

**Mortgage Elec. Registration Sys., Inc. v Richards**

2025 NY Slip Op 32652(U)

July 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 9844/2005

Judge: Cenceria P. 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 18th day of May, 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS,  
Justice.

Seq. No.: 5  
Calendar No.: 41  
Papers read: NYSCEF Doc. No.(s): 5-49

-----X  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
INC. AS NOMINEE AND MORTGAGEE OF RECORD  
AND WACHOVIA BANK, N.A. AS TRUSTEE,  
SUCCESSOR BY MERGER TO FIRST UNION NATIONAL  
BANK, AS INDENTURE TRUSTEE,

Plaintiff,

- against -

Index No. 9844/2005

THEODORE A. RICHARDS A/K/A THEODORE A.  
RICHARDS; SHIMON GLODNY; NORTHERN FUNDING,  
LLC; NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD; "JOHN DOES" and "JANE DOES," said names  
being fictitious, parties intended being possible  
tenants or occupants of premises, and corporations,  
other entities or persons who claim, or may claim,  
a lien against the premises,

Defendants.

-----X  
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross  
Motion and Affidavits (Affirmations) \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_

5-23  
26-39

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 1840 Prospect Place in Brooklyn (Block 1464, Lot 24) (Property), non-party and plaintiff's alleged "successor in interest," Argolica LLC (Argolica), moves (in motion sequence [mot. seq.] five) for an order: (1) vacating the Order of Reference entered on

February 10, 2005; (2) granting it leave to amend the complaint to include Five Star Island Corp. as a named defendant, pursuant to CPLR 3025 (b); (3) consolidating this 2005 foreclosure action with the 2019 foreclosure action entitled *U.S. Bank National Assoc., Not In Its Individual Capacity But Solely As Trustee For The RMAC Trust, Series 2013-IT v New York State Department of Taxation and Finance et al.*, Kings County index No. 513346/19 (2019 Foreclosure Action), pursuant to CPLR 602 (a) and 1002 (b); (4) substituting Argolica as the plaintiff in the consolidated foreclosure action; and (5) amending the caption to substitute Natasha Bernard, Martin Johnson, Daniel Johnson, Sheena Charles, Julie Dummet, Justin Alexander, Roger Dummet, Anthony Richards, Angel Smith, Larry Smith, Sam Haynes and Katajah Young, the tenants of the Property, for the “John Doe” and “Jane Doe” defendants (NYSCEF Doc No. 5).

### **Background**

On January 14, 2003, defendant Theodore A. Richards a/k/a Theodore A. Richards (Richards or Borrower) financed his purchase of the Property by executing a \$407,200.00 promissory note in favor of Olympia Mortgage Corp. (Olympia), which was secured by a first mortgage encumbering the Property in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Olympia. That same day, Richards took out a second mortgage in the amount of \$74,950.00 from MERS as nominee for Olympia.

On April 1, 2005, MERS as Nominee and Mortgagee of Record and Wachovia Bank, N.A. As Trustee, Successor by Merger to First Union National Bank, as Indenture Trustee (collectively, Plaintiff) commenced this 2005 foreclosure action based on the

Borrower's alleged January 1, 2005 payment default under the first mortgage (NYSCEF Doc No. 10). Importantly, Plaintiff *did not include* the holder of the second mortgage as a party defendant to this 2005 foreclosure action.

By a February 8, 2005, decision and order, entered on February 10, 2005, the court (Demarest, J.) granted Plaintiff an Order of Reference on default (2005 Order of Reference) (NYSCEF Doc No. 11). A May 25, 2006 Judgment of Foreclosure and Sale was subsequently issued (NYSCEF Doc No. 12). A foreclosure sale was scheduled for July 13, 2006, but the auction was stayed pending the Borrower's July 14, 2006 motion, by order to show cause, to dismiss the action. By a December 14, 2006 decision and order, the court (Demarest, J.) denied the dismissal motion and vacated all stays (NYSCEF Doc No. 13).

### ***The 2007 Foreclosure Action***

Instead of proceeding to sale, on May 24, 2007, Wachovia Bank N.A., As Trustee, Successor By Merger To First Union National Bank, As Indenture Trustee (Wachovia) commenced a second action seeking to foreclose the first mortgage under Kings County index No. 18672/07 (2007 Foreclosure Action), but this time Olympia was named as a party defendant because it held the second mortgage lien (NYSCEF Doc No. 29 at ¶ 18).

The 2007 Foreclosure Action was ultimately dismissed by Judge Demarest in 2015.

### ***The Prior Motions to Consolidate***

Meanwhile, Plaintiff moved to vacate the May 25, 2006 Judgment of Foreclosure and Sale issued in the 2005 foreclosure action and for a new judgment of foreclosure and sale upon consolidation of the 2005 and 2007 Foreclosure Actions, which was only granted

to the extent that the May 25, 2006 Judgment of Foreclosure and Sale was vacated because Plaintiff failed to timely serve a copy of the Order of Reference upon the owner of the equity of redemption (NYSCEF Doc No. 14). When Plaintiff moved to resettle the Order of Reference, by a September 16, 2011, decision and order the court (Demarest, J.) denied Plaintiff's motion because "[i]f a necessary party is to be included in this action, it must be done prior to referral to a referee" (*see* NYSCEF Doc No. 15).

