

U.S. Bank N.A. v Cohen

2025 NY Slip Op 31628(U)

April 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 523781/17

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 __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 TRUSTEE
FOR HARBORVIEW MORTGAGE LOAN TRUST
2003-10, MORTGAGE LOAN PASS-THROUGH
CERTIFICATES, SERIES 2005-10,

Plaintiff,

- against -

Index No. 523781/17

MOSHE COHEN; ANGELA BROWN; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., AS
NOMINEE FOR COUNTRYWIDE BANK, A DIVISION
OF TREASURY BANK, N.A.; DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT;
CITY OF NEW YORK ENVIRONMENTAL CONTROL
BOARD; CITY OF NEW YORK PARKING VIOLATIONS
BUREAU; CITY OF NEW YORK TRANSIT
ADJUDICATION BUREAU; "JOHN DOE"; "JANE DOE";
"JOHN DOE"; "JOHN DOE"; "JOHN DOE";
"JOHN DOE"; "JOHN DOE"; "JOHN DOE";
"JOHN DOE"; "JOHN DOE,"

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) _____
Reply Affidavits (Affirmations) _____

100, 102-109 110-123
110-123 125
125 126

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 7264 Bergen Court in Brooklyn (Block 8373, Lot 68) (Property),

plaintiff U.S. Bank National Association, as Trustee for Harborview Mortgage Loan Trust 2005-10, Mortgage Loan Pass-Through Certificates, Series 2005-10 (US Bank or Plaintiff) moves (in motion sequence [mot. seq.] three), for an order granting it a Judgment of Foreclosure and Sale (NYSACEF Doc No. 100).¹

Defendant Angela Brown (Brown) cross-moves (in mot. seq. four) for an order: (1) denying Plaintiff's motion; (2) vacating the October 28, 2019 order granting Plaintiff summary judgment and a default judgment against the non-appearing defendants and the October 28, 2019 Order of Reference, pursuant to CPLR 5015 (a), and dismissing this action, pursuant to CPLR 3211 (a) (2); or (3) granting Brown leave to renew her opposition to US Bank's motion for summary judgment and an order of reference, and, upon renewal, denying Plaintiff's motion; or, alternatively, (4) staying this proceeding pending the judgment after inquest in the matter under index No. 516387/20 (NYSCEF Doc No. 110).

Background

On December 11, 2017, US Bank commenced this action to foreclose a mortgage encumbering the Property by filing a summons, a complaint and a notice of pendency (NYSCEF Doc Nos. 1-3). The complaint alleges that defendant Moshe Cohen (Cohen) made a \$532,000.00 note in favor of Countrywide Bank, a Division of Treasury Bank, N.A., on July 21, 2005, which was secured by a mortgage encumbering the Property (NYSCEF Doc No. 2 at ¶¶ 4-5). The complaint alleges that Cohen "failed and neglected to

¹ From the balance of US Bank's moving papers, it is clear that US Bank also seeks an order confirming the February 28, 2022 Referee's Report (*see* NYSCEF Doc No. 102-109).

comply with the conditions of said mortgage, bond or note by omitting and failing to pay the monthly payments of principal, interest, taxes, assessments, water rates, insurance premiums, escrow and/or other charges . . .” on April 1, 2017 (*id.* at ¶ 8 and Schedule C at 11). The complaint alleges that Plaintiff has complied with RPAPL § 1304 (*id.* at ¶ 18).

On January 16, 2018, Defendant Brown, who resides at the Property, answered the complaint, denied the material allegations therein and asserted affirmative defenses, including failure to comply with RPAPL § 1304 (NYSCEF Doc No. 21).

On April 9, 2019, US Bank moved for summary judgment, an order of reference and a default judgment against the non-appearing defendants (NYSCEF Doc No. 47). Brown opposed US Bank’s summary judgment motion arguing that US Bank acted in bad faith because it failed to modify the mortgage after Brown made three trial payments (NYSCEF Doc Nos. 69 and 70).

By an October 28, 2019, decision and order, the court (Dear, J.) granted US Bank’s motion and held that “Defendant Brown’s arguments regarding a trial modification would be irrelevant even if she were the borrower (she is not) and demonstrated that the payments thereunder were timely made (she has not)” (NYSCEF Doc No. 74). On October 28, 2019, the court issued an “Order Granting Summary/Default Judgment” and an order of reference appointing a referee to compute the amounts due and owing to Plaintiff and to ascertain whether the Property could be sold in one parcel (NYSCEF Doc No. 75). Notably, the court struck and dismissed Brown’s answer to the complaint (*id.* at 2).

