

**U.S. Bank N.A. v Gill**

2025 NY Slip Op 31595(U)

April 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 33152/2007

Judge: Cenceria 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 21st day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE  
FOR TRUMAN ACH GRANTOR TRUST 2013, SERIES  
2013-1,

Plaintiff,

- against -

Index No. 33152/2007

CAROL GILL, ADMINISTRATOR OF THE ESTATE  
OF EUGENE CLEMENT; DARRELL RAYMOND;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. AS NOMINEE FOR MORTGAGE  
LENDERS NETWORK, USA INC.; NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD; MEDOUNE  
NAGASOUBA,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross  
Motion and Affidavits (Affirmations) \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

2-27, 31 34-51, 71  
34-51 55-66  
55-66

Upon the foregoing papers in this action to foreclose a first mortgage encumbering the residential property at 585 Lexington Avenue in Brooklyn (Block 1619, Lot 71) (Property), Plaintiff U.S. Bank National Association, as Trustee for Truman ACM Grantor Trust 2013, Series 2013-1 (US Bank or Plaintiff) moves (in motion sequence [mot. seq.] seven) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) granting it a default judgment against all non-appearing defendants: Carol Gill,

Administrator of the Estate of Eugene Clement, Darrel Raymond, Mortgage Electronic Registration Systems, Inc., as Nominee for Mortgage Lenders Network, USA Inc. (MERS), New York City Environmental Control Board and Medoune Nagasouba; and (3) appointing a referee to compute the amount due to Plaintiff under the note and mortgage, pursuant to RPAPL §1321 and CPLR 4311.

Non-party Toiny LLC (Toiny), the owner of a second, subordinate mortgage, cross-moves (in mot. seq. eight) for an order: (1) granting it leave to intervene in this action, pursuant to CPLR 1012 (a) (3), and compelling Plaintiff to accept its proposed answer to the complaint (NYSCEF Doc No. 45); or, alternatively, (2) substituting Toiny for defendant MERS, pursuant to CPLR 1018, and compelling Plaintiff to accept Toiny's late answer to the complaint; and (3) dismissing this action, pursuant to 3211 (a) (3) and RPAPL § 1302-a, for lack of standing and vacating the notice of pendency filed against the Property (NYSCEF Doc No. 71).

### **Background**

On August 30, 2007, the original plaintiff, CitiMortgage, Inc. (CitiMortgage), commenced this action by filing a summons, a complaint verified by counsel and a notice of pendency against the Property (NYSCEF Doc No. 4). The complaint alleges that on or about June 15, 2006, the borrower, Eugene Clement, executed and delivered a \$576,000.000 promissory note, which was secured by a first mortgage encumbering his residential Property (NYSCEF Doc No. 4 at ¶¶ 2-3). The complaint alleges that "EUGENE CLEMENT has failed to comply with the terms and provisions of the note and mortgage

by failing to make the monthly payments of interest and principal due on April 1, 2007, and each successive month thereafter” (*id.* at ¶ 10). The complaint alleges that MERS is a party defendant solely because it holds a subordinate mortgage (*id.* at ¶ 15 [c]).

All of the defendants failed to answer or otherwise respond to the complaint.

In February 2008, CitiMortgage timely moved for summary judgment and an order of reference, and the court granted the motion and issued a May 13, 2008, order of reference (NYSCEF Doc No. 1 at 32-35). About two years later, on August 6, 2010, the court confirmed the July 9, 2008, referee’s report of amounts due to Plaintiff and issued a Judgment of Foreclosure and Sale (*id.* at 324-335). CitiMortgage scheduled a foreclosure auction of the Property for October 7, 2010, but Eugene Clement filed a Chapter 13 Bankruptcy Petition on October 6, 2010, which cancelled the foreclosure sale and stayed this action.

On November 9, 2010, defendant Eugene Clement moved, by order to show cause, for an order vacating his appearance default and dismissing the action for lack of personal jurisdiction, pursuant to CPLR 5015 (a) (4) and 3211 (a) (8), or, alternatively, vacating the Judgment of Foreclosure and Sale, pursuant to CPLR 5015 (a) (1), and granting him leave to file a late answer (*id.* at 463-469). CitiMortgage cross-moved for the appointment of a receiver (*id.* at 470). By a May 19, 2011 order, the court granted Clement’s motion to vacate the default Judgment based on a “postal error” regarding mandatory settlement conferences and denied CitiMortgage’s cross-motion (*id.* at 481).

