

Wells Fargo Bank, N.A. v Daniel

2025 NY Slip Op 32736(U)

July 29, 2025

Supreme Court, Kings County

Docket Number: Index No. 12930/09

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2 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 29th day of July, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,
Acting Justice.

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WELLS FARGO BANK, NATIONAL ASSOCIATION, NOT
IN ITS INDIVIDUAL OR BANKING CAPACITY, BUT
SOLELY AS TRUSTEE FOR SRMOF II 2011-1 TRUST,

Plaintiff,

- against -

Index No. 12930/09

BRENTH DANIEL; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE FOR
FIRST NATIONAL BANK OF ARIZONA, ITS SUCCESSORS
AND ASSIGNS; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD; NEW YORK CITY PARKING
VIOLATIONS BUREAU; NEW YORK CITY TRANSIT
ADJUDICATION BUREAU,

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) _____	<u>119-135</u>
Opposing Affidavits (Affirmations) _____	<u>139-140</u>
Reply Affidavits (Affirmations) _____	<u>143-147</u>

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 13 Preston Court in Brooklyn (Block 7949, Lot 239) (Property), plaintiff's assignee U.S. Bank National Association, not in its individual capacity but solely as Owner Trustee for RCAF Acquisition Trust (RCAF Trust) moves (in motion sequence [mot. seq.] 14) for an order: (1) granting it a Judgment of Foreclosure and Sale; (2) confirming the

Referee's Oath and Report; and (3) amending the caption to substitute it as plaintiff in place of "Wells Fargo Bank, N.A., Not in its Individual or Banking Capacity, but Solely as Trustee for SRMOF II 2011-1 Trust" (NYSCEF Doc No. 119).

Background

In May 2009, plaintiff's predecessor in interest commenced this foreclosure action against the defendant borrower, Brenth Daniel (Defendant or Daniel), among others, to foreclose a mortgage encumbering the Property. Defendant Daniel failed to answer the complaint. In January 2019, after substantial delays in prosecuting this action, the court (Knipel, J.) issued an order of reference.

On September 9, 2019, plaintiff moved for an order confirming the referee's report of amounts due and for a judgment of foreclosure and sale. Defendant Daniel cross-moved to dismiss the complaint and separately moved to toll the accrual of interest based on plaintiff's prolonged delay in the prosecution of this action.

By an April 28, 2022 decision and order, the court (Partnow, J.) denied plaintiff's motion, without prejudice and with leave to renew, because the Referee's Report of the amounts due was based upon unproduced business records (NYSCEF Doc No. 75). The court granted Defendant Daniel's motion to toll the accrual of interest on the mortgage loan from November 12, 2010, to January 24, 2014, and from November 21, 2014, to August 3, 2017, in "response to the plaintiff's unexplained delay in prosecuting the action by failing to promptly move for relief after both the withdrawal of its first motion for an Order of Reference and again after the denial of its second motion for an Order of Reference" (*id.*).

On October 9, 2024, the court's April 28, 2022 decision and order was affirmed on appeal (NYSCEF Doc No. 110).

The RCAF Trust's Renewed Motion

On February 20, 2025, plaintiff's assignee, the RCAF Trust, renewed plaintiff's motion for an order confirming the October 10, 2023 Referee's Report and for a Judgment of Foreclosure and Sale (NYSCEF Doc No. 119).

Counsel asserts that "[i]n order to cure the deficiency [in plaintiff's prior motion], detailed business records are attached as an exhibit to the Referee's Report of Amounts Due" (NYSCEF Doc No. 120 at ¶ 17). Schedule B to the Referee's Report states that the Referee was provided with a September 20, 2023 affidavit of merit and amounts due from Dave Kleinman, Vice President of Asset Management of American Mortgage Investment Partners Management, LLC (AMIP), and AMIP's "business records and loan history . . ." (NYSCEF Doc No. 125, Schedule B, at page 10). The September 2023 Kleinman Affidavit attests that AMIP is "administrator for the named Plaintiff's assignee, Wilmington Savings Fund Society, FSB, as Owner Trustee of the Residential Credit Opportunities Trust V-C (hereinafter 'RCOV-C') . . ." and identifies RCOV-C as "the current holder of the Note and Mortgage" (*id.* at page 17). In addition to the payment history of the loan, the Kleinman Affidavit also annexes a December 4, 2018 Limited Power of Attorney between AMIP and RCOV-C (*id.* at pages 27-31).

