Bank of N.Y. Mellon v Powell
2025 NY Slip Op 32942(U)
July 22, 2025
Supreme Court, Kings County
Docket Number: Index No. 513638/18
Judge: Cenceria P. Edwards

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 17th day of June, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,
Justice.

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THE BANK OF NEW YORK MELLON AS TRUSTEE FOR CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2007-7,

Plaintiff,

- against - Index No. 513638/18

MAULYN POWELL; LEXINGTON NATIONAL; ACTION BAIL BONDS, INC.; ARGENT MORTGAGE COMPANY, LLC;

"JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the person or parties intended being the tenants, occupant, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

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)	1-2 63 65-81, 83-95 99-108
Opposing Affidavits (Affirmations)	67-81

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1779 Troy Avenue in Brooklyn (Block 7770, Lot 123) (Property), Defendant Maulyn Powell (Powell or Defendant), a self-represented litigant, moves (in motion sequence [mot. seq.] four) for an order dismissing the complaint with prejudice

because Plaintiff is "not the real party in interest . . ." (NYSCEF Doc No. 79). Powell moves (in mot. seq. five) for an order extending his time within which to answer the complaint (NYSCEF Doc No. 63). Powell also moves (in mot. seq. seven) for an order seeking dismissal based on Plaintiff's lack of standing (NYSCEF Doc No. 99).

Plaintiff The Bank of New York Mellon as Trustee for CWABS, Inc. Asset-Backed Certificates, Series 2007-7 (BONY Trust or Plaintiff) cross-moves (in mot seq. six) for an order: (1) granting it summary judgment as against Powell and striking his answer, with prejudice, including all defenses and counterclaims asserted therein, pursuant to CPLR 3212; (2) granting it a default judgment as against defendants Lexington National, Action Bail Bonds, Inc. and Argent Mortgage Company, LLC, pursuant to CPLR 3215; (3) appointing a referee to ascertain damages due and to issue a report, pursuant to RPAPL § 1321; (4) amending the caption by striking the John Doe defendants; and (5) reforming the public land records, pursuant to RPAPL Article 15, to reflect that the BONY Trust is the mortgagee of record with respect to the mortgage in the principal amount of $223,200.00, dated March 3, 2005, and recorded with the Office of the City Register of the City of New York on March 30, 2005 at City Register File Number (CRFN) 2005000183387 (NYSCEF Doc No. 65).

Background

On July 3, 2018, the BONY Trust commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-3). The complaint alleges that on March 27, 2007, Powell "duly

executed and delivered a note whereby MAULYN POWELL promised to pay the sum of $334,750.00 plus interest as set forth in said note," which was secured by a Consolidation, Extension, and Modification Agreement (CEMA) encumbering his residential Property (NYSCEF Doc No. 1 [complaint] at ¶¶ 2 and 4). The complaint alleges that Defendant "failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on April 01, 2016 and each subsequent payment thereafter" (*id.* at ¶ 9).

The complaint alleges that "[t]o the extent that the original note or interim assignments of mortgage are lost or unavailable, Plaintiff has the right to foreclose the subject note and mortgage pursuant to New York law" (*id.* at ¶ 3). The complaint annexes a copy of a Lost Note Affidavit from Jaren French (French), a Document Control Officer of Select Portfolio Servicing, Inc. (SPS), the current servicer of the mortgage loan and the attorney-in-fact for the BONY Trust (*id.* at 11-13). French makes the conclusory assertions that "[t]hough it has conducted a diligent search of the records and files maintained in connection with the Mortgage, [SPS] has been unable to locate the Note and believes that the Note has been lost, misfiled, misplaced, or destroyed" (*id.* [French Lost Note Affidavit] at ¶ 4). Notably, French further attests, upon information and belief, that "*the Noteholder* was the owner of the Note when the loss of possession occurred and was entitled to enforce the Note at that time" and "[t]he records of the Company do not show that the Note was ever released, paid off, satisfied, assigned, transferred, pledged, hypothecated or that the Note was otherwise disposed of by the Company" (*id.* at ¶¶ 5-6 [emphasis added]).

On or about September 12, 2018, Powell attempted to answer the complaint (NYSCEF Doc No. 71). BONY's counsel variously claims that Powell's answer, verified on September 7, 2018, was rejected and that he was in default as of September 30, 2018 (NYSCEF Doc No. 80 at ¶¶ 14-15) or that Powell's answer should now be stricken (NYSCEF Doc No. 67 at ¶¶ 2 and 6).

