US Bank v Roque

2025 NY Slip Op 32858(U)

July 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 3548/09

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 FRP1, 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 the 14th day of July, 2025.

P R E S E N T:

HON. CENCERIA P EDWARDS,
Justice.

----------X

US BANK,

Plaintiff,

-against-

Index No.: 3548/09
MS 8&9

PEDRO ROQUE et al,

Defendant,

----------X

The following e-filed papers read herein:	NYSEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	2-51 56-70
Opposing Affidavits (Affirmations)	73-77
Affidavits/ Affirmations in Reply	78-79

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 726 East 84th Street in Brooklyn (Block 8004, Lot 149), Plaintiff US Bank moves for summary judgment and dismissal of the verified answer of Defendant Pedro Roque. In the alternative, it seeks to strike his answer pursuant to CPLR 3126 for failing to comply with his discovery obligations. Defendant opposes the requested relief and cross-moves for dismissal of the action for failure to comply with RPAPL 1303. If the case is not dismissed, Defendant seeks leave to amend his answer to assert a defense that Plaintiff failed to comply with the pre-suit notice provisions of the mortgage. Plaintiff opposes.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on February 13, 2009. All defendants were allegedly served with the summons and complaint. Defendant, aided in drafting by Brooklyn Legal Services Corporation A, filed a pro se answer including five affirmative defenses dated July 9, 2009 which was rejected by Plaintiff as untimely.

The matter was in the Foreclosure Settlement Conference Part from April 28, 2009 until February 16, 2012. It does not appear that an amicable resolution to this action was reached.

On April 15, 2013, Defendant – now represented by Tanya P Dwyer, Esq – filed a motion seeking dismissal of this action pursuant to CPLR 2101[f] and 3126[3]. Though the motion was initially marked off, Defendant moved to restore it and Plaintiff cross-moved for summary judgment. By order dated August 9, 2013, Defendant's motion to restore was granted and, upon restoration, dismissal was denied. Plaintiff's cross-motion was adjourned and Defendant granted leave to file a motion to amend his answer. After Defendant did so,[1] Plaintiff was ordered to accept his previously served answer and its motion for summary judgment was denied without prejudice.

Thereafter, Plaintiff moved for an order pursuant to CPLR 3124 compelling Defendant to respond to its notice to produce and first set of interrogatories. By order dated March 28, 2014, Defendants were directed to serve complete responses within 14 days of the order. Dwyer and Plaintiff's counsel also signed on the order.

On February 25, 2015, Plaintiff filed another motion for summary judgment and an order of reference. Defendant cross-moved for dismissal, alleging, among other things. that Plaintiff lacked standing and that personal jurisdiction over Defendant was lacking. Via interim order, Plaintiff was directed to bring the original note to court on October 13, 2015. After an extension of time, Plaintiff did so on December 15, 2015. The Court noted that it did not match the exhibit to the motion papers as the original did not include a description of the property and had two

[1] Though Plaintiff sought summary judgment, Defendant's answer had been rejected so he moved for leave to file a late answer.

allonge pages which appeared to be duplicative and were not affixed to the note. The remainder of the motions were stayed pending a traverse hearing.

By order dated September 19, 2016, a Special Referee determined following a hearing that "the plaintiff has failed to bear the burden of proving by a preponderance of evidence that the defendant Pedro Roque was served with the summons and complaint and the RPAPL § 1303 notice." In light of her findings, Plaintiff's motion was denied and Defendant's granted on January 9, 2017.

Plaintiff appealed the dismissal of the action and, on May 8, 2019, the Appellate Division, Second Department reversed. In relevant part, the panel found that "the defendant waived his defense of lack of personal jurisdiction on the basis of improper service, as he failed to move for judgment on that ground within 60 days after serving his answer."

Plaintiff's Motion for Summary Judgment [MS 8]

On June 3, 2022, Plaintiff filed the instant motion for summary judgment and other relief. Therein, Plaintiff, arguing that it has met its prima facie burden and overcome all of Defendant's affirmative defenses, seeks to strike his answer on the merits. In the alternative, it seeks to dismiss his answer pursuant to CPLR 3126 for failure to comply with his discovery obligations. Thereafter, Plaintiff requests that a referee be appointed to compute the amounts due to it. Plaintiff further seeks default judgment against the non-appearing defendants and to amend the caption by substituting U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, as Trustee, for J.P. Morgan Alternative Loan Trust 2005-S1, Holders of Mortgage Pass-Through Certificates, as Plaintiff and by substituting Robert McCallister, Troy Boudier, Miggon Collins, Joy Collins, Rodney Snyder, Antoine Wilson, Sharonna Kearns, Gizette Wallace, Mark Vernell, Richard Pearce, Peter Hoover, Jerome Delovis, and Kenel Sinous, for the Doe defendants.

