

U.S. Bank N.A. v Telman

2024 NY Slip Op 34670(U)

June 4, 2025

Supreme Court, Kings County

Docket Number: Index No. 511350/17

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP 1 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 27th day of August, 2024.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR RESIDENTIAL ASSET SECURITIES CORPORATION,
HOME EQUITY MORTGAGE ASSET-BACKED PASS-
THROUGH CERTIFICATES, SERIES 2006-KS9,

Plaintiff,

- against -

Index No. 511350/17

CHRISTOPHER TELMAN, NEW CENTURY MORTGAGE CORPORATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, FIDELITY HEALTH CARE EMPLOYMENT AGENCY, INC., "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the Subject Property described in the Complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

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

44-56, 61 63-71

Opposing Affidavits (Affirmations) _____

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Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 16 Fairview Place in Brooklyn (Block 4869, Lot 21) (Property),

plaintiff U.S. Bank National Association, As Trustee For Residential Asset Securities Corporation, Home Equity Mortgage Asset-Backed Pass-Through Certificates, Series 2006-KS9 (Plaintiff or US Bank) moves (in motion sequence [mot. seq.] one) for an order: (1) awarding it summary judgment against answering defendants Christopher Telman (Telman or Borrower Defendant) and Fidelity Health Care Employment Agency, Inc. (Fidelity), pursuant to CPLR 3212; (2) striking the answers, affirmative defenses and counterclaims interposed by said defendants; (3) appointing a referee to compute the sum due and owing to Plaintiff, pursuant to RPAPL 1321; and (4) amending the caption¹ (NYSCEF Doc No. 44).

Defendant Telman cross-moves (in mot. seq. two) for an order, pursuant to CPLR 3211 (a) (3) and RPAPL 1304, dismissing the complaint on the grounds that “Plaintiff failed to serve the Defendant with the required 90[-]day notice and that the Plaintiff’s 2010 [mortgage] assignment is void . . .” (NYSCEF Doc No. 63).

Background

On June 8, 2017, Plaintiff commenced this action to foreclose a \$340,000.00 mortgage encumbering Telman’s residential Property by filing a summons, an unverified complaint and a notice of pendency against Telman’s Property (NYSCEF Doc Nos. 1-2). The complaint alleges that Telman executed an August 15, 2006 note in favor of New Century Mortgage Corporation (New Century), which was secured by a mortgage

¹ While Plaintiff’s reply papers generally indicate that Plaintiff seeks to amend the caption in this action (*see* NYSCEF Doc No. 72 at 16), it provides no further explanation of the amendment sought.

encumbering Telman's residential Property (NYSCEF Doc No. 1 and exhibits thereto). The complaint alleges that the mortgage and note were transferred to US Bank, after which the loan was modified twice, by an October 1, 2010 modification agreement, and again by an October 1, 2012 modification agreement (*id.* at ¶¶ 11-12). Telman allegedly defaulted under the modified loan on October 1, 2015 (*id.* at ¶ 15). The complaint alleges that Plaintiff complied with RPAPL 1304's 90-day notice requirement "to the extent the instant circumstances require" (*id.* at ¶ 17). Notably, the complaint annexes as Exhibit A a copy of the August 15, 2006 note with endorsements in favor of New Century's successors, Residential Funding Company, LLC and US Bank (NYSCEF Doc No. 1 at 19-20).

On July 12, 2017, defendant Fidelity answered the complaint, denied the material allegations therein and asserted several affirmative defenses and seven counterclaims (NYSCEF Doc No. 29).

On November 20, 2017, the Defendant Borrower answered the complaint, denied the material allegations therein and asserted several affirmative defenses, including that Plaintiff failed to comply with RPAPL 1304, a condition precedent to foreclosure, and Plaintiff lacks standing to foreclose (NYSCEF Doc No. 39).

On December 12, 2019, Plaintiff filed a note of issue and certificate of readiness indicating that discovery is complete (NYSCEF Doc No. 42).