US Bank's Instant Motion

On March 30, 2022, US Bank moved for an order granting it a judgment of foreclosure and sale and to confirm the Referee's Report (NYSCEF Doc No. 100 and 104). US Bank submitted an attorney affirmation (NYSCEF Doc No. 104) referencing documents, including an *illegible* copy of the Referee's Oath and February 28, 2022, "Report of Amount Due to the Plaintiff" with exhibits thereto, *most of which are illegible* (*see* NYSCEF Doc No. 106). US Bank's counsel asserts that:

“[t]he Referee's Report dated February 28, 2022 annexed hereto as Exhibit 'B' shows the amount of principal, interest and other charges accruing under the Note and Mortgage then due Plaintiff to be the sum of \$575,123.93 as of November 1, 2021, plus a per diem interest for every day thereafter” (NYSCEF Doc No. 104 at ¶ 5).

Brown's Cross-Motion

On April 29, 2022, Brown cross-moved for an order denying US Bank's motion, vacating the October 28, 2019 decision and order and Order of Reference and dismissing this action, pursuant to CPLR 3211 (a) (2), or granting her leave to renew her opposition to US Bank's summary judgment motion, or , alternatively, staying this action pending a judgment in the matter under index No. 516387/20 (NYSCEF Doc No. 110).

Brown submitted an affidavit explaining that she has resided at the Property with her son, Ian Duncan, since 2011, at which time they were defrauded into purchasing the Property from the defendant borrower, Moshe Cohen, in exchange for a \$63,000.00 deposit (NYSCEF Doc No. 122 at ¶¶ 15-18). Brown attests that Cohen “further promised that he

would assist us in improving our credit and completing a re-finance whereby we could, then, pay-off the existing Mortgage on the Premises” and “under the guise of trying to comply with his promise to help me repair my credit, he referred me to a sham ‘credit repair company’ which I believe was controlled by him, but which did nothing more than ruin my credit” (*id.* at ¶¶ 12 and 18). Brown attests that “[s]ubsequent to the 2011 deed, while my son and I were waiting for Mr. Cohen to go forward with what he represented to us, I made payments towards his Mortgage, doing everything in my power to protect my home” but Brown defaulted when the Property needed extensive repairs (*id.* at ¶¶ 22-23). When Cohen failed to appear and defend this foreclosure action, Brown retained defense counsel (*id.* at ¶¶ 25-26).

Defense counsel submits an affirmation explaining that after Cohen purported to sell the Property to another entity, Bergenc 18 Development Inc., in November 2018, Brown filed a formal complaint with the New York City Sherriff’s office against Cohen (NYSCEF Doc No. 111 at ¶¶ 12-13). Defense counsel explains that, on September 2, 2020, Brown and her son commenced a fraud and slander of title action against Cohen in *Angela Brown and Ian Duncan v Moshe Cohen; et al.*, under Kings County index No. 516387/20 (2020 Fraud Action) and “[o]n July 14, 2021, Defendant Brown and Ian Duncan were granted judgment against Moshe Cohen on their fraud and slander of title causes of action” (*id.* at ¶ 15). Defense counsel argues that “[a] stay is warranted here, as the amount owed by Moshe Cohen will be used to cover Plaintiff’s claims herein” (*id.* at ¶¶ 76-78).

Defense counsel asserts that, under CPLR 5015 (a), courts have the power to vacate an order in the interest of justice based on the facts of the particular case (*id.* at ¶¶ 24-25). Defense counsel argues that US Bank failed to comply with RPAPL § 1304 based on caselaw from the Second Department holding that additional information cannot be sent in the same envelope as a 90-day foreclosure notice (*id.* at ¶¶ 26-31). Specifically, defense counsel relies on the Second Department’s holding in *Bank of Am., N.A. v Kessler*, 202 AD3d 10, 13 (2d Dept 2021), wherein the 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 asserts that “[w]hen moving for summary judgment, Plaintiff proffered copies of the notice dated July 7, 2017” which is “facially defective” because it “included extraneous notices, which is against the statute” (*id.* at ¶¶ 33-36). Defense counsel asserts that, in light of the *Kessler* holding, US Bank should not have been granted summary judgment and an order of reference, and thus, the October 28, 2019, Order of Reference should be vacated (*id.* at ¶ 41). Defense counsel argues that vacatur would promote the interests of justice, since defendant Cohen defrauded Brown and her son and the Property is their only home (*id.* at ¶¶ 43-44). Defense counsel also argues that “*Kessler* represents new law supporting a motion to renew . . .” and “[t]he arguments made in connection with vacatur also warrant the change of the October 28, 2019 decision and order and the order of reference” (*id.* at ¶¶ 69-74).

