

RBS Citizens, N.A. v Manheimer

2025 NY Slip Op 31833(U)

May 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 502682/16

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 20th day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X
RBS CITIZENS, NATIONAL ASSOCIATION, SUCCESSOR
BY MERGER TO CHARTER ONE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

- against -

Index No. 502682/16

CHAIM MANHEIMER a/k/a CHAIM J. MANHEIMER;
FAY MANHEIMER; ASTORIA FEDERAL SAVINGS
AND LOAN ASSOCIATION; MERRILL LYNCH BUSINESS
FINANCIAL; CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD; CITY OF NEW YORK PARKING
VIOLATIONS BUREAU; CITY OF NEW YORK TRANSIT
ADJUDICATION BUREAU and "JOHN DOE", said name
being fictitious, it being the intention of Plaintiff to
designate any and all occupants of premises being
foreclosed herein, and any parties, corporations or
entities, if any, having or claiming an interest or lien
upon the mortgaged premises,

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) _____

43, 45-65 71-77
72-77 78-80
78-80

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 915 East 23rd Street in Brooklyn (Block 7587, Lot 40) (Property),

plaintiff RBS Citizens, National Association, Successor by Merger to Charter One Bank, National Association (RBS or Plaintiff) moves (in motion sequence [mot. seq.] one) for an order: (1) granting it summary judgment against Defendants Chaim Manheimer and Fay Manheiner (Manheiner Defendants), pursuant to CPLR 3212; (2) granting it a default judgment against all non-appearing and non-answering defendants, pursuant to CPLR 3215; (3) appointing a referee to compute the amount due to Plaintiff, pursuant to RPAPL § 1321; and (4) amending the caption to eliminate the John Doe defendant (NYSCEF Doc No. 43).

The Manheimer Defendants cross-move (in mot. seq. two) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint (NYSCEF Doc No. 71).

Background

On February 26, 2016, RBS commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-3). The complaint alleges that on September 29, 2003, the Manheimer Defendants executed and delivered to Astoria Federal Savings and Loan a \$400,000.00 promissory note, which was secured by a consolidation, extension and/or modification agreement (CEMA) encumbering the Property (NYSCEF Doc No. 2 at ¶¶ 4-5 and Schedules C and D). The complaint alleges that the Manheimer Defendants “have failed and neglected to 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 August 1, 2010 (*id.* at ¶ 8 and Schedule C).

On April 6, 2016, the Manheimer Defendants collectively answered the complaint, denied the material allegations therein and asserted counterclaims and affirmative defenses, including that “Plaintiff has failed to meet the legal requirements that are conditions precedents to bringing a mortgage foreclosure action by amongst other things, upon information and belief, failing to deliver to defendants a notice of default” (NYSCEF Doc No. 19 at ¶ 7).

The remaining defendants, all of whom were served with process in March 2016 (NYSCEF Doc Nos. 5, 7-9, 11), failed to answer or otherwise respond to the complaint.

On July 9, 2019, a status conference was held, after which the court issued a July 26, 2019, decision and order noting that “[t]here has been a significant period of inactivity in prosecuting this action” and ordering that “Plaintiff must resume prosecution of this action . . . within 90 days . . .” and “if Plaintiff fails to do so, the Court will consider tolling interest for the period of inactivity” (NYSCEF Doc No. 41).

RBS’s Summary Judgment Motion

On October 24, 2019, *more than three years after* RBS commenced this foreclosure action, and exactly 90 days after the court issued the July 26, 2019, decision and order, RBS moved for summary judgment, an order of reference and a default judgment against the non-answering defendants (NYSCEF Doc No. 43).

