

Bank of N.Y. Mellon v Kashmiri

2025 NY Slip Op 34622(U)

November 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 507480/2019

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 25th day of NOVEMBER, 2025

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE-HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-81, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-81,

Plaintiff,

- against -

Index No. 507480/2019

QARINA A. KASHMIRI; LEXINGTON NATIONAL, AND ACTION BAIL BONDS, INC., ALL FLORIDA CORPORATIONS; JOHN DOE (SAID NAME BEING FICTITIOUS TO REPRESENT UNKNOWN TENANTS/OCCUPANTS OF THE SUBJECT PROPERTY AND ANY OTHER PARTY OR ENTITY OF ANY KIND, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PROPERTY),

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

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

30-32, 34-48 50-52
49

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1503 East 33rd Street in Brooklyn (Block 7695, Lot 40) (Property), plaintiff The Bank of New York Mellon FKA The Bank of New York, As Trustee for the Certificate holders of CWALT, Inc., Alternative Loan Trust 2005-81, Mortgage Pass-

Through Certificates, Series 2005-81 (BONY or Plaintiff) moves (in motion sequence [mot. seq.] one) for an order: (1) granting it summary judgment and striking the answer and defenses filed by defendant Qarina A. Kashmiri, pursuant to CPLR 3212; (2) substituting Shoaib Kashmiri, Sidra Kashmiri, Sabika Kashmiri, Ansar Kareem, Insha Kashmiri, Kaleemullah Khan, Saima Kashmiri, Saad Kashmiri, Fowad Kashmiri, Rehana Kashmiri, Allahrakha Kashmiri and Ziad Kashmiri as party defendants in place and instead of the fictitious “John Doe” defendants; (3) granting it a default judgment against the non-appearing defendants, Lexington National, and Action Bail Bonds, Inc., All Florida Corporations, Shoib Kashmiri, Sidra Kashmiri, Sabika Kashmiri, Ansar Kareem, Insha Kashmiri, Kaleemullah Khan, Saima Kashmiri, Saad Kashmiri, Fowad Kashmiri, Rehana Kashmiri, Allahrakha Kashmiri and Ziad Kashmiri; (4) appointing a referee to compute the amount due to Plaintiff and to examine and report how the mortgaged premises should be sold, pursuant to RPAPL § 1321 (NYSCEF Doc No. 30).

Defendant Qarina Kashmiri s/h/a as Qarina A. Kashmiri cross-moves (in mot. seq. two) for an order granting her summary judgment dismissing the action and awarding her counsel fees and expenses, pursuant to CPLR 3212 (NYSCEF Doc No 50).

Background

On April 4, 2019, BONY commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-2). The complaint alleges that on November 28, 2005, Qarina Kashmiri executed and delivered to Countrywide Bank, N.A. an \$440,000.00 promissory note, which was secured

by a mortgage encumbering Qarina Kashmiri's residential Property (NYSCEF Doc No. 1 at ¶¶ 3-4). The complaint alleges that Qarina Kashmiri "has failed to comply with the terms of the Note and Mortgage by failing to pay the monthly payment due on 06/01/2013 and each subsequent payment that has come due . . ." and "Plaintiff elects to call due the entire amount secured by the Mortgage" (*id.* at ¶ 6).

The complaint further alleges that "prior to the commencement of this action, Plaintiff sent notice to Qarina A. Kashmiri in accordance with the terms of RPAPL 1304 . . ." and annexes a copy of the RPAPL § 1304 notice (*id.* at ¶ 12). The RPAPL § 1304 notice dated December 19, 2018, advises that "[i]f you have not taken any actions to resolve this matter within 90 days from the date this notice was mailed, we may commence legal action against you . . ." (NYSCEF Doc No. 1 at 63-69). Notably, the December 19, 2018, 90-day notice also includes the following additional language:

"If you have submitted a complete borrower response package and are currently in an active loss mitigation review, you will not be referred to foreclosure. If your loss mitigation application is denied or you fail to meet the terms of the new loss mitigation agreement, then you may be referred to foreclosure or continue with the foreclosure process.

"Please read the following important notices as they may affect your rights.

"New Penn Financial LLC dba Shellpoint Mortgage Servicing is a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

"If you are a customer in bankruptcy or a customer who has received a bankruptcy discharge of this debt: please be advised that this notice is to advise you of the status of your mortgage loan. This notice constitutes neither a demand for payment nor a notice of personal

liability to any recipient hereof, who might have received a discharge of such debt in accordance with applicable bankruptcy laws or who might be subject to the automatic stay of Section 362 of the United States Bankruptcy Code. However, it may be a notice of possible enforcement of the lien against the collateral property, which has not been discharged in your bankruptcy.

“Attention Servicemembers and Dependents: The federal Servicemembers Civil Relief Act and certain state laws provide important protections for you, including interest rate protections and prohibiting foreclosure under most circumstances during and twelve months after the servicemember’s military or other service. Counseling for covered servicemembers is available from Military OneSource (800-342-9647) and the United States Armed Forces Legal Assistance or other similar agencies. For more information, please visit the Military OneSource website www.militaryonesource.mil/.

“Notice of Error or Information Request Address: You have certain rights under Federal law related to resolving errors in the servicing of your loan and requesting information about your loan. If you want to request information about your loan or if you believe an error has occurred in the servicing of your loan and would like to submit an Error Resolution or Informational Request, please write to us at the following address: Shellpoint Mortgage Servicing P.O. Box 10826 Greenville, SC 29603-0826.

“In accordance with the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., debt collectors are prohibited from engaging in abusive, deceptive, and unfair debt collection efforts, including but not limited to:

- (i) the use or threat of violence;
- (ii) the use of obscene or profane language; and
- (iii) repeated phone calls made with the intent to annoy, abuse, or harass.

“If a creditor or debt collector receives a money judgment against you in court, state and federal laws may prevent the following types of income from being taken to pay the debt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
4. Spousal support, maintenance (alimony) or child support;
5. Unemployment benefits;

6. Disability benefits;
7. Workers' compensation benefits;
8. Public or private pensions;
9. Veterans' benefits;
10. Federal student loans, federal student grants, and federal work study funds; and
11. Ninety percent of your wages or salary earned in the last 60 days.

“A successor in interest is someone who acquires an ownership interest in a property secured by a mortgage loan by transfer upon the death of a relative, as a result of a divorce or legal separation, through certain trusts, between spouses, from a parent to a child, or when a borrower who is a joint tenant or tenant by the entirety dies. If you are a successor in interest, or you think you might be, please contact by phone, mail or email to start the confirmation process” (NYSCEF Doc No. 1 at 65).

On April 30, 2019, Qarina Kashmiri answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that “Plaintiff cannot establish that that it served the notice on defendant that is required by RPAPL Section 1304” (NYSCEF Doc No. 27 at 2).

The remaining defendants, all of whom were served with process in April 2019 (NYSCEF Doc Nos. 7-18 and 26), failed to answer or otherwise respond to the complaint.

BONY's Summary Judgment Motion

On April 8, 2022, *more than three years after* BONY commenced this foreclosure action, it moved for summary judgment, an order striking defendant Qarina Kashmiri's answer, an order of reference and a default judgment against the non-appearing defendants (NYSCEF Doc No. 30).

BONY submits a fact affidavit from Jaimie Inman (Inman), a “Doc. Verif. Spec. of NewRez LLC, F/K/A New Penn Financial, LLC, D/B/A Shellpoint Mortgage Servicing”

(Shellpoint) as servicer/attorney-in-fact for BONY pursuant to a February 16, 2022 [power of attorney (NYSCEF Doc Nos. 34 at ¶ 1 and 35). Inman attests that his affidavit is based on his review of Plaintiff’s business records relating to the loan (NYSCEF Doc No. 34 at ¶¶ 1-3). Inman further attests that “[t]o the extent records related to the Loan came from another entity, those records were received by Plaintiff in the ordinary course of its business, have been incorporated into and maintained as part of Plaintiff’s business records, and are relied upon by Plaintiff in its normal course of business” (*id.* at ¶ 4). Based on his review of the payment history of the loan maintained by Shellpoint (NYSCEF Doc No. 40), Inman attests that Qarina Kashmiri “defaulted on the terms of the Note and Mortgage by failing to make the mortgage payment that was due on June 1, 2013, and all subsequent payments” and “[a]s of January 7, 2022 (as reflected in the business records attached as Exhibit F), there is due and owing on the mortgage loan the sum of \$691,017.25. . .” (NYSCEF Doc No. 34 at ¶¶ 13 and 19).