On or about September 12, 2014, and on August 30, 2018, Plaintiff again filed motions seeking to vacate the 2005 Order of Reference and to consolidate the 2005 and the 2007 Foreclosure Actions, which the court (Dear, J.) denied by a January 2, 2019 order in which the court noted that "[t]he 2007 action was dismissed by Judge Demarest in 2015 and has not been restored" (NYSCEF Doc Nos. 17 and 34).

### ***SRP's Foreclosure of The Second Mortgage***

On November 29, 2017, SRP 2012-4, LLC (SRP), the assignee of the second mortgage, commenced an action to foreclose the second lien (NYSCEF Doc No. 31). Defendant US Bank moved for summary judgment. By a November 19, 2018 decision and order, the court (Dear, J.) granted US Bank's motion, and held that US Bank's lien is in first position although SRP's second mortgage was recorded first (NYSCEF Doc No. 18).

SRP obtained a June 20, 2019 Judgment of Foreclosure and Sale, and the Property was transferred after an auction to Five Star Island Corp. (Five Star), the successful bidder, pursuant to a November 22, 2019 Referee's Deed (NYSCEF Doc No. 19).

### *The 2019 Foreclosure Action*

Meanwhile, on June 17, 2019, Plaintiff's successor, U.S. Bank National Association, Not In Its Individual Capacity, But Solely As Trustee For The RMAC Trust, Series 2013-IT (US Bank), commenced the 2019 Foreclosure Action, seeking to foreclose the first mortgage (NYSCEF Doc No. 20). Counsel for Argolica claims that the 2019 Foreclosure Action was commenced by US Bank “[d]ue to a lapse in the Notice Pendency in the 2005 Action . . .” (NYSCEF Doc No. 6 at ¶ 18).

Defendant SRP made a pre-answer motion to dismiss the 2019 foreclosure complaint on the grounds that it was time-barred. By a November 7, 2019, decision and order, the court (Dear, J.) granted SRP's pre-answer dismissal motion and held that:

“[i]t is undisputed that a prior foreclosure action was filed in 2005 and remains pending. SRP's predecessor was not named as a defendant therein. A second action was filed in 2007 to remedy that omission but was dismissed by Judge Demarest in 2015. Plaintiff argues that the instant action relates back to the 2005 action (with which it will seek consolidation). However, this is a separate action rather than a motion to amend - and Plaintiffs predecessor asserted these claims against SRP's predecessor in the 2007 action, also more than six years prior to the instant action. As such, Plaintiffs argument is unavailing.

Motion granted. Case dismissed as to SRP” (NYSCEF Doc No. 36).

On December 13, 2019, Plaintiff noticed its appeal from the courts' November 7, 2019, decision and order (NYSCEF Doc No. 37), which was dismissed for failure to perfect.

*Argolica's Instant Motion to Vacate, Amend and Consolidate*

On March 5, 2021, more than *15 years after* commencement of the 2005 Foreclosure Action, Argolica, Plaintiff's alleged "successor-in-interest" pursuant to an October 27, 2020 mortgage assignment and a blank endorsement on the note,<sup>1</sup> moved for an order: (1) vacating the 2005 Order of Reference; (2) amending Plaintiff's 2005 complaint to add Five Star as a party defendant in the 2005 Foreclosure Action; (3) consolidating the 2005 and 2019 Foreclosure Actions; (4) substituting Argolica as the "proper party plaintiff"; and (5) substituting the tenants of the Property for the John Doe and Jane Doe defendants (NYSCEF Doc No. 5).

**Discussion**

After Argolica's motion was fully submitted, the Foreclosure Abuse Prevention Act (FAPA) was enacted on December 30, 2022, which moots the relief that Argolica seeks.

FAPA provides that:

“[w]hile [a foreclosure] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought” (RPAPL 1301 [3]).

If leave is not acquired, the second action is “deemed discontinued upon the commencement of the other action” (*id.*; *see also Bank of New York Mellon v Richards*, 233 AD3d 1250, 1251 [3d Dept 2024]).

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<sup>1</sup> See NYSCEF Doc No. 6 at ¶ 4 and NYSCEF Doc No. 8.

Here, US Bank's commencement of the 2019 Foreclosure Action without obtaining prior leave of court resulted in the discontinuance of this 2005 foreclosure action, by operation of law. Accordingly, it is hereby

**ORDERED** that Arjolica's motion (mot. seq. five) is denied as moot.

This constitutes the decision and order of the court.

E N T E R,



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

**DATED:** [July 7, 2025](#)