Powell's Successive Dismissal Motions

On April 30, 2019, Powell moved to dismiss the complaint (NYSCEF Doc No. 72). On July 9, 2019, Powell filed a second dismissal motion asserting that Plaintiff lacked standing (NYSCEF Doc No. 75).[1] By a September 20, 2019, decision and order, the court (Dear, J.) denied Powell's second dismissal motion on the ground that "Defendant has not demonstrated that Plaintiff lacks standing, merely that Plaintiff has not as of yet proven its standing" (NYSCEF Doc No. 35).

On December 16, 2019, Powell filed a third dismissal motion on the same grounds (NYSCEF Doc No. 77). By an August 10, 2020, decision and order, the court (Sheares, J.) denied Powell's third dismissal motion and held that "Plaintiff's counsel has proffered records *creating at least an issue of fact* as to whether it had standing at the commencement of this action *and states that her office is now in possession of the original note*" (NYSCEF Doc No. 110 [emphasis added]).

[1] Powell's first dismissal motion was marked withdrawn since it was replaced by Powell's second dismissal motion.

Powell's Instant Dismissal Motion

On or about February 25, 2020, Powell made a fourth motion to dismiss the complaint on the ground that the BONY Trust is "not the real party in interest [and] a mortgage without a Note is a nullity and is not enforceable" (NYSCEF Doc No. 79).[2] Powell's fourth dismissal motion is, essentially, a successive motion to dismiss for lack of standing, which the court has previously denied twice (NYSCEF Doc Nos. 35 and 110).

The BONY Trust, in opposition, argues that Powell's fourth successive motion to dismiss the complaint for lack of standing is precluded by the single motion rule set forth in CPLR 3211 (e), citing *Klien v Gutman*, 12 AD3d 417, 420 (2d Dept 2004) (NYSCEF Doc No. 80 at ¶ 20). Importantly, Plaintiff's counsel argues that "a copy of the note is annexed to the lost note affidavit, which evidences its terms, and Borrower has not established that Plaintiff does not own the note or did not own the note at the time the complaint in this matter was filed[,]" and thus, "*there remain questions of fact* which preclude the Court from granting Borrower's motion and dismissing Plaintiff's complaint at this time" (*id.* at ¶¶ 27-28 [emphasis added]).

Powell's Instant Motion for An Extension Of Time to Answer the Complaint

On November 19, 2020, Powell moved for an extension of time within which to answer the complaint (NYSCEF Doc No. 63). Powell's affidavit in support argues that

[2] Powell's fourth dismissal motion, which Powell did not e-file, was reproduced by the BONY Trust and e-filed as NYSCEF Doc No. 79.

"pro se litigants . . . are held to less stringent pleading standards that BAR registered attorneys" and "[r]egardless of the deficiencies in their pleadings, pro se litigants are entitled to the opportunity to submit evidence in support of their claims" (*id.* at 2).

The BONY Trust's Motion for an Order of Reference

On March 2, 2021, the BONY Trust opposed Powell's motion and cross-moved for an order granting it summary judgment against Powell and striking his answer, a default judgment against the non-appearing defendants, appointing a referee, amending the caption and reforming the land records to reflect that the BONY Trust is the mortgagee of record (NYSCEF Doc No. 65).

Notably, to dispose of the issues regarding the lost note, the BONY Trust submitted an attorney affirmation asserting that the previously lost note has been found and has been in his law firm's possession since July 11, 2019:

> "[t]he original, properly-endorsed consolidated note was delivered to the Trust's attorneys Eckert Seamans on July 11, 2019, and the original, properly-endorsed consolidated note remains in the custody of Eckert Seaman [and] is currently stored at Eckert Seamans headquarters in Pittsburgh, Pennsylvania. A true and accurate copy of the bailee letter showing delivery and acceptance of the original collateral file by Eckert Seamans is annexed hereto as **Exhibit 14**" (NYSCEF Doc No. 67 at ¶ 18).

The July 11, 2019, Bailee Letter evidencing delivery of the consolidated note to Plaintiff's counsel is actually annexed to the BONY Trust's cross-moving papers *as* ***Exhibit 13*** (NYSCEF Doc No. 81). The Bailee Letter, which was sent by Loretta Whitworth of Richmond Monroe Group as "Vendor" for SPS, purportedly enclosed the Allonge, CEMA,

CEMA Note, Legal Description, "Original Mortgage Deed 2," "Original Note 2" and Riders and provides that "[a]ll above collateral is to be held by you as bailee for the benefit of S[PS] and subject to S[PS] exclusive direction and control" and "[b]y accepting the above collateral, you consent to be the custodian, agent, and bailee for S[PS] on the terms described in this letter" (*id.* at 1).

Plaintiff's counsel asserts that Powell's motion for an extension of time to answer should be denied because Powell already filed an answer to the BONY Trust's complaint (NYSCEF Doc No. 67 at ¶ 19).

In support of its motion for summary judgment and an order of reference, the BONY Trust submits an affidavit from Cynthia May (May), an officer of SPS, the current servicer of the subject mortgage loan and attorney-in-fact for BONY, pursuant to an August 8, 2017, Limited Power of Attorney (NYSCEF Doc No. 83 at ¶ 1 and NYSCEF Doc No. 84). May attests that the affidavit is based on her review of SPS's business records "relating to the Borrower(s)'s loan and from my own personal knowledge of how the records are kept and maintained" (NYSCEF Doc No. 83 at ¶ 2). May further attests that "[t]o the extent that the business records of the loan in this matter were created by a prior servicer, the prior servicer's records for the loan were incorporated and boarded into SPS's systems, such that the prior servicer's records concerning the loan are now part of SPS's business records" (*id.* at ¶ 3).

May clarifies that the original Consolidated Note was never lost or misplaced, but was located with the prior loan servicer after Plaintiff's counsel conducted an investigation:

> "[a]t the time the complaint was filed, it was thought that the original Consolidated Note had been lost or misplaced; however, an investigation undertaken by Plaintiff[']s current attorneys of record determined that the original, properly-endorsed Consolidated Note was in the possession of Plaintiff's previous mortgage-loan servicer, Specialized Loan Servicing LLC ('SLS'), and the original, properly-endorsed Consolidated Note was physically delivered to SLS on January 16, 2015 by Bank of America, N.A., as successor to Countrywide, the 'Master Servicer' pursuant to the Pooling and Servicing Agreement ('PSA') applicable to the trust. A true and accurate copy of the Bailee Letter Agreement between Bank of America, N.A., and SLS and excerpts from the PSA are annexed hereto as collective **Exhibit H**.
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> "The Loan Records reflect that Plaintiff is the current owner of the original, properly-endorsed Consolidated Note and CEMA, [and] was at the time the complaint was filed on July 3, 2018, and the original, properly-endorsed Consolidated Note is currently in the possession of Plaintiff's attorneys, Eckert Seamans Cherin & Mellott, LLC, on behalf of Plaintiff, as Bailee" (*id.* at ¶¶ 16-17).

Regarding Powell's payment default, May attests that "[t]he Loan Records reflect that the Borrower defaulted under the terms of the Consolidated Note and CEMA, as modified, by failing to tender the payment that was due on April 1, 2016, and each payment due thereafter" and "[t]he Loan Records reflect that the Borrower has not cured the default and remains in default" (*id.* at ¶¶ 18 and 22). May specifically references an annexed "Financial Breakdown Statement" from SPS "showing the date of default and amounts due and owing . . ." (*id.* at ¶ 22 and NYSCEF Doc No. 95).

Defendant Powell's Cross-Motion

On April 16, 2021, Powell opposed the BONY Trust's cross-motion and seemingly moved, once again, for an order dismissing the complaint based on lack of standing (NYSCEF Doc No. 99). Powell argues that an attorney for the plaintiff cannot admit evidence as a witness, and that absent any depositions, admissions or affidavits, the court cannot grant summary judgment (*id.* at 4). Powell asserts that "[s]ince a BAR attorney is not under oath nothing he says can be trusted or entered into evidence" and "[s]ince the attorney is not a first-hand witness, anything and everything he says must be considered as hearsay and not be permitted to be placed on the scales of justice" (*id.* at 5-6).

Discussion

(1)

Powell's Successive Dismissal Motions

CPLR 3211 (e) provides, in relevant part, that that at any time before service of a responsive pleading is required, a party may move to dismiss a pleading "on one or more of the grounds set forth" in CPLR 3211 (a), and that "no more than one such motion shall be permitted." "The single motion rule prohibits parties from making successive motions to dismiss a pleading" (*Ramos v City of New York*, 51 AD3d 753, 754 [2d Dept 2008]). "The rule bars both repetitive motions to dismiss a pleading pursuant CPLR 3211 (a), as well as subsequent motions to dismiss that pleading pursuant to CPLR 3211 (a) that are based on alternative grounds" (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015]).

Here, Defendant Powell previously moved *twice* pursuant to CPLR 3211 (a) to dismiss the complaint on the ground that the BONY Trust lacked standing to foreclose. The court denied Powell's first dismissal motion on the ground that "Defendant has not demonstrated that Plaintiff lacks standing, merely that Plaintiff has not as of yet proven its standing" (NYSCEF Doc No. 35). The court also denied Powell's second dismissal motion based on lack of standing and held that:

> "[Powell] fails to demonstrate that Plaintiff lacks standing, merely that it relies on a lost note affidavit. The Court further notes that *Plaintiff's counsel has proffered records creating at least an issue of fact as to whether it has standing at the commencement of this action* and states that her office is now in possession of the original note" (NYSCEF Doc No. 110 [emphasis added]).

