-2013 an order issued from the court that certain documents were to be executed and certain monies paid out by the Nominal Defendant in that case.

¹ pleading n) The individual allegations of the respective parties to an action at common law, proceeding from them alternately. The term "pleadings" has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties. Desnover v. Leroux. 1 Minn. 17 (Gil. 1) – thelawdictionary.org/pleadings

² pleading n) every legal document filed in a lawsuit, petition, motion and or hearing, including complaint, petition, answer, demurrer, motion, declaration, and memorandum of points and authorities (written argument citing precedents and statutes). - West's Encyclopedia of American Law, edition 2. 2008.

Brett Wynkoop, Plaintiff in this action, was the corporate officer of 622A President Street Owners Corporation tasked by the court to take the needed actions.

2. Very quickly after the decision and order was entered both active parties in the action filed notices of appeal. Wynkoop was advised by counsel that an automatic stay of the order was then in place under CPLR 5519, but that Wynkoop would have to deposit the instruments he had been ordered to execute with the clerk until hearing and determination by the Second Department.

3. Wynkoop took the needed steps as directed by counsel, yet Judge Rivera, in an example of his bias against Wynkoop, upon motion for contempt by Wynkoop's opponents in the action ruled that no automatic stay applied in spite of CPLR 5519 being clear on its face, and thereafter forced Wynkoop into a Contempt Trial for not complying with the court's order. Wynkoop was not held in contempt, but the whole process was a waste of resources for all parties and the court. Additionally it violated Wynkoop's Constitutional Rights under the 14th amendment to the United States Constitution in that he was treated differently than other similarly situated litigants.

4. It is therefore necessary to get a determination from the court at this time if the court will follow the law as the New York State Legislature has written it, or if the court intends to not follow the law. Finding out after the fact that the court will not obey the law would prejudice Plaintiff and would be a violation of his right to due process.

Stay is Automatic Under CPLR 3024(c)

5. Plaintiff in the instant motion has moved to strike pleadings under CPLR 3024. That action invokes an automatic stay as we are taught in CPLR 3024(c).

CPLR 3024(c) Time limits; pleading after disposition. A notice of motion under this rule shall be served within twenty days after service of the challenged pleading. If the motion is denied, the responsive pleading shall be served within ten days after service of notice of entry of the order and, if it is granted, an amended pleading complying with the order shall be served within that time.

6. Plaintiff having moved under CPLR 3024 is entitled to the full benefit of CPLR 3024(c) and it is within his right to ask the court to make that clear on paper as part of the Order To Show Cause for this motion.

7. Plaintiff should not be prejudiced by Judge Rivera's self admitted bias.³

No Prejudice to Defendant

8. Since the stay is statutory and automatic there is no prejudice to the Defendant with the court putting the stay in writing. Putting the stay in writing acts to protect both litigants from the need for appellate practice should Judge Rivera decide at a later date to ignore the black letter provisions of CPLR 3024 just he has in the past done with CPLR 5591 (Wynkoop Affidavit).

Relief Requested

9. Plaintiff requests the court include as part of the signed order to show cause the statement that there is a stay of motion sequence 1 under the terms of CPLR 3024(c).

10. Plaintiff requests any other or further relief the court feels is just and proper.

11. Plaintiff has not requested this relief previously.

AFFIDAVIT OF VERIFICATION

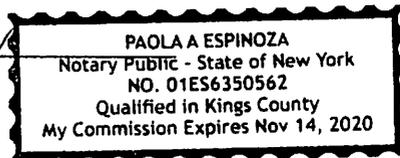
STATE OF NEW YORK:

COUNTY OF Kings: :ss.

Brett Wynkoop being duly sworn deposes and says that he is the Plaintiff in this proceeding; that he has written this memorandum of law and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

Sworn before me on the
27 day of December, 2019.