In support of its motion, Plaintiff proffers an affidavit signed by Cynthia May, an officer of Select Portfolio Servicing (SPS) which is alleged to be the servicing agent and attorney-in-fact for Plaintiff. Therein, she introduces, among other documents, copies of the note, mortgage, and a "Financial Breakdown Statement" which she claims reflects that the loan is due for the October

1, 2008 payment. Though May states that SPS' records reflect that a notice of default was mailed and appends a copy thereof to her affidavit, she provides no further details or evidence of mailing.[2] The affiant also proffers a variety of documents in an effort to show that the original note was endorsed in blank and in Plaintiff's possession at all relevant times.

Plaintiff also offers an "Affidavit of Mailing" signed by Florence Strangis, a Vice President of JPMorgan Chase Bank which allegedly was the servicer of the loan in 2008. Strangis sets forth that she is familiar with Chase's mailing practices and procedures and how it creates and maintains its business records. In this case, she avers, Chase sent a default notice dated December 2, 2008 – a copy of which is appended to her affidavit – to Defendant at the property address via first class mail.

Also proffered by Plaintiff is an "Affidavit of Note Possession" signed by Sherry Stafford, a Vice President of JPMorgan Chase Bank. Therein, she attests that Chase's regular business practice is to store original notes in collateral files maintained by its agent JPMCCSI[3] (with whose records she is also familiar) in a secure vault facility in Monroe, Louisiana. The affiant further notes that, per Chase's custodial system, Chase maintained possession of the relevant original note at that facility from June 16, 2005 until October 15, 2015 when the note was forwarded to Richmond Monroe Group.

Plaintiff notes that, on August 29, 2019, it propounded on Defendant a First Notice to Produce, First Set of Interrogatories, and a Notice to Admit ("Discovery Requests"). Having not received a response, the following month Plaintiff sent a deficiency letter to Defendant. As of the time of the filing of the instant motion, Defendant still had neither served any responses to Plaintiff's requests nor replied to the letter. As such, Plaintiff argues that Defendant's answer should be stricken pursuant to CPLR 3126.

[2] As subsequently noted by Plaintiff, however, Defendant's answer does not allege non-compliance with the notice requirement and, as such, it did not need to demonstrate compliance in seeking summary judgment.
[3] The affiant attests to access to the records of, and knowledge of the document maintenance policies of, both Chase and JPMCCSI.

Defendant's Cross-Motion for Summary Judgment [MS 9]

On October 20, 2022, Defendant filed the instant cross-motion. Therein, he argues that the action should be dismissed as Plaintiff failed to comply with RPAPL 1303. There is no copy of the alleged notice in the record and Plaintiff has not demonstrated that font size requirements were met. Further, the Special Referee already found following the traverse hearing that Plaintiff failed to demonstrate that service thereof was properly accomplished.

In the alternative, Defendant seeks leave to amend his answer to include a defense that Plaintiff did not comply with the default notice provisions of the mortgage. In support, he argues that Plaintiff clearly anticipated the need to address the issue, submitting an affidavit of mailing, but none of the evidence offered by Plaintiff is sufficient to demonstrate that the notice was actually mailed.

Defendant further argues that, even were the Court to deny the relief that he is seeking, Plaintiff has not met its burden. More specifically, Defendant notes that, even if Chase was in possession of the note as of the commencement of this action, it is not the plaintiff and nothing shows the connection between it and Plaintiff. Additionally, the copy of the note annexed to the May Affidavit includes two allonges (both with dates in September 2005) while the one proffered by Stafford lacks allonges. The existence of two versions, Defendant claims, is sufficient to create a further issue of fact as to whether Plaintiff was in possession of the original note at the relevant time.

