

Wells Fargo Bank N.A. v Wilson

2025 NY Slip Op 31563(U)

April 14, 2025

Supreme Court, Kings County

Docket Number: Index No. 32015/2009

Judge: Cenceria P. Edwards

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.

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 14th day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X

WELLS FARGO BANK N.A., AS TRUSTEE FOR
CARRINGTON MORTGAGE LOAN TRUST SERIES
2006-FRE2 ASSET-BACKED PASS-THROUGH
CERTIFICATES,

Motion Seq. #s 5 and 6

Plaintiff,

- against -

Index No. 32015/2009

KEVIN WILSON A/K/A KEVIN JOHN WILSON; ASSET
BASED LENDING LLC; BANK OF AMERICA, N.A.;
NEW YORK CITY CRIMINAL COURT; NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD; NEW
YORK CITY PARKING VIOLATIONS BUREAU; NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE; UNITED STATES OF AMERICA ACTING
THROUGH THE IRS; EUGENE ALSTON,

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) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

9-10, 12-16 18-23
18-23 24-28
24-28

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 165 Legion Street in Brooklyn (Block 3536, Lot 5) (Property), plaintiff Wells Fargo Bank, N.A., As Trustee for Carrington Mortgage Loan Trust, Series 2006-FRE2 Asset-Backed Pass-Through Certificates (Wells Fargo or Plaintiff) moves (in

motion sequence [mot. seq.] five) for an order: (1) confirming the Referee Report made in accordance with RPAPL § 1321; (2) granting it a Judgment of Foreclosure and Sale, pursuant to RPAPL § 1351; and (3) directing the distribution of the sale proceeds, pursuant to RPAPL § 1354 (NYSCEF Doc No. 9).

Defendant Kevin Wilson a/k/a Kevin John Wilson (Wilson or Defendant Borrower) cross-moves (in mot. seq. six) for an order: (1) denying Plaintiff's motion; (2) granting him summary judgment dismissing the complaint "based on Defendant's RPAPL 1304 defense"; and (3) granting him summary judgment on his RPL § 282 (1) counterclaim, "awarding him actual and reasonable attorneys' fees, costs and disbursements" (NYSCEF Doc No 18).

Background

On December 16, 2009, Wells Fargo commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc No. 20). The complaint alleges that on or about August 10, 2006, Wilson executed and delivered to Countrywide Bank, N.A. an \$385,840.00 promissory note, which was secured by a mortgage encumbering his residential Property (NYSCEF Doc No. 20 [complaint] at ¶¶ 2-3). The complaint alleges that Wilson "failed to comply with the conditions of the mortgage and note by failing to pay principal and interest . . . and/or other charges that came due and payable on the 1st day of April, 2009 . . ." (*id.* at ¶ 5). Notably, the complaint alleges that Plaintiff has complied with RPAPL § 1304 (*id.* at ¶ 11).

On January 5, 2010, Wilson answered the complaint, denied the material allegations therein and asserted a single affirmative defense that the loan had a “High Interest Rate Adjustable Rate” and a counterclaim asserting that “Lender did not offer or agree to loan modification” (NYSCEF Doc No. 21).

On October 8, 2019, Wells Fargo moved for an order of reference and summary judgment. The court (Joseph, J.) granted Wells Fargo’s summary judgment motion and issued a February 10, 2020, Order Granting Summary Judgment and Order of Reference and appointed a referee to ascertain and compute the amount due to Plaintiff (NYSCEF Doc No. 13). Notably, in the Order of Reference, the court struck Wilson’s answer to the complaint and his counterclaim (*id.* at 3).

After a contested April 15, 2021 hearing,¹ the referee issued his June 14, 2021, Referee’s Report (2021 Referee’s Report), which provides:

“[t]hat it appears to my satisfaction that no person or party was entitled to any Notice of Hearing as the Answer of the Defendant Kevin Wilson a/k/a Kevin John Wilson was stricken and the appearance of said Defendant limited to a Notice of Appearance and Waiver of service of all papers and notices of all proceedings in this action except a copy of the Referee’s Oath and Report of Amount Due, copy of Judgment of Foreclosure and Sale, Notice of Entry of Judgment, Notice of Sale and copy of Referee's Report of sale. Plaintiff’s counsel has provided me with a copy of the letter sent to Ivan E. Young, Esq. of Young Law Group PLLC the attorney for Defendant Kevin Wilson providing a copy of the proposed Report and Computation.

