

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

2025 NY Slip Op 32197(U)

June 16, 2025

Supreme Court, Kings County

Docket Number: Index No. 524250/17

Judge: Cenceria P. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 16<sup>th</sup> day of June, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,  
Justice.

-----X  
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE  
FOR GSAA HOME EQUITY TRUST 2006-12, ASSET-  
BACKED CERTIFICATES, SERIES 2006-12,

Plaintiff,

- against -

Index No. 524250/17

RAFI HAYON; BOARD OF MANAGERS OF 215 BAY  
23RD STREET CONDOMINIUM; HAMOU AIT  
MOHAMEDAMER; NASSIMA BENJAMER,

Defendants.

-----X  
The following hard copy papers read herein:

Document Nos.

Notice of Motion/Order to Show Cause/Cross	
Motion and Affidavits (Affirmations) _____	<u>80-83, 85-105 106-116 133-142, 144</u>
Opposing Affidavits (Affirmations) _____	<u>106-116 117-120 145-157</u>
Reply Affidavits (Affirmations) _____	<u>117-120 124-127 159-163</u>

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property, a condominium unit, at 215 Bay 23<sup>rd</sup> Street, Unit #2B, in Brooklyn (Block 6441, Lot 1104) (Property), plaintiff U.S. Bank National Association, as Trustee for GSAA Home Equity Trust 2006-12, Asset-Backed Certificates, Series 2006-12 (US Bank or Plaintiff) moves (in mot. seq. three) for an order: (1) confirming the Referee’s Report made in accordance with RPAPL § 1321; (2) granting it a Judgment of Foreclosure and Sale, pursuant to RPAPL § 1351; (3) directing the distribution of the sale proceeds,

pursuant to RPAPL § 1354; and (4) reforming the Property's legal description in the mortgage (NYSCEF Doc No. 80).

Defendants Rafi Hayon (Hayon or Defendant Borrower) and Board of Managers of 215 Bay 23<sup>rd</sup> Street Condominium (Condominium) collectively cross-move (in mot. seq. four) for an order, pursuant to CPLR 5015 (a) *et seq.* and the RPAPL, denying and dismissing US Bank's motion to confirm the Referee's Report on the following grounds:

“(a) pursuant to RPAPL 1321, as defendants have vigorously disputed standing and other irregularities in this matter and interposed a timely answer, so there was no actual default;

“(b) pursuant to RPAPL 1351, as the Referee's Report is flawed, see 01/15/2020 Affidavit in Opposition and in Support for the Cross-Motion, so no foreclosure and sale shall properly lie;

“(c) pursuant to RPAPL 1354, as plaintiff has not established its right to collect/be reimbursed under this section;

“(d) denying the application to reform the property description to match the improper description that was annexed to the Complaint as there is a pre-existing, legal property description, **Exhibit ‘5,’** which should be the applicable property description as filed with the New York City Department of Finance, and plaintiff has not supplied any rationale for replacing same, other than plaintiff's error in annexing a description of its own device to the Complaint;

“(e) vacating and voiding the prior Order, **Exhibit ‘7,’** as that Order was based upon numerous frauds, such as fraud under CPLR 5015 (a) (1) upon excusable default, as alleged, within one year of Notice of Entry, as such vacatur may be made in the interest of justice, see, *e.g.*, Melendez v City of New York, 271 A.D.2d 416, 706 N.Y.S.2d 132 (2d Dept. 2000); under CPLR 5015 (a) (3), due to ‘fraud, misrepresentation or other misconduct of an adverse party,’ concealing defective Note and assignments from the Court by plaintiff; and under CPLR 5015 (a) (4), as there was a lack of jurisdiction as condition

precedent under RPAPL 1304, RPAPL 1306 and CPLR 3012-b were not met, and:

“(i) plaintiff never properly denied defendants’ statute of limitations defense in the Answer, and the defense stands not specifically denied in the record, as does the defense of plaintiff’s lack of standing;

“(ii) pursuant to CPLR 3126, striking the Complaint, for commission of fraud on the Court, CDR Creances S.A.S. v Cohen, 23 N.Y.3d 307, 316-22 (2014), and failure to include in the pleadings allegations making the Court and defendant aware of the following case: Nationstar Mortgage, LLC v. Rafi Hayon et al., Index No. 508931/2016 (Kings County Supreme Court), commenced on 05/27/2016 and discontinued on 11/28/2016, see NYSCEF;

“(iii) pursuant to CPLR 3012-b, for failing to submit a sufficient Certificate of Merit at commencement, as there are numerous deficiencies or misrepresentations in NYSCEF Doc. 3, **Exhibit ‘1’**, in which plaintiff conceals the fact that the alleged ‘lost note’ was a Note for Condominium Unit 1A not 2B on this foreclosure action and the Notes involved conflict with the defective chain of title in this matter, inclusive of a missing Nationstar power of attorney;

“(iv) pursuant to the Administrative Order of the Chief Judge 548/10, as replaced by Order 431/11 and 22 NYCRR 202.12-a (f), due to the fact there is no credible affirmation by the attorneys attesting to the accuracy of the litigation documents (attesting to ‘scope of inquiry \*\*\* and accuracy \*\*\* both owner-occupied and \*\*\* non-owner-occupied residential properties’);

“(v) pursuant to 22 NYCRR 202.12a (b) *et seq.* for failure to timely file an RJI pursuant to the Rule (proof of service filed 01/15/2018 and RJI filed on 08/30/2018) and no settlement conference occurred in this matter; and

“(f) pursuant to failure of the Referee to credibly state his familiarity with the record and to articulate the calculation of the alleged debt and costs in this truncated report, **Exhibit ‘4’**, which contains errors and omissions [and]

“(g) pursuant to the alleged final assignment purportedly giving current plaintiff standing to sue never having been filed or made part of the public record for anomalous reasons (under ACRIS records, using ‘Unit 2B’ as an identifier assignment *does not* appear, but merely using block and lot numbers, the assignment appears[]), **Exhibit ‘6’**” (NYSCEF Doc No. 106).

Defendants Hayon and the Condominium also collectively move (in mot. seq. five) for an order, pursuant to CPLR 5015 (a) (3) and (a) (4), the RPAPL and CPLR 2309 (c), “vacating the Court’s Short Form Order dated 02/14/2019, entered 03/01/2019, and dismissing the Complaint . . .” (NYSCEF Doc No. 133).

### **Background**

On December 18, 2017, US Bank commenced this action by filing a summons, an unverified complaint and a notice of pendency (NYSCEF Doc Nos. 1-2). The complaint alleges that on May 4, 2006, Hayon executed and delivered a \$412,000.00 promissory note in favor of Fairmont Funding, Ltd. (Fairmont), which was secured by a mortgage encumbering his Property (complaint at ¶¶ 2 and 4). The complaint alleges that Hayon “failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on February 01, 2012 and each subsequent payment thereafter” (*id.* at ¶ 9). The complaint asserts two causes of action: (1) to foreclose the mortgage, and (2) to reform the legal description of the Property in the mortgage based on the parties’ mutual mistake, since the mortgage “was recorded without a legal description” (*id.* at ¶ 21). Notably, annexed to the complaint is an “Affidavit of Lost Note” and a copy of the Note.

On February 20, 2018, Hayon answered the complaint, denied the material allegations therein except admitted that he executed a note on or about May 4, 2006, “but

denies that the alleged copy of the Note presented, which plaintiff admits is lost and cannot be proved, is a true copy of the Note that [he] executed” (NYSCEF Doc No. 20 at ¶ 2). Hayon also asserted affirmative defenses, including failure to comply with RPAPL § 1304, lack of standing and the statute of limitations, and Hayon asserted several counterclaims. On March 2, 2018, US Bank replied to Hayon’s counterclaims (NYSCEF Doc No. 21).

All of the remaining defendants, including the Condominium, failed to appear, answer or otherwise respond to the complaint.

