

U.S. Bank N.A. v Cohen

2025 NY Slip Op 33660(U)

September 15, 2025

Supreme Court, Kings County

Docket Number: Index No. 507667/2015

Judge: Menachem M. Mirocznik

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At IAS Part ^{FRP5} of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the ^{17th} of September 2025

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

Cal # 40:41
Index No. 507667/2015

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP. SCFB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004 AR4,

Plaintiff,

-against-

LIAT COHEN A/K/JA LIAJ COHEN; ELIE ZEITOUNE AND MIRAY ZEITOUNE; CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; JACK COHEN;YOSEFCOHEN

Defendants.

**Decision and Order
(Motion Seq. 4 and 5)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 127-154
Notice of Cross-Motion	NYSCEF Doc. 156-159
Opposition to Cross-Motion and Reply	NYSCEF Doc 160-162
Reply to Cross-Motion	NYSCEF Doc. 163

Upon the foregoing papers, the motion and cross-motion are determined in accordance with this Decision and Order as follows:

Procedural History

This action was commenced on June 22, 2015. Defendant filed a pro se answer which asserted affirmative defenses and several counterclaims. Plaintiff served reply to the counterclaims. Settlement conferences were held on October 5, 2015, October 21, 2015, December 16, 2015 and January 25, 2016.

On March 22, 2017 plaintiff moved for partial summary judgment to dismiss defendant's counterclaims. Defendant cross-moved for summary judgment dismissing the action due to plaintiff's purported lack of standing and for non-compliance with RPAPL 1304 and RPAPL 1306.

By order dated March 12, 2018 the Court granted plaintiff's motion and denied defendant's cross-motion holding that plaintiff established its standing and defendant failed to establish as a matter of law that plaintiff failed to comply with the subject statutory conditions precedent.

On December 8, 2021, after any stays arising from the COVID-19 pandemic, plaintiff moved for summary judgment and order of reference and to strike defendant's answer which included affirmative defenses. Defendant opposed the motion contending that relief was precluded by collateral estoppel and res judicata by the Court's determination to deny defendant's prior motion for summary dismissal due to non-compliance with RPAPL 1304 and RPAPL 1306. Defendant also contended that plaintiff failed to establish standing, a default and that it mailed a notice of default under the terms of the subject mortgage.

By decision and order dated October 3, 2023 and entered February 7, 2024, the Court granted plaintiff's motion and specifically rejected defendant's contention that the March 12, 2018 order had preclusive effect on the relief sought and noted to the contrary that the Court already found that plaintiff established its standing in the same order. The Court also held that defendant's contentions were considered, found unavailing and that defendant abandoned the remainder of her affirmative defenses. By long form order dated October 3, 2023 and entered February 7, 2024 the Court granted plaintiff's motion for summary judgment, struck defendant's answer and ordered a reference of amounts due and owing to plaintiff.

Plaintiff now moves to confirm the referee's report and for a judgment of foreclosure and sale. Defendant cross-moves to deny confirmation of referee's report, again to dismiss the action for non-compliance with RPAPL 1304 and RPAPL 1306 and to toll interest for plaintiff's delays in prosecuting this action.

Discussion

Initially, as correctly noted by plaintiff, defendant's request for dismissal based on non-compliance with RPAPL 1304 and RPAPL 1306 is barred by the law of the case doctrine. "The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding" *Bank of New York Mellon v Singh*, 205 AD3d 866, 867 [2d Dept 2022]

Here, "plaintiff's strict compliance with RPAPL 1304 and the notice of default provision of the mortgage agreement were both considered and decided in the plaintiff's favor on its motion for summary judgment. Therefore, while it is true that a defense based on noncompliance with RPAPL 1304 may be raised at any time...the doctrine of law of the case precluded the court from reconsidering those issues on the defendant's cross motion." *US Bank NA. v Ramanababu*, 202 AD3d 1139, 1142 [2d Dept 2022][internal citations omitted]; See also *U.S. Bank Tr., NA. v Longo*, 227 AD3d 1122, 1123 [2d Dept 2024][the Supreme Court considered and decided the issues of the plaintiff's compliance with RPAPL 1304 and the notice of default provision of the mortgage

agreement in the plaintiffs favor on the plaintiffs motion for summary judgment. ... The doctrine of law of the case precluded the court from reconsidering those issues in opposition to the plaintiffs motion to confirm the referee's report and for a judgment of foreclosure and sale] [internal citations omitted];