RBS submits an “Affidavit of Merit and Amounts Due” from Regina Irving-Francois (Irving-Francois), an officer of Bank of America N.A. (BANA), the servicer of the loan, based on her review of BANA’s servicing records (NYSCEF Doc No. 48 at ¶¶ 1 and 4). RBS also submits an “Affidavit of Servicing” from Cameka Edwards, Assistant Vice President of BANA, who attests that BANA has serviced the subject loan since January 20, 2004 (albeit, in the names of its predecessors by merger), and “as servicer, BANA is authorized to execute affidavits and take all necessary and reasonable actions to complete this foreclosure proceeding on Plaintiff’s behalf” (NYSCEF Doc No. 59 at ¶¶ 4-5). Irving-Francois attests to the execution of the note and CEMA based on her review of BANA’s business records (NYSCEF Doc No. 48 at ¶¶ 5-6). Based on her review of BANA’s “Account Information Statement” in the servicing records maintained by BANA (NYSCEF Doc No. 51), Irving-Francois attests that “the borrower defaulted on the Loan by failing to make Monthly Payments due on August 1, 2010, and continuing to the present” and “[t]he unpaid principal balance due on the Loan is \$263,414.75 . . .” (NYSCEF Doc No. 48 at ¶ 7). Irving-Francois attests that “[t]he business record attached as Exhibit 3 is a notice of default dated September 16, 2010, which was mailed to the Borrower(s)” (*id.* at ¶ 8 and NYSCEF Doc No. 52). RBS submits an “Affidavit of Mailing” by Teylore Laurice Bratton, Assistant Vice President of BANA, who affirms to the mailing of the Notices of Default and the 90-Day pre-foreclosure notices (NYSCEF Doc No. 49).

Regarding the 90-day notice, pursuant to RPAPL § 1304, Irving-Francois attests that “[a]ccording to the business records I have reviewed, a 90 day notice, in at least 14

point type, was served via certified mail and also by first class mail, on [March 24, 2015] to the borrower(s) at their last known address, and, if different, to the subject premises . . .” and “the notice was mailed in a separate envelope from any other mailing or notice BANA sent the borrower(s)” (NYSCEF Doc No. 48 at ¶¶ 11-12). RBS submits copies of its March 24, 2015, 90-day notices as Exhibit 4 (NYSCEF Doc No. 53).

The Manheimer Defendants’ Cross-Motion

On March 14, 2022, just after the Covid-19 pandemic, the Manheimer Defendants opposed RBS’s summary judgment motion and cross-moved for summary judgment dismissing the complaint (NYSCEF Doc No. 71). Chaim Manheimer and Fay Manheimer each submit an affidavit containing the same conclusory claims that “I never received the 90-day notices Plaintiff is alleging it sent[,]” “I never signed for or completed any return receipts that the Plaintiff is alleging was signed by me in connection with the 90 days notices” and “I never received the notice of default Plaintiff is alleging it sent” (NYSCEF Doc Nos. 73 at ¶¶ 6-8 and 74 at ¶¶ 6-8).

Defense counsel submits an affirmation asserting that the Manheimer Defendants’ summary judgment motion seeking dismissal of the complaint should be granted because “the alleged 90 day notices submitted by Plaintiff fail to comply with RPAPL 1304 on their face” (NYSCEF Doc No. 72 at ¶ 6). Specifically, defense counsel asserts that “Plaintiff annexes to its motion the alleged 90 day notices, which utterly fail to comply with RPAPL 1304 as they appear to have the inclusion of non-statutory material in the same envelope sent to the borrower [which] constitutes a violation of the separate envelope requirement

of RPAPL 1304 (2)” (*id.* at ¶ 8). Defense counsel relies on the Second Department’s holdings in *Bank of Am., N.A. v Kessler*, 202 AD3d 10, 13 (2d Dept 2021) and *Wells Fargo Bank, N.A. v DeFeo*, 200 AD3d 1105, 1107 (2d Dept 2021), 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 further argues that RBS failed to evidence its compliance with RPAPL § 1304 because the notices at issue here were mailed by BAC, BANA’s predecessor by merger (*id.* at ¶¶ 22-23).

