

U.S. Bank N.A. v Kolodny

2025 NY Slip Op 31542(U)

April 14, 2025

Supreme Court, Kings County

Docket Number: Index No. 511885/15

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 24th day of September, 2024.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

- against -

Index No. 511885/15

GANNA KOLODNY; NATIONAL BANK; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; "JOHN DOE" and "JANE DOE" said names being fictitious, It being the intention of the Plaintiff to designate Any and all occupants of premises being foreclosed herein,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

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

91-93, 95-102, 108-110

Opposing Affidavits (Affirmations)_____

96-102, 108-110, 117-154, 156-194

Reply Affidavits (Affirmations)_____

117-154, 156-194, 196-197

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 2267 62nd Street in Brooklyn (Block 6550, Lot 51) (Property), Plaintiff U.S. Bank National Association (Plaintiff or US Bank) moves (in motion sequence [mot. seq.] two) for an order: (1) awarding it summary judgment, pursuant to CPLR 3212; (2) dismissing Ganna Kolodny's affirmative defenses, pursuant to CPLR 3211 (b); (3)

appointing a referee to compute the sum due and owing to Plaintiff, pursuant to RPAPL 1321; (4) granting Plaintiff a default judgment against all non-appearing defendants; and (5) amending the caption (NYSCEF Doc No. 91).

NS172, LLC (NS172), successor-by-assignment to defendant National City Bank (National City), cross-moves (in mot. seq. three) for an order, pursuant to CPLR 3215 (c), dismissing the complaint as against National City and amending the caption accordingly (NYSCEF Doc No. 95).

Defendant Ganna Kolodny (Ganna or Defendant Borrower), cross-moves (in mot. seq. four) for an order: (1) dismissing this action, pursuant to CPLR 3212; or, alternatively, (2) “denying or adjourning” Plaintiff’s summary judgment motion, pursuant to CPLR 3212 (f); and (3) compelling Plaintiff to comply with her outstanding discovery demands, pursuant to CPLR 3126 (NYSCEF Doc No. 108).

Background

On September 30, 2015, US Bank commenced this action to foreclose a modified mortgage encumbering Ganna’s residential Property by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-2). Notably, the promissory note with an undated allonge executed by the Associate General Counsel of US Bank was annexed as an exhibit to the complaint (NYSCEF Doc No. 1). On October 2, 2015, US Bank filed a supplemental summons and an amended complaint (NYSCEF Doc Nos. 4 and 5). The amended complaint alleges that on August 25, 2009, the subject mortgage was modified “to reflect a new principal balance of \$543,521.22”

(NYSCEF Doc No. 5 at ¶ 7). Schedule E to the complaint states that interest began accruing as of November 1, 2009. The amended complaint generally alleges that Plaintiff complied with RPAPL 1304's 90-day notice requirement (*id.* at ¶ 9).

On November 1, 2015, Ganna answered the complaint (NYSCEF Doc No. 20). On November 8, 2015, Ganna filed an "Amended Verified Answer with Counterclaims" in which she denied the material allegations in the amended complaint and asserted affirmative defenses, including: (1) this action is time-barred, (2) lack of standing, and (3) US Bank failed to satisfy condition precedents to foreclosure (NYSCEF Doc No. 23). Ganna filed two counterclaims for breach of the implied duty of good faith and fair dealing and rescission of the modified mortgage (*id.* at ¶¶ 20-23).

US Bank's Prior Summary Judgment Motion

On January 22, 2018, US Bank moved for summary judgment, an order striking Ganna's affirmative defenses and counterclaims, an order of reference and a default judgment against the non-appearing defendants (NYSCEF Doc No. 41). Ganna, in opposition, asserted, amongst other things, that US Bank failed to demonstrate its compliance with RPAPL 1304 (NYSCEF Doc No. 60 at ¶ 7). US Bank, in reply, submitted an attorney affirmation specifically arguing that US Bank was not required to serve Ganna with a RPAPL 1304 notice because the loan had been modified:

"Plaintiff was not obligated to serve a 90-day notice in this action since RPAPL § 1304 in effect at the time this action was commenced exempts loans for which the borrower has filed for an adjustment of debts or an order for relief from the payment of debts.

