

US Bank v Stern

2025 NY Slip Op 33661(U)

September 22, 2025

Supreme Court, Kings County

Docket Number: Index No. 512007/17

Judge: Cenceria Edwards

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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 22nd day of September, 2025.

P R E S E N T:

HON. CENCERIA P EDWARDS,
Justice.

-----X

US BANK,

Plaintiff,

-against-

Index No.: 512007/17
MS 2&3

ASHER STERN 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 _____

49-72 115-123

Opposing Affidavits (Affirmations) _____

104-108

Affidavits/ Affirmations in Reply _____

109-110

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 1272 East 29th Street in Brooklyn (Block 7646, Lot 74), Plaintiff US Bank moves for summary judgment against Defendants Asher Stern and Tzipora Stern, default judgment against the non-appearing defendants, discontinuance as to the Doe defendants, and the appointment of a referee to compute the total sum due. Defendants oppose and cross-moves for summary judgment in their favor, alleging that Plaintiff failed to comply with RPAPL 1304 and the default notice provisions of the mortgage, that Plaintiff lacks standing, and that this action is barred by the statute of limitations. Plaintiff opposes.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on June 19, 2017. All defendants were allegedly served with the summons and complaint. On August 21, 2017, Defendants filed a pre-answer motion to dismiss. Therein, they alleged that there was another action pending between the same parties to foreclose on the same lien and that Plaintiff failed to seek leave of the Court prior to filing this one. As such, they argued that dismissal pursuant to CPLR 3211[a][4] and RPAPL 1301[3] should result. In addition, they averred that the Court lacked personal jurisdiction over them and, thus, the action should be dismissed pursuant to CPLR 3211[a][8]. In opposition, Plaintiff noted that its motion to discontinue the prior action was sub judice for close to a year at the time it commenced this one and that, had it not done so, the statute of limitations to do so would have lapsed. Discontinuance was granted shortly before Defendants filed their motion to dismiss. As such, Plaintiff argued, the prior action was effectively abandoned when this one was commenced and was now actually terminated. Further, averring that Defendants were attempting to evade service, Plaintiff claimed to have (re-)served them pursuant to CPLR 308[4] since the filing of the motion. While, in reply, Defendants both reasserted their prior arguments and challenged the process server's diligence, their motion was denied – the Court holding that the re-service was effective, that under the circumstances dismissal pursuant to CPLR 3211[a][4] would be inappropriate, and that it could and would grant the leave required by RPAPL 1301[3] nunc pro tunc.¹

Defendants then timely answered and the matter was sent to the Foreclosure Settlement Conference Part. Conferences were held there until January 15, 2019 and in before the Court until September 6, 2019 but an amicable resolution was not reached.

Plaintiff's Motion for Summary Judgment [MS 2]

On January 2, 2022, Plaintiff filed the instant motion. Therein, Plaintiff, arguing that it has met its prima facie burden and that Defendants' affirmative defenses lack merit, seeks to

¹ The Appellate Division, Second Department affirmed the denial of the motion to dismiss (189 AD3d 1313 [2d Dept 2020]).

strike Defendants' answer and for summary judgment to be granted in its favor. Plaintiff further seeks default judgment against the non-appearing defendants, to have a referee appointed to compute the amount due to it, and to drop the "Doe" defendants.

In support of its motion, Plaintiff proffers an affidavit signed by Kimberly A Mueggenberg, a Vice President Loan Documentation of Wells Fargo Bank NA, as servicing agent of Plaintiff. Therein, she introduces, among other documents, copies of the note, mortgage, and default notices. Mueggenberg further states that the loan has been in default since August 1, 2009.

An Affidavit of Mailing, also signed by Mueggenberg, addresses the default and RPAPL 1304 notices. The affiant, claiming familiarity with the mailing practices of both Wells Fargo and the vendor it employed to perform mailings (LenderLive), summarizes those policies. Based therein and upon the "TrackRight" documents appended to her affidavit, Mueggenberg affirms that the notices were properly sent to Defendants.

Defendant's Cross-Motion for Summary Judgment [MS 3]

On March 8, 2021, Defendants filed the instant cross-motion. Therein, they argue that Plaintiff failed to strictly comply with RPAPL 1304, denying receipt of the notices. They further assert that the alleged notices were sent in 2014, three years prior to the commencement of this action and while a prior suit for the same relief was being actively litigated. Noting that the Power of Attorney proffered by Plaintiff post-dates the Mueggenberg Affidavit, Defendants question her authority to testify. They also posit that the "sender" on the letters was America's Servicing Company ("ASC") and that the entity which allegedly generated and sent the notices was LenderLive – neither of which is Mueggenberg's employer, Wells Fargo. Finally, Defendants suggest that Mueggenberg has not explained the basis for her purported familiarity with the mailing practices of Wells Fargo and LenderLive.

Defendants also argue that the contents of the notices allegedly sent does not comply with RPAPL 1304. The statute was amended effective December 2016, changing the required language. As such, Defendants note that what they were ostensibly sent in 2014 is facially insufficient, among other things, omitting the paragraph beginning "IMPORTANT," missing the

language about websites and updated phone numbers, and failing to include five housing counseling agencies serving Kings County.

Noting that the notices were ostensibly sent to Defendants jointly (rather than separate copies being sent to each), Defendants assert that the alleged mailings were not in compliance with the requirement that notices be sent to each borrower.