To the extent that Powell seeks dismissal, again, his successive dismissal motion is denied under the one motion rule. As the court previously held, as Plaintiff's counsel admits, and as discussed below, there are issues of fact regarding the BONY Trust's standing.

(2)

The BONY Trust's Cross-Motion

"When seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment [which] may be shown . . . by the plaintiff showing entitlement to summary judgment . . ." (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 (A), * 5 [Sup Ct, Kings County 2015] [citing RPAPL § 1321; 1-2 Bruce J. Bergman, Bergman on New York Mortgage Foreclosures § 2.01 (4) (k) (note: online edition)]).

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]).

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 evidence of the borrower's payment default (*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]). Furthermore, "[w]here, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (*Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016], quoting *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 628 [2014], *aff'd* 25 NY3d 355 [2015]).

"In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note" (*U.S. Bank Nat. Ass'n v Weinman*, 123 AD3d 1108, 1109 [2d Dept

2014]). "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" (*Bank of New York Mellon v Gales*, 116 AD3d 723, 724 2d Dept 2014]; *U.S. Bank N.A. v Guy*, 125 AD3d 845, 846-847 [2d Dept 2015]).

"[P]ursuant to UCC [§]3-804, which is intended to provide a method for recovering on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit due proof of the plaintiff's ownership of the note, the facts which prevent the plaintiff from producing the note, and the note's terms" (*HSBC Bank USA, Nat'l Ass'n v Gilbert*, 189 AD3d 1377 [2d Dept 2020]; *see also Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812, 814 [2d Dept 2019]).

Here, upon the 2018 commencement of this action, the BONY Trust submitted the Lost Note Affidavit with the complaint which "did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost" (*Wells Fargo Bank, N.A. v Meisels*, 177 AD3d at 815). While the Lost Note Affidavit did not provide sufficient facts and failed to sufficiently establish the BONY Trust's ownership of the note at the time of commencement, the BONY Trust has now submitted documentation, including a Bailee Letter, evidencing that Plaintiff's counsel located the Consolidated Note in the possession of the BONY Trust's prior mortgage loan servicer, SLS, after counsel conducted its own investigation. While an attorney affirmation typically constitutes inadmissible hearsay (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] [holding that bare affirmation of attorney who demonstrated no personal knowledge of the

manner in which the accident occurred is without evidentiary value]), as Powell correctly argues, Plaintiff's counsel conducted the investigation for the lost Consolidated Note, and thus, has personal knowledge regarding that investigation, including the location of the Consolidated Note found in the possession of the prior mortgage loan servicer.

However, there remains an issue of fact regarding the BONY Trust's possession of the Consolidated Note at the time of commencement in 2018. May *of SPS* now attests that "the original, properly-endorsed Consolidated Note was physically delivered to SLS on January 16, 2015," without providing any factual details of the delivery or SLS's business practices regarding its physical receipt and retention of original negotiable instruments (*Wells Fargo Bank, NA v Meisels*, 177 AD3d at 815; *US Bank Trust NA v Rose*, 176 AD3d 1012, 1014-11015 [2d Dept 2019]). Notably, there is no testimony offered regarding the whereabouts of the Consolidated Note at the time of the commencement of this action. While the BONY Trust has produced the loan documents and evidence of Powell's payment default based on the Financial Breakdown Statement from SPS, the current servicer of the mortgage loan, it has failed to dispose of the question of fact regarding the BONY Trust's possession and ownership of the Consolidated Note at the time of commencement. Accordingly, it is hereby

ORDERED that Defendant Powell's successive dismissal motions (mot. seq. four and seven) are denied and Powell's motion for an extension of time to answer (mot. seq. five) is denied as moot, since Powell is deemed to have answered the complaint (NYSCEF Doc No. 71); and it is further

ORDERED that the BONY Trust's cross-motion (mot. seq. six) is only granted to the extent that the caption is amended to strike the John Doe defendants, as reflected below:

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THE BANK OF NEW YORK MELLON AS TRUSTEE FOR CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2007-7,

Plaintiff,

- against - Index No. 513638/18

MAULYN POWELL; LEXINGTON NATIONAL; ACTION BAIL BONDS, INC.; ARGENT MORTGAGE COMPANY, LLC;

Defendants.
----------X

And the motion is otherwise denied based on issues of fact regarding the BONY Trust's standing to foreclose.

This constitutes the decision and order of the court.

July 22, 2025 E N T E R,

Hon. Cenceria P. Edwards, JSC, CPA