

U.S. Bank Trust, N.A. v Newman

2025 NY Slip Op 32032(U)

June 3, 2025

Supreme Court, Kings County

Docket Number: Index No. 523293/2018

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3 day of June, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS, CPA,

Justice.

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U.S. BANK TRUST, N.A. AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff(s),

-against-

YEHOSHUA NEWMAN, SIMA NEWMAN, et al.,

Defendant(s).
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ORDER

Motion Calendar: 6/28/2022

Motion Cal. #(s): 48

Index #: 523293/2018

Mot. Seq. #(s): 3

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affidavits (Affirmations) and Exhibits _____	_____ 83-92 _____
Opposing Affidavits (Affirmations) and Exhibits _____	_____ 93-94 _____
Reply Affidavits (Affirmations) and Exhibits _____	_____ 95-98 _____

This is an action, inter alia, to foreclose on the consolidated mortgages encumbering the residential real property known as 1135 East 32nd Street, Brooklyn, NY 11210. Defendants-mortgagors YEHOSHUA NEWMAN and SIMA NEWMAN (collectively, “Defendants”) now move, in motion sequence (“mot. seq.”) #3, to vacate the Note of Issue and Certificate of Readiness filed by Plaintiff on September 10, 2021.

Conferences were conducted on May 1, 2019 and May 28, 2019 (*see* NYSCEF Doc. #s 13-14). Thereafter, Plaintiff moved, in mot. seq. #1, for summary judgment and an order of reference, and Defendants cross-moved, in mot. seq. #2, for summary judgment dismissing the complaint. By order dated December 2, 2019 (entered December 6, 2019), the Court (Noach Dear, J.) denied both motions and directed the “[p]arties to complete discovery and proceed to trial” (*see* NYSCEF Doc. #63). Approximately three months later, the COVID-19 pandemic caused a brief shutdown of the court system and the enactment of multiple foreclosure moratoria

through January of 2022. During the interim, Plaintiff retained new counsel and e-filed a consent to change attorney form on June 22, 2021 (*see* NYSCEF Doc. #68), and e-filed the Note of Issue and Certificate of Readiness on September 10, 2021 (*see* NYSCEF Doc. #72).

Defendants now move to vacate the Note of Issue. The Uniform Rules for Trial Courts provide that within 20 days after service of a note of issue and certificate of readiness, a party “may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect” (22 NYCRR 202.21 [e]). “Where a party’s motion to vacate a note of issue is timely, ‘the party is required only to demonstrate why the case is not ready for trial’” (*Reardon v Macy’s, Inc.*, 191 AD3d 712, 714 [2d Dept 2021] [alterations omitted]). “A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a ‘material fact’ within the meaning of 22 NYCRR 202.21 (e), and where that statement is incorrect, the note of issue should be vacated” (*Reid v Green*, 236 AD3d 945, 946 [2d Dept 2025], quoting *Jablonsky v Nerlich*, 189 AD3d 1561, 1563 [2d Dept 2020]).

As this motion by Defendants is timely, having been made only 17 days after Plaintiff e-filed and served the Note of Issue, they need only show why this case is not ready for trial (*see Reardon*, 191 AD3d at 714). Defendants argue that this case is not ready because no discovery has taken place, most notable of which is Plaintiff’s failure to produce a witness as per their notice of deposition served with their answer on or about January 7, 2019. Plaintiff does not dispute that it did not produce a witness in accordance with Defendants’ discovery notice, nor does it contend that it timely objected to the demand. Instead, Plaintiff argues that Defendants made no effort to obtain discovery, thereby impliedly waiving same, because they cross-moved for summary judgment without the very discovery of which they now complain, and did not raise the issue until now. Defendants counter that they did not waive discovery but rather, they participated in settlement conferences until the end of May 2019, Plaintiff moved for summary judgment shortly thereafter on July 19, 2019, against which they then cross-moved, and the Court did not issue a decision until that December. Defendants also note that the Court denied the motions because it found issues of fact regarding Plaintiff’s standing and compliance with RPAPL 1304 and, thus, ordered the parties to complete discovery. According to Defendants, they were still contemplating how best to proceed when the COVID-19 pandemic struck, essentially halting progress on most foreclosure matters, and once Plaintiff changed attorneys in

June 2021, they expected its new counsel to take some time to get up to speed on the case, but instead, Plaintiff filed the note of issue less than three months later.

On this record, the Court finds that Defendants' argument is more persuasive. Plaintiff cannot plausibly contend that there was no need for discovery when Justice Dear ordered the parties to complete discovery after he identified triable issues of fact warranting denial of their respective motions for summary judgment. In its Certificate of Readiness, Plaintiff states that "[d]iscovery now know[n] to be necessary completed" and "[t]here are no outstanding requests for discovery" (*see* NYSCEF Doc. #72, p. 2). Since it does not appear that either side took steps to comply with Justice Dear's directive, the first of those statements was untrue. The second statement was also untrue, as Plaintiff admits that it never produced a witness in response to Defendants' notice of deposition. Even if Plaintiff assumed that Defendants no longer wished to depose a witness, that does not excuse the inclusion of a false statement of material fact on the certificate of readiness, particularly where Plaintiff does not indicate that it conferred with its adversary concerning the status of discovery before filing the certificate and note of issue. These incorrect statements of material fact warrant vacatur of the note of issue (*Gigauri v One Hudson Yards Owner, LLC*, 215 AD3d 807, 808 [2d Dept 2023]; *Barrett v NY City Health & Hosps. Corp.*, 150 AD3d 949, 951-952 [2d Dept 2017]; *Moses v B & E Lorge Family Trust*, 147 AD3d 1043, 1044-1045 [2d Dept 2017]; *cf. Jablonsky*, 189 AD3d at 1562 [note of issue not stricken where, inter alia, certificate of readiness advised that an outstanding independent medical examination was scheduled for four days later and "discovery was otherwise complete"]).

Accordingly, the above-referenced motion by Defendants (mot. seq. #3) is GRANTED to the extent that it is

ORDERED, that the Note of Issue and Certificate of Readiness e-filed by Plaintiff on September 10, 2021, found at NYSCEF Doc. #72, shall be vacated; and it is further

ORDERED, that Defendant shall serve a copy of this Order upon the clerk of the trial court in accordance with 22 NYCRR 202.21 (e); and it is further

ORDERED, that the parties shall complete discovery as previously directed in the Court's order dated December 2, 2019 and entered December 6, 2019.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: June 3, 2025



Hon. Cenceria P. Edwards, JSC, CPA