Defendants contentions pertaining to strict compliance with RPAPL 1304 and RPAPL 1306 were specifically raised and considered in connection with the Court's determination granting plaintiff summary judgment. Therefore, defendant's contentions are without merit.

Although not addressed in defendant's attorney affirmation, defendant submits an affidavit containing a conclusory denial of receipt of the notice required by RPAPL 1303. The law is well settled that a "process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service" *Citimortgage, Inc. v Cardali*, 230 AD3d 467,468 [2d Dept 2024]. "A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit" *PennyMac Corp. v Barbosa*, 189 AD3d 863 [2d Dept 2020]

Here, defendants conclusory denial of service of the RPAPL 1303 notice is insufficient to rebut the presumption of proper service.

"The 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 ... The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute." *Citimortgage, Inc. v Kidd*, 148 AD3d 767 (2d Dept 2017)(citations omitted)

Here, the referee's report is based upon the affidavit of plaintiff's alleged server and attorney in fact. However, although apparently not considered or provided to the referee, the power of attorney annexed to the motion is limited by an unproduced pooling and servicing agreement. Therefore, the power of attorney is insufficient to demonstrate that plaintiff's affiant possessed the requisite authority to act on behalf of plaintiff. See *US Bank NA. v Tesoriero*, 204 AD3d 1066, 1068 [2d Dept 2022]["the limited power of attorney submitted by Nationstar Mortgage (hereinafter Nationstar), the plaintiffs loan servicer, restricted and conditioned its authority based on the terms of other agreements which were not provided by the plaintiff. Thus, the limited power of attorney was insufficient to demonstrate that Nationstar possessed the authority to act on behalf of the plaintiff"]

Additionally, the report also provides for the recovery of \$66,750.91 m "Mortgage Insurance" and which is not explained or substantiated.

Therefore, the referees report is not substantially supported by the record and plaintiffs motion to confirm same and for judgment of foreclosure is denied. See *Citimortgage, Inc. v Kidd*, 148 AD3d 767 (2d Dept 2017)

Lastly, defendant's motion for the equitable tolling of interest due to plaintiff's unexplained delays in prosecuting this action is granted.

"A foreclosure action is equitable in nature and triggers the equitable powers of the court...In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party,' such as where the plaintiffs conduct has prejudiced the defendant...Further, a tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action" *GMAC Mtge., LLC v Yun*, 206 AD3d 798, 798-99 [2d Dept 2022][internal citations omitted]; See also *People's United Bank v Patio Gardens III, LLC*, 189 AD3d 1622, 1623 [2d Dept 2020]["tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action"]

Here, plaintiff offers no explanation for the delay in first moving for partial summary judgment, a period of approximately 14 months from January 25, 2016-March 22, 2017. Nor is an explanation provided for the delay in moving for summary judgment after the Court issued the order dated March 12, 2018, a period of approximately 24 months until the matter was stayed due to the COVID-19 pandemic in March 2020. Therefore, the Court finds that interest should be tolled for a period of 36 months for plaintiff's unexplained delays in prosecuting this action.

Accordingly, it is hereby

ORDERED, that plaintiff's motion to confirm the referee's report and for judgment of foreclosure and sale is DENIED; and it is further

ORDERED, that defendant's cross-motion is GRANTED solely to the extent that interest is tolled for a period of 36 months;

This constitutes the decision and order of the Court.

ENTER:


Hon. Menachem M. Mirocznik, JSC

KINGS COUNTY CLERK
FILED
2025 SEP 17 A 9:52