“That on April 15, 2021, a hearing was held in this matter for the purposes of hearing testimony and evidence concerning the amount due and owing.

¹ NYSCEF Doc No. 30.

“That I have ascertained and computed the amount due to the Plaintiff upon the said note and mortgage together with interest thereon from March 1, 2009 through February 5, 2021, at the contract rate, and that I find and accordingly report that there is due to the Plaintiff upon the said note and mortgage the sum of \$750,190.37, plus interest on the principal balance from February 5, 2021.

“That Schedule ‘A’ hereto annexed contains a Schedule of the documentary evidence introduced before me. . . .” (NYSCEF Doc No. 15).

Schedule A to the Referee’s Report entitled “Abstract of Documentary Evidence” identifies the following evidence relief upon by the Referee:

“(1) Affidavit of Amount Due of Elizabeth Gonzales, Default Fulfillment Manager of Carrington Mortgage Services, LLC, servicer and attorney in fact for [Wells Fargo], Plaintiff, sworn to on October 27, 2020 [Gonzalez Affidavit of Amount Due], and Power of Attorney dated May 28, 2010, by and between [Wells Fargo] and Carrington Mortgage Services, LLC. Inclusive of Exhibits:

- A) Power of Attorney
- B) Note
- C) Mortgage
- D) Assignments
- E) Account Summary and Payment History

“(2) Testimony at the Hearing conducted on April 15, 2021, and the Testimony of Bryan Heifner, a Case Manager for Carrington Mortgage Services, LLC (hereinafter ‘Carrington’) as servicer and Attorney in Fact for Plaintiff. A copy of the Transcript from the Hearing has been filed as part of Plaintiff’s Post-Hearing Memorandum of Law. The exhibits introduced into evidence at the hearing and attached to Plaintiff’s Post-Hearing Memorandum of Law are:

- Exhibit 1: Carrington’s Power of Attorney for Plaintiff.
- Exhibit 2: Note dated August 10, 2006 . . .
- Exhibit 3: Mortgage dated August 10, 2006 . . .

Exhibit 4: Loan Modification dated February 13, 2009 . . .
Exhibit 5: Carrington's Transaction/Payment History.
Exhibit 6: Carrington's Judgment Figures . . .
Exhibit 7: Copies of checks relating to payments for advances"
(*id.* at 4).

Wells Fargo's Motion to Confirm the Referee's Report

On August 17, 2021, Wells Fargo moved for an order confirming the 2021 Referee's report and for a judgment of foreclosure and sale (NYSCEF Doc No. 9). Wells Fargo submits an attorney affirmation asserting that "Plaintiff's prima facie case having already been established, Plaintiff now moves this Court to confirm the [2021] Referee's Report made in accordance with RPAPL §1321 and for a Judgment of Foreclosure and Sale" (NYSCEF Doc No. 10 at 5). Wells Fargo submits a copy of the Gonzalez Affidavit of Amount Due along with the payment history annexed to the Affidavit, upon which the Referee relied in computing the amount due and owing (NYSCEF Doc No. 14).

Wilson's Summary Judgment Cross-Motion

On January 28, 2022, Wilson opposed Wells Fargo's motion and cross-moved for summary judgment dismissing the complaint "based on Defendant's RPAPL 1304 defense" (NYSCEF Doc No. 18). Defense counsel submits a cross-moving affirmation asserting that "Plaintiff's Motion must be denied and the instant action must be dismissed as recent caselaw has now rendered Plaintiff's RPAPL 1304 90-day notices defective" (NYSCEF Doc No. 19 at ¶ 7). As a preliminary matter, defense counsel asserts that "[a]lthough Defendant failed to raise noncompliance with RPAPL 1304 as an affirmative

defense in his answer, it is a condition precedent to foreclosure that can be raised anytime, citing *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 830 (2d Dept 2016) (*id.* at ¶ 9).

On the merits, defense counsel argues that Wells Fargo failed to strictly comply with RPAPL 1304 based on caselaw from the Second Department holding that additional information cannot be sent in the same envelope as a RPAPL § 1304 notice (*id.* at 10-13). Defense counsel relies on the Second Department's holding in *Bank of Am., N.A. v Kessler*, 202 AD3d 10, 13 (2d Dept 2021), and its progeny, wherein the appellate court articulated "a bright-line rule" that compliance with the 'separate envelope' requirement of RPAPL 1304 mandates that no material other than the notices described in RPAPL 1304 be contained in the envelope. Defense counsel argues that Wells Fargo's 90-day notice is defective under the *Kessler* holding because it contains additional language not in RPAPL 1304 (2).