On August 30, 2018, US Bank moved for summary judgment, an order striking Hayon’s answer and counterclaims, an order of reference, a default judgment against the non-appearing and non-answering defendants, reforming the mortgage to reflect the correct legal description of the Property and amending the caption (NYSCEF Doc No. 23). Defendant Hayon opposed US Bank’s motion and separately moved to dismiss the complaint on various grounds, including the statute of limitations (NYSCEF Doc No. 56).

By a February 14, 2019 decision and order, the court (Dear, J.) held that US Bank established its prima facie entitlement to summary judgment, and granted its motion, including reforming the Property description in the mortgage (NYSCEF Doc No. 75). The court held that Hayon’s statute of limitations arguments “are speculative at best” because the earlier demonstrated acceleration was in 2016 and denied Hayon’s dismissal motion (*id.* at 2). Regarding the lost note, the court determined that US Bank established its prima facie entitlement to summary judgment, and held that:

“Plaintiff admits that it cannot locate the original note and proffers a lost note affidavit. ‘Pursuant to UCC 3-804, the owner of a lost note may maintain an action ‘upon due proof

of [1] his [or her] ownership, [2] the facts which prevent his [or her] production of the instrument and [3] its terms'. The party seeking to enforce a lost instrument is required to 'account for its absence'" (*U.S. Bank National Association v Cope*, 167 AD3d 965, 967 [2d Dept 2018] [internal citations omitted]). Herein Lozano attests to Nationstar's receipt of the original note in 2014 and subsequent inability to locate it. Thompson attests to the unsuccessful completion of a search for it pursuant to Nationstar's lost note procedures. She also proffers a copy of the note showing its terms. Finally, Lozano attests to Nationstar's sale of the note and mortgage to Plaintiff prior to the commencement of this action" (*id.* at 1-2).

The court also issued a February 14, 2019 Order of Reference striking Hayon's answer to the complaint, granting US Bank a default judgment against the remaining defendants, including the Condominium, dismissing Hayon's counterclaims, reforming the mortgage to include a description of the Property and appointing a referee to compute the amount due (NYSCEF Doc No. 76).

### ***US Bank's Motion to Confirm the Referee's Report***

On December 20, 2019, US Bank moved for an order confirming the November 11, 2019, Referee's Report (NYSCEF Doc No. 99) and granting it a Judgment of Foreclosure and Sale (NYSCEF Doc No. 80). The November 11, 2019, Referee's Report provides, in relevant part, that:

"I have computed and ascertained the amount due and owing to the Plaintiff under said Note and Mortgage and accordingly report, the amount now due to the Plaintiff to be the sum of \$621,254.67 as of June 04, 2019.

"That **SCHEDULE 'A'** hereto annexed is the affidavit of the Plaintiff" (NYSCEF Doc No. 99).

Schedule “A” to the Referee’s Report is the June 27, 2019, affidavit of Daphne Alexander (Alexander), a Document Execution Associate of Nationstar Mortgage LLC d/b/a Mr. Cooper (Nationstar), the servicing agent of the mortgage loan and US Bank’s attorney-in-fact. Alexander attests to the amount due based on her review of “the computerized records relating to the Mortgage Loan” copies of which are annexed to Alexander’s affidavit. Notably, US Bank submitted a copy of its Limited Power of Attorney authorizing Nationstar to act on its behalf (NYSCEF Doc No. 102).

***Defendants’ Opposition, Cross-Motion and Motion***

Defendants Hayon and the Condo Board opposed US Bank’s motion and collectively cross-moved to deny US Bank’s motion and separately moved to vacate the February 14, 2019, order granting US Bank summary judgment and an Order of Reference, pursuant to CPLR 5015 (a) (3), based on an alleged fraud on the court.

Hayon, in opposition, submitted an affidavit asserting that he is the owner of the Property and the President and Managing Member of the Defendant Condominium (NYSCEF Doc No. 107 at ¶ 1). Hayon speculates that “the Referee only signed what was put before him without really reading anything” (*id.* at ¶ 4). Hayon also asserts that the computerized business records annexed to Alexander’s affidavit, which do not include the payment history of the loan, are insufficient for the Referee and the court to ascertain the actual amount due under the mortgage:

“there are loads of disconnected spreadsheets spread through the papers, some of which have dates from prior to 02/01/2012, the alleged operative date prior to my alleged default. But, missing, however, is my alleged payment history so that the Court-and Referee-can actually calculate where I allegedly fell

short in payments. Recall, respectfully, this alleged plaintiff is three or four times removed as alleged mortgagee and the allegations that the plaintiff has actual knowledge, based upon confusing and defective documents, is specious” (*id.*).