On December 19, 2011, defense counsel appeared for a mandatory settlement conference, pursuant to CPLR 3408, at which time he advised the court that defendant Eugene Clement died on May 31, 2011 (*id.* at 745-749), which triggered an automatic stay of this foreclosure action pending substitution of a legal representative (*id.* at 670).

Before substitution of a legal representative, the court issued a February 18, 2014, order directing dismissal of the complaint based on Plaintiff's failure to appear at a status conference. CitiMortgage cross-moved to vacate the dismissal, and non-party Toiny opposed CitiMortgage's cross-motion on or about July 24, 2019. By an August 1, 2019, order, the February 18, 2014 dismissal order was vacated, and such vacatur was subsequently affirmed on appeal.<sup>1</sup>

By a December 5, 2019, order, the court amended the caption in this action substituting Carol Gill, as Administrator of the Estate of Eugene Clement (the Estate), for the decedent and substituting US Bank for CitiMortgage (NYSCEF Doc No. 18 at 4-5). After the Estate was substituted in this action in place of Clement, the Estate failed to answer or otherwise respond to the complaint.

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<sup>1</sup> See *CitiMortgage, Inc. v Clement*, 209 AD3d 971, 972 [2d Dept 2022] [holding that "Supreme Court should not have directed dismissal of the action pursuant to 22 NYCRR 202.27 after Clement's death and before the substitution of a legal representative" and "the court properly granted that branch of the plaintiff's cross motion which was to vacate the order dated February 18, 2014"]).

### *US Bank's Instant Summary Judgment Motion*

On October 13, 2020, US Bank moved for summary judgment, an order of reference and a default judgment against the non-appearing defendants, including the Estate (NYSCEF Doc No. 2).

US Bank submitted a fact affidavit from DeeAnna Hamilton (Hamilton), an Assistant Secretary at Rushmore Loan Management Services, LLC (Rushmore), the purported attorney-in-fact and the servicing agent for US Bank, based on her review of Rushmore's business records (NYSCEF Doc No. 31 at ¶¶ 1 and 4). Notably, Rushmore fails to submit a power of attorney or a servicing agreement reflecting that Rushmore is authorized to act on US Bank's behalf.

Hamilton attests that “the servicing rights to the subject loan were transferred from Matrix Servicing LLC (‘Matrix’) to Rushmore, effective May 1, 2012 . . .” and “[a]t the time of the transfer . . . Rushmore received servicing documents and information related to the Borrower's loan from Matrix including Matrix's complete loss mitigation and servicing files . . .” and “the Matrix Documents were reviewed by Rushmore and incorporated into Rushmore's record keeping system . . .” (*id.* at ¶¶ 7-8).

Hamilton submits copies of the note and mortgage (NYSCEF Doc Nos. 23 and 24) and attests that “[t]he Loan Records reflect that on August 14, 2007, Plaintiff was in physical possession of the original Note (indorsed in blank)” and thus, “Plaintiff was in physical possession of the original Note (indorsed in blank) prior to, and on the date of, the commencement of this action on August 30, 2007” (*id.* at ¶ 12). Hamilton references the

August 14, 2007 affidavit of Nate Blackstun, an Assistant Vice President of CitiMortgage,<sup>2</sup> which “was reviewed by Rushmore and incorporated into Rushmore’s record keeping system . . .” and which “confirmed” that CitiMortgage was in possession of the original note on August 14, 2007 because Blackstun attested that “I hold in my possession the original recorded documents pertaining to this action” (*id.* at ¶¶ 13-14 and NYSCEF Doc No. 25 at 3).

Based on a single payoff statement generated by Rushmore (NYSCEF Doc No. 27), Hamilton attests that “Borrower breached his payment obligation pursuant to the Loan Documents by failing to tender the installment which became due and payable on April 1, 2007, and has failed to make all subsequent payments due thereafter” (NYSCEF Doc No. 21 at ¶ 17). Notably, while Hamilton attested that Rushmore began servicing the loan in 2012, and that Matrix’s business records were integrated into Rushmore’s records, US Bank fails to produce the payment history of the loan or any business records evidencing Clement’s April 1, 2007, payment default.