Defense counsel also argues that the Gonzalez Affidavit upon which the Referee's Report is based is supported by inadmissible evidence of the payment history of the loan because the Gonzalez Affidavit is based on her review of the loan servicer's business records regarding the payment history rather than those of the Plaintiff (*id.* at ¶ 20).

Discussion

(1)

Wilson's Summary Judgment Cross-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]).

RPAPL § 1304 (1) provides that “with regard to a home loan, 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 requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (RPAPL § 1304 [2]). “Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition

precedent to the commencement of a foreclosure action” (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20 [2d Dept 2019]). The plaintiff bears the burden of establishing strict compliance with RPAPL § 1304 (*Nationstar Mortg., LLC v Osikoya*, 205 AD3d 1038, 1039 [2d Dept 2022]).

Here, Wells Fargo previously demonstrated that it complied with the requirements of RPAPL § 1304 by submitting admissible evidence that it mailed the RPAPL § 1304 notice to Wilson at the Property by both certified and by first-class mail. The Second Department has held that proof of the requisite mailing can be demonstrated by “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” (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 21 [internal quotations marks omitted]). While Wells Fargo’s 90-day notice in the record contains additional language not included in the statute (*see* NYSCEF Doc No. 22), that does not render the 90-day notice legally defective, as defense counsel contends.

Defense counsel’s reliance on the Second Department’s holding in *Kessler* and its progeny is misplaced because those holdings were specifically reversed by the Court of Appeals’ subsequent decision in *Kessler* that was issued on February 14, 2023, after the parties’ motion and cross-motion were *sub judice*. Importantly, in *Bank of Am. v Kessler*, the Court of Appeals specifically rejected the bright-line rule imposed by the Second Department, and held that statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure

do not constitute “other notices” that must be sent in a separate envelope from the RPAPL § 1304 notice and “application of a bright-line rule would contravene the legislative purpose” of RPAPL § 1304 (*Bank of Am., N.A. v Kessler*, 39 NY3d 317, 326 [2023]).

Based on the Court of Appeals’ holding in *Kessler*, Wells Fargo’s RPAPL § 1304 notice was proper, despite the fact that it included additional information. Consequently, for the foregoing reasons, Wilson’s summary judgment cross-motion is denied.

(2)

Wells Fargo’s Motion

CPLR 4403 provides that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part . . . the report of a referee . . . may make new findings with or without taking additional testimony; and may order a new trial or hearing.” “The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility” (*Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]). While CPLR 4403 authorizes a court to confirm or reject a referee’s report, “[t]he referee’s findings and recommendations are advisory only and have no binding effect on the court . . .” (*Indymac Federal Bank, FSB v Vantassell*, 187 AD3d 725, 726 [2d Dept 2020]). “In cases involving references to report, the Supreme Court is the ultimate arbiter of the dispute and has the power to reject the referee’s report and make new findings” (*Bank of America, N.A. v Barton*, 199 AD3d at 627, quoting *Countrywide Home Loans*,

Inc. v Hershkop, 188 AD3d 1148, 1149 [2d Dept 2020]; *see also HSBC Bank USA, National v Cherestal*, 178 AD3d 680, 682-683 [2d Dept 2019]).

Here, defense counsel's assertion that the Gonzalez Affidavit upon which the Referee's Report is based is supported by inadmissible evidence of the payment history of the loan because it is based on her review of the loan servicer's business records regarding the payment history rather than those of the Plaintiff is rejected. The Gonzalez Affidavit included a May 28, 2010, limited power of attorney demonstrating that Carrington Mortgage Services, LLC (Carrington), the servicer of the subject mortgage loan and Wells Fargo's attorney-in-fact, had authority to service the loan on Wells Fargo's behalf (NYSCEF Doc No. 14 at 7). Wells Fargo's motion for an order confirming the 2021 Referee's Report – which appears to be substantially supported by the record – is granted. Accordingly, it is hereby

ORDERED that Wells Fargo's motion to confirm the June 14, 2021 Referee's Report and for a judgment of foreclosure and sale (mot. seq. five) is granted and a judgment shall be settled on notice; it is further

ORDERED that Wilson's summary judgment cross-motion (mot. seq. six) is denied.

This constitutes the decision and order of the court.

April 14, 2025

E N T E R,



Hon. Cenceria P. Edwards, JSC, CPA