

U.S. Bank N.A. v Frederic

2025 NY Slip Op 34607(U)

December 1, 2025

Supreme Court, Kings County

Docket Number: Index No. 505308/17

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of December, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE OF CITIGROUP MORTGAGE LOAN TRUST INC. ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-AMC1,

Plaintiff,

- against -

Index No. 505308/17

JEAN FREDERIC; MARIE FREDERIC; MIDLAND FUNDING, LLC D/B/A IN NEW YORK AS MIDLAND FUNDING OF DELAWARE LLC; CAPITAL EQUITY MANAGEMENT, LLC; NEW YORK CITY PARKING VIOLATIONS BUREAU; UNITED STATES OF AMERICA – INTERNAL REVENUE SERVICE; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; MICHAEL D. HESS, D.D.S., P.C.; KASIANA FREDERIC

“JOHN DOE #2” through “JOHN DOE #12”, the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

66-69, 71-89
91-93
94

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1577 East 45th Street in Brooklyn (Block 7843, Lot 23) (Property), plaintiff U.S. Bank National Association, as Trustee of Citigroup Mortgage Loan Trust Inc. Asset-Backed Pas-Through Certificates Series 2007-AMC1 (Plaintiff or US Bank) moves (in motion sequence [mot. seq.] three) for an order: (1) awarding it summary judgment against answering defendants Jean Frederic and Marie Frederic (Frederic Defendants) and striking the answer interposed by them; (2) appointing a referee to compute the amount due to Plaintiff and examine whether the Property may be sold in parcels and make his/her computation and report with all convenient speed, pursuant to RPAPL § 1321; and (3) amending the caption to eliminate the John Doe defendants (NYSCEF Doc No. 66).

Background

On March 16, 2017, US Bank commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that on September 26, 2006, the Frederic Defendants executed and delivered a \$403,750.00 promissory note, which was secured a mortgage encumbering the Property (Complaint at ¶¶ 2 and 4-5). The complaint alleges that the Frederic Defendants “failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on April 1, 2011, and each subsequent payment thereafter” (*id.* at ¶ 9). Notably, annexed to the complaint is a copy of the September 26, 2006, note in favor of Argent Mortgage Company, LLC (Argent), which contains a bank endorsement executed by Argent on the second page (*id.* at 9-10).

On March 29, 2017, the Frederic Defendants collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses, including “Plaintiff failed to properly serve notice required by Real Property Actions and Proceedings Law § 1304” (NYSCEF Doc No. 11 at ¶¶ 7-9). The Frederic Defendants also assert seven counterclaims against US Bank for: (1) violation of New York Banking Law § 6-L, rendering the note and mortgage void; (2) violation of Banking Law § 6-L, warranting the return of all payments made under the note and mortgage; (3) reasonable attorneys’ fees based on its violation of Banking Law § 6-L; (4) reasonable attorneys’ fees under the Access to Justice in Lending Act; (5) breach of the terms of the promissory note; (6) violation of the Federal Fair Debt Collection Practices Act; and (7) reasonable attorneys’ fees, pursuant to RPL § 282.

US Bank’s Instant Summary Judgment Motion

On August 2, 2021, US Bank moved for summary judgment, an order of reference and to amend the caption (NYSCEF Doc No. 66). US Bank submitted an affidavit from Steven Ross (Ross), Second Assistant Vice President of Specialized Loan Servicing LLC (SLS), the current mortgage loan servicer and attorney in fact for US Bank, pursuant to a June 12, 2017, Limited Power of Attorney (NYSCEF Doc No. 84), who attests that his affidavit is based on his review of business records created and maintained by SLS including records that have been integrated into SLS’s system from prior servicers (NYSCEF Doc No. 82 at ¶ 2). Ross reiterates the allegations in the complaint regarding

the Frederic Defendants' execution of the September 6, 2006 note and mortgage and annexes copies of the loan documents (*id.* at ¶¶ 4-5).

Regarding the Frederic Defendants' alleged payment default, Ross attests that:

“Borrowers breached the obligations owed Plaintiff by failing to tender the installment which became due and payable on April 01, 2011 and by failing to tender subsequent installments. *In addition, a copy of the payment history obtained from SLS's electronic file which demonstrates the above default, is annexed hereto as Exhibit 'E'”* (*id.* at ¶ 9).