Notary Public



Brett Wynkoop
622A President Street
Brooklyn, NY 11215
917-642-6925 - wynkoop@tekhq.com

³ For a brief treatment of Judge Rivera's bias against Plaintiff the court is referred to motion sequence 2 Plaintiff's motion to recuse, but in summary Judge Rivera said on the record in open court he was biased against Plaintiff.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS

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| Brett Wynkoop, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> Michael T. Yonker <p style="text-align: center;">Defendant</p> | <p style="text-align: center;">Index Number: 3863-2019</p> <p style="text-align: center;">Memorandum Of Law Motion to Strike Pleadings MS-3</p> <p style="text-align: center;">Court Reporter Requested Oral Argument Requested</p> |
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No Waiver of Rejection

Defendant’s motion to dismiss the instant action was properly and timely rejected (EX-A) and as such is not properly before the court. Plaintiff does not waive his rights with respect to the rejection of motion sequence 1 and informs the court that the clerk erred in accepting a NON-Verified pleading in response to a verified complaint. The court therefore has a duty to strike Defendant’s motion to dismiss for Plaintiff did not and never will waive his right to verified pleadings.¹² CPLR 3022 provides that pleadings with defective or missing verification may be rejected and treated as a nullity. CPLR 3020 instructs what an acceptable verification statement in New York Courts.

Defendant’s Motion to Dismiss Not Properly Before The Court

1. As noted above Defendant’s motion to dismiss was properly and timely rejected for lack of verification by Plaintiff. Having been properly and timely rejected this court has no jurisdiction to hear motion sequence 1 and it must be struck from the calendar. Once rejected Defendant has two options

¹ pleading n) The individual allegations of the respective parties to an action at common law, proceeding from them alternately. The term “pleadings” has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties. *Desnover v. Leroux*. 1 Minn. 17 (Gil. 1) – thelawdictionary.org/pleadings

² pleading n. 1) every legal document filed in a lawsuit, petition, motion and or hearing, including complaint, petition, answer, demurrer, motion, declaration, and memorandum of points and authorities (written argument citing precedents and statutes). - West's Encyclopedia of American Law, edition 2. 2008.

with respect to his unverified pleading³. He may verify the pleading and reserve, if timely, or he may move this court to compel Plaintiff to accept his unverified pleading. Having done neither his motion is not properly before this court and must be struck from the calendar for the court lacks jurisdiction to rule on his motion.

“Once jurisdiction is challenged, it must be proven.”
See Hagens v. Lavine, 415 U.S. 533.

“Jurisdiction, once challenged, is to be proven, not by the court, but by the party attempting to assert jurisdiction. The burden of proof of jurisdiction lies with the assenter.” *See McNutt v. GMAC, 298 US 178.*

The origins of this doctrine of law may be found in *Maxfield’s Lessee v. Levy, 4 US 308*. Defendant has submitted nothing to show the jurisdiction of the court is invoked by a non-verified responsive pleading to a verified complaint.

2. It must be noted for the court that jurisdiction must be obtained with respect to each pleading in a given case. If a litigant submits a motion to the court without serving his opponent then the court has no jurisdiction to hear that motion. In a similar vein if a litigant neglects to verify his responsive pleading and fails to correct he has not invoked the power of the court to hear the motion.

3. Having been properly rejected there is no motion to dismiss before the court and therefore the court must mark Defendant’s motion to dismiss off the calendar.

Defendant Pounds The Table

4. *“The defense seems to have been prepared according to the old rules. ‘If the facts are against you, hammer the law. If the law is against you, hammer the facts. If the fact and the law are against you, hammer opposing counsel.’”⁴*

³ pleading n) A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. - Blacks Law Dictionary 8th edition 2004

⁴ Jacob J. Rosenblum on what every lawyer knows.

5. An alternate version of the above adage attributed to Oliver Wendell Holmes advises *“If you’re weak on the facts and strong on the law, pound the law. If you’re weak on the law and strong on the facts, pound the facts. If you’re weak on both, pound the table.”*

6. Defendant’s motion to dismiss is so much table pounding. Recognizing he has not the facts or the law Yonker’s Attorney comes out swinging at Plaintiff. He begins character assassination and defamation, that would be actionable if not protected by litigation privilege.

7. Mr. Oxenburg’s firm seems to make defending lying lawyers their stock and trade, so perhaps he does not understand the high standards the public expects from attorneys. Those expected high standards are the reason the instant matter is before the court and the reason the legislature expanded on hundreds of years of common law remedy for abuses by lying lawyers with the enactment of Judiciary Law 487 and the criminal component therein.

8. There is a very big difference between being a zealous advocate for your client and attempting to mislead the court by muddying the waters with scandalous and prejudicial material. In his Motion to Dismiss Mr. Oxenburg treads the path to violating Judiciary Law 487.

