

**U.S. Bank, N.A. v Holmes**

2025 NY Slip Op 34379(U)

November 3, 2025

Supreme Court, Kings County

Docket Number: Index No. 528864/2023

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 3rd of November 2025

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

U.S. BANK, N.A., AS TRUSTEE FOR CITIGROUP  
MORTGAGE LOAN TRUST INC, SERIES 2005-9,

Plaintiff,

-against-

STACEY HOLMES A/K/A STACEY MAURICE  
HOLMES, AS AN INDIVIDUAL AND AS HEIR  
AND DISTRIBUTE OF THE ESTATE OF EVON  
HOLMES A/K/A EVON THERESA THOMAS AKA  
EVON THERESA WILLIAMS; ET AL,

Defendants.

**Index No. 528864/2023**

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

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Papers	Numbered
Notice of Motion	NYSCEF Doc. 123-148
Opposition Papers	NYSCEF Doc. 150
Reply Papers	NYSCEF Doc. 152-155

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

**Procedural History**

This action was commenced on October 5, 2023, seeking to foreclose a mortgage ("mortgage") executed by Stacey Holmes ("defendant") and the heirs and distributes of the Estate of Evon Holmes ("decedent") encumbering the property known as 727 East 46<sup>th</sup> Street, Brooklyn, NY 11203. Decedent died prior to commencement of this action and was a fee owner of the property. Defendant was purportedly served on October 11, 2023, pursuant to CPLR 308(4).

By order dated January 8, 2024, the Court granted plaintiff's application to direct service of defendants by publication, to amend the caption and to appoint a guardian ad litem and military attorney.

On April 11, 2024, Lashawn Holmes filed an answer with counterclaims on behalf of defendant Stacy Holmes and annexes an executed power of attorney ("POA") dated June 28, 2017.

The power of attorney has four pages and appears to be missing a page based on the page numbering.

On April 19, 2024, plaintiff rejected the answer because the power of attorney purportedly did not comply with GOL 5-1501B.

On April 29, 2024, plaintiff filed the answer, consent and waiver of the guardian ad litem dated April 11, 2024.

On May 3, 2024, counsel filed a motion to compel acceptance of defendant's answer but the same was returned by the county clerk for undisclosed reasons.

Plaintiff now moves for a default judgment and order of reference. Plaintiff contends that the answer filed by LaShawn Holmes under a power of attorney for defendant Stacey Holmes was properly rejected because the power of attorney omitted the mandatory language required by GOL 5-1510B(d)(2), rendering it invalid and defendant never appeared or moved to vacate her default.

Defendant Stacey Holmes, through counsel and her attorney-in-fact LaShawn Holmes, opposes the motion, asserting that the power of attorney fully complied with GOL 5-1501B and authorized LaShawn to appear and file an answer, which plaintiff wrongfully rejected. Defendant argues plaintiff lacks standing, as the note and mortgage assignments are conflicting and inconsistent, with post-commencement reassignments proving that plaintiff did not own both instruments when suit began. She contends plaintiff submitted no admissible evidence of default, relying only on counsel's affirmation without a valid servicer affidavit or business records, in violation of CPLR 4518. Defendant also claims plaintiff failed to prove compliance with RPAPL §§ 1303 and 3408 and that service by publication on unknown heirs was jurisdictionally defective for lack of due diligence. Finally, she claims factual issues concerning payments the statute-of-limitations bars, and other defenses that preclude entry of a default judgment or order of reference.

In reply plaintiff argues that the notice of rejection of the answer was proper because the POA lacked the statutory agent-disclosure language, making it invalid, and that defendant remains in default for failing to answer or move to vacate. Plaintiff maintains it met its prima facie foreclosure burden by annexing the note endorsed in blank to the complaint and providing a servicer affidavit with attached ledgers proving default since June 1, 2009, which were allegedly admissible business records. Plaintiff argues defendant's opposition raises no triable issue of fact. Plaintiff also asserts settlement conferences were held on August 6 and September 4, 2024, satisfying RPAPL § 3408, and that defendant lacks standing to contest service by publication on the decedent's unknown heirs.

