

US Bank v Jackson-Cutler

2025 NY Slip Op 32386(U)

July 1, 2025

Supreme Court, Kings County

Docket Number: Index No. 518195/23

Judge: Carolyn Mazzu Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-5, 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

JUL 01 2025

P R E S E N T:

HON. CAROLYN MAZZU GENOVESI,

Index No.: 518195/23

_____ X

MS # 1 & 2

US BANK,

Plaintiff,

DECISION AND ORDER

-against-

JACQUELINE JACKSON-CUTLER et al,

Defendant,

_____ X

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion (MS 1)	<u>1</u>
Opp/Cross (MS 2)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for summary judgment and an order of reference. Defendant opposes and cross-moves for dismissal or, in the alternative, consolidation with her co-pending quiet title action. Plaintiff opposes.

Prior actions were filed in 2010, 2011, and 2013. The 2010 and 2013 cases were both unilaterally discontinued in 2013. The 2011 action was dismissed on January 11, 2023, by Justice Lawrence Knipel. Plaintiff argues that it is entitled to the toll of CPLR 205-a, rendering this matter timely. Defendant disagrees asserting that, under RPAPL 1301(1) as amended by the Foreclosure Abuse Prevention Act of 2022 (FAPA), the filing of the 2013 action automatically

discontinued the then-pending 2011 case and, thus, that it was terminated more than six months prior to the commencement of this matter.

Plaintiff maintains that the parties stipulated in 2019 to proceed with the 2011 action – rather than the 2010 or 2013. Plaintiff further argues that because of this purported stipulation, the parties agreed that only the 2011 action would survive, and the parties would proceed to litigate solely under the 2011 index number. However, the court has reviewed the documents plaintiff contends are stipulation and finds they are not binding on the defendants. In the 2010 action, plaintiff submitted a document styled “Stipulation to Cancel Lis Pendens” which states “[t]he undersigned, being the attorney for the Plaintiff and the attorneys for all the Defendants who have appeared or answered...” This document was dated June 7, 2013, entered by the County Clerk on July 14, 2013, and is only signed by the plaintiff’s counsel in that action. Plaintiff also provides a document styled “Stipulation Discontinuing Action” in connection to the 2013 action, dated September 13, 2013, entered by the County Clerk on September 25, 2013. That document states “IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for all parties appearing in the above-entitled action...” but is also only signed by the plaintiff’s counsel in that action. “An agreement between parties or their attorneys relating to any matter in an action... is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.” CPLR 2104. Since no defendant signed this purported stipulation, it is not binding and cannot affect the tolling provision of CPLR 205-a.

RPAPL 1301(3), as amended by the Foreclosure Abuse Prevention Act of 2022 (FAPA), provides:

For purposes of this subdivision, in the event such other action is commenced without leave of the court, the former action shall be deemed discontinued upon the commencement of the other action, unless prior to the entry of a final judgment in such other action, a defendant raises the failure to comply with this condition precedent therein, or seeks dismissal thereof based upon a ground set forth in paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules. This subdivision shall not be treated as a stay or statutory prohibition for purposes of calculating the time within which an action shall be commenced and the claim interposed pursuant to sections two hundred four and two hundred thirteen of the civil practice law and rules.

Moreover, RPAPL 1301(4), as amended by FAPA, provides:

If an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations.

The Appellate Division, Second Department has held that that the statutory amendments enacted under FAPA apply retroactively. See *97 Lyman Avenue, LLC v. MTGLQ Investors, L.P.*, 233 A.D.3d 1038, 1042 (2d Dep't 2024); *Deutsche Bank National Trust Company v. Dagrín*, 233 A.D.3d 1065, 1067-1068 (2d Dep't 2024). Additionally, in *Dagrín*, the Second Department found the retroactive application of FAPA to be constitutional. The Appellate Division, First Department has held that the FAPA amendments to RPAPL 1301 are retroactive, and ostensibly are constitutional. *US Bank National Association as Trustee for Truman 2012 SC2 Title Trust v. Calhoun*, 236 A.D.3d 557, 558 (2d Dep't 2025).

The first action to foreclose the subject mortgage was commenced on October 8, 2010. The commencement of the second action on June 1, 2011, effectively discontinued the first, 2010 action, under the current RPAPL 1301(3). The commencement of the third action on June 20, 2013, effectively discontinued the second, 2011 action, under the current RPAPL 1301(3). The 2013 action was voluntarily discontinued in September 2013. The six-year statute of limitations expired on October 8, 2016. *U.S. Bank Trust, NA v. Aorta*, 167 A.D.3d 807 (2d Dep't 2018); *GMAT Legal Title Trust 2014-1 v. Kator*, 213 A.D.3d 915, 916 (2d Dep't 2023). When Justice Knipel issued an Order dismissing the second, 2011 case on January 11, 2023, that case was already discontinued. Accordingly, plaintiff is not entitled to the benefit of the CPLR 205-a toll, as the statute of limitations had already run.

Turning now to plaintiff's motion for summary judgment it is well established that "[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default." *Loancare v. Firshing*, 130 A.D.3d 787 (2d Dep't 2015). It appears undisputed that plaintiff has done so.

Defendant opposes plaintiff's motion on the grounds that plaintiff failed to comply with RPAPL 1304 and RPAPL 1306. The Court finds issues of fact remain as to whether Plaintiff complied with RPAPL 1304 and the default notice provisions of the mortgage. In his Affidavit,

Steven B. Ross, the Second Vice President of plaintiff's loan servicer, SLS, merely states that SLS' records show that the notices were sent, but neither details its mailing procedures nor provides documentary evidence of actual mailing. *U.S. Bank N.A. v Pickering-Robinson*, 197 A.D.3d 757, 759 (2d Dep't 2021).

The Gomez Affidavit is improperly submitted in reply and, even had it been submitted as part of the moving papers, is also insufficient. While she claims that SLS' policy was to properly mail the notices, Gomez does not detail SLS' mailing procedures and, though she does proffer its comment log, that document does not demonstrate actual mailing. *Id.*

As Plaintiff has not demonstrated compliance with RPAPL 1304, however, it inherently cannot have demonstrated compliance with RPAPL 1306 which requires a filing within three days of the mailing of the notices.

Defendant has abandoned her remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion. *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 761 (2d Dep't 2019). Accordingly, it is hereby

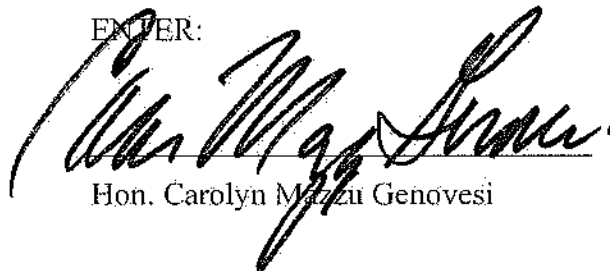
ORDERED that plaintiff's motion (MS #1) is denied in all respects; and it is further

ORDERED that defendant's cross-motion (MS # 2) is granted to the extent that the complaint is dismissed.

All other relief requested is denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Carolyn Mazza Genovesi