Plaintiff's Instant Motion for an Order of Reference

On February 10, 2020, Plaintiff moved for an order of reference and summary judgment against Fidelity and Telman (NYSCEF Doc No. 44). Plaintiff submits an

“Affidavit of Indebtedness” from Vanessa Giorgiani (Giorgiani), a Vice President of Ocwen Loan Servicing, LLC (Ocwen), based on her review of Ocwen’s business records “made, used and kept . . .” by Ocwen as “mortgage loan servicer . . .” (*id.* at ¶¶ 2-3). Giorgiani attests that the subject note was physically delivered to Plaintiff on January 5, 2016, and “Plaintiff remained in physical possession of the Note up to and through the date upon which this action was commenced” (*id.* at ¶ 5). Regarding Plaintiff’s compliance with RPAPL 1304, Giorgini alleges that:

“[o]n August 31, 2016, 90-day pre-foreclosure notices . . . were mailed by first-class and certified mail, having been placed in an official depository under the exclusive case and custody of the United States Post Office in postage-paid properly addressed envelopes, to the Borrower(s) at the address(es) as set forth within Exhibit ‘F’. The Notices mailed to the Borrower(s) described herein were not returned to as undeliverable and they were mailed in envelopes separate from the Demand Letter” (*id.* at ¶ 9).

Giorgiani’s affidavit annexes the following “business records” upon which her affidavit is based: (1) the 90-day pre-foreclosure notices, pursuant to RPAPL 1304; (2) the demand letter seeking payment under the mortgage note; (3) copies of the subject note and mortgage; (4) the mortgage assignments; (5) Ocwen’s power of attorney; and (6) Ocwen’s business records identified as “data compilation(s) and account ledger(s)” (*id.* at ¶ 3).

Plaintiff also submits an “Affidavit of Mailing” from Guirlene Dolcine (Dolcine), the Vice President of PHH Mortgage Corporation (PHH), successor by merger to Ocwen (NYSCEF Doc No. 55 at ¶ 2). Regarding Plaintiff’s compliance with RPAPL 1304, Dolcine asserts that:

“[b]ased upon my review of the aforementioned business records, including the records of Ocwen . . . related to the preparation and mailing of pre-foreclosure notices, I hereby certify and affirm that, I am familiar with the mailing practices and procedures of PHH . . . In accordance with those mailing practices and procedures, and in compliance with RPAPL § 1304, a notice as required by said statute was, separate from any other mailing or notice, enclosed in both a certified or registered mail postage prepaid envelope sealed and also a first-class mail, postage prepaid, sealed envelope, both of which were properly addressed to Defendant at the address of the residence that is subject to the mortgage and, if different from Defendant’s last known address, to Defendant’s last known address and both deposited in an official depository in the exclusive care and custody of the United States Postal Service. True and correct copies of these ‘90 Day Notices’ are annexed hereto as Exhibit ‘A’

“Based upon my review of the aforementioned business records and my knowledge of the aforementioned mailing practices and procedures, I hereby certify and affirm that said 90 Day Notices were mailed on August 31, 2016, that being more than 90 days before the commencement of the instant foreclosure action.

“I hereby certify and affirm that said Notices complied with the informational requirements of RPAPL § 1304 and listed at least five (5) housing counseling agencies as designated by the division of housing and community renewal that serve the region where Christopher Telman resides. A copy of said notice is annexed hereto” (*id.* at ¶¶ 4-6).

Plaintiff also submits a memorandum of law arguing that:

“Plaintiff made a prima facie showing of entitlement to judgment against the Defendants by submitting the Mortgage, a copy of the Note, the required pre-foreclosure notices, and affidavits of employee[s] attesting to Defendant Telman’s default and to Plaintiff’s compliance with notice requirements” (NYSCEF Doc No. 57 at 3).

Regarding standing, Plaintiff asserts that:

“because here there was a physical transfer of the Note and Mortgage prior to the commencement of the action that is supported by a sworn written affidavit and by a notarized written assignment, Plaintiff has established its standing to commence and prosecute the instant action” (*id.* at 6).

Regarding the 90-day notice required by RPAPL 1304, Plaintiff asserts that:

“[a]s referenced in the Affidavits of Indebtedness and Mailing, on August 31, 2016, Plaintiff mailed the Pre-Foreclosure Notice pursuant to RPAPL § 1304 to Defendant at the Subject Premises by registered or certified and first class mail, See Exhibit ‘F’. Indeed, also attached to Exhibit ‘F’ is a copy of the proof of mailing of the 90-Day Pre-Foreclosure Notice by Certified Mail together with the signed Return Receipt Card for same.

“The Affidavits of Indebtedness and Mailing are prima facie evidence that Plaintiff complied with RPAPL § 1304” (*id.* at 7-8; *see also* NYSCEF Doc No. 52 [Exhibit F]).