Defense counsel, in opposition to US Bank's motion, asserts that "Plaintiff's submission is largely illegible" and should be denied for this reason alone (*id.* at ¶ 79). Defense counsel also contends that the findings in the Referee's Report are not supported by the record because the Referee relied solely on representations made by Plaintiff's affiant, Tracy Armstrong, which is both illegible and inadmissible because it does not reference any business records (*id.* at ¶¶ 81-82; *see also* NYSCEF Doc No. 106).

US Bank's Opposition and Reply

US Bank, in opposition, submits an attorney affirmation arguing that "[i]nsofar as Defendant cross moves for vacatur and renewal, ultimately to attempt to assert a defense under RPAPL § 1304, same is without merit, as Defendant admits she is not a party to the note and mortgage . . ." because failure to comply with RPAPL § 1304 is a personal defense that cannot be asserted by a stranger to the note and mortgage (NYSCEF Doc No. 125 at ¶¶ 5-8). Counsel further argues that the Property was never defendant Cohen's principal dwelling and thus, RPAPL § 1304 is inapplicable (*id.* at ¶ 9). Regarding Brown's motion for a stay pending the outcome of the 2020 Fraud Action against Cohen, US Bank's counsel asserts that "Defendant has no right to demand Plaintiff subordinate its clear legal right to enforce the mortgage because of her presumed ability to obtain a money judgment from the borrower on the loan" (*id.* at ¶ 25).

US Bank's counsel, in reply, argues that the Armstrong fact affidavit laid a proper foundation for the business records submitted with US Bank's motion (*id.* at ¶¶ 17-21).

Notably, US Bank's counsel does not mention or even address the fact that the Armstrong fact affidavit submitted in support of its motion and the Referee's Report are both illegible.

Brown's Reply

Brown, in reply, submits an attorney affirmation arguing that [t]he contention that Defendant does not have standing to assert the argument fails" because "RPAPL §1304 is a prerequisite to any foreclosure action" and "Plaintiff's position ignores that the RPAPL § 1304 notice is not a contractual requirement, as its obligation to comply does not stem from a lender-borrower agreement, but rather, directly from the statute" (NYSCEF Doc No. 126 at ¶¶ 2-3 and 7).

Discussion

(1)

"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 [2017]). Here, the court cannot possibly review the propriety of the findings in the February 28, 2022 Referee's Report because both the document and the majority of its exhibits in the record, including the Armstrong affidavit, are extremely blurry and illegible. For this reason alone, US Bank's motion for a judgment of foreclosure and sale and to confirm the February 28, 2022, Referee's Report is denied without prejudice to renewal upon proper papers.

(2)

Brown's Cross-Motion

CPLR 2221 (e) (2) provides that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been *a change in the law* that would change the prior determination” (emphasis added). “Therefore, ‘[a] motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law’” (*JPMorgan Chase Bank, Nat’l Ass’n v Eze*, 232 AD3d 865, 866 [2d Dept 2024], quoting *Sharan v Christiana Trust*, 219 AD3d 1549, 1551 [2d Dept 2023]).

Defendants Brown’s cross-motion seeking leave to renew her opposition to US Bank’s motion for summary judgment and an order of reference and/or vacating the October 28, 2019 Order of Reference, pursuant to CPLR 5015 (a), based on US Bank’s defective 90-day foreclosure notice is denied because the Second Department holding in *Kessler* was reversed by the Court of Appeals’ subsequent decision in *Kessler* issued on February 14, 2023, after Brown’s cross-motion was *sub judice* (see *JPMorgan Chase Bank, Nat’l Ass’n v Eze*, 232 AD3d at 866 [holding that defendant was not entitled to leave to renew based on the Second Department’s holding in *Kessler* and its progeny because he failed to establish that there was a change in the law regarding strict compliance with RPAPL § 1304 that would have altered the trial court’s prior determination because the Court of Appeals issued the *Kessler* decision reversing the Second Department’s holdings]).

In *Kessler*, the New York 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 a 90-day foreclosure 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]). Thus, even if Brown has standing to assert a defense regarding RPAPL § 1304, her reliance on the Second Department’s reversed holding is misplaced.

Additionally, Brown’s motion to stay this foreclosure action is denied because she has failed to demonstrate any basis for such equitable relief since the merits of her 2020 Fraud Action against Cohen are irrelevant to US Bank’s instant foreclosure action. Accordingly, it is hereby

ORDERED that US Bank’s motion (mot. seq. three) is denied without prejudice and with leave to renew upon proper papers that are not illegible; and it is further

ORDERED that Brown’s cross-motion (mot. seq. four) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

April 24, 2025



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