

**SRP 2013-9 Funding Trust v McDuffie**

2025 NY Slip Op 32961(U)

June 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 503059/2018

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP 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, 11201 on the 11th day of June, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,  
Acting Justice.

✓ -----X  
SRP 2013-9 FUNDING TRUST,  
Plaintiff,

- against -

✓ EVELYN MCDUFFIE, CITY OF NEW YORK  
ENVIRONMENTAL CONTROL BOARD AND JANE  
DOE,  
Defendants.  
-----X

MS#5 ✓

Index No. 503059/2018

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed  
Opposition Affirmation to Motion

92, 93, 94  
134, 135

Upon the foregoing papers in this action, defendant Evelyn McDuffie (“defendant”) moves by order to show cause (under mot. seq. five) for an order granting defendant leave to renew and reargue this court’s order entered May 14, 2019, which granted plaintiff’s application for an order of reference and default judgment and denied defendant’s cross-motion to dismiss the complaint.

***Background***

Plaintiff commenced the instant action on February 13, 2018. On May 1, 2019, an order of reference was granted by this court, awarding plaintiff default judgment against the defendant, and denied defendant’s cross-motion to dismiss the action because

defendant did not seek to vacate their default. Defendant is now moving to renew and reargue said order.

In support of the motion, defendant argues that she should be granted reargument as a new law has been enacted, the Foreclosure Abuse Prevention Act (hereinafter FAPA). Defendant provides that there was one prior action commenced regarding the subject mortgage. The first action was commenced on or about December 6, 2006, and dismissed on July 24, 2012. Honorable Yvonne Lewis dismissed the first complaint with leave to renew due to the papers being insufficient to prove that plaintiff had the authority to foreclose on the subject premises at the time that this action commenced.

The second action, the instant action, was commenced on February 13, 2018. Defendant contends that she demonstrated, prima facie, that the six year statute of limitation began to run on or about December 12, 2006, when AMERICAN HOME MORTGAGE SERVICING filed the first foreclosure action and elected to call due the entire amount secured by the mortgage. As the instant action was commenced on February 13, 2018, twelve years after the first action was filed, defendant argues that the cross motion to dismiss the plaintiff's complaint and to discharge the mortgage as time barred pursuant to FAPA dated March 5, 2019, should have been granted. Additionally, defendant alleges that she was never served with the complaint. Lastly, defendant alleges that plaintiff lacks standing as Bank of America was only a servicing company and not authorized to assign the mortgage.

In opposition, plaintiff argues that defendant's motion to reargue is untimely as it was brought more than five years after being served with notice of entry of the decision

and order entered May 14, 2019, and the order of reference entered May 14, 2019. Additionally, plaintiff argues that defendant's request for leave to renew, based upon a change in law, i.e. the Foreclosure Abuse Prevention Act ("FAPA"), must also be denied, as untimely, as it is likewise being brought more than five years after defendant was served with notice of entry of the judgment of foreclosure and sale. Plaintiff notes that as defendant does not seek to vacate the judgment, the judgment is final and non-appealable. Further, plaintiff argues that the 2006 foreclosure action sought to foreclose a senior mortgage, in the principal amount of \$484,000.00, whereas the instant action foreclosed a junior mortgage, in the principal amount of \$121,000.00. Plaintiff argues that defendant at no point alleged that she was not served with process until the instant motion, and even still, this argument has been waived as she appeared by counsel on December 19, 2018, and filed a notice of appearance. As for defendant's standing argument, plaintiff contends that this argument likewise fails as defendant never filed an answer nor moved to vacate her default.

### *Discussion*

#### *I. Service*

A motion to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion (CPLR §2221[d][2]).

Defendant argues, for the first time in this action, that she was never served with process.

Defendant may not reargue a defense that was never raised in the prior motion. *Id.*

#### *II. Standing*

Although RPAPL 1302–a provides that a defendant may raise the defense of lack of standing at any time, even after a foreclosure sale if the judgment of foreclosure and sale was issued upon the defendant's default, the statute does not apply to a defaulting defendant who has not vacated his or her default (*see U.S. Bank N.A. v. Ashon*, 226 A.D.3d 941, 943 [2d Dept 2024]).

Here, defendant never answered the complaint nor moved to vacate her default after the order of reference was issued. Standing is not a jurisdictional defect and must be raised in a responsive pleading or pre-answer motion to dismiss (*GMAC Mtge., LLC v. Coombs*, 191 A.D.3d at 47, quoting *U.S. Bank, N.A. v. Emmanuel*, 83 A.D.3d 1047, 1048–1049). Furthermore, the record reflects that plaintiff annexed a copy of the promissory note to the complaint, which is sufficient to establish standing at the time of commencement (*see U.S. Bank N.A. v Henry*, 157 AD3d 839 [2d Dept 2018]). Defendant is therefore precluded from raising this defense at this stage of the litigation.

### **III. FAPA**

A motion for leave to renew shall demonstrate that there has been a change in the law that would change the prior determination (CPLR §2221[e][2]). Defendant's order to show cause seeks renewal based on the Foreclosure Abuse Prevention Act ("FAPA"), enacted in December 2022. Defendant argues that FAPA requires dismissal of this action as time-barred, because the six-year statute of limitations began to run when the first foreclosure action was commenced in 2006. Section 10 of the Foreclosure Abuse Prevention Act provides that it shall apply to all foreclosure actions "in which a final judgment of foreclosure and sale has not been enforced."

Here, a judgment of foreclosure and sale was granted by the court by order dated September 5, 2019, and the subject property was sold at a foreclosure auction held on January 11, 2024. Therefore, a FAPA argument is not applicable in this action.

Accordingly, it is

**ORDERED** that defendant's order to show cause (mot. seq. five) is denied in its entirety. ✓

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES

A. J. S. C.

**NON DEREKIM B. NECKLES  
A.J.S.C.**