

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

2025 NY Slip Op 31620(U)

April 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 500050/2019

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 24 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 LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST,

Plaintiff,

- against -

Index No. 500050/2019

GEOFFREY S. GOLDMAN; MARILYN MASON;  
COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK SOCIAL SERVICES DISTRICT,

“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 premises 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) \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_

34-56      59-74, 77  
59-74, 77

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 244 Warwick Street in Brooklyn (Block 3951, Lot 37) (Property), plaintiff U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust (US Bank or Plaintiff) moves (in motion sequence [mot. seq.] one) for an order: (1)

granting it summary judgment on the complaint and dismissing the counterclaims and affirmative defenses asserted by defendant Marilyn Mason (Mason), pursuant to CPLR 3212; (2) granting it a default judgment against non-appearing defendants, Commissioner of Social Services of the City of New York Social Services District, “John Doe” (Refused Name) as John Doe #1, “John Doe” (Refused Name) as John Doe #2, “John Doe” (Refused Name) as John Doe #3 and “Jane” Mason (Refused First Name) s/h/a John Doe #4; (3) discontinuing this action as against defaulting borrower defendant, Geoffrey Goldman (Goldman); (4) appointing a referee to compute the amount due to Plaintiff under the note and mortgage, pursuant to RPAPL § 1321 and CPLR 4311; and (5) amending the caption to: (i) substitute John Doe (Refused Name) in place and instead of John Doe #1, John Doe (Refused Name) in place and instead of John Doe #2, John Doe (Refused Name) in place and instead of John Doe #3 and Jane Mason (Refused First Name) in place and instead of John Doe #4, and (ii) discontinuing the action as to “John Doe #1” through “John Doe #12” and Geoffrey Goldman (NYSCEF Doc No. 34).

Defendant Mason cross-moves (in mot. seq. two) for an order: (1) granting her summary judgment dismissing the complaint with prejudice, pursuant to CPLR 3212, on the ground that this action is barred by the applicable statute of limitations; (2) canceling the notice of pendency filed against the Property; (3) declaring that the mortgage and note are unenforceable, pursuant to RPAPL § 1501 (4), canceling and discharging the mortgage and declaring that Mason’s interest in the Property is free from the mortgage; or, alternatively (4) denying Plaintiff’s motion (NYSCEF Doc No. 59).

### Background

On January 2, 2019, within six months after the dismissal of a prior foreclosure action commenced by BAC Home Loans Servicing LP (BAC) on June 17, 2009 (2009 Foreclosure Action), US Bank commenced this second foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-2).

The 2019 complaint alleges that on November 30, 2007, Goldman executed and delivered a promissory note in the principal amount of \$462,150.00 in favor of Mercury, Inc. (Mercury), which was secured by a mortgage encumbering the Property (NYSCEF Doc No. 1 at ¶¶ 2 and 4-5). The complaint alleges that Goldman “failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on July 01, 2008 and each subsequent payment thereafter” (*id.* at ¶ 9). The complaint alleges that “by reason of such defaults, Plaintiff hereby declares the balance of the principal indebtedness immediately due and payable” although the loan was previously accelerated by BAC when it commenced the 2009 Foreclosure Action (*id.* at ¶ 10). Notably, the complaint annexes a copy of the November 30, 2007, note, which has an endorsement from Mercury in favor of Webster Bank National Association (Webster) on the bottom of the last page of the note and a “Note Allonge” by Webster in favor of Countrywide Bank, FSB, on a separate page.

On February 21, 2019, Mason, the owner of the Property, answered the complaint, denied the material allegations therein and asserted affirmative defenses, including lack of

standing and the statute of limitations based on BAC's commencement of the 2009 Foreclosure Action (NYSCEF Doc No. 19 at ¶¶ 31-36). Mason's answer also asserted a counterclaim seeking to cancel and discharge the mortgage, pursuant to RPAPL § 1501 (4), which alleges that:

“[t]he period allowed by the applicable statute of limitations for the commencement of an action to foreclose on defendant Goldman's mortgage has expired since more than six years have passed since plaintiff's predecessor in interest elected to accelerate the entire mortgage debt by making a demand for the immediate payment of all sums due in the complaint filed in the foreclosure action it brought in June 2009” (*id.* at ¶ 65).