Defendant's Opposition

Defendant, in opposition, submits a memorandum of law arguing that “the Referee’s Oath and Referee’s Report of Amount Due . . . is not substantially supported by the record” because the “computations were premised upon inadmissible records for which no proper foundation (under CPLR §4518) was laid” (NYSCEF Doc No. 141 at 2). Defendant argues that the Kleinman Affidavit “is inadmissible hearsay due to the fact that Plaintiff failed . . . to submit any admissible evidence to establish that the affiant . . . was, in fact, the servicer for Plaintiff (and/or its alleged assignee) and, thus, failed to prove that the affiant had the authority to execute h[is] affidavit” (*id.* at 3).

Specifically, Defendant asserts that the Limited Power of Attorney annexed to the Kleinman Affidavit “only purport[s] to appoint AMIP as servicer for those mortgage loans which are the subject of separate Agreements[.]” including a November 7, 2018 Servicing and REO Management Agreement, which was not produced by Plaintiff (*id.* at 4-5). Defendant relies on *U.S. Bank v Tesoriero*, (204 AD3d 1066 [2d Dept 2022]), in which the Second Department held that where a loan servicer’s authority to speak or act on behalf of the plaintiff is restricted and conditioned on the terms of other agreements, such agreements must be produced to demonstrate that the servicer had the requisite authority (*id.* at 5).

The RCAF Trust's Reply

The RCAF Trust, in reply, submits another affidavit from Dave Kleinman, V.P. Asset Manager of AMIP “as administrator (*during the relevant time period*) for the named Plaintiff’s *prior* assignee, Wilmington Savings Fund Society, FSB, as Owner Trustee of

the Residential Credit Opportunities Trust V-C (hereinafter ‘RCOV-C’), the *prior* holder of the Note and Mortgage” (NYSCEF Doc No. 144 at ¶ 1 [emphasis added]). Kleinman attests that the Limited Power of Attorney references both a Servicing Agreement and a Trust Agreement, both of which are annexed to Kleinman’s reply affidavit (*id.* at ¶¶ 2-3).

The RCAF Trust also submits an attorney affirmation asserting that “[t]he substance of the Opposition is entirely lacking as it fails to present any valid objection to the computations” and “no admissible evidence in opposition to the proposed computation was presented by Defendant, nor did Defendant object to the validity of the note, the alleged date of default, or the amounts claimed as owed” (NYSCEF Doc No. 143 at ¶¶ 4 and 10). Plaintiff’s counsel asserts that “there is no allegation or proof presented that Mr. Kleiman specifically lacks authority, only that additional documents (which Defendant is precluded from challenging) are not exhibited” (*id.* at ¶ 16). Plaintiff’s counsel asserts that “[w]hile not required due to the procedural and factual history of this action, further confirmation is simultaneously submitted herewith in the form of an additional Kleiman Aff., attaching redacted versions of the relevant Pooling and Servicing Agreements . . .” (*id.* at ¶ 17).

Discussion

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 Second Department has held that “[t]he 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]).

Here, the Referee’s Report is substantially supported by the record before the court, including AMIP’s business records produced to the Referee with the Kleinman Affidavit. Defendant, although he had a sufficient opportunity to present evidence in opposition to the motion to confirm, presented no evidence that the Referee’s computations in the Referee’s Report were inaccurate in any respect. Contrary to defense counsel’s assertions, the RCAF Trust sufficiently demonstrated that Dave Kleinman and AMIP were authorized to speak and act on its behalf based on the terms of a Limited Power of Attorney and the Servicing Agreement that the RCAF Trust produced in response to Daniel’s opposition. The RCAF Trust’s motion for an order confirming the Referee’s Report, which is substantially supported by the record, is granted. The RCAF Trust is also entitled to a judgment of foreclosure and sale in the form proposed (*see* NYSCEF Doc No. 135). Accordingly, it is hereby

ORDERED that the RCAF Trust’s motion (mot. seq. 14) is granted in its entirety.

Long form order to follow.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES
A. J. S. C.

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