9. The purpose of pleadings in all jurisdictions that spring from English Common Law, as does New York, is to narrow the issues for the court so that the true matters in conflict might become clear to the court and the matter at bar may be disposed of in an expedient, unbiased and just manner.

10. Here Defense Attorney Oxenburg follows the famous advice from W. C. Fields *“If you can’t dazzle them with brilliance, baffle them with bullshit”*. This same tactic got his client into the instant litigation.

11. Clearly the purpose of CPLR 3024(b) is to promote an unbiased court and judicial economy.

CPLR 3024(b)

Scandalous or prejudicial matter. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.

12. Should the court compel Plaintiff to accept Defendant's unverified pleading then Plaintiff moves to strike all scandalous and prejudicial matter unnecessarily inserted into Defendant's motion to dismiss (MS-1).

Scandalous and Prejudicial Matter

13. Strike the second paragraph of PRELIMINARY STATEMENT from "Plaintiff" to "Attorney Yonker"

14. Strike Sections G & H they are prejudicial to Plaintiff and have no relation to the complaint against Defendant.

15. Section I first paragraph strike the word bizarrely. Upon information and belief Mr. Oxenburg as an experienced attorney knows that misdemeanor crimes come complete with incarceration and he has the ability to read Judiciary Law 487 for himself and determine that it is a misdemeanor. This word can only have been inserted to prejudice the court in this matter.

16. Exhibits I, J, K, L and M must all be struck as scandalous and prejudicial matter not related to the instant action.

Defendant's Motion Not Supported By Affidavit

17. Oxenburg's attorney affirmation does not meet the requirements of CPLR 2214. Mr. Oxenburg is not in any way a fact witness in this case. Under New York Law the only value his affirmation has is to attest to what the exhibits are and that they are authentic reproductions of the source documents.

18. CPLR 2214(B) provides in pertinent part:

Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time. *Emphasis added.*

19. Defendant's papers for his motion to dismiss contained no supporting affidavit and as such the motion is facially defective. See *Berger v Pavlounis* 2011 NY Slip Op 50973(U). The clerk should have rejected it at filing for this flaw, in addition to the fatal lack of verification.

20. Given this fatal facial defect the court has no jurisdiction to hear motion sequence 1 and must mark it off the calendar.

Request For Relief

21. Given the foregoing, supported by the annexed affidavit and exhibits Plaintiff requests an order marking Defendant's Motion To Dismiss off the court calendar as not being properly before the court, those motion papers having been rejected by Plaintiff in a timely and proper manner.

22. In the alternative Plaintiff requests Defendant's Motion To Dismiss be marked off the court's calendar as being facially defective for not including an affidavit from anyone with first hand knowledge of the facts as required by CPLR 2214(b).

23. In the alternative Plaintiff requests those portions of Defendant's Motion to Dismiss and associated exhibits identified above as scandalous and prejudicial unrelated matter be struck and the Defendant be directed to reserve his corrected pleading on Plaintiff.

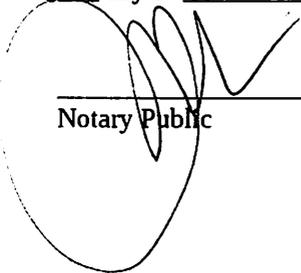
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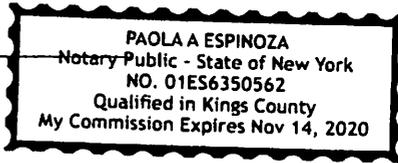
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Brett Wynkoop being duly sworn deposes and says that he is the Plaintiff in this proceeding; that he has written this memorandum of law and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

Sworn before me on the
01 day of December, 2019.