Plaintiff's Opposition to the Cross-Motion

Plaintiff argues that the affidavit of service of the summons and complaint is sufficient to demonstrate compliance with RPAPL 1303. Defendant's denial of receipt and speculation as to font sizes are of no moment. To the extent that the Special Referee found that Plaintiff had not proven service thereof, that finding was reversed on Appeal and any challenge to the service of the notice should be deemed waived upon Defendant's failure to move for dismissal on that ground within sixty days of answering the complaint. Additionally, the Special Referee's

finding as to RPAPL 1303 is misleading as that issue was neither before her nor specifically addressed at the hearing.

Plaintiff notes that Defendant was already litigating this action for thirteen years prior to seeking to amend his answer. To the extent that the case was dismissed for a portion of that time, the order reversing dismissal was nearly four years prior to the motion. Defendant was or should have been aware of this potential defense no later than the initial motions for summary judgment in 2015. Such amendment would allegedly be highly prejudicial to Plaintiff due to the passage of time, difficulty of locating additional evidence of a mailing done many years earlier by a prior servicer, and the late stage of this litigation. Further, Plaintiff suggests that the amendment would be futile in light of the Strangis Affidavit.

Turning to its own motion, Plaintiff asserts that it has proven its standing. There is only one original note – the copy proffered by Stafford was scanned prior to the addition of the allonges. Counsel attests that the original note is in the possession of his office and now has both allonges firmly affixed to it. The February 5, 2019 assignment of mortgage explicitly transferred ownership of the note to Plaintiff. It further argues that the May and Stafford Affidavits and appended exhibits are sufficient to show possession prior to the commencement of this action. Finally, it alleges that the Pooling and Servicing Agreement for the subject loan shows that Chase was acting as loan servicer and custodian on its behalf at the relevant time.

Finally, Plaintiff notes that Defendant did not respond to the portion of its motion seeking to strike his answer pursuant to CPLR 3126. As such and in light of the continued absence of an explanation for the failure to comply with discovery obligations, Plaintiff reiterates that Defendant's answer should be stricken.

Defendant's Reply

Defendant argues that, as a matter of law, his RPAPL 1303 defense was not waived and the Special Referee found that Plaintiff did not serve him with the required notice. The Appellate Division did not reverse the finding that service was improper, merely finding that CPLR 3211[e] barred raising personal jurisdiction as a defense. Further, Plaintiff has still not proffered a copy of whatever version was allegedly served.

Noting that untimeliness is not a bar to amendment, Defendant alleges that no actual prejudice has been shown. Plaintiff has already addressed the proposed additional affirmative defense and there would, thus, be no unfair surprise. To the extent that Plaintiff would need to proffer additional documentary evidence, it should already have produced them.

Defendant further asserts that Plaintiff offers no explanation as to why one copy of the note lacks allonges. He further suggests that there is no proof that the allonges were firmly affixed at the relevant time.

Finally, Defendant (inaccurately) argues that Plaintiff did not move to strike his answer and that, even if it had, there is no proof that his failure to respond to discovery was willful and contumacious.

Analysis

RPAPL 1303

Pursuant to CPLR 3211[e], "an objection that the summons and complaint… was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." Though the RPAPL 1303 notice is served along with the summons and complaint, non-compliance with that section does not have the same temporal limitation (*JPMorgan Chase Bank v Lee*, 186 AD3d 685, 687 [2d Dept 2020]["RPAPL 1303 … may be raised at any time while the action is pending"]). As such, the Appellate Division's holding herein does not bar Defendant from raising it.

Nor is the Special Referee's finding dispositive. "A referee derives his or her authority from an order of reference by the court, and the scope of the authority is defined by the order of reference" (*Brighton Leasing Corp v Brighton Realty Corp*, 192 AD3d 749, 750-751 [2d Dept 2021][internal citation omitted]). "A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction" (*Petrychenko v Solovey*, 177 AD3d 908 [2d Dept 2019]). Pursuant to the April 11, 2016 order, the matter was referred to the JHO Part for a traverse hearing. The accompanying JHO/Special

Referee Order defined the scope as "the issue(s) of service of process." Neither order mentions RPAPL 1303. Unsurprisingly, per the transcript, the parties did not address the notice at the hearing. Thus, the Special Referee's finding that Defendant was not served with it – though logical in light of her finding that the summons and complaint were not properly served – was beyond the scope of the referral and not binding.