“The Defendant, the borrower, applied for and subsequently entered into a Loan Modification Agreement, which agreement adjusted and/or modified the debt owed to Plaintiff . . .

“As a result, Defendant waived her right to the 90-day notice pursuant to RPAPL §1304 (3), since the application for a loan modification was ‘an application for the adjustment of debts of the borrower’” (NYSCEF Doc No. 69 at ¶¶ 17-19).

By a July 18, 2018 decision and order (July 2018 Decision and Order), the court (Dear, J.) denied US Bank’s summary judgment motion based on the following decision:

“Plaintiff appears to admit that it failed to send 1304 notices but argues that it was not required to do so since Defendant previously has a loan modification. That is incorrect (*see, for example, U.S. Bank National Association v Henry*, 157 AD3d 839 [2d Dept 2018] [defendant had prior loan mod but Court denied summary judgment as plaintiff failed to demonstrate compliance with RPAPL 1304])” (NYSCEF Doc No. 75).

US Bank did not appeal from, or move for leave to reargue, the court’s July 2018 Decision and Order, notice of entry of which was e-filed on July 31, 2018 (NYSCEF Doc No. 76).

US Bank’s Successive Summary Judgment Motion

On October 12, 2020, US Bank filed its second, successive motion for summary judgment, an order striking Ganna’s affirmative defenses, a default judgment against the non-appearing defendants and an order of reference (NYSCEF Doc No. 91). Notably, US Bank does not address or even mention the fact that it previously moved for the exact same relief, which the court already denied based on US Bank’s admitted failure to send RPAPL 1304 notices to Ganna.

Instead, US Bank e-filed an attorney affirmation annexing a four-page fact affidavit from Sha'kesha Veal (Veal), a "Foreclosure Specialist" of Fay Servicing, LLC, US Bank's servicing agent and attorney-in-fact since July 12, 2017, who now attests *for the first time* that a 90-day pre-foreclosure notice was sent to Ganna in March 2015:

“[a] 90[-]day pre-foreclosure notice . . . was sent to Ganna Kolodny by certified and first class mail to the last known address of the Borrower at 2267 62nd St., Brooklyn, NY 11204, which is the residence that is the subject of the Mortgage. The 90 Day Notice was mailed on March 17, 2015 and contained a list of at least five housing counseling agencies serving the county where the property is located. A copy of the 90 Day Notice is attached” (NYSCEF Doc No. 93 at 221-224 [Veal Affidavit at ¶ 9]).

Notably, although Veal's affidavit testimony is based entirely on a review of Fay Servicing's business records, which have incorporated the records of prior loan servicers (*id.* at ¶¶ 2-3), it *does not annex* any of Fay Servicing's business records reflecting the manner and timing of the RPAPL 1304 mailing on March 17, 2015, and does not include any proof of service, including copies of the certified mail or first-class mail receipts or affidavits of service.

In addition, while Veal attests that “[t]here is a default under the terms and conditions of the Promissory Note and Mortgage because the December 1, 2009 payment has not been made[,]” “[t]o date, the default has not been cured” and “Fay Servicing, LLC[’s] records show that the loan remains in default” (*id.* at ¶¶ 8 and 15 [emphasis added]), Veal does not include a copy of the payment history of the loan or Fay Servicing's “records” to substantiate those hearsay statements. The only documents annexed to Veal's

affidavit are copies of the note, mortgage, the loan modification agreement, the RPAPL 1304 notices, a printout concerning the RPAPL 1306 filing with a Proof of Filing Statement, a February 4, 2010 default notice and Fay Servicing's July 12, 2017 Limited Power of Attorney (NYSCEF Doc No. 93).