Notably, Mason's answer includes a “Statement of Facts” alleging that Goldman engaged in a fraudulent scheme in which he misrepresented to Mason that he would assist her with a refinance of her home to make repairs if she deeded the Property to him as part of a leaseback transaction and repurchase agreement, after which Goldman encumbered the Property with the subject mortgage before transferring the Property back to Mason (*id.* at ¶¶ 20-27).

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

On December 4, 2019, US Bank moved for summary judgment, an order of reference, a default judgment against the non-appearing defendants, dismissal of Mason's counterclaim, a discontinuance against Goldman and other relief (NYSCEF Doc No. 34).

US Bank submits an affidavit from Alfreda Johnson (Johnson), a Foreclosure

Specialist at Fay Servicing, LLC (Fay), the purported attorney-in-fact for US Bank<sup>1</sup> and servicing agent of the mortgage loan, who attests that “[t]he statements made in this Affidavit are based on my personal knowledge, which is obtained through review of Fay’s business records made in the ordinary course of business” (NYSCEF Doc No. 35 at ¶ 4). Johnson attests that servicing was transferred from Ocwen Loan Servicing, LLC (Ocwen), to Fay effective June 25, 2015, and “[a]t the time of service transfer, Fay received servicing documents and information related to the Borrower’s loan from Ocwen, including, but not limited to, a complete payment history, servicing notes, and correspondence to and from Borrower[,]” all of which were incorporated into Fay’s business records (*id.* at ¶¶ 5-7).

Johnson submits copies of the note, the mortgage and the HUD-1 statement from the closing of the mortgage loan (*id.* at ¶¶ 8-10; *see also* NYSCEF Doc Nos. 36, 37 and 38). Johnson attests that “[t]he Loan Records reflect that the original Loan Documents were physically delivered to Plaintiff’s custodian, US Bank, on **March 21, 2017**” and “Plaintiff is the current owner and holder of the Note and Mortgage and has been in physical possession of these documents prior to and on the date of commencement of this action on January 2, 2019” (NYSCEF Doc No. 35 at ¶ 11).

Johnson further attests that “[t]he Loan Records reflect that Borrower breached h[is] payment obligation pursuant to the Loan Documents by failing to tender the installment which became due and payable on July 1, 2008 and has failed to make all subsequent

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<sup>1</sup> Notably, US Bank fails to submit a power of attorney between it and Fay evidencing that Fay is authorized to speak and act on US Bank’s behalf.

payments due thereafter” (*id.* at ¶ 15 [emphasis added]). Notably, while Johnson attested that Fay began servicing the loan in 2015, and that Ocwen’s business records were integrated into Fay’s records, US Bank fails to produce the payment history of the loan or any business records evidencing Goldman’s July 1, 2008, payment default.

US Bank also submits an attorney affirmation asserting that US Bank commenced this action “within six months of the dismissal of the 2009 Foreclosure Action, on January 2, 2019 . . .” (NYSCEF Doc No. 41 at ¶ 6). US Bank’s counsel explains that all necessary defendants were served with process except for Goldman, the borrower, because “[d]espite repeated attempts and due diligence, Plaintiff was unable to serve Borrower” (*id.* at ¶ 7). Consequently, US Bank seeks to discontinue this action against Goldman (*id.* at ¶ 22).

### ***Mason’s Summary Judgment Cross-Motion***

On February 27, 2020, Mason opposed US Bank’s summary judgment motion and cross-moved for summary judgment dismissing the complaint based on the expiration of the statute of limitations and granting her counterclaim, pursuant to RPAPL § 1501 (4), declaring that the mortgage and note are unenforceable (NYSCEF Doc No. 59).