Regarding the 90-day notice, pursuant to RPAPL § 1304, Inman attests that:

“[t]he business records that I reviewed, including electronic screen prints, indicate that by letters dated December 19, 2018, in accordance with the amendments to the Foreclosure Laws, Plaintiff sent 90-day notices to Qarina A. Kashmiri via regular and certified mail at the property address of the real estate subject to the Mortgage and to the last known address of Borrower, if different, *separate from any other mailing*, advising Borrower the loan was in default, the total amount needed to cure the default, loss mitigation options and advised that a foreclosure action will be commenced if the default was not cured within 90-days” (*id.* at ¶ 15 [emphasis added]).

Inman's affidavit annexes a copy of the December 19, 2018, 90-day notice as Exhibit F (NYSCEF Doc No. 42).

BONY's counsel submits an affirmation in support of the motion asserting that "Plaintiff is entitled to summary judgment as the answer and defenses filed by Defendant fails to raise a triable issue of material fact" (NYSCEF Doc No. 32 at ¶ 3). BONY's counsel asserts that the Inman moving affidavit "sets forth the various facts entitling Plaintiff to summary judgment, including evidence of the Note, Mortgage, and evidence of Defendant's continuing default" (*id.* at ¶ 21). BONY's counsel asserts that "as a copy of the underlying Note, endorsed in blank, was attached to the filed complaint, Plaintiff established prima facie that it had standing to commence the foreclosure action" (*id.* at ¶ 24). BONY's counsel further argues that "Plaintiff's compliance with RPAPL 1304 is established through the INMAN Affidavit and exhibits attached thereto . . ." and the notices "were in the form required by the statute" (*id.* at ¶ 33).

Defendant's Summary Judgment Cross-Motion

On May 30, 2022, Defendant Qarina Kashmiri opposed BONY's summary judgment motion (NYSCEF Doc No. 49) and cross-moved for summary judgment (NYSCEF Doc No. 50). Defense counsel submits a cross-moving affirmation asserting that the December 19, 2019 90-day pre-foreclosure notice contains "additional language" that "violates the mandate of RPAPL § 1304 (2), as explained by the Court in Kessler" (NYSCEF Doc No. 51 at ¶ 6). Defense counsel relies on the Second Department's holding in *Bank of Am., N.A. v Kessler*, 202 AD3d 10, 13 (2d Dept 2021), and its progeny, wherein

the appellate court articulated “a bright-line rule” that compliance with the ‘separate envelope’ requirement of RPAPL 1304 mandates that no material other than the notices described in RPAPL 1304 be contained in the envelope (*id.* at ¶¶ 4-5). Defense counsel argues that BONY’s 90-day notice is defective under the *Kessler* holding because it contains additional language that is not set forth in RPAPL 1304 (2).

Discussion

(1)

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 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 payment 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]).

RPAPL § 1304 (1) provides that “with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . such lender, assignee or mortgage loan servicer shall give notice to the borrower.” 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 borrower (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]). The plaintiff bears the burden of establishing strict compliance with RPAPL § 1304 (*Nationstar Mortg., LLC v Osikoya*, 205 AD3d 1038, 1039 [2d Dept 2022]).

Here, BONY satisfied its prima facie burden by producing the promissory note, the mortgage and admissible evidence of defendant Qarina Kashmiri's payment default. BONY also demonstrated, prima facie, that it complied with the requirements of RPAPL § 1304 by submitting admissible evidence that it mailed the RPAPL § 1304 notice to Qarina Kashmiri at the Property by both certified and by first-class mail. Inman attested to

Shellpoint's standard mailing practice regarding 90-day foreclosure notices and submitted a copy of the December 29, 2018, 90-day notice that was mailed to Qarini Kashmiri at the Property. The Second Department has held that proof of the requisite mailing can be demonstrated by "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 21 [internal quotations marks omitted]).

Furthermore, defense counsel's reliance on the Second Department's holding in *Kessler* and its progeny is misplaced because those holdings were specifically reversed by the Court of Appeals' subsequent decision in *Kessler* that was issued on February 14, 2023, after the parties' summary judgment motion and cross-motion were *sub judice*. Importantly, in *Bank of Am. v Kessler*, the Court of Appeals specifically rejected the bright-line rule imposed by the Second Department, and held that statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute "other notices" that must be sent in a separate envelope from the RPAPL § 1304 notice and "application of a bright-line rule would contravene the legislative purpose" of RPAPL § 1304 (*Bank of Am., N.A. v Kessler*, 39 NY3d 317, 326 [2023]).

Based on the Court of Appeals' holding in *Kessler*, Wells Fargo's RPAPL § 1304 notice was proper, despite the fact that it included additional information about bankruptcy and the rights of veterans and consumers. Consequently, for the foregoing reasons, Qarina

Kashmiri's summary judgment cross-motion is denied and those branches of BONY's motion seeking summary judgment and an order of reference are granted.

(2)

BONY also moves for a default judgment against the non-appearing defendants *nearly three years after* they defaulted in May 2019 by failing to answer or otherwise respond to BONY's complaint. BONY's affidavits of service in the record reflect that all of the defendants were served with process in April of 2019, and thus, their answers were due in May 2019. CPLR 3215 (c) explicitly provides that:

“[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall dismiss the complaint as abandoned*, without costs, upon its own initiative or on motion, *unless sufficient cause is shown* why the complaint should not be dismissed” (emphasis added).

Where a plaintiff fails to seek leave to enter a default judgment within one year after a party's default, the plaintiff must show “sufficient cause,” which requires the plaintiff to demonstrate both a reasonable excuse for the delay and a meritorious cause of action (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2d Dept 2011]; *First Nationwide Bank v Pretel*, 240 AD2d 629, 629 [2d Dept 1997]). The determination of whether an excuse is reasonable is within the sound discretion of the court (*Deutsche Bank National Trust Co. v Bakarey*, 198 AD3d 718, 721 [2d Dept 2021]; *Deutsche Bank National Trust Co. v Charles*, 186 AD3d 454, 456 [2d Dept 2020]).

The Second Department has clarified that, if plaintiff fails to demonstrate a reasonable excuse for the delay and a meritorious cause of action, CPLR 3215 (c) explicitly provides that the complaint “shall” be dismissed, which is not discretionary, but mandatory (*Deutsche Bank National Trust Company v Watson*, 199 AD3d 879, 880 [2d Dept 2021]; *US Bank National Assoc. v Davis*, 196 AD3d 530, 533 [2d Dept 2021]; *HSBC USA, National Assoc. v Grella*, 14 AD3d 669 [2d Dept 2016]). “The policy underlying the statute is ‘to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims’” (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764 [2d Dept 2015] [quoting *Giglio*, 86 AD3d at 307]).

Here, BONY has failed to provide any excuse for its untimely motion for a default judgment against the non-appearing defendants, which mandates dismissal of this action as abandoned against those defendants, as a matter of law. Accordingly, it is hereby

ORDERED that BONY’s motion (mot. seq. one) is only granted to the extent that summary judgment is granted and Wells Fargo is entitled to an order of reference, which shall be settled on notice, and Shoaib Kashmiri, Sidra Kashmiri, Sabika Kashmiri, Ansar Kareem, Insha Kashmiri, Kaleemullah Khan, Saima Kashmiri, Saad Kashmiri, Fowad Kashmiri, Rehana Kashmiri, Allahrakha Kashmiri and Ziad Kashmiri are substituted as party defendants in place and instead of the “John Doe” defendants; the motion is otherwise denied; and it is further

ORDERED that this action is dismissed as against non-appearing defendants Lexington National, and Action Bail Bonds, Inc., All Florida Corporations, Shoaib

Kashmiri, Sidra Kashmiri, Sabika Kashmiri, Ansar Kareem, Insha Kashmiri, Kaleemullah Khan, Saima Kashmiri, Saad Kashmiri, Fowad Kashmiri, Rehana Kashmiri, Allahrakha Kashmiri and Ziad Kashmiri, pursuant to CPLR 3215 (c); and it is further

ORDERED that Qarina Kashmiri's summary judgment cross-motion (mot. seq. two) is denied.

This constitutes the decision and order of the court.

November 25, 2025

E N T E R,



HON.CENCERIA P. EDWARDS J.S.C.