NS172's Dismissal Cross-Motion

NS172 opposes US Bank's motion and cross-moves to dismiss the complaint as against its successor-by-assignment,¹ defendant National City, pursuant to CPLR 3215 (c) "for Plaintiff's failure to initiate steps for the entry of default judgment within one year of Defendant's default" (NYSCEF Doc No. 96 at ¶ 3). NS172 submits an attorney affirmation arguing that:

"[t]he language of § 3215 (c) is not discretionary but rather it is mandatory. As Plaintiff effectuated service of process over Defendant on October 7, 2015 and did not move for the entry of default judgment until January 23, 2018, more than two years later, it is respectfully submitted that this action must be dismissed as abandoned against Defendant" (*id.* at ¶ 4).

Counsel asserts that National City's time to appear in this action and interpose an answer expired on November 10, 2015, and US Bank belatedly moved for a default judgment more than two years later, in January 2018, when US Bank filed its first summary judgment motion (*id.* at ¶¶ 11 and 15).

¹ Defendant National City held a second mortgage in the amount of \$150,492.00 encumbering the Property (NYSCEF Doc No. 96 at ¶¶ 7 and 9).

Ganna's Summary Judgment/Discovery Cross Motion

Ganna opposes US Bank's summary judgment motion and cross-moves for summary judgment dismissing the complaint for lack of standing or failure to comply with RPAPL 1304, or, alternatively, denying US Bank's summary judgment motion, pursuant to CPLR 3212 (f), and compelling US Bank to comply with her discovery demands, pursuant to CPLR 3126.

Ganna submits an affidavit attesting that “[p]rior to the commencement of this action, I did not receive a 90-day notice pursuant to RPAPL § 1304 that I have been informed must be received as a condition precedent to commencing an action” (NYSCEF Doc No. 110 at ¶ 3). Ganna also adopts the following arguments of her counsel:

“Plaintiff submits its application based on an attorney affirmation in lieu of an affidavit in support of its application, and similarly, attempts to submit business records of his law firm as an affidavit of merit for the Plaintiff.

“Within the attorney's affirmation and attached exhibits, all totaling 335 pages. Pages 221- 224 include an affidavit from Fay Servicing, Plaintiff's servicer, that the Plaintiff did not obtain the underlying mortgage note until April 2, 2018. As this action was started on September 30, 2015, Plaintiff did not have standing to file this action as it did not possess the note at that time.

“Plaintiff's first application for summary judgment was denied on July 25, 2018 because it did not prove compliance with RPAPL §1304. In Plaintiff's second application, it refers to exhibit 'H' attached to the attorney affirmation for business records showing proof of compliance. Exhibit 'H' contains no records, and as such, Plaintiff's application must be denied again” (NYSCEF Doc No. 109 at ¶¶ 3-5).

Defense counsel asserts that either summary judgment is warranted for lack of standing and failure to serve RPAPL 1304 notices, or US Bank should be compelled to respond to Ganna's outstanding discovery demands regarding those defenses:

“[d]espite the demand for interrogatories asking only twelve simple questions regarding standing and compliance with RPAPL 1304, an inspection of the note and demand for an oral examination. The Plaintiff refused to respond to the demands for discovery, including busting a court ordered deposition, and instead, filed the instant motion” (*id.* at ¶ 12).

Defense counsel asserts that US Bank failed to meet its burden of proof for summary judgment, especially because “[n]either Plaintiff’s counsel, nor the affidavit of Ms. Veal, provide any admissible proof that the Plaintiff had standing as no business records were attached . . .” (*id.* at ¶ 19). Defense counsel also argues that “[t]he Plaintiff has failed to tender sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304” (*id.* at ¶ 26). Defense counsel also contends that summary judgment is premature because Ganna requires discovery regarding US Bank’s standing to foreclose, including inspection of the wet ink note (*id.* at ¶¶ 45-46).