Defense counsel submits an affirmation elaborating on the fraud perpetrated by Goldman on homeowners, like Mason:

“[a]ccording to a press release issued by the New York State Attorney General’s office on December 6, 2011, defendant Goldman was the former owner of Rivertown Investments LLC, which perpetrated a scheme to defraud homeowners in financial distress. Defendant Goldman solicited homeowners, such as Ms. Mason, to sell their homes and in exchange, he would agree to lease the homes back to them and apply the net

equity as a down payment on their eventual repurchase of the homes. Defendant Goldman was arrested and convicted in December 2011 of grand larceny and scheming to defraud homeowners. He was sentenced to a prison term of 4-12 years and was ordered to pay over \$5.6 million in restitution to Ms. Mason and several other individuals . . .” (NYSCEF Doc No. 60 at ¶ 7).

Defense counsel also describes the 2009 Foreclosure Action commenced by BAC, in which neither Mason nor Goldman answered or otherwise responded to the complaint (*id.* at ¶¶ 9-10). Defense counsel recounts that BAC made an untimely motion for a default judgment and an order of reference on or about June 14, 2016, *more than six years after* it commenced the 2009 Foreclosure Action, and Mason cross-moved to dismiss the complaint based on BAC’s delay in moving for a default judgment (*id.* at ¶¶ 11-12).

Defense counsel submits the July 12, 2018, decision and order from the court granting Mason’s cross-motion and dismissing the complaint in the 2009 Foreclosure Action, pursuant to CPLR 3215 (c), since “Plaintiff allegedly served the summons and complaint in mid-2009 and failed to seek a default until June 2016 (or even file an RJI until July 2015...)”; “Plaintiff fails to offer a sufficient explanation for the delay”; and “[n]one of counsel’s speculation as to its predecessor’s failure to act is availing and, even if true, would not justify the failure to proceed” (*id.* at ¶ 12 and NYSCEF Doc No. 70).

Mason submits a memorandum of law arguing that dismissal is warranted because “this action was commenced more than *nine years* after the mortgage debt was accelerated when [the 2009] foreclosure action was commenced. . .” (NYSCEF Doc No. 75 at 1). Mason contends that CPLR 205 (a)’s “savings provision” is not applicable “as the

provision expressly excludes from its six-month savings provision ‘a dismissal for neglect to prosecute the action’” and this includes dismissal under CPLR 3215 (c) (*id.* at 8).

Alternatively, Mason argues that if the action is not dismissed, US Bank’s summary judgment motion should be denied because there are issues of fact that preclude summary judgment, including US Bank’s standing to foreclose (*id.* at 10-11). Mason argues that “[a]lthough a copy of the purported note in this action was attached to the complaint, plaintiff has failed to demonstrate that it was validly transferred to it . . .” (*id.* at 12). Mason also asserts that “the copy of the note includes an allonge after the last page of the note itself, and plaintiff has not demonstrated that it was firmly affixed to the note” (*id.*).

#### ***US Bank’s Opposition to the Cross-Motion***

US Bank, in opposition to the cross-motion and in reply, submits a memorandum of law asserting that “[n]on-Borrower Defendant failed to cite any case law or statutory authority to support her argument that a dismissal under CPLR 3215 (c) specifically constitutes a general pattern of neglect to prosecute under CPLR 205 (a)” (NYSCEF Doc No. 82 at 3). US Bank argues that “the Dismissal Order does not identify any general pattern of delay, disobeying of Court Orders or any other repeated acts of non-compliance beyond merely failing to move for a default judgment” and thus “the Dismissal Order does not fall within an exception to the Savings Provision as a matter of law” (*id.* at 5).

US Bank asserts that “since the Court dismissed the 2009 Foreclosure Action pursuant to CPLR 3215 (c), Plaintiff was able to rely on the Savings Provision and had until April 23, 2019 to file a new foreclosure action” and “on January 2, 2019, within the

Savings Provision, Plaintiff timely commenced the 2019 Foreclosure Action” (*id.* at 6). For these reasons, US Bank argues that Mason’s summary judgment cross-motion should be denied and there is no basis to quiet title to the Property, pursuant to RPAPL § 1501 (4) (*id.* at 7-8).