Notary Public



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

| | |
|---|---|
| Brett Wynkoop, Plaintiff, -against- Michael T. Yonker Defendant | Index Number: 3863-2019 Affidavit of Brett Wynkoop In Support of Motion to Strike Defendant's Motion to Dismiss ms-3 Court Reporter Requested Oral Argument Requested |
|---|---|

STATE OF NEW YORK)
)ss.
COUNTY OF Kings)

Brett Wynkoop, swears the following to be true under penalty of perjury except those things stated as upon information and belief, which are believed to be true through appropriate personal investigation;

1. I am a free man over the age of 21 years.
2. I am the Plaintiff in the captioned matter.
3. Exhibit A is a true copy of the rejection served on Defendant Yonker.
4. Exhibit B is a true copy of Defendant's rejected motion to dismiss.
5. On 16 December 2019 Defendant Yonker was served with a rejection of his Motion To Dismiss. (Exhibit-A) The rejection was based on the first defect discovered in Defendant's papers, lack of verification of his papers in response to my Verified Petition.
6. Upon further inspection I discovered that Defendant's papers were defective under CPLR 2214 for not including an affidavit of anyone that was a fact witness in support of the relief requested.
7. The only possible fact witnesses to the events during the pendency of KSC 6548-2012 are Defendant Yonker, his co-conspirators Kyle Taylor, Hillary Taylor, Rajeev Subramanyam, attorneys for 622A President Street Owners Corporation, who were Brian Murphy Esquire, Corey Hardin Esquire,

and David Bunji Fromartz, Plaintiff, Kathleen Keske, Antony Hilton Esquire, and the assigned judge in the instant matter Francois Rivera.

8. I have read Defendant's Motion To Dismiss papers and can find nowhere therein any sworn statements by any of the afore mentioned. I find no affidavit that swears any knowledge of any facts in support of the Defendant's motion.

9. In summation Oxenburg knows nothing, which is why his affirmation is devoid of any testimony to support the motion he has submitted, making the motion frivolous.¹

10. I was present at nearly all court appearances in 6548-2012 and at all settlement meetings.

11. I either read, or authored every document filed with the court in 6548-2012.

12. I am an honorably discharged Naval Officer. I swore an oath to support and defend the Constitution of The United States of America against all enemies foreign and domestic. My oath never expires. As such when my constitutional rights are attacked by persons operating under color of law I have an obligation to stand up and fight for my rights, for in so doing I ensure the continued ability to exercise those rights by my fellow citizens.

13. Judge Francois Rivera is an oath breaker and has under color of law issued orders contrary to the Constitution of the United States of America. The prime example is the issuance of a search warrant with no sworn affidavit or statement of probable cause in support of the application.²

14. During the pendency of KSC 507156-2013 Judge Rivera ignored a CPLR 5519 statutory stay to the prejudice of Plaintiff. It is therefore necessary for Plaintiff to take proactive action to protect his rights and request an order that details the automatic stay embodied in CPLR 3024.

1 Rules of the Chief Administrative Judge Part 130-1.1(c)(2) and (3)

2 The court is directed to take judicial notice of the 4th and 14th amendments to the United States Constitution.

15. Defendant's listing of legal actions I have taken to defend my rights in other proceedings is of no moment in these proceedings and only goes to show that I will fight for my rights, even so it meets the simple clear language of CPLR 3024 and must be struck as unnecessary matter that is scandalous and prejudicial.

16. None of the legal actions I have been involved in to protect and defend my rights has been adjudicated frivolous.

17. The several legal actions I have been involved in since KSC 6548-2012 are a direct result of a conspiracy to obtain my home for the benefit of Kyle Taylor Esquire and Rajeev Subramanyam. This conspiracy started with Michael T. Yonker Esquire before I was served with the summons and complaint in KSC 6548-2012 and is ongoing today with Taylor and Subramanyam aided by other persons since the end of KSC 6548-2012.

18. While as of this writing no Article 78 actions I have originated have resulted in the issue of any Writ, they have lead to self correction on the part of those against whom they were brought showing that my causes were righteous and proper even though my petitions were withdrawn for being moot.

19. Even so the scorecard of my activities in other actions is of no bearing on the instant action and upon information and belief only presented to this court as a tactic to muddy the waters, cause prejudice against me and delay the litigation with needless motion practice.

Sworn to before me this

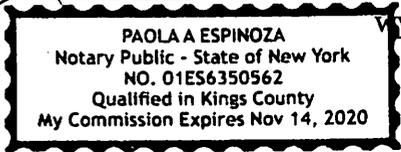
27th day of *December* 2019



Brett Wynkoop
622A President Street
Brooklyn, NY 11215
917-642-6925

wynkoop@tekhq.com

NOTARY PUBLIC



PAOLA A ESPINOZA
Notary Public - State of New York
NO. 01ES6350562
Qualified in Kings County
My Commission Expires Nov 14, 2020