US Bank’s Opposition and Reply

US Bank, in opposition to NS172’s dismissal cross-motion, submits a memorandum of law asserting that it is entitled to a default judgment against National City because it established its prima facie right to foreclose (NYSCEF Doc No. 155 at 10). US Bank asserts that dismissal pursuant to CPLR 3215 (c) is not warranted because it did not “abandon” this foreclosure action (*id.*). US Bank asserts that it has a “reasonable excuse” for its

admitted failure to seek a timely default as against National City within one year of its appearance default based on “the delay necessarily engendered by the conference requirements of CPLR 3408” (*id.* at 11-12). US Bank claims that it failed to seek a timely default judgment against National City in accordance with CPLR 3215’s mandated time-frame because CPLR 3408 conferencing “stayed Plaintiff’s ability to move for [a] default judgment” (*id.* at 13). Additionally, US Bank asserts that it “had to change [c]ounsel from Fein Such to Rosicki and from Rosicki to RAS in 2016, which created additional delays in being able to proceed with the Action” (*id.*). US Bank also argues that “[n]on-Borrower Defendant failed to introduce even an iota of evidence establishing prejudice” by US Bank’s untimely motion for a default judgment (*id.* at 15).

In further support of its summary judgment motion, US Bank asserts that the Veal affidavit, which is admittedly based on a review of Fay Servicing’s business records, is admissible to establish Ganna’s payment default (*id.* at 18-20).

NS172’s Reply

NS172, in reply, asserts that even of “the one-year deadline [in CPLR 3215 (c)] did not begin to run until April 12, 2016, when this matter was released from the foreclosure settlement conference part, the deadline to take proceedings for entry of default judgment nonetheless expired on April 12, 2017” and “and that Plaintiff did not move for default judgment until January 23, 2018” (NYSCEF Doc No. 196 at ¶¶ 3 and 4).

Discussion

(1)

US Bank's Second Summary Judgment Motion

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 [2d Dept 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 [2d Dept 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 [2d Dept 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 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002

[2d Dept 2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014]). Where the issue of standing is raised by a defendant, a plaintiff must establish its standing as part of its prima facie case (*Wells Fargo Bank, N.A. v Frankson*, 157 AD3d 844, 845 [2d Dept 2018]; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2d Dept 2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2d Dept 2016]).

Importantly, 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 [2d Dept 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]). Regarding the proof required to establish 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 [2d Dept 2018]).

Generally, successive summary judgment motions are not permitted (*Verizon New York, Inc. v Supervisors of Town of North Hempstead*, 169 AD3d 740, 744 [2d Dept 2019]).

The Second Department has held that “[a] court may, however, properly entertain such a motion ‘when it is substantively valid and the granting of the motion will further the ends of justice and eliminates an unnecessary burden on the resources of the courts’” (*id.*, quoting *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, 811 [2d Dept 2016]; *see also Graham v City of New York*, 136 AD3d 747, 748 [2d Dept 2016]). The Second Department has directed that “[s]uch a showing may be demonstrated by newly-discovered evidence or other good cause” (*Verizon New York, Inc. v Supervisors of Town of North Hempstead*, 169 AD3d at 744).

Here, on January 23, 2018, US Bank moved for summary judgment, which the court (Dear, J.) denied based on US Bank’s admitted failure to serve Ganna with a RPAPL 1304 notice (NYSCEF Doc No. 75). US Bank failed to appeal from or move for leave to reargue the court’s July 2018 decision and order, which is, consequently, *law of the case*. US Bank has presented no new law to allow this court to reconsider the court’s prior determination and there are no new facts in the record that did not exist at the time of US Bank’s first summary judgment motion. US Bank has not shown good cause why this court should consider its second, successive summary judgment motion, especially since US Bank failed to provide any grounds to renew.

Even if this court were to consider US Bank’s second, successive summary judgment motion, Veal’s affidavit testimony regarding service of the RPAPL 1304 notices in March 2015 is inadmissible hearsay based on her review of unidentified business records generated by a prior servicer without any proof of mailing by its predecessor servicer

(*MTGLQ Investors, L.P. v Daleo*, 228 AD3d 929, 931 [2024] [holding that “(p)roof of 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 the items are properly addressed and mailed, sworn by someone with personal knowledge of the procedure”] [internal citations and quotation marks omitted]).