However, Exhibit E consists of the following information, which contains both inconsistent payment data and is presented in various different formats: (1) a four-page chart reflecting transactions from 1/26/2007 through 12/11/2014, including \$455.56 of “REGULAR PAYMENTS” made on “4/18/2011,” “5/17/2011,” “6/17/2011,” “7/15/2011,” “8/15/2011” and “9/15/2011” (*id.* at 38-41); (2) a four-page, undated chart, which seemingly reflects late charges and the escrow balance (*id.* at 42-45); and (3) a partial payment history, which indicates that the loan was paid through 3/1/2011 (*id.* at 49-51).

Ross further attests that “I have personal knowledge of SLS's standard business practice for generating and mailing 90-day Pre-foreclosure Notices pursuant to RPAPL § 1304” and “[t]he 90-day Pre-foreclosure Notices are generated automatically using data from SLS's loan servicing computer system . . .” (*id.* at ¶ 14). However, Ross attests that “SLS records and the 90-day Pre-foreclosure Notice reflect that *PHH followed its standard practices* with respect to the mailing of 90-day Pre-foreclosure Notice in connection with the subject loan” without explaining the role of PHH (another servicer) (*id.* at ¶ 15

[emphasis added]). In addition, the United States Postal Service Certificate of Mailing of the February 13, 2017, 90-day notice (annexed to the Ross affidavit as Exhibit G) reflects that the 90-day notice(s) were actually mailed by Computershare Communication Services (*id.* at 75-76).

US Bank also submits an attorney affirmation asserting, in the most conclusory way, that dismissal of the Frederic Defendants' counterclaims is warranted because the counterclaims are "conclusory, factually unsupported and without apparent merit" (NYSCEF Doc No. 69 at ¶ 50).

The Frederic Defendants' Opposition

The Frederic Defendants, in opposition, submit an affidavit from Jean Frederic, who disputes the date of the alleged payment default and receipt of the RPAPL § 1304 notice (NYSCEF Doc No. 92 at ¶¶ 3-4).

Defense counsel also submits an affirmation asserting that "Plaintiff's submissions, while intended to bolster Plaintiff's prima facie showing in support of summary judgment, actually introduce questions of fact that require denial of summary judgment" (NYSCEF Doc No. 91 at ¶ 11). Defense counsel asserts that the "payment history" annexed to the Ross affidavit as Exhibit E "does not have a single unified format, but records from different time periods appear in five different formats, 2010, 2011, 2014-2018, 2019-2020 all are presented in different formats and information from 2012-2013 appears to be missing entirely" (*id.* at ¶ 16). Defense counsel argues that the various different types of formatting in the purported payment history of the loan strongly suggests that they are

records of an unidentified, prior servicer(s) that were merely filed by SLS, rather than incorporated into SLS's business records (*id.*). Defense counsel argues that “[i]nfirmities found within the business record directly weaken the evidentiary value of the testimony based upon such records” and “[i]rregularities in such records should therefore be treated with skepticism” (*id.* at ¶¶ 19 and 20).

Defense counsel also argues that US Bank's failure to show strict compliance with RPAPL § 1304 requires denial of US Bank's motion for an order of reference (*id.* at ¶ 22). Counsel argues that US Bank failed to meet its prima facie burden by failing to submit an affidavit of service evidencing that it properly served the 90-day notice (*id.* at ¶ 24). Defense counsel notes that the proof of mailing annexed to the Ross affidavit reflects that the RPAPL § 1304 notice was mailed by another entity, Computershare Communication Services, which was not mentioned in the Ross affidavit:

“an examination of Exhibit G to the Ross Affidavit at page 76, states that the notices were mailed by Computershare Communication Services, not SLS. Nowhere in the Ross Affidavit is Computershare Communication Services mentioned nor is it mentioned that the records of Computershare were ever incorporated into the records of SLS” (*id.* at ¶ 27).

US Bank's Reply

US Bank, in reply, submits an attorney affirmation asserting that the court (Dear, J.) previously determined that US Bank established its prima facie case, and thus, the court's

finding is law of the case (NYSCEF Doc No. 94 at ¶¶ 8-9).¹ Plaintiff's counsel asserts that "[r]egardless, the Plaintiff advised in its affidavit that it incorporated by reference the documents of the prior servicer and relied upon them in the ordinary course of business and thereafter attached the same to an affidavit" (*id.* at ¶ 10). While counsel asserts that "the current servicer incorporated the payment histories of prior servicer's in the ordinary course of business and as such, established a proper default date through the reference to business records" (*id.* at ¶ 13), counsel fails to identify the prior servicer(s) whose business records US Bank admittedly relies upon.

