

**Wilmington Sav. Fund Socy., FSB v Northward
Estates LLC**

2025 NY Slip Op 31676(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 850647/2023

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

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INDEX NO. 850647/2023

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A
CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY
BUT SOLELY AS OWNER TRUSTEE OF RESIDENTIAL
CREDIT OPPORTUNITIES TRUST II,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiff,

- v -

NORTHWARD ESTATES LLC, ABUKARRIEM SHABAZZ,
BOARD OF MANAGERS OF ST. CHARLES
CONDOMINIUM IV, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU, BCC LOAN FUNDER
LLC, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering residential real property located at 2573 Frederick Douglass Boulevard, Unit A, A/K/A 300 West 138TH Street, Unit 2573 A/K/A 2573 8TH Avenue, Unit A, New York, New York. The mortgage, dated October 22, 2022, was given by Defendant Northward Estates LLC (“Estates”) to non-party Visio Financial Services Inc. (“Visio”) to secure an indebtedness with an original principal amount of \$599,000.00. The loan is memorialized by a note dated the same as the mortgage. The loan documents were signed by Abukarriem Shabazz (“Shabazz”) as Member of Estates. Plaintiff commenced this action alleging that the Mortgagor defaulted in repayment of the loan. Defendants Estates and Shabazz answered and pled forty-eight affirmative defenses, including lack of standing, failure to comply with RPAPL §§1303, 1304 and 1306 as well as neglecting to serve a contractual pre-foreclosure notice. Defendants also pled a counterclaim for attorney’s fees. Plaintiff replied to the counterclaim.

Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for an order of reference and to amend the caption. Defendants Estates and Shabazz oppose the motion and cross-move to dismiss pursuant to CPLR §3211[a][3]. Plaintiff opposes the cross-motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Plaintiff was also obliged to establish strict compliance with, or demonstrate the inapplicability of, RPAPL §§1303, 1304 and 1306 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]).

In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No specific business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Troy Valentine ("Valentine"), an Assistant Vice President of BSI Financial Services, Inc. ("BSI"), the alleged servicer for Plaintiff. Valentine avers that his affidavit is based on personal knowledge BSI's record keeping practice as well as a review of those records. Valentine's affidavit laid a proper foundation for the admission BSI's records into evidence under CPLR §4518 by sufficiently showing that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record[s][were] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] [were] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Valentine established that those records were received from the makers and incorporated into the records BSI kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Valentine were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). BSI's authority to act on Plaintiff's behalf was established with submission of a limited power of attorney, dated April 18, 2017 (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

Valentine's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *see also Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the

plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). Here, annexed to Valentine's affidavit were two written assignments of the mortgage, both dated before the action was commenced. Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]), both assignments provide the mortgage was transferred "TOGETHER with the Bond, Note or other Obligation therein described". This language sufficiently established conveyance of the note and rendered any issues concerning the allonges and physical delivery of the note irrelevant (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]). Accordingly, Plaintiff established its entitlement to summary judgment on its cause of action for foreclosure against the answering Defendants.

The moving papers also establish the affirmative defense pursuant to RPAPL §1303[1][a] is inapplicable as the subject property was not an "owner-occupied" dwelling as the owner is a limited liability company. With respect to notice required by RPAPL §1303[1][b], Defendants failed to plead the existence of tenants at the premises at issue. In any event, the affidavits of service of the pleadings demonstrate compliance with RPAPL §1303. RPAPL §1304 is inapplicable to this action as the encumbrance is not a residential mortgage, to wit the borrower was not a "natural person" and debt was not incurred by the borrower primarily for "personal, family, or household purposes" (*see* RPAPL §1304[6][a][1][i] and [ii]; *Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). Since RPAPL §1304 is inapplicable, compliance with RPAPL §1306 was not required (*see* RPAPL §1306[1]). Concerning the contractual pre-foreclosure notice required by paragraph 22 of the mortgage, Valentine's affidavit and the annexed documents showed substantial compliance therewith (*see generally HSBC Bank USA, N.A. v Ozcan*, 154 A.D.3d 822, 827 [2d Dept 2017]).

In opposition, Defendants' claim that Plaintiff failed to lay a proper foundation under CPLR §4518 is ineffective. The affidavit and proffered business documents were all in admissible form. Further, since none of the salient facts on the issues of the note, mortgage and the default were contradicted by any of the appearing Defendants, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]). The arguments concerning standing, authority to action and statutory notice fail for the reasons stated supra.

As to the branch of Plaintiff's motion to dismiss Defendants' affirmative defenses and counterclaims, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

All the affirmative defenses and counterclaims are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is insufficiently pled as a matter of law

(see *Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; see also *Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; see also *Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). To the extent that no specific legal argument was proffered in support of a particular affirmative defense or claim, they were abandoned (see *U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]). Since the counterclaims are largely reflective of the affirmative defenses, those claims fail as well (see *Deutsche Bank, NA v Marino*, ___AD3d___, 2025 NY Slip Op 00374 [1st Dept 2025]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (see CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (see generally CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its foreclosure claim against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that Defendants' cross-motion to dismiss is denied; and it is further

ORDERED that the affirmative defenses and counterclaims pled by all the appearing Defendants are dismissed; and it is further

ORDERED that **Paul Sklar, Esq., 551 5th Avenue, Ste 2200, New York, New York 10176-0001- (212) 972-8845** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that the "John Doe" and "Jane Doe" defendants are removed as party defendants as the New York County Clerk will not accept any judgment for filing with a "Doe" defendant in the caption; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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WILMINGTON SAVINGS FUND SOCIETY, FSB,
D/B/A CHRISTIANA TRUST, NOT IN ITS
INDIVIDUAL CAPACITY BUT SOLELY AS OWNER
TRUSTEE OF RESIDENTIAL CREDIT
OPPORTUNITIES TRUST II,

Plaintiff,

-against-

NORTHWARD ESTATES LLC; ABUKARRIEM
SHABAZZ, AS MEMBER OF NORTHWARD
ESTATES LLC; BOARD OF MANAGERS OF ST.
CHARLES CONDOMINIUM IV; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
NEW YORK CITY DEPARTMENT OF FINANCE;
NEW YORK CITY PARKING VIOLATIONS
BUREAU; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD; NEW YORK CITY TRANSIT
ADJUDICATION BUREAU; BCC LOAN FUNDER
LLC,

Defendants.

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and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may sua sponte vacate this order and direct Plaintiff to move again for an order of reference and the Court may sua sponte toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on August 6, 2025, at 10:00 a.m. If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/3/2025
DATE


FRANCIS KAHN, III, A.J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NOT FINALLY DISPOSED
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	SUBMIT ORDER
				FIDUCIARY APPOINTMENT
				REFERENCE

HON. FRANCIS A. KAHN III
J.S.C.