Furthermore, although US Bank submitted copies of the note, mortgage and the modification agreement, it has not established its prima facie entitlement to summary judgment and an order of reference because it failed to submit admissible proof of Ganna’s payment default. The Second Department has held that affidavit testimony regarding a borrower’s default based on a review of a servicer’s business records is inadmissible hearsay and lacks probative value if the business records themselves are not produced (*Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017, 1021 [2d Dept 2020]; *Bank of New York Mellon v Gordon*, 171 AD3d 197, 208-209 [2d Dept 2019]; *JPMorgan Chase Bank National Assoc. v Grennan*, 175 AD3d 1513, 1516-1517 [2d Dept 2019]). Veal’s affidavit testimony regarding Ganna’s 2009 default based on her review of unidentified business records is inadmissible because US Bank failed to produce the business records upon which Veal’s knowledge is based. Consequently, for the foregoing reasons, US Bank’s second summary judgment motion is denied.

(2)

NS172's Dismissal Cross-Motion

CPLR 3215 (c) provides that:

“[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion*, unless sufficient cause is shown why the complaint should not be dismissed” (emphasis added).

Here, National City was served with process on October 7, 2015, and National City’s answer or response to the complaint was due on or before November 10, 2015. There is no dispute that this matter was released from the foreclosure settlement conference part on April 12, 2016, yet Plaintiff waited more than one year, until January 23, 2018, before moving for a default judgment as against National City. Dismissal of the complaint as against National City is mandated by the plain language of CPLR 3215 (c) (*see BAC Home Loan Servicing, L.P. v Kirnon*, 184 AD3d 547 [2d Dept 2020] [dismissing foreclosure action because “plaintiff failed to take steps to initiate proceedings for the entry of default judgment against the defendant within one year after her default”]).

US Bank’s untimely motion for a default judgment is not excused simply because plaintiff changed counsel a number of times in 2016. Dismissal is warranted under CPLR 3215 (c) where, as here, there has been an inexcusable delay in seeking a default judgment for more than one year and a failure to demonstrate a meritorious action. Consequently, this action is dismissed as against defendant National City, pursuant to CPLR 3215 (c).

(3)

Ganna's Summary Judgment/Discovery Cross Motion

Here, as Ganna concedes, her summary judgment cross-motion is premature given the fact that there are triable issues regarding US Bank's noncompliance with RPAPL 1304, US Bank's prior admission that it never served RPAPL 1304 notices upon Ganna and Ganna's alleged 2009 payment default, which was not substantiated by any contemporaneous business records from Fay Servicing or any prior loan servicer.

Furthermore, while Ganna is entitled to responses to her outstanding discovery requests, including interrogatories regarding US Bank's compliance with RPAPL 1304, she did not submit her outstanding discovery requests as exhibits to her cross-motion seeking to compel disclosure from US Bank, nor did she submit an affirmation of good faith reflecting that she attempted to resolve the outstanding disputes regarding discovery. It is well-established that 22 NYCRR 202.7 (c) requires that a discovery motion include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (*Farmer v Gazebo Contracting, Inc.*, 218 AD3d 644, 647 [2d Dept 2023]). Although Ganna's instant motion to compel disclosure is denied, the parties will proceed with disclosure as directed and ordered by the court at a compliance conference. Accordingly, it is hereby

ORDERED that US Bank's second, successive summary judgment motion (mot. seq. two) is denied; and it is further

ORDERED that NS172's cross-motion (mot. seq. three) to dismiss the complaint as against defendant National City, pursuant to CPLR 3215 (c), is granted, the amended complaint is hereby dismissed as against National City and the caption is amended to eliminate National City; and it is further

ORDERED that Ganna's summary judgment cross motion (mot. seq. four) is denied without prejudice and with leave to renew after the conclusion of discovery; and it is further

This constitutes the decision and order of the court.

E N T E R,

April 14, 2025



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