

U.S. Bank N.A. v Batista

2025 NY Slip Op 34585(U)

November 14, 2025

Supreme Court, Kings County

Docket Number: Index No . 4138/2009

Judge: Derefim B. Neckles

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KINGS COUNTY CLERK
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2025 DEC -1 A 10:37

At an IAS Term, Part FSMP 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, 11201 on the 14th day of November, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,

Acting Justice.

-----X
U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

- against -

Index No. 4138/2009

CARMEN BATISTA; ET AL,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed

41-68

Opposition Affirmation/Exhibits Annexed

73-84

Reply Affirmation to Opposition

87

Upon the foregoing papers in this proceeding, plaintiff moves (under mot. seq. 3) for an order (1) confirming the referee's report; (2) granting a judgment of foreclosure and sale; (3) directing the distribution of the sale proceeds; (4) deeming the refiled notice of pendency timely filed, *nunc pro tunc*; (5) removing SANDERSON STATE BANK as a party defendant herein due to a Satisfaction of Mortgage; (6) reforming the property's legal description contained within the subject mortgage; and (7) directing the Clerk of Kings County to reform its records to reflect that the mortgage contain the legal description annexed hereto as "Schedule A".

Background

Plaintiff commenced this action on February 19, 2009, to foreclose on the mortgage encumbering the subject property located at 30 Amber Street, Brooklyn, New York. Plaintiff was granted an order of reference and default judgment by order dated August 18, 2009. On October 31, 2013, a conditional order of dismissal was issued for plaintiff failing to timely prosecute this action. This action was then dismissed on July 17, 2014.

On February 3, 2021, plaintiff moved to vacate the dismissal and to restore the action to the court's active calendar. By order dated May 17, 2022, the court granted plaintiff's motion to vacate the dismissal, but on the condition that interest, late charges, and outstanding fees on the loan be waived from October 31, 2013, the date of the dismissal order, through February 3, 2021, the date of the filing of the vacatur motion.

On April 16, 2024, the referee executed an oath and report of amount due, and plaintiff now moves to confirm the referee's report. Defendant opposes on the grounds that the referee's report is not substantially supported by the record, the servicer's affidavit is inadmissible hearsay, interest must be stricken, plaintiff failed to demonstrate its prima facie entitlement to a default judgment, and plaintiff cannot correct its defects nunc pro tunc.

Discussion

I. Servicer Affidavit

In opposition to plaintiff's motion, defendant asserts that the affidavit of Felix Rodriguez, the vice president of PHH Mortgage Corporation ("PHH"), servicer for plaintiff, relied upon by the referee, fails to lay a foundation for the electronic records, under the requirements of CPLR §4518(a). A business record is admissible if "it was made

in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter” (CPLR 4518[a]; *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1330 [4th Dept 2009]). “A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures” (see *Aurora Loan Servs., LLC v. Mercius*, 138 A.D.3d 650, 652 [2d Dept 2016]; *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861, 861[2d Dept 2015]; *Palisades Collection*, 67 A.D.3d at 1331).

Here, plaintiff's affiant, Rodriguez, attests to having personal knowledge of PHH's recording keeping practices and procedures, and testifies that the business records for the subject loan were made at or near the time of the transaction, by a person with personal knowledge, and they were maintained in PHH's business records. Accordingly, the Rodriguez affidavit complies with CPLR §4518 and lays a foundation for business records.

II. Referee's Report

CPLR 4403 provides that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part . . . the report of a referee . . . may make new findings with or without taking additional testimony; and may order a new trial or hearing.” The Second Department has held that “[t]he 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” (*Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]).

Here, the referee's report is substantially supported by the record before the court, including Newrez LLC dba Shellpoint Mortgage Servicing's business records produced to the referee with the Rodriguez affidavit. Contrary to defendant's assertion, the attached payment logs are eligible, and display identifying information of the subject loan. Defendant fails to present any evidence in opposition to plaintiff's motion, that the referee's computations are inaccurate. Defendant also had the opportunity to present their objections and evidence to the referee, per the notice of computation dated March 26, 2024. Accordingly, the referee's report is substantially supported by the record.

III. Default Judgment

In opposition to plaintiff's motion for a judgment of foreclosure and sale, defendant asserts that plaintiff did not prove its prima facie entitlement to a default judgment. However, absent a motion to vacate defendant's default, the court will not revisit the issue of liability (*see Christian v. Hashmet Mgmt. Corp.*, 189 A.D.2d 597, 598 [1st Dept 1993]).

IV. Defects

"CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" (*Beltway Cap., LLC v. Gutierrez*, 140 A.D.3d 998, 999 [2d Dept 2016]). Here, defendant fails to show any prejudice in allowing plaintiff to correct its defaults.

V. Interest

Per the court's May 17, 2022 order, interest, late charges, and outstanding fees on the loan were to be waived from October 31, 2013, through February 3, 2021. This is not reflected on the referee's report and requires a re-computation.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that (1) the Notice of Pendency filed on December 06, 2022 be deemed filed, *nunc pro tunc*, to the date of the expiration of the Notice of Pendency on January 24, 2015; (2) Defendants captioned as Sanderson State Bank is hereby stricken from the caption of this action due to a satisfaction of mortgage recorded on August 27, 2019; (3) the legal description contained within the Subject Mortgage be reformed to include the correct legal description recited in "Schedule A"; and (4) the clerk of Kings County is hereby directed to reform its records to reflect that the mortgage contain the legal description annexed hereto as "Schedule A"; all other relief is denied, with leave to renew; and it is further

ORDERED that the caption shall be amended as follows:

-----X
U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR ASSET BACKED SECURITIES
CORPORATION HOME EQUITY LOAN TRUST,
SERIES OOMC 2006-HE5, ASSET BACKED PASS-
THROUGH CERTIFICATES, SERIES OOMC
2006-HE5,

INDEX NO. 4138/2009

Plaintiff,

- against -

CARMEN BATISTA, KINGVISION PAY PER VIEW
LTD; NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE; GARDEN CITY BOXING,
AS BROADCAST LICENSEE OF THE SEPTEMBER
HOYA/HO PROGRAM; ANDRES BATISTA; TAMAR
JOHNSON

Defendants.

-----X

; and it is further

ORDERED that the referee is directed to compute the amount due to plaintiff, with interest tolled from October 31, 2013, through February 3, 2021.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES
A. J. S. C.

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SCHEDULE A - LEGAL DESCRIPTION

ALL THAT CERTAIN PLOT, PIECE OR PARCEL OF LAND SITUATE, LYING AND BEING IN THE COUNTY OF KINGS, CITY AND STATE OF NEW YORK, BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE WESTERLY SIDE OF AMBER STREET DISTANT 238.00 FEET SOUTHERLY FROM THE CORNER FORMED BY THE INTERSECTION OF THE SOUTHERLY SIDE OF LORING AVENUE WITH THE WESTERLY SIDE OF AMBER STREET;

RUNNING THENCE WESTERLY PARALLEL WITH THE SOUTHERLY SIDE OF LORING AVENUE 100.00 FEET TO A POINT;

RUNNING THENCE SOUTHERLY PARALLEL WITH THE WESTERLY SIDE OF AMBER STREET 34.00 FEET TO A POINT;

RUNNING THENCE EASTERLY PARALLEL WITH THE SOUTHERLY SIDE OF LORING AVENUE 100.00 FEET TO THE WESTERLY SIDE OF AMBER STREET;

RUNNING THENCE NORTHERLY ALONG THE WESTERLY SIDE OF AMBER STREET 34.00 FEET TO THE POINT OR PLACE OF BEGINNING.