Plaintiff otherwise argues that defendants’ answers, affirmative defenses and Fidelity’s counterclaims should be stricken and dismissed.

Defendant’s Dismissal Cross-Motion

Defendant Telman cross-moves to dismiss the complaint based on Plaintiff’s purported lack of standing to foreclose and Plaintiff’s failure to strictly comply with RPAPL 1304. Notably, Telman’s cross-motion does not oppose, mention or even address Plaintiff’s motion for summary judgment and an order of reference. Fidelity similarly fails to oppose Plaintiff’s motion resulting in the dismissal of its counterclaims.

Defense counsel submits an affirmation asserting that US Bank lacks standing to foreclose because a 2010 mortgage assignment from Mortgage Electronic Registration Systems (MERS) as nominee for New Century to Plaintiff “**must be void because New**

Century Mortgage Corporation has been divested of its asset as a result of its 2008 bankruptcy . . .” (NYSCEF Doc No. 64 at ¶ 5). Defense counsel also argues that “[a] review of the Mortgage and Note reveals that MERS was not mentioned as nominee for New Century . . . therefore any [mortgage] assignment by MERS is invalid” (*id.* at ¶ 7).

Defense counsel further contends that dismissal of the complaint is warranted because Plaintiff failed to demonstrate its strict compliance with RPAPL 1304 (*id.* at ¶ 12). Defense counsel asserts that while Giorgiani attested that the RPAPL 1304 notices were mailed by first class and certified mail, “[t]he Plaintiff failed to attach, as [an] exhibit to [its] motion papers, any document to prove that the mailing actually happened” (*id.*).

Defense counsel asserts that:

“[t]here is no copy of any United States Post Office mailing indicating that the notice was sent by certified and regular first-class mail. GIORGIANI’s Affidavit did not mention who mailed the document and she has no personal knowledge of who allegedly sent the notice” (*id.*).

Telman submits a two-page fact affidavit denying receipt of the 90-day pre-foreclosure notice:

“[o]n August 31, 2016, the date the alleged 90[-]day notice was served, your Defendant lived at the subject property, and received other mail there. I was never contacted by the United States Postal service about signing any mail and moreover, my mailman knows me very well. I did not receive the 90-day notice from my bank or the mortgage servicer” (NYSCEF Doc No. 65 at ¶ 6).

Telman also asserts that “MERS was not listed as a nominee for my lender New Century . . . and therefore did not have the authority to assign my mortgage” (*id.* at ¶ 7).

Plaintiff's Opposition and Reply

Plaintiff in opposition to Telman's dismissal cross-motion and in further support of its motion for summary judgment and an order of reference submits an attorney affirmation (NYSCEF Doc No. 72), wherein counsel notes that "Defendant fails to provide an Affirmation or Affidavit in support of any opposition to Plaintiff's underlying motion for summary judgment" and "only Cross-Moves for dismissal" (*id.* at ¶ 8). Plaintiff's counsel asserts that "Defendant therefore failed to contest the vast majority of Plaintiff's arguments in support of summary judgment and provides no challenge to those facts . . ." (*id.*).

Plaintiff's counsel further argues that Telman failed to establish his entitlement to dismissal for lack of standing or failure to comply with RPAPL 1304. Regarding standing, Plaintiff's counsel argues that "any issue with respect to the assignment of mortgage into Plaintiff is of no consequence" since "[i]t is well-settled in New York that a mortgage securing repayment of a note is incident to the note, and that a transfer of the note correspondingly transfers the mortgage that secures it" (*id.* at ¶ 36). Regarding the 90-day notices, Plaintiff's counsel asserts that US Bank established its strict compliance with RPAPL 1304 by submitting affidavits from representatives of PHH and Ocwen attesting to the mailing of the 90-day notices by both first class and certified mail and annexing copies of such notices as business records (*id.* at ¶ 28).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of the borrower’s default (*Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2014]). Where, as here, the issue of standing is raised by a defendant, a plaintiff must also establish its standing as part of its prima facie case (*Wells Fargo Bank, N.A. v Frankson*, 157 AD3d 844, 845 [2018]; *Security*

Lending, Ltd. v New Realty Corp., 142 AD3d 986, 987 [2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2016]). A plaintiff in a mortgage foreclosure action has standing where it is the holder or assignee of the underlying note at the time the action is commenced (*Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355, 361 [2015]).