Discussion

(I)

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]).

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 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]).

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, RBS satisfied its prima facie burden by producing the promissory note, the CEMA and admissible evidence of the Manheimer Defendants’ payment default based on

BANA's "Account Information Statement" in the record. RBS also demonstrated, prima facie, that it complied with the requirements of RPAPL § 1304 by submitting admissible evidence that BAC, BANA's predecessor by merger, mailed the RPAPL § 1304 notice to the Manheimer Defendants by both certified and by first-class mail by submitting testimony regarding the standard mailing practice regarding 90-day foreclosure notices and submitting copies of the 90-day notices that were mailed to the Manheimer Defendants. 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]).

Furthermore, defense counsel's reliance on the Second Department's holdings in *Kessler* and *DeFeo* 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' summary judgment 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*, RBS's RPAPL § 1304 notices were proper, despite the fact that they included additional information. Consequently, for the foregoing reasons, the Manheimer Defendants' summary judgment cross-motion is denied and those branches of RBS's motion seeking summary judgment and an order of reference are granted.

(2)

RBS also moves for a default judgment against the non-appearing defendants *nearly three years after* they defaulted in April 2016 by failing to answer or otherwise respond to the complaint. RBS's affidavits of service in the record reflect that all of the defendants were served with process in March of 2016, and thus, their answers were due in April 2016. CPLR 3215 (c) explicitly provides that:

“[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall dismiss the complaint as abandoned*, without costs, upon its own initiative or on motion, *unless sufficient cause is shown* why the complaint should not be dismissed” (emphasis added).

Where a plaintiff fails to seek leave to enter a default judgment within one year after a party's default, the plaintiff must show “sufficient cause,” which requires the plaintiff to demonstrate both a reasonable excuse for the delay and a meritorious cause of action (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2d Dept 2011]; *First Nationwide Bank v Pretel*, 240 AD2d 629, 629 [2d Dept 1997]). The determination of whether an excuse is reasonable is within the sound discretion of the court (*Deutsche Bank National Trust Co. v Bakarey*,

198 AD3d 718, 721 [2d Dept 2021]; *Deutsche Bank National Trust Co. v Charles*, 186 AD3d 454, 456 [2d Dept 2020]).

The Second Department has clarified that, if plaintiff fails to demonstrate a reasonable excuse for the delay and a meritorious cause of action, CPLR 3215 (c) explicitly provides that the complaint “shall” be dismissed, which is not discretionary, but mandatory (*Deutsche Bank National Trust Company v Watson*, 199 AD3d 879, 880 [2d Dept 2021]; *US Bank National Assoc. v Davis*, 196 AD3d 530, 533 [2d Dept 2021]; *HSBC USA, National Assoc. v Grella*, 14 AD3d 669 [2d Dept 2016]). “The policy underlying the statute is ‘to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims’” (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764 [2d Dept 2015] [quoting *Giglio*, 86 AD3d at 307]).

Here, RBS has failed to provide any excuse for its untimely motion for a default judgment against the defaulting defendants, which mandates dismissal of this action as abandoned against those defendants, as a matter of law. Accordingly, it is hereby

ORDERED that RBS’s motion (mot. seq. one) is only granted to the extent that summary judgment is granted against the Manheimer Defendants and RBS is entitled to an order of reference, which shall be settled on notice, and the caption is amended to eliminate the John Doe defendant; RBS’s motion is otherwise denied; and it is further

ORDERED that this action is dismissed as against the non-answering defendants, Astoria Federal Savings and Loan Association, Merrill Lynch Business Financial, City of New York Environmental Control Board, City of New York Parking Violations Bureau

and City of New York Transit Adjudication Bureau, pursuant to CPLR 3215 (c); and it is further

ORDERED that the Manheimer Defendants' summary judgment cross-motion (mot. seq. two) is denied.

This constitutes the decision and order of the court.

E N T E R,



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

[*11]