"RPAPL 1303 is a condition precedent to the commencement of a foreclosure action and the failure to comply is a basis for dismissal of a complaint" (*JPMorgan Chase Bank v Lee*, 186 AD3d 685, 687 [2d Dept 2020].) "The foreclosing party bears the burden of establishing compliance with RPAPL 1303" (*HSBC Mortgage Corp v Tehrani*, 229 AD3d 772, 777 [2d Dept 2024]) but can meet its burden by submitting an affidavit of service reflecting delivery of a notice printed on colored paper that was other than the color of the summons and complaint and in the required typeface (*PNC Bank v Mone*, 231 AD3d 977, 979 [2d Dept 2025]). A bare and unsubstantiated denial of receipt of the notice is insufficient to rebut the presumption of proper service created by the affidavit (*Deutsche Bank v Blackman*, 203 AD3d 698, 699 [2d Dept 2022]). Likewise, speculative and conclusory allegations as to the font sizes utilized do not create an issue of fact (*OneWest Bank v Cook*, 204 AD3d 1025, 1027 [2d Dept 2022]).

Plaintiff proffers an affidavit of service wherein the process server, Alan Feldman, swears that he served the Defendant with the summons and complaint on white paper "together with the Notice required by RPAPL Section 1303, which Notice, as served, was printed on blue paper, the title of the Notice appeared to be in bold 20-point type, and the text appeared to be in bold, 14-point type." Service was allegedly accomplished at 355 S 2nd Street, Apt 3B by delivering a copy of the documents to Defendant's mother-in-law, Melida Espiritusanto. Plaintiff, thus, met its initial burden.

Defendant now denies receipt of the notice and claims that, having failed to produce a copy of the notice, Plaintiff has not demonstrated compliance with the statutory type-size requirements. Neither the denial nor the speculation, however, rebut the affidavit of service. Nonetheless, Defendant is correct that his prior assertions that service of the summons and complaint was defective are also applicable here. Not only did the Court previously set the matter down for a hearing in light of his sworn assertion that he did not reside at the service

address, the Special Referee appears to have found his testimony to that effect to be credible.[4] As such, issues of fact remain as to whether Defendant was properly served with the RPAPL 1303 notice.

Amendment

"Leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit" (*Cirillo v Lang*, 206 AD3d 611,612 [2d Dept 2022]). "The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion" (*Wells Fargo Bank v Spatafore*, 183 AD3d 853, 853 [2d Dept 2020]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered" *(Cumberbatch v Townsend*, 2025 NY Slip Op 04158 [2d Dept 2025], quoting *Flowers v Mombrun*, 212 AD3d 713, 714–715 [2d Dept 2023]). However, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*C Castle Group Corp v Hertzfeld & Rubin, PC*, 237 AD3d 888, 889 [2d Dept 2025], quoting *Edenwald Contr Co v City of New York*, 60 NY2d 957, 959 [1983]). Prejudice exists where the nonmoving party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014] [internal quotation marks omitted]).

Herein, Defendant answered with the aid of counsel in 2009, successfully moved for leave to file a late answer in 2013, and opposed Plaintiff's motion for summary judgment and cross-moved for dismissal in 2015 – all without seeking to assert a defense that Plaintiff had failed to comply with the default notice requirements of the mortgage. While he now argues that the procedural posture of the action at various junctures prevented him from seeking to amend

[4] Neither the transcript nor the resulting order explicitly set forth the Special Referee's logic but it appears from her findings that she accepted Defendant's assertion that he did not reside at the service address and, thus, sustained the traverse.

his answer, he had ample opportunities to do so – in any of his prior moving papers, since the restoration of this action in May 2019, etc – but did not.

Plaintiff alleges that actual prejudice would result from the amendment. The servicer of the loan is now SPS rather than Chase which allegedly sent the notice. To the extent that the Strangis Affidavit is insufficient to demonstrate mailing in the absence of the records upon which she relied, Plaintiff has not demonstrated compliance. Further cooperation from Chase would need to be secured and the underlying records located many years after the relevant event.

As Defendant knew or should have known of this potential defense many years ago and in light of the prejudice to Plaintiff that would result from the amendment, the portion of Defendant's motion seeking to amend his answer is denied.