Hayon, however, does not demonstrate that the Referee’s calculations of amounts due based on the Alexander affidavit and the spreadsheets attached thereto are incorrect.

Hayon, in support of his and the Condominium’s motion to vacate the February 14, 2019, Order of Reference, pursuant to CPLR 5015 (a) (3), submitted an affidavit asserting that US Bank defrauded the court by submitting a Lost Note Affidavit and a photocopy of the note for a different condominium unit (NYSCEF Doc No. 134 at ¶¶ 7-9 and 18), although that identical argument was previously asserted in opposition to US Bank’s motion for an order of reference and was rejected (*see* NYSCEF Doc No. 75 at 1-2). Defense counsel submits an affirmation admitting that “defendant has been arguing fraud since 2018-2020” and “[t]he instant Motion brings forward what has been long said: plaintiff has been falsely and fraudulently alleging that the Note copy annexed to the Affidavit of Lost Note as a copy of the Note for Unit 2B . . . is actually a copy of the Note for Unit 1A . . .” (NYSCEF Doc No. 142 at ¶ 6). Defense counsel suggests that the court that issued the February 14, 2019, decision and order “may have missed the point” (*id.*).

### **Discussion**

#### **(1)**

Hayon and the Condominium’s motion to vacate the February 14, 2019, Order of Reference based on a purported fraud on the court regarding the lost note is nothing more than an untimely attempt to reargue US Bank’s prior motion by asserting identical

arguments Hayon asserted, and the court rejected, in opposition to US Bank's summary judgment motion. Having failed to perfect an appeal from the court's February 14, 2019, decision and order, the court's holding regarding US Bank's prima facie entitlement to judgment based upon the lost note affidavit and Nationstar's lost note procedures constitutes law of the case. Consequently, Defendants' motion to vacate the February 14, 2019, decision and order granting US Bank's summary judgment motion and the February 14, 2019 Order of Reference is denied.

(2)

CPLR 4403 provides that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part . . . the report of a referee . . . may make new findings with or without taking additional testimony; and may order a new trial or hearing.” “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 [2d Dept 2017]). While CPLR 4403 authorizes a court to confirm or reject a referee's report, “[t]he referee's findings and recommendations are advisory only and have no binding effect on the court . . .” (*Indymac Federal Bank, FSB v Vantassell*, 187 AD3d 725, 726 [2020]). “[T]he Supreme Court is the ultimate arbiter of the dispute and has the power to reject the referee's report and make new findings” (*Bank of America, N.A. v Barton*, 199 AD3d at 627 [quoting *Countrywide Home Loans, Inc. v Hershkop*, 188 AD3d 1148, 1149 (2020)]; see also *HSBC Bank USA, National v Cherestal*, 178 AD3d 680, 682-683 [2019]).

Here, US Bank timely moved to confirm the Referee's Report of amounts due and the Referee's Report is substantially supported by the record before the court, including the Alexander affidavit and the business records produced therewith. Defendants, although they had a sufficient opportunity to present evidence in opposition to the motion to confirm, presented no evidence that the referee's computations were inaccurate. Under these circumstances, confirmation of the Referee's Report is warranted. Accordingly, it is hereby

**ORDERED** that US Bank's motion (mot. seq. three) to confirm the Referee's Report and for a judgment of foreclosure and sale in the form proposed to the court (NYSCEF Doc No. 81) is granted and the judgment shall be signed; and it is further

**ORDERED** that Defendants Hayon and the Condominium's cross-motion (mot. seq. four) and motion to vacate the February 14, 2019 decision and order and Order of Reference (mot. seq. five) are both denied.

This constitutes the decision and order of the court.

E N T E R,



---

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