Furthermore, proper service of a 90-day pre-foreclosure notice, pursuant to RPAPL 1304, is a condition precedent to the commencement of a residential foreclosure action, and the plaintiff has the burden of establishing strict compliance with RPAPL 1304 (*Citibank, N.A. v Wood*, 150 AD3d 813, 814 [2017]). RPAPL 1304 provides that, “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . such lender, assignee or mortgage loan servicer shall give notice to the borrower.” The statute further provides the required content for the notice and requires that the notice be sent by registered or certified mail and also by first-class mail to the last known address of the borrower (RPAPL 1304 [2]).

Here, US Bank has established its prima facie right to summary judgment and an order of reference by submitting the mortgage, the note and the Giorgiani affidavit attesting to Telman’s payment default under the mortgage (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]).

Plaintiff has also demonstrated, prima facie, that it was the holder and owner of the note before this action was commenced, and thus, it had the requisite standing to foreclose. In this regard, US Bank submits a copy of the endorsed note and the affidavit of Vanessa Giorgiani, Vice President of its servicer and attorney-in-fact, Ocwen, who attests that the

note was physically delivered to US Bank on January 5, 2016, and that it remained in physical possession of the note up to and through the date upon which this action was commenced. Indeed, the note endorsed to US Bank was annexed as an exhibit to US Bank's complaint (NYSCEF Doc No. 1 at 15-20), establishing that US Bank had physical possession of the note at the time of commencement (*Deutsche Ban Nat'l Trust Co. v Blackman*, 203 AD3d 698, 699 [2022] [holding that "by annexing to the complaint a copy of the note, endorsed to the plaintiff, the plaintiff established, prima facie, that it had physical possession of the note when it commenced the action"] [internal quotation marks omitted]; see also *Wells Fargo Bank. N.A. v Frankson*, 157 AD3d 844, 845 [2018] ["plaintiff demonstrated, prima facie, that it was the holder of the note at the time the action was commenced, as evidenced by its attachment of the note, endorsed in blank, to the summons and complaint at the time the action was commenced"]).

Telman's dismissal cross-motion failed to raise a triable issue of fact regarding US Bank's standing to foreclose. Contrary to defense counsel's assertion, the validity of the 2010 mortgage assignment from MERS as nominee for New Century to US Bank is irrelevant to US Bank's standing to foreclose. Indeed, it is axiomatic that "[e]ither a written assignment of the underlying note or the physical delivery of the note is sufficient to transfer the obligation, and *the mortgage passes with the debt as an inseparable incident*" (*Wells Fargo Bank. N.A. v Frankson*, 157 AD3d at 845 [emphasis added]). The Court of Appeals has specifically held that "the note, and not the mortgage, is the dispositive

instrument that conveys standing to foreclose under New York law” (*Aurora Loan Servs., LLC v. Taylor*, 25 NY3d at 361).

Finally, US Bank amply demonstrated its strict compliance with RPAPL 1304. Regarding the proof required to establish strict compliance with RPAPL 1304, the Second Department has held that:

“[p]roof of the requisite mailing is established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure” (*Wells Fargo Bank, NA v Mandrin*, 160 AD3d 1014, 1016 [2018]).

Here, contrary to defense counsel’s contention, US Bank established, *prima facie*, its compliance with RPAPL 1304 by submitting the affidavit of a representative of its loan servicer, Dolcine, who attested to “a standard office mailing procedure designed to ensure that items were properly addressed and mailed” (*HSBC Bank USA v Trincilla*, 202 AD3d 766, 768 [2022]). Telman’s mere denial of receipt of the 90-day notices is insufficient to raise an issue of fact to preclude summary judgment (*id.*). Accordingly, it is hereby

ORDERED that Plaintiff’s motion (mot. seq. one) is only granted to the extent that (1) Plaintiff is granted summary judgment dismissing Fidelity’s counterclaims without opposition; (2) Plaintiff is granted summary judgment against Telman and Fidelity on its cause of action to foreclose the mortgage; and (3) Plaintiff is entitled to an order of reference, which shall be settled on notice; the motion is otherwise denied; and it is further

ORDERED that defendant Telman's cross-motion (mot. seq. two) to dismiss the complaint based on Plaintiff's lack of standing and failure to comply with RPAPL 1304 is denied.

This constitutes the decision and order of the court.

E N T E R,

June 4, 2025



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