3126

"Although public policy favors the resolution of cases on the merits, a court may strike a pleading as a sanction if a party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. The drastic remedy of striking a pleading is appropriate when there is a clear showing that the failure to comply with discovery demands or orders was willful and contumacious" (*Pfeiffer v Shoela*, 206 AD3d 941, 942-943 [2d Dept 2022]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time" (*Amos v Southampton Hospital*, 198 A.D.3d 947, 948 [2d Dept 2021], quoting *Rock City Sound v Bashian & Farber, LLP*, 83 AD3d 685, 686–687 [2d Dept 2011]).

Plaintiff served its discovery requests in August 2019 and sent a deficiency letter the following month. It does not appear that it followed up during the nearly three years thereafter before making the instant motion. Further, there is no order requiring Defendant to respond to discovery. As such, even in the absence of any excuse for Defendant's failure to meet its obligations, striking its answer would be an overly harsh sanction. To the extent that this decision and order largely obviates the need to for responses, this Court will also not order Defendant to do so.

Summary Judgment

"Generally, in a mortgage foreclosure action, a plaintiff demonstrates its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default" (*BNY Mellon v Swift*, 213 AD3d 624, 625 [2d Dept 2023]). It is undisputed that Plaintiff has done so here.

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of America, NA v Paulsen*, 125 AD3d 909, 910 [2d Dept 2015]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*US Bank, NA v Collymore*, 68 AD3d 752, 754 [2d Dept 2009] [citations omitted]).

While it is true that the copy proffered by May includes two allonges while the one appended to Stafford's affidavit does not, an examination of the documents reflects that they are otherwise identical – the same markings, identically placed signature, same endorsement placed diagonally across the bottom left line on the signature page, etc. As such, it appears that there is only one original note.

The Court notes that the signature page of the note includes an endorsement by the original lender to blank. Similarly, the chain of allonges also culminates in blank. As such, whichever one was the state of the note at commencement, it was a bearer instrument.

While Defendant is correct that Stafford attests to Chase's possession of the note but offer any evidence that it held it on behalf of Plaintiff, Plaintiff accurately notes that the February 2009 assignment of mortgage from Chase to Plaintiff also explicitly transferred ownership of the note. As such, Plaintiff has demonstrated its standing.

Defendant has abandoned his remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

Default Judgment Against the Non-Appearing Defendants

Plaintiff has demonstrated its entitlement to default judgment against the non-appearing defendants. "On a motion pursuant to CPLR 3215 for leave to enter a default judgment, a plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's default in answering or appearing" (*US Bank v Deblinger*, 235 AD3d 1025, 1027 [2d Dept 2025]). Plaintiff has done so.

Amendment of the Caption

The portion of Plaintiff's motion seeking to amend the caption by substituting U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, as Trustee, for J.P. Morgan Alternative Loan Trust 2005-S1, Holders of Mortgage Pass-Through Certificates, as Plaintiff and by substituting Robert McCallister, Troy Boudier, Miggon Collins, Joy Collins, Rodney Snyder, Antoine Wilson, Sharonna Kearns, Gizette Wallace, Mark Vernell, Richard Pearce, Peter Hoover, Jerome Delovis, and Kenel Sinous, for the Doe defendants is unopposed and the requested relief is granted.

Conclusion

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment and other relief is granted to the extent that partial summary judgment is granted in its favor and Defendant's affirmative defenses other than non-compliance with RPAPL 1303 are stricken; and it is further

ORDERED that default judgment is granted against the non-answering defendants; and it is further

ORDERED that the caption is amended to substitute U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, as Trustee, for J.P. Morgan Alternative Loan Trust 2005-S1, Holders of Mortgage Pass-Through Certificates, as Plaintiff and by substituting Robert McCallister, Troy Boudier, Miggon Collins, Joy Collins,

Rodney Snyder, Antoine Wilson, Sharonna Kearns, Gizette Wallace, Mark Vernell, Richard Pearce, Peter Hoover, Jerome Delovis, and Kenel Sinous, for the Doe defendants; and it is further

ORDERED that Defendant's motion to dismiss or amend is denied; and it is further

ORDERED that the parties shall proceed to trial on the remaining issue (service of the RPAPL 1303 notice).

This constitutes the decision and order of the Court.

July 21, 2025 ENTER:

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