

**Wilmington Savings Fund Socy., FSB v Ramos**

2024 NY Slip Op 33019(U)

August 26, 2024

Supreme Court, New York County

Docket Number: Index No. 850008/2024

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANCIS A. KAHN, III PART 32**

*Justice*

INDEX NO. 850008/2024

-----X  
WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN  
ITS INDIVIDUAL CAPACITY, BUT SOLELY AS OWNER  
TRUSTEE FOR CSMC 2018-RPL6 TRUST,

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

Plaintiff,

- v -

JOSE N. RAMOS, MARIA J. REYES, ANNOLY RAMOS,  
NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,  
NEW YORK COUNTY SUPREME COURT, CRIMINAL  
COURT OF THE CITY OF NEW YORK (NEW YORK), NEW  
YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE, MIDLAND FUNDING LLC, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY  
TRANSIT ADJUDICATION BUREAU, NEW YORK CITY  
PARKING VIOLATIONS BUREAU, JOHN DOE AND JANE  
DOE

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44,  
45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a mortgage encumbering a parcel of real property located at 526 West 175 Street, New York, New York. The mortgage was given by Defendants Jose N. Ramos and Maria J. Reyes to non-party Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for IndyMac Bank, FSB ("IndyMac"), the lender. The mortgage secures a loan in an original principal amount of \$425,000.00 which is memorialized by a fixed/adjustable-rate note. The note and mortgage are both dated September 26, 2006. Mortgagors and IndyMac executed a loan modification agreement, dated March 21, 2010, wherein Mortgagors acknowledged their default in repayment, the indebtedness and reaffirmed their promise to repay same.

Plaintiff commenced this action to foreclose the mortgage and pled Defendant defaulted in repayment of the indebtedness beginning on or about March 1, 2023. Mortgagors answered and pled eleven affirmative defenses, including standing and failure to provide statutory and contractual pre-foreclosure notices. Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers, for a default judgment against the non-appearing parties, to appoint a Referee to compute and to amend the caption. Mortgagors oppose the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James*, 180 AD3d 594 [1<sup>st</sup> Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1<sup>st</sup> Dept 2019]). As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]), its strict compliance with RPAPL §§1303, 1304 and 1306 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]).

In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affirmation from Timothy Jacobs ("Jacobs"), a Document Verification Specialist of NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint"), servicer and attorney-in-fact for Plaintiff. Jacobs avers that his submission was based upon a review of Shellpoint's records and knowledge of its record keeping practices. Jacobs's affidavit laid a proper foundation for the admission of Shellpoint's records into evidence under CPLR §4518 by sufficiently showing that the records Shellpoint relied upon "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Jacobs established that those records were received from the makers and incorporated into the records Shellpoint kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the affirmation were the records referenced by Jacobs (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1<sup>st</sup> Dept 2020]). Shellpoint's authority to act on Plaintiff's behalf was established with submission of a limited power of attorney, dated September 5, 2019 (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

Jacobs's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1<sup>st</sup> Dept 2011]; *see also Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). The

loan modification agreements also evidenced the indebtedness and Mortgagors' default in repayment (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). In this case, Plaintiff annexed a copy of the note to the complaint endorsed in blank by the original lender, IndyMac, on its face. This is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1<sup>st</sup> Dept 2020]; *Bank of NY v Knowles*, supra at 597).

Likewise, the submissions proved that all the statutory and contractual pre-foreclosure requisites were fulfilled or inapplicable (*see generally United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]; *Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. The argument concerning physical delivery of the note is meritless. When a copy of the note, endorsed in blank, is attached to the complaint "[t]here is simply no requirement that an entity. . . must establish how it came into possession of that instrument" (*see JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]; *see also Bank of Am., N.A. v Pennicooke*, 186 AD3d 545 [2d Dept 2020]).

As to the branch of Plaintiff's motion to dismiss Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

All the affirmative defenses are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1<sup>st</sup> Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1<sup>st</sup> Dept 2020]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that

no specific legal argument was proffered in support any particular affirmative defense, such defense was abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1<sup>st</sup> Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the answers and affirmative defenses pled by all the appearing Defendants are stricken; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing or is required to perform other significant services in issuing the report, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED, that Yanaris Serrano s/h/a John Doe, Alejandrina Pena s/h/a John Doe, Juan Urina s/h/a John Doe, and Maria Suarez s/h/a John Doe are substituted in place of "John Doe" and "Jane Doe" and that the caption of this action is amended and shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT  
IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS  
OWNER TRUSTEE FOR CSMC 2018-RPL6 TRUST,

Plaintiff,

-against-

JOSE N. RAMOS; MARIA J. REYES A/K/A MARIA  
UCETA; ANNOLY RAMOS; NEW YORK CITY  
DEPARTMENT OF SOCIAL SERVICES; NEW YORK  
COUNTY SUPREME COURT; CRIMINAL COURT OF  
THE CITY OF NEW YORK (NEW YORK); NEW  
YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE; MIDLAND FUNDING LLC; NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD; NEW  
YORK CITY TRANSIT ADJUDICATION BUREAU;  
NEW YORK CITY PARKING VIOLATIONS BUREAU;  
YANARIS SERRANO; ALEJANDRINA PEÑA; JUAN URINA  
AND MARIA SUAREZ,

Defendants.

-----X  
and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **December 19, 2024, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk ([SFC-Part32-Clerk@nycourts.gov](mailto:SFC-Part32-Clerk@nycourts.gov)) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

8/26/2024

DATE



FRANCIS KAHN III, J.S.C.  
**HON. FRANCIS A. KAHN III**  
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE