

NS194, LLC v Rodriguez

2025 NY Slip Op 34235(U)

November 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 519216/2024

Judge: Menachem M. Mirocznik

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This opinion is uncorrected and not selected for official publication.

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 7th of November 2025

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

NS194, LLC,

Plaintiff,

-against-

MARIA RODRIGUEZ, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, STATE OF NEW YORK DEPARTMENT OF TAXATION & FINANCE, CITY OF NEW YORK DEPARTMENT OF FINANCE, INTERNAL REVENUE SERVICE UNITED STATES OF AMERICA, YOLAIDA CARRASCO, CHRISTINA CARRASCO, NANCY T. SUNSHINE, COMMISSIONERS OF JURORS, CAPITAL ONE BANK (USA) N.A., PANAMA LEASING, LLC, ELEKTRA FEDERAL CREDIT UNION, RELIANCE FINANCIAL and "JOHN DOE No. 1 through JOHN DOE. No. 99", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendant.

Index No. 519216/2024

**Decision and Order
(Motion Seq. 2)**

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Papers	Numbered
Notice of Motion	NYSCEF Doc. 35-49
Opposition	NYSCEF Doc. 54-61
Reply	NYSCEF Doc. 62

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

Relevant Procedural and Factual History

This action was commenced on July 17, 2024, seeking to foreclose a mortgage (the "mortgage") executed by defendant Maria Rodriguez ("defendant") which encumbers the property known as 1172 Madison Street, Brooklyn, NY 11210(the "property"). On October 31, 2024, defendant joined issue by filing an answer asserting various affirmative defenses including lack of standing and several counterclaims. On November 8, 2024, plaintiff filed a reply to defendant's counterclaims. Settlement conferences were held on September 17, 2024, October 1, 2024, October 30, 2024, December 18, 2024, and January 30, 2025, whereat the matter was released from the foreclosure settlement part.

Plaintiff now moves for summary judgment, to strike defendant's answer, to dismiss defendant's affirmative defenses and counterclaims, a default judgment against the remaining parties, to appoint a referee and to amend the caption.

Defendant opposes the motion asserting that plaintiff has not proven standing, default, or entitlement to summary judgment. Specifically, defendant argues the Home Equity Line of Credit ("HELOC") is a non-negotiable instrument citing *One West Bank, NA. v. FMCDH Realty, Inc.* 165 AD3d 128 [2d Dept 2018], so possession of the non-negotiable instrument does not confer standing. Defendant further argues plaintiff failed to prove a default, as no admissible evidence or competent affidavit establishes nonpayment; that plaintiff lacks capacity to sue because it is an unregistered foreign LLC; and that much of the debt is barred by the statute of limitations. Defendant also notes plaintiff ignored outstanding discovery demands, creating unresolved factual issues that preclude summary judgment.

In reply, plaintiff argues defendant's opposition lacks merit and abandons all unaddressed defenses. Plaintiff maintains it proved standing by attaching the endorsed note to the complaint and cites *JPMorgan Chase Bank, NA. v. Garcete*, 203 AD3d 1149 [2d Dept 2022], and *HSBC Bank USA v. Michalczyk*, 211 AD3d 914 [2d Dept 2022], holding that attaching a HELOC endorsed in blank confers standing. Plaintiff asserts its servicer's affidavit properly incorporated prior servicers' records and established default. It further contends the capacity defense fails because maintaining a lawsuit does not constitute "doing business" in New York. Plaintiff further argues no prior acceleration occurred, so the statute of limitations has not expired, and the payment history demonstrates default since August 20, 2012.

Discussion

"As we have stated frequently, the proponent of a summary judgment motion 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...Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers... Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][citations omitted]; See also *Zuckerman v. New York*,

49 NY2d 557 [1980]; *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Tafi; LLP*, 26 NY3d 40 [2015].

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" *Hudson City Sav. Bank v Genuth*, 148 AD3d 687 [2d Dept 2017]. This showing shifts the burden to the non-movant to present evidence in admissible form sufficient to raise a material issue of fact requiring a trial. See *Gesuale v. Campanelli & Assocs., P.C.*, 126 AD3d 936 [2d Dept 2015]; See also *First Intern. Bank of Israel, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436 [1983] ["Where, as here, plaintiff moves for summary judgment on a debt instrument, the non-movant can only defeat the motion by raising material issues of fact which are "genuine and based on proof, not shadowy and conclusory statements."]

However, "[w]here, as here, the plaintiffs standing has been placed in issue by the defendant's answer, the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment" *US. Bank NA. v Moulton*, 179 AD3d 734, 736 [2d Dept 2020]; See also *Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016] ["Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief"]

"In a mortgage foreclosure action, a [party] has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced ... Moreover, while assignment of a promissory note also effectuates assignment of the mortgage... the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it." *US. Bank Nat. Ass'n v Dellarmo*, 94 AD3d 746 [2d Dept 2012] [internal citations and quotation marks omitted]; See also *Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2d Dept 2011] ["an assignment of the mortgage without assignment of the underlying note or bond is a nullity"]

Additionally, in general, a plaintiff can establish prima facie that it had standing to commence the action by annexing a copy of the subject note endorsed in blank to the complaint. *US. Bank NA. v Auguste*, 173 AD3d 930 [2d Dept 2019]; *Bank of New York Mellon v Swift*, 213 AD3d 624 [2d Dept 2023]; *Selene Fin., L.P. v Coleman*, 187 AD3d 1082 [2d Dept 2020]; *US. Bank NA. v Roza-Castellanos*, 201 AD3d 995 [2d Dept 2022]

Here, plaintiff does not dispute that the subject assignment of mortgage does not assign the note and is insufficient to establish its standing to commence this action. Plaintiff argues that it demonstrated it has standing by virtue of being in possession of the note endorsed in blank which was annexed to the complaint. However, the parties dispute whether plaintiff is a "holder" and the HELOC is a negotiable instrument subject to transfer by delivery alone.

"A "holder" is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession... Pursuant to article 3 of the Uniform Commercial Code, a note can be endorsed, or signed over, to a new owner. A note can also be endorsed in blank, naming no specific payee, which makes it a bearer instrument under

article 3 of the Uniform Commercial Code, so that any party that possesses the note has the legal authority to enforce it." *U.S. Bank NA. v Moulton*, 179 AD3d 734 [2d Dept 2020][internal citations and quotation marks omitted]; NY UCC 1-201(21); See also *U.S. Bank NA. for Citigroup Mtge. Loan Tr., Inc., 2006-NC2 v Brody*, 156 AD3d 839 [2d Dept 2017][“A “holder” is ‘the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession”]

“[T]o qualify as a negotiable instrument under the UCC, a document must “(a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a *sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article*; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer” *One West Bank, NA. v FMCDH Realty, Inc.*, 165 AD3d 128 [2d Dept 2018][emphasis added] citing NY UCC 3-104[1]

Here, defendant is correct that subject HELOC is not a negotiable instrument within the meaning of the UCC. The subject HELOC is not for a sum certain and contains other contains other promises. Specifically, the HELOC provides for an open-ended line of credit to obtain cash advances from time to time and does not qualify for the payment of a “sum certain” and is subject to the borrower's future conduct.

In *One West Bank, NA. v FMCDH Realty, Inc.*, 165 AD3d 128 [2d Dept 2018] (“*FMCDH*”) the Appellate Division squarely addressed whether an open-ended line of credit, such as one in the instant matter, is a negotiable instrument subject to negotiation by delivery if endorsed in blank. See *Id.* [“Upon our review of the record... we conclude that the [open-ended line of credit] does not constitute a negotiable instrument within the meaning of UCC 3-104. Therefore, the plaintiff cannot establish its standing merely by demonstrating that it was in possession of the original Cash Account Agreement, indorsed in blank, at the time the instant action was commenced.”]

Contrary to plaintiffs contention, the holding in *FMCDH* remains good law and its reliance on *JPMorgan Chase Bank, NA. v Garcete*, 203 AD3d 1149 [2d Dept 2022] (“*Garcete*”) and *HSBC Bank USA, NA. v Michalczyk*, 211 AD3d 914 [2d Dept 2022] (“*Michalczyk*”) is misplaced as neither case dealt with whether the subject agreements were negotiable instruments within the meaning of the UCC.

New York Federal Courts have similarly found that a home equity line of credit is not a negotiable instrument within the meaning of the UCC. See *W Coast 2014-7, LLC v Moses*, 20CV04101NGGJRC, 2022 WL 20703851 [EDNY Oct. 27, 2022] [“The court finds that the Note is not a negotiable instrument under N.Y. U.C.C. § 3-104(1). While the Note is signed by the maker and is payable to the bearer, it does not contain an unconditional promise to pay a sum certain. The Note is titled “Equity Reserve Agreement” and provides the borrower an “open-end

line of credit ... to obtain cash advances from time to time." citing *FMCDH and rejecting reliance on Garcete*¹; See also *Windward Bora, LLC v Weiss*, 717 F Supp 3d 247,263 [EDNY 2024] [same]²

Accordingly, the Court finds that the subject HELOC is not a "negotiable instrument" and plaintiff is not a "holder" within the UCC and therefore failed to demonstrate it had standing to commence this action.

Therefore, plaintiff's motion must be denied without regard to the sufficiency of the opposition papers. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985][Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986][Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers"]; *Gregg v Key Food Supermarket*, 50 AD3d 1093 [2d Dept 2008][Moreover, when the defendant fails to meet its burden, the motion must be denied without regard to the sufficiency of the plaintiffs opposition papers"]

The parties' remaining contentions need not be reached in light of the Court's determinations.

Accordingly, it is hereby

ORDERED, that plaintiff's motion is DENIED.

This constitutes the Decision and Order of the Court.

ENTER:



Hon. Menachem M. Mirocchnik, JSC

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¹ "The court in *Garcete*, however, did not address the criteria in N.Y. U.C.C. § 3-104(1), nor even mention whether the note in question was a negotiable instrument."

² "This Court is aware of other Second Department case law holding that a plaintiff can establish holder status based on its possession of a note securing repayment of a home equity loan. See, e.g., *HSBC Bank USA, N.A. v Michalczyk*, 211 A.D.3d 914, 180 N.Y.S.3d 580 (2d Dep't 2022); *JPMorgan Chase Bank, Nat'l Ass'n v. Garcete*, 203 A.D.3d 1149, 163 N.Y.S.3d 816, 817-18 (2d Dep't 2022); *US Bank Nat'l Ass'n v. Rowe*, 194 A.D.3d 978, 149 N.Y.S.3d 197, 199 (2d Dep't 2021). None of these cases, however, address the criteria in U.C.C. § 3-104(1), nor do they mention whether the note in question was, in fact, a negotiable instrument. Moreover, as the court recognized in *W. Coast 20J.1-7. LLC*, the Second Department cases are in "contrast[] [to] the in-depth analysis that courts in this circuit have used in assessing whether a specific agreement is a negotiable instrument." See also this Court's decision pertaining to stare decisis in *loan Depot.com, LLC vs. Ortner, Rivka et al; Index No. 518507/2023 at NYSCEF Doc. 134 at pg. 10*