### 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]).

The Foreclosure Abuse Prevention Act (FAPA) amended CPLR 205-a (a), the six-month savings statute, effective December 20, 2022, which explicitly provides that:

“[i]f an action upon [a note and mortgage] is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, ***a dismissal of the complaint for any form of neglect*** . . . for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the

merits, *the original plaintiff*, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, *may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination . . .*” (emphasis added).

“[T]o determine whether the new savings provision applies, a court must apply the three-part test of C.P.L.R. § 205-a to the immediately prior action that terminated outside the statute of limitations. If that immediately prior action (1) was timely filed, (2) *was filed by the same plaintiff* as the plaintiff in the present action, and (3) terminated for a reason not listed in the statute, the plaintiff may invoke the savings provision to gain one final chance to pursue the foreclosure action” (*Windward Bora LLC v Sotomayor*, 113 F4th 236, 242-243 [2d Cir. 2024] [emphasis added]).

Importantly, in *ACE Sec. Corp. v DB Structured Prods., Inc.*, (38 NY3d 643, 647 [2022]), the Court of Appeals held that the savings provision is explicitly and exclusively bestowed on “the original plaintiff” who prosecuted the first action and cannot be invoked by another entity different than the plaintiff in the prior dismissed action. Notably, the original plaintiffs in *ACE Sec. Corp. v DB Structured Prods., Inc.*, were two certificateholders of 25% of the mortgage loan trust’s voting certificates, RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC (38 NY3d at 648). When the action commenced by the certificateholders was dismissed, HSBC, as trustee of the mortgage loan trust, sought to revive the certificateholder’s initial action pursuant to the savings statute. The Court of Appeals held that the savings statute applies only where the second action is

commenced by the same plaintiff as the first action because the legislature did not intend for it to “broadly allow any entity seeking to vindicate the “same rights” as the original plaintiff to benefit from the savings statute (*id.* at 652).

Here, the six-year statute of limitations began to accrue when BAC filed the summons and complaint in the 2009 Foreclosure Action on June 17, 2009, and it ran for six years until June 17, 2015, prior to US Bank’s commencement of this foreclosure action on January 2, 2019. The savings statute set forth in CPLR 205-a (a) is inapplicable and cannot be invoked by US Bank because it was not the “original plaintiff” in the 2009 Foreclosure Action, as required by the new law. As the Court of Appeals held in *ACE Sec. Corp. v DB Structured Prods., Inc.*, (38 NY3d at 652), it is irrelevant that US Bank is seeking to vindicate the same rights as BAC because they both represent the same mortgage trust; the savings statute does not apply to anyone other than the original plaintiff, as a matter of law.

Consequently, dismissal if this 2019 complaint is warranted based on the expiration of the statute of limitations, the enactment of FAPA, the amendment of CPLR 205-a (a) and the Court of Appeals’ dispositive holding in *ACE Sec. Corp. v DB Structured Prods., Inc.*, (38 NY3d 643, 647 [2022]). Mason is entitled to a judgment in her counterclaim quieting title to the Property and declaring that the mortgage is canceled and discharged, pursuant to RPAPL 1501 (4). Accordingly, it is hereby

**ORDERED** that Mason’s cross-motion (mot. seq. two) is only granted to the extent that: (1) Mason’s summary judgment cross-motion to dismiss the 2019 complaint with

prejudice based on the expiration of the six-year statute of limitations is granted, this action is dismissed with prejudice and the notice of pendency filed against the Property is vacated; and (2) Mason's counterclaim for a judgment declaring that the \$462,150.00 mortgage encumbering the Property and recorded on June 1, 2009, under CRFN 2009000162716 in the Office of the City Register is null and void, is granted, pursuant to RPAPL 1501 (4), and the mortgage shall be expunged from the Property records; the motion is otherwise denied; and it is further

**ORDERED** that US Bank's motion (mot. seq. one) is denied as moot.

This constitutes the decision and order of the court.

April 24, 2025

E N T E R,



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