### ***Toiny’s Cross-Motion to Intervene***

On June 28, 2022, *three years after* Toiny appeared in this action to oppose CitiMortgage’s cross-motion to vacate the February 18, 2014 dismissal order, Toiny cross-moved for leave to intervene in this action, pursuant to CPLR 1012 (a), or, alternatively,

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<sup>2</sup> Plaintiff’s counsel affirms that the August 14, 2007, Blackstun affidavit was submitted in support of CitiMortgage’s February 2008 motion for an order of reference and a default judgment (NYSCEF Doc No. 3 at ¶ 7).

for leave to substitute it in place of defendant MERS, an alleged subordinate lienor, pursuant to CPLR 1018, and permitting it to interpose a late answer to the complaint asserting standing as an affirmative defense or dismissing this action based on CitiMortgage's lack of standing (NYSCEF Doc No. 71).

Toiny submits an affidavit from Yonel Devico (Devico), the Vice President and the managing member of Toiny, the "assignee and successor in interest . . ." of MERS regarding a June 15, 2006, second mortgage on the Property in the amount of \$144,000.00 (NYSCEF Doc No. 48 at ¶¶ 1, 3 and 4). Devico attests that "[t]he Note was physically transferred to Toiny when this action was dismissed on October 3, 2017" (*id.* at ¶ 8). Toiny submits copies of its subordinate note and mortgage (NYSCEF Doc Nos. 49 and 50).

Toiny's counsel submits an affirmation asserting that "[i]ntervention should be granted because this action was dismissed and no notice of pendency was active when Toiny acquired its interest the mortgage . . ." (NYSCEF Doc No. 34 at ¶ 4). Alternatively, Toiny's counsel argues that "this Court should permit Toiny to substitute for Defendant [MERS] pursuant to CPLR § 1018 and compel[ ] Plaintiff to accept a late answer because Toiny is the successor in interest to [MERS] and acquired this interest while this action was dismissed and the notice of pendency was inactive" (*id.*). Toiny's counsel asserts that "[t]his Court should permit Toiny to intervene in the Instant Action pursuant to CPLR § 1012 (a) (3) because the Instant Action concerns disposition of the Property" and "this action could adversely affect Toiny by improperly foreclosing its interest in the Property" (*id.* at ¶ 19).

Toiny's counsel asserts that “[u]pon intervention or substitution, this matter must be dismissed because the commencing Plaintiff lacked standing to commence the instant action in 2007” (*id.* at ¶ 5). Counsel notes that RPAPL § 1302-a became effective December 23, 2019, and provides that “the defense of standing in a foreclosure proceeding shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or a pre-answer motion to dismiss” (*id.*).

Toiny's counsel, in opposition to US Bank's summary judgment motion, argues that denial of US Bank's motion is warranted “because Plaintiff fails to establish default under the terms of the loan and there is at the very least a triable issue of fact concerning the commencing Plaintiff's standing” (*id.* at ¶ 7).

Regarding the standing defense, Toiny's counsel argues that “Plaintiff cannot establish that CitiMortgage possessed the endorsed note at commencement of the Instant Action” because “no copy of the endorsed note was annexed to the complaint . . .” (*id.* at ¶ 43). Toiny's counsel further argues that the August 14, 2007, Blackstun affidavit from CitiMortgage is insufficient to establish CitiMortgage's physical possession of the note at the time of commencement because it merely attests that “I hold in my possession the original *recorded* documents . . .” without mentioning the promissory note, which is not a “recorded document” (*id.* at ¶ 44 [emphasis added]). Toiny's counsel asserts that, “in the very least, Plaintiff's motion must be denied because a triable issue of fact exists concerning Plaintiff's standing” (*id.* at ¶ 45).

Toiny's counsel also contends that US Bank failed to submit admissible evidence of Clement's alleged 2007 payment default because "Plaintiff states that it possesses the underlying records from the prior servicer [Matrix], but does not provide them in support of its assertion of the Borrower's default" (*id.* at ¶ 46). Toiny's counsel asserts that "Plaintiff was required to submit the Matrix Document in support of the Hamilton Aff. because they are the original records that purportedly substantiate the default by the borrower . . ." (*id.* at ¶ 57). Additionally, Toiny's counsel notes that the Hamilton affidavit fails to include a power of attorney evidencing Rushmore's authority to speak for US Bank (*id.* at ¶ 52).

#### ***US Bank's Opposition and Reply***

US Bank, in opposition to the cross-motion and in reply, submits an attorney affirmation asserting that Toiny previously appeared in this action on or about July 24, 2019, when it opposed Plaintiff's cross-motion to vacate the February 18, 2014 dismissal order (NYSCEF Doc No. 55 at ¶¶ 10-11 and NYSCEF Doc No. 59). US Bank's counsel also describes Toiny's appeal from the order granting Plaintiff's cross-motion to vacate (NYSCEF Doc No. 55 at ¶¶ 17-22). Notably, US Bank's counsel fails to address the purported deficiencies in US Bank's summary judgment motion.

## Discussion

(1)

### *Toiny's Cross-Motion*

CPLR 1012 (a) (3) provides that a party may intervene as of right “when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely.” “In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party” (*Deutsche Bank Nat’l Tr. Co. v Allenstein*, 201 AD3d 783, 785 [2d Dept 2022] [internal quotation marks omitted]). “[I]ntervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties” (*Halstead v Dolphy*, 70 AD3d 639, 640 [2d Dept 2010]).

Here, Toiny’s motion for leave to intervene in this action, pursuant to CPLR 1012 (a) (3), is granted since it established that is has a real and substantial interest in the outcome of this foreclosure action by virtue of its subordinate lien encumbering the Property (*Dekalb Assets 2015, LLC v Roman*, 219 AD3d 800, 801 [2d Dept 2023] [granting assignee of subordinate mortgage leave to intervene]). Although Toiny waited until June 2022 to seek intervention, after appearing and previously participating in motion practice, intervention at this juncture would not prejudice US Bank, the only other party to this action, given the fact that a judgment of foreclosure and sale has not yet been issued in this action. Despite the vintage age of this foreclosure case, it is still in the early stages of

litigation due to the death of Clement and the delay in substituting the Estate for the decedent. Upon intervention, Toiny shall timely e-file its proposed answer to the complaint, which asserts lack of standing as an affirmative defense (*see* NYSCEF Doc No. 45 at ¶ 22), and may thereafter seek discovery regarding CitiMortgage's standing to commence this foreclosure action.

(2)

***US Bank's 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 [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 *admissible evidence* of the borrower's payment default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]).

Here, although US Bank submitted copies of the note and mortgage, it has not established its prima facie entitlement to summary judgment and an order of reference because it failed to submit admissible proof of Clement's 2007 payment default, as a matter of law. The Second Department has repeatedly held that affidavit testimony from a servicing agent regarding a borrower's payment default based on a review of business records is inadmissible hearsay and lacks probative value if the business records relied upon are not produced (*see 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]). Hamilton's affidavit testimony regarding Clement's 2007 default based on her review of unidentified business records from Matrix, the prior servicer, is inadmissible hearsay because US Bank failed to produce Matrix's 2007 servicing records upon which Hamilton's knowledge is based.

In addition, Hamilton's affidavit cannot form the basis for summary judgment and an order of reference because it fails to include a power of attorney between Rushmore and

US Bank evidencing that Rushmore has authority to act on behalf of US Bank (*Citibank, N.A. v Herman*, 215 AD3d 629, 630 [2d Dept 2023]). Accordingly, it is

**ORDERED** that US Bank’s motion for summary judgment and an order of reference (mot. seq. seven) is denied without prejudice to renewal upon proper papers after the completion of discovery; and it is further

**ORDERED** that Toiny’s cross-motion (mot. seq. eight) is only granted to the extent that Toiny is granted leave to intervene in this foreclosure action, pursuant to CPLR 1012 (a) (3), and Toiny’s proposed answer to the complaint in NYSCEF Doc No. 45 shall be e-filed within 15 days after service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,

April 21, 2025



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J. S. C.