

**Wells Fargo Bank, N.A. v Joseph**

2025 NY Slip Op 32257(U)

June 18, 2025

Supreme Court, Kings County

Docket Number: Index No. 500767/15

Judge: Cenceria P. Edwards

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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 \_18\_\_\_ day of June, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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WELLS FARGO BANK, N.A.,

Plaintiff,

- against -

Index No. 500767/15

DJECKBY JOSEPH A/K/A JOSEPH DJECKBY, STEADFAST FUNDING, LLC, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, DANIEL SEARS, LORNA SEARS, KARL SEARS, MELINDA SEARS, CLEMENT SEARS, JOSE PADILLA, ARELYS PADILLA, FILBERTO PADILLA, RAMON PADILLA,

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) \_\_\_\_\_

116-117, 119-120 129-142

Opposing Affidavits (Affirmations) \_\_\_\_\_

129-142 144-150

Reply Affidavits (Affirmations) \_\_\_\_\_

144-150 152-153

Sur Reply Affidavits (Affirmations) \_\_\_\_\_

154-155

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 61 Macdougall Street in Brooklyn (Block 1524, Lot 39) (Property), plaintiff Wells Fargo Bank, NA (Wells Fargo or Plaintiff) moves (in motion sequence [mot. seq.] seven) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) dismissing the answer of Defendant Joseph Djekby a/k/a Djekby Joseph (Djekby or

Defendant), the affirmative defenses and counterclaims,<sup>1</sup> pursuant to CPLR 3211 (b); (3) appointing a referee to compute the amounts due on the Note and Mortgage; (4) granting it a default judgment against all non-appearing and non-answering defendants; and (5) amending the caption (NYSCEF Doc No. 120).

Defendant Djeckby cross-moves (in mot. seq. eight) for an order: (1) granting him summary judgment dismissing the complaint, pursuant to CPLR 3212 (b); or (2) granting him leave to amend his answer, pursuant to CPLR 3025 (b); and/or (3) denying Plaintiff's summary judgment motion (NYSCEF Doc No. 129).

### **Background**

On January 21, 2015, Wells Fargo commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1 and 4). The complaint alleges that on July 7, 2011, Djeckby executed a \$292,395.00 promissory note, which was secured by a mortgage encumbering the Property (NYSCEF Doc No. 1 at ¶¶ 4 and 10 and Exhibit B). The complaint alleges that Djeckby, the principal defendant, “failed to pay the August 1, 2014 payment and subsequent installments due on the Note” (*id.* at ¶ 8). Notably, the complaint annexes as Exhibit C a copy of the promissory note in favor of the original lender, Mortgage Enterprise, Ltd., with an endorsement to Wells Fargo on the third page (*id.* at 14-16).

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<sup>1</sup> This branch of Wells Fargo's motion is denied as moot, since Defendant Djeckby has since withdrawn his remaining counterclaims.

On October 16, 2017, Defendant Djekby answered the complaint,<sup>2</sup> denied the material allegations therein and asserted affirmative defenses and five counterclaims (NYSCEF Doc No. 81). On November 13, 2017, Wells Fargo replied to Djekby's counterclaims (NYSCEF Doc No. 82).

The remaining defendants failed to answer or otherwise respond to the complaint.

***Wells Fargo's Instant Summary Judgment Motion***

On October 18, 2019, Wells Fargo moved, in part, for summary judgment on its complaint, an order of reference and a default judgment against the non-answering defendants (NYSCEF Doc No. 120).

Wells Fargo submits an "Affirmation of Regularity" from counsel in support of its summary judgment motion (NYSCEF Doc No. 119), which annexes several exhibits including Exhibit L (*id.* at 160-164), "Plaintiff's Affidavit in Support of Motion for Summary Judgment" sworn to on April 18, 2018, by Janneika Duncan (Duncan), Vice President Loan Documentation of Wells Fargo, who attests that "[i]n connection with making this affidavit, I have acquired personal knowledge of the matters stated herein by examining the business records relating to the subject mortgage loan . . ." (*id.* at ¶ 2). Duncan reiterates the allegations in the complaint regarding Djekby's execution of the note and mortgage and attests Wells Fargo has been in possession of the endorsed note

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<sup>2</sup> By a September 29, 2017 So Ordered Stipulation (NYSCEF Doc No. 80), Djekby agreed to withdraw his Order to Show Cause (OSC) to dismiss for lack of personal jurisdiction in exchange for filing a late answer, and Wells Fargo agreed to vacatur of the previously granted May 31, 2016 Order of Reference and February 6, 2017 Judgment of Foreclosure and Sale.

since November 4, 2013 (*id.* at ¶¶ 3-5). Regarding the 90-day notice, pursuant to RPAPL § 1304, Duncan attests that:

“[a] 90 day pre-foreclosure notice (‘90 Day Notice’) was sent to **Djeckby Joseph** by certified and first class mail to the last known address of the Borrower(s) at **61 Macdougall St, Brooklyn, NY 11233**, and to the residence that is the subject of the Mortgage **61 Macdougall St, Brooklyn, NY 11233**. The 90 Day Notice was mailed on or about **April 21, 2014**, in a separate envelope from any other mailing or notice, and contained a list of at least five housing counseling agencies serving the county where the property is located. A copy of the 90 Day Notice, is attached” (*id.* at ¶ 7).

Without referencing or annexing any business records or a payment history, Duncan attests that “[t]here is a default under the terms and conditions of the Promissory Note and Mortgage because the **August 1, 2014** payment has not been made[,]” “[t]o date, the default has not been cured” and “[t]he total amount due the Plaintiff on said Note through 4/10/2018 is \$369,356.92 . . .” (*id.* at ¶¶ 6 and 10).

Plaintiff’s counsel’s “Affirmation of Regularity” also annexes an “Affidavit of Mailing of 90 Day Notice and Notice of Default” as Exhibit M (*id.* at 248-252), by Sherri McManus (McManus), the Vice President Loan Documentation of Wells Fargo, who attests that “[i]n connection with making this affidavit, I have acquired personal knowledge of the matters stated herein by examining Wells Fargo’s business records” (*id.* at ¶ 2). While McManus attests that “I am familiar with Wells Fargo’s standard practices and procedures used to create, mail and store data regarding the 90 day pre-foreclosure notice (‘90 Day Notice’) required by New York law[,]” the “transaction detail” for the first class

and certified mailing of the 90-day pre-foreclosure notices reflect that they were actually mailed by a company named LenderLive, LLC (*id.* at ¶ 6 and pages 253 and 263).

***Defendant Djeckby's Summary Judgment Cross-Motion***

On February 10, 2022, Defendant Djeckby opposed Wells Fargo's summary judgment motion and cross-moved for summary judgment dismissing the complaint, or, alternatively, an order granting him leave to amend his answer (NYSCEF Doc No. 129).

Defense counsel submits an affirmation asserting that the 90-day notices submitted by Plaintiff fail to comply with RPAPL § 1304 because they included non-statutory material in the same envelope in violation of the separate envelope requirement of RPAPL § 1304 (2) (NYSCEF Doc No. 130 at ¶¶ 16-20). 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 appellate court articulated "a bright-line rule" that compliance with the separate envelope requirement of RPAPL § 1304 mandates that no material other than the 90-day notices described in the statute be contained in the envelope (*id.* at ¶ 17). Defense counsel asserts that Wells Fargo's 90-day pre-foreclosure notices sent to Djeckby impermissibly contain "superfluous language," including a bankruptcy disclosure on the second page (*id.* at ¶¶ 18-19).

Defense counsel further argues that Wells Fargo failed to evidence its compliance with RPAPL § 1304 to make out a prima facie case for its own summary judgment motion because "McManus has no personal knowledge of the actual mailing, since all of Plaintiff's [90-day] notices were contracted out to a third party, LenderLive" (*id.* at ¶ 22-23). Defense

counsel asserts that “McManus, at best, attests to having knowledge of Plaintiff’s standard practices and procedures, yet she fails to lay any foundation for the admission of LenderLive’s business records pursuant to CPLR § 4518” (*id.* at ¶ 52).

Alternatively, if the complaint is not dismissed for violation of RPAPL § 1304, defense counsel asserts that Djekby should be granted leave to amend his answer to assert affirmative defenses for failure to comply with applicable federal regulations governing Djekby’s Federal Housing Authority (FHA) mortgage, including 24 Civil Federal Rule (CFR) §§ 203.602, 203.604, 203.605 and 203.606 (*id.* at ¶¶ 22-31). Defense counsel argues that “Defendant’s requested amendment does not prejudice Plaintiff, as he merely seeks to clearly articulate his originally pleaded Tenth Affirmative defense regarding the Plaintiff’s violation of the terms of the Mortgage” (*id.* at ¶ 32). Defense counsel advises that Djekby is withdrawing most of his affirmative defenses and all of his counterclaims (*id.* at ¶ 34).

Defense counsel also asserts that Wells Fargo failed to establish its *prima facie* entitlement to summary judgment because “Plaintiff has failed to establish a default, as it has not submitted a payment history” and “Plaintiff submitted the Affidavit of Janneika Duncan . . . with no supporting documents establishing a default” (*id.* at ¶¶ 42 and 44).

### ***Wells Fargo’s Opposition and Reply***

Wells Fargo, in opposition to the cross-motion and in reply, submits a “Supplemental Affidavit of Merit and Amounts Due and Owing” from Anthony Younger (Younger), an Assistant Secretary of Rushmore Loan Management Services, LLC (Rushmore), the servicing agent of the subject loan and attorney-in-fact for Wells Fargo

(NYSCEF Doc No. 148). Younger attests that “[i]n connection with making this affidavit, I have acquired personal knowledge of the matters stated herein by examining the business records relating to the subject mortgage loan . . .” which include both those of Rushmore and the business records of prior servicers, which were integrated into Rushmore’s records (*id.* at ¶¶ 2-4). Younger annexes the full payment history of the loan (*id.* at 6-116) and FHA letters sent to Djeckby, which include: “Pre-Referral Solicitation for HAMP Letter, FHA Loss Mitigation Letter, FHA Face to Face Letter, and RESPA Live Contact and Loss Mitigation Options” (*id.* at 123-218).

### **Discussion**

#### ***(I)***

#### ***The Parties’ Summary Judgment Motion and Cross-Motion***

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]). 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]).

Wells Fargo is not entitled to summary judgment because it failed to demonstrate that it complied with the statutory requirements of RPAPL § 1304 by submitting admissible evidence that the RPAPL § 1304 notices were mailed to Djeckby by both certified and first-class mail. While Wells Fargo submitted an “Affidavit of Mailing” of the RPAPL § 1304 notice from McManus, her affidavit annexes business records reflecting that the notices were actually mailed by a third-party, LenderLive, and McManus does not attest that she has any personal knowledge of LenderLive’s standard office mailing practices. Wells Fargo has failed to prove that it complied with the mailing requirements of RPAPL § 1304, a condition precedent to foreclosure.

Defendant Djeckby is also not entitled to summary judgment based on the content of Wells Fargo’s 90-day pre-foreclosure notices. Defense counsel’s reliance on the Second Department’s holding in *Kessler* is misplaced because that holding was 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*. 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*, the content of Wells Fargo’s RPAPL § 1304 notices were proper, despite the fact that they included additional information in the notices about bankruptcy. Consequently, Defendant Djekby’s summary judgment cross-motion based on the Second Department’s now-reversed holding in *Kessler* is denied.

(2)

***Defendant Djekby’s Cross-Motion to Amend***

Defendant Djekby alternatively seeks an order granting him leave to amend his answer to assert affirmative defenses for Wells Fargo’s alleged failure to comply with 24 CFR §§ 203.602, 203.604, 203.605 and 203.606, federal regulations governing Djekby’s FHA mortgage. It is well-settled that “[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]). While Wells Fargo produced FHA Letters to demonstrate its compliance with federal regulations governing FHA mortgages, it has not demonstrated that the proposed amendment is patently devoid of merit or that it would be prejudiced thereby, and thus, leave to amend is granted. Accordingly, it is hereby

**ORDERED** that Wells Fargo’s motion (mot. seq. seven) is denied without prejudice; and it is further

**ORDERED** that Defendant Djeckby's cross-motion (mot. seq. eight) is only granted to the extent that he is granted leave to amend his answer in the form proposed as NYSCEF Doc No. 137, which shall be e-filed within 15 days after service of this decision and order with notice of entry; the cross-motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



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