Defendants also argue that Plaintiff failed to comply with the mortgage default notice requirement for similar reasons. There is no affidavit from someone with personal knowledge of LenderLive's mailing procedures. The alleged notice came from ASC rather than the lender and there is no demonstrated relationship between the two. Defendants further suggest that the contents of the notices do not include the information required by Paragraph 22(b)(1) and (5) of the mortgage. Finally, they argue that the letter was addressed to them jointly, rather than individually.

Additionally, Defendants challenge Plaintiff's standing. Noting that Plaintiff cannot rely on the chain of assignments of mortgage as MERS could not assign the note, Defendants assert that Mueggenberg's claim that Plaintiff was in physical possession of the note is unauthorized and unsupported. She neither claims to work for Plaintiff nor to have knowledge of its records. Mueggenberg also offers no documentary basis for her assertion. To the extent that Plaintiff relies on the attachment of a copy of the note to the complaint to demonstrate standing, Defendants assert that attachment is only relevant when the note is specifically endorsed to the plaintiff and not, as here, where it is endorsed to blank.

Finally, Defendants note that the statute of limitations for foreclosure actions is six years and, thus, that Plaintiff cannot seek any interest, advances, and expenditures that accrued more than six years prior to the commencement of this action.

Plaintiff's Opposition to the Cross-Motion

Plaintiff argues that the Affidavit of Mailing and appended business records are sufficient to demonstrate that the RPAPL 1304 notices were sent – that the affiant sufficiently demonstrates a standard office procedure designed to ensure that items were properly addressed

and mailed and the documents reflect that it was followed here. Admitting that it used the text required as of the date of the notices rather than as of the commencement of the action, Plaintiff argues that the notice was valid at the time of mailing and that the subsequent amendment did not invalidate it. Likewise, the included housing counselors serve the *region* where the property is located – as required in 2014. To the extent that Defendants argue that the notices were stale, Plaintiff asserts that notices do not expire. Nor, in Plaintiff’s view, are separate copies of the notices required for each borrower.

Again relying on the Affidavit of Mailing, Plaintiff asserts that the default notice was properly sent and that Defendants’ remaining allegations regarding the notice are unavailing.

Plaintiff also argues that it has demonstrated its standing both through the Mueggenberg Affidavit and by attaching a copy of the note to the complaint.

Agreeing that it cannot collect installments due more than six years prior to the commencement of this action, Plaintiff notes that the statute of limitations has not lapsed on the remainder of the debt and that its action remains timely.

Defendant’s Reply

Noting that the Second Department had recently held² that sending notices to defendants jointly was non-compliant with RPAPL 1304, Defendants argue that the documentary evidence proffered by Plaintiff reflects that infirmity and that this action must be dismissed on that basis.

Defendants further reiterate that no valid Power of Attorney has been produced authorizing Wells Fargo to act on behalf of Plaintiff at the relevant times. Nor, in their view, has Plaintiff overcome the staleness of the notices and that they were sent during the prior action. Further, Defendants suggest, the notices must be compliant with the version of the statute in effect at the commencement of the action, not at the time of mailing.

As to the default notice, Defendants state that they are relying upon the arguments in their cross-motion and responses to Plaintiff’s counterarguments as to RPAPL 1304.

² *Wells Fargo v Yapkowitz*, 199 AD3d 126 [2d Dept 2021].

Reasserting that the Mueggenberg Affidavit is defective and offers no admissible basis for the affiant's assertion that Plaintiff was in possession of the original note since 2010, Defendants argue that Plaintiff has not demonstrated its standing. Defendants also again assert that appending a copy of the note to the complaint is insufficient evidence of standing.

Noting that Plaintiff does not contest that part of the debt is uncollectible, Defendants assert that Plaintiff must amend its complaint but has not.

Analysis

It is now well established that “the mailing of a 90-day notice jointly addressed to two or more borrowers in a single envelope is not sufficient to satisfy the requirements of RPAPL 1304, and that the plaintiff must separately mail a 90-day notice to each borrower as a condition precedent to commencing the foreclosure action” (*Wells Fargo v Yapkowitz*, 199 AD3d 126, 134 [2d Dept 2021]; see also, *Wells Fargo Bank NA v Welz*, 239 AD3d 693, 695-696 [2d Dept 2025]; *Deutsche Bank v Loayza*, 2034 AD3d 753, 755 [2d Dept 2022]). As Plaintiff claims to have sent a single set of notices to Defendants jointly, it has not complied with RPAPL 1304 and the instant action must be dismissed.

It is also undisputed that Plaintiff's 90 day notices were allegedly sent in 2014 and utilized the pre-2016 text. It is, however, the version in effect at the commencement of the action rather than at the time of mailing that must be used (*US Bank NA v Christmas-Beck*, 219 AD3d 534, 538 [2d Dept 2023]). This too is a basis for dismissal.

Defendants' arguments that this action should be dismissed based upon non-compliance with the default notice requirements of the mortgage and/or lack of standing have been considered and found unavailing.

Conclusion

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment and other relief is denied; and it is further

ORDERED that Defendant's cross-motion to dismiss is granted and the instant action dismissed for failure to strictly comply with RPAPL 1304.

This constitutes the decision and order of the Court.

ENTER:



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