### Discussion

Prior to addressing the parties' contentions pertaining to defendant's answer and the effectiveness of the POA, plaintiff's motion for a default judgment pursuant to CPLR 3215 must be denied. First, the unknown heirs submitted an answer through the guardian ad litem. Therefore, the unknown heirs are not in default. Second, this Court has an obligation under CPLR 3215[f] to

insure that it has jurisdiction over the parties. See *Dupps v Betancourt*, 99 Ad3d 855 [2d Dept 2012]; See also *Niagra Mohawk Power Corp. v. Wheeler*, 51 Misc 3d 1226(A) [NY City Ct 2016]

"Service pursuant to CPLR 308(4) may be used only where service under CPLR 308(1) or (2) cannot be made with "due diligence"... The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received ... The due diligence requirement may be met with a few visits on different occasions and at different times to the defendant's residence or place of business *when the defendant could reasonably be expected to be found at such location at those times*" *Bank of New York Mellon v Simpson*, 241 AD3d 1412 [2d Dept 2025]

However, attempts at service during normal working hours or when a defendant can be expected to be in transit to or from work are insufficient as a matter of law to comply with the due diligence requirement of CPLR 308(4). See *Earle v Valente*, 302 AD2d 353 [2d Dept 2003] ["The plaintiffs failed to establish that the "due diligence" requirement of CPLR 308 (4) was met. The process server made three attempts to serve the defendant on weekdays during normal business hours or when it could reasonably have been expected that he was in transit to or from work"]; *Magalios v Benjamin*, 160 AD2d 773 [2d Dept 1990] ["Those attempts occurred on weekdays at the hours of 9:00 A.M., 5:30 P.M. and 6:00 P.M. Clearly, these attempts, which were made during normal business hours or at times when it could reasonably have been expected that the defendant was in transit to or from her job, were insufficient, as a matter of law, to satisfy the "due diligence" requirement ... "]; *Gantman v Cohen*, 209 AD2d 377 [2d Dept 1994] ["Those attempts occurred on weekdays at the hours of 10:50 A.M., 4:30 P.M., and 6:36 P.M. These attempts, which were made during normal business hours or at times when it could reasonably have been expected that the defendant was in transit to or from his place of employment, were insufficient, as a matter of law, to satisfy the "due diligence" requirement of CPLR 308(4)"]

Here, a review of the affidavit of service shows that plaintiff attempted service on October 7, 2023, at 12:40 PM, October 10, 2023, at 6:05PM and October 11, 2023, at 10:05AM. The second and third attempts were made during normal working hours or when defendant could be expected to be in transit to or from work. Therefore, service was defective as a matter of law and thus this Court will not enter a default judgment.

Additionally, as noted above, an attempt to serve an answer was made by LaShawn Holmes under the POA for defendant and the POA appears to be missing a page which may be the page that includes the requisite language required by GOL 5-1510B(d)(2). If the answer is a nullity, then service appears to be defective, if the answer is effective, jurisdictional defenses are waived because defendant failed to move for relief within 60 days as required by CPLR 3211(e). Further still if the answer is effective there is no default. It is axiomatic that a default judgment may not be entered against a party that is not in default. See CPLR 3215(a); See generally *Retained Realty, Inc. v 1828 51, LLC*, 153 AD3d 1438 [2d Dept 2017]

In any case, it is well settled that a "foreclosure action is equitable in nature and triggers the equitable powers of the court...[O]nce equity is invoked, the court's power is as broad as equity and justice require" *Mtge. Elec. Registration Sys., Inc. v Horkan*, 68 AD3d 948 (2d Dept. 2009); See also *Norstar Bank v Morabito*, 201 AD2d 545 [2d Dept 1994] ["In cases such as the one at bar,

the court sitting in equity looks to the substance and to the merits of a transaction, rather than to its form"]

Moreover, New York has a long-established public policy favoring resolution of actions on the merits. *Sawh v Bridges*, 120 AD2d 74 [2d Dept 1986] ["long-established public policy favors resolution of actions on their merits"]

To hold a defendant in default under the circumstances would be inequitable<sup>1</sup> especially in light of New York's well settled public policy favoring resolution of actions on the merits. See e.g. *Discover Bank v Gilliam*, 199 AD3d 645 [2d Dept 2021] ["However, under the circumstances presented here, the Supreme Court should not have proceeded to adjudicate the plaintiffs motion... without first permitting the defendant the opportunity to appear and participate in the action, either pro se, or with appropriate counsel"]

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

Accordingly, it is hereby

**ORDERED**, that plaintiff's motion is DENIED; and it is further,

**ORDERED**, that counsel for LaShawn Holmes, is directed to file a complete copy of the power of attorney dated June 28, 2017, or new power of attorney compliant with GOL 5-1501B within 15 days of entry of this order. Upon production of the aforementioned documents the answer will be deemed accepted.

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

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<sup>1</sup> It is not clear why counsel did not supply a full copy of the power attorney but rather moved to compel without ensuring the motion was adjudicated. It is further inequitable to permit a default judgment to be entered for what appears to be incompetence of defense counsel.