Notably, Plaintiff's counsel reasserts that SLS sent the requisite RPAPL § 1304 notices to the Frederic Defendants without addressing or even mentioning: (1) Ross's reference to PHH regarding the service of the 90-day notices, and/or (2) the Proof of Mailing annexed to US Bank's submission reflecting that the 90-day notices were mailed by Computershare Communication Services (*id.* at ¶¶ 20-21).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment

¹ By a February 14, 2019, decision and order, the court (Dear, J.) held that US Bank, having submitted proof of service upon the non-answering defendants' and their *appearance default*, was entitled to a default judgment (NYSCEF Doc Nos. 57 and 62). The court did not determine that US Bank submitted sufficient evidence of the Frederic Defendants' payment default.

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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note and admissible evidence of the borrower’s default (see *Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2d Dept 2016]).

Here, US Bank submitted copies of the note and mortgage, but it failed to submit sufficient evidence of the Frederic Defendants’ alleged April 1, 2011, payment default. While Ross attests that the Frederic Defendants breached their obligations under the

mortgage by failing to tender the installments which were due on April 1, 2011, and subsequently thereafter, Exhibit E to the Ross affidavit inconsistently reflects that “Regular Payments” of \$455.56 were made on “4/18/2011,” “5/17/2011,” “6/17/2011,” “7/15/2011,” “8/15/2011” and “9/15/2011” (NYSCEF Doc No. 82 at 38-41). Furthermore, as defense counsel notes, the business records annexed to the Ross affidavit as Exhibit E are comprised of records from unidentified prior servicers, all of which have different formats. The Ross affidavit fails to identify the prior servicers who created the business records relied upon by SLS and US Bank, nor does Ross describe and/or discuss the information contained in the various business records attached to his moving affidavit.

In addition, US Bank’s moving papers raise additional issues of fact regarding US Bank’s compliance with RPAPL § 1304, which requires the service of a 90-day notice at least ninety days before commencement of a foreclosure action. The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrowers (RPAPL § 1304 [2]). “Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action” (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20 [2d Dept 2019]) and the plaintiff bears the burden of establishing strict compliance with RPAPL § 1304 (*Nationstar Mortg., LLC v Osikoya*, 205 AD3d 1038, 1039 [2d Dept 2022]).

US Bank failed to establish its compliance with RPAPL § 1304 because the Ross affidavit attests that SLS mailed the 90-day notices to the Frederic Defendants, however, the United States Postal Service Certificate of Mailing of the February 13, 2017, 90-day

notice (annexed to the Ross affidavit as Exhibit G) reflects that the notices were actually mailed by Computershare Communication Services (NYSCEF Doc No. 82 at 75-76). Ross also inexplicably attests that “PHH followed its standard practices with respect to the mailing of 90-day Pre-foreclosure Notice in connection with the subject loan” without describing PHH’s role or authority (*id.* at ¶ 15). The inconsistent affidavit testimony from Ross and the conflicting documentary evidence submitted by US Bank and its servicer, SLS, raises issues of fact regarding US Bank’s compliance with RPAPL § 1304.

The court has considered the parties remaining arguments, including US Bank’s conclusory argument seeking dismissal of the Frederic Defendants’ counterclaims, and finds them to be unavailing. Accordingly, it is hereby

ORDERED that US Bank’s motion (mot. seq. 3) is only granted to the extent that the caption is amended to exclude the John Doe defendants; US Bank’s motion is otherwise denied; and it is further

ORDERED that the caption shall hereinafter read as follows:

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
OF CITIGROUP MORTGAGE LOAN TRUST INC. ASSET-
BACKED PASS-THROUGH CERTIFICATES, SERIES
2007-AMC1,

Plaintiff,

- against -

JEAN FREDERIC; MARIE FREDERIC; MIDLAND
FUNDING, LLC D/B/A IN NEW YORK AS MIDLAND
FUNDING OF DELAWARE LLC; CAPITAL EQUITY
MANAGEMENT, LLC; NEW YORK CITY PARKING

VIOLATIONS BUREAU; UNITED STATES OF
AMERICA – INTERNAL REVENUE SERVICE; NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE; MICHAEL D. HESS, D.D.S., P.C.;
KASIANA FREDERIC,

Defendants.

-----X;

This constitutes the Decision and Order of the court.

E N T E R,



J. S. C.