Wilmington Sav. Fund Socy., FSB v Thukral
2025 NY Slip Op 34029(U)
October 7, 2025
Supreme Court, New York County
Docket Number: Index No. 850432/2023
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

----------X

INDEX NO. 850432/2023

MOTION DATE

MOTION SEQ. NO. 001

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST AS TRUSTEE FOR PNPMS TRUST I,

Plaintiff,

- v -

TRIPTA THUKRAL, ANUJ THUKRAL, 627 WEST 42ND STREET LLC A/K/A ATELIER CONDOMINIUM, SOUTH BROADWAY HOLDINGS LLC,ALEXANDER R. ACOSTA, JOHN DOE 1 THROUGH JOHN DOE 10, SAID NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, INTENDED TO BE POSSIBLE TENANTS OR OCCUPANTS OF THE PREMISES, OR CORPORATIONS, PERSONS, OR OTHER ENTITIES HAVING OR CLAIMING A LIEN UPON THE MORTGAGED PREMISES

Defendant.

----------X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, the motion is determined as follows:

This is an action to foreclose on a consolidated mortgage encumbering a parcel of residential real property located at 635 West 42 Street, 25F, New York, New York. The mortgage, dated June 15, 2010, was given by Defendants Tripta Rani Thukral and Anuj Thukral ("Thukral") to non-party Signature Bank ("Signature") to secure an indebtedness with an original principal amount of $900,000.00. The loan is memorialized by a note dated the same day as the mortgage. Plaintiff commenced this action, and pled Defendants defaulted in repayment of the indebtedness beginning on or about April 3, 2018. Thurkal Defendants answered and pled forty-one affirmative defenses. Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption. Thurkal Defendants oppose the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st

Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No specific business records must be proffered, provided the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affirmation from Augustina Abeyta, ("Abeyta"), an officer of Statebridge Company, LLC ("Statebridge"), the servicer for Plaintiff. Abeyta avers that the submission was based upon a review of the records of Statebridge, as well as knowledge of its record keeping practices. Abeyta's affidavit laid a proper foundation for the admission of the records of Statebridge into evidence under CPLR §4518 by sufficiently showing that the records relied upon "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of prior servicers were also admissible since Abeyta established that those records were received from the makers and incorporated into the records Statebridge kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Abeyta were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Statebridge's authority to act on Plaintiff's behalf was established with submission of a power of attorney dated July 18, 2022 (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

Proof of the loan documents, including the note and mortgage, was established in the first instance through the affirmation of Abeyta and the annexed documents (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.,* 218 AD3d 417 [1st Dept 2023]). A defendant's default, "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Abeyta's affidavit and the loan history demonstrated the mortgagor's default in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *see also Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

In opposition, Defendants' claim that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. Further, since none of the salient facts on these issues were contradicted by any of the appearing defendants, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). Standing is evaluated when an action is commenced, not thereafter (*see eg 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC,* 234 AD3d 401 [1st Dept 2025]) and may not be cured retroactively (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]).

It is undisputed that Plaintiff is not the originator of any of the loans or the named obligee on the notes. Standing via possession of the note, referred to as holder status "is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]).

Here, the indorsements of note are contained on an allonge on a separate page from the note. The copy of the note attached to the complaint did not reveal any indicia of firm annexation upon visual inspection (*cf. US Bank v Hunte*, 215 AD3d 887 [2d Dept 2023]). Resultantly, Plaintiff was required, but failed, to establish that each allonge was "firmly affixed" to the note (*see 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, 234 AD3d 401, 403 [1st Dept 2025]; *938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.,* 218 AD3d 417 [1st Dept 2023]). Not every attachment can satisfy UCC §3-202[2] and Abeyta offered no description of the nature of the attachment (*see 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC,* supra at 402; *HSBC Bank, USA, N.A. v Roumiantseva,* 130 AD3d 983 [2d Dept 2015]; *cf. U.S. Bank N.A. v Mave Hotel Invs. LLC,* 231 AD3d 607 [1st Dept 2024]), nor did she indicate "*when* she [,if ever,] reviewed the copy of the note and allonge" (*Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1058 [2d Dept 2023]). Thus, absent is any proof of firm annexation "at the time of commencement of the action" (*see US Bank Trust, N.A. v Loring*, 193 AD3d 1101, 1103 [2d Dept 2021].

To the extent Plaintiff may point to a written assignment of the mortgage dated October 31, 2022, that document is a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012]) since it does not state the mortgage was transferred with the note, indebtedness or other similar language (*cf. Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]). Accordingly, Plaintiff failed to establish, *prima facie*, it had standing when this action was commenced.

Plaintiff was also required to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). While RPAPL §1304 does not specify the proof necessary to demonstrate compliance therewith, the Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing . . . or . . . by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). "In other words, there are two methods by which a plaintiff can demonstrate the requisite mailings" (*U.S. Bank N.A. v. Romano*, 231 AD3d 1079, 1080 [2d Dept 2024]).

Proof of actual mailing may be shown with an affidavit of mailing or domestic return receipts with attendant signatures (*see eg US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]). Also, evidence of a satisfactory office practice can raise a rebuttable presumption that the required notice was sent and received by the addressee (*Cit Bank N.A. v Schiffman*, supra). A practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things,

how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). Proof from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). An affidavit from the person who performed the mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]).

In support of the motion, Plaintiff proffered an affirmation of service, dated January 9, 2023, from Thomas Frank, Esq. ("Frank"), an attorney with Plaintiff's counsel, who averred he personally mailed the notices on that date. "A properly executed affidavit of service raises a presumption that a proper mailing occurred" (*Engel v Lichterman*, 62 NY2d 943, 944 [1984]). In this context, direct knowledge affidavits, despite the rarity of same, are competent to prove service of the statutory notice (*see Emigrant Bank v Cohen*, 205 AD3d 103, 107-108 [2d Dept 2022]). Further, "RPAPL 1304 does not preclude an attorney acting on behalf of a lender from sending RPAPL 1304 notices" (*Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408, 409 [1st Dept 2020]; *see also United Nations Federal Credit Union v Diarra*, 194 AD3d 506 [1st Dept 2021]). Compliance with RPAPL §1306 was shown by submitting a copy of a proof of filing statement from the New York State Department of Financial Services (*see United States Bank Trust, N.A. v Mehl,* supra at 1056) and RPAPL §1303 via the affidavits of Plaintiff's process server (*see HSBC Bank USA, N.A. v Ozcan,* 154 AD3d 822 [2d Dept 2017]).

As to the branch of the motion to dismiss Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

As pled, all the affirmative defenses, except the second as it relates to standing, are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden,* 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, other than standing, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

All the counterclaims fails as they are largely reflective of the dismissed affirmative defenses (*see Deutsche National Bank v Marino*, 234 AD3d 587 [1st Dept 2025]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branches of Plaintiff's motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the second as it relates to standing, are stricken, and it is

ORDERED that the JOHN DOE defendants are excised as parties and the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST AS TRUSTEE FOR PNPMS TRUST I,

Plaintiff,

-against-

TRIPTA RANI THUKRAL; ANUJ THUKRAL; 627 WEST 42ND STREET LLC A/K/A ATELIER CONDOMINIUM; SOUTH BROADWAY HOLDINGS LLC; ALEXANDER R. ACOSTA,

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

and it is

ORDERED that this matter is set down for a status conference on **December 17, 2025 @ 12:20 pm** via Microsoft Teams.

10/7/2025
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE