

Freedom Mtge. Corp. v Whatley

2025 NY Slip Op 34784(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 505514/2018

Judge: Menachem M. Mirocznik

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This opinion is uncorrected and not selected for official publication.

At IAS Part ~~925~~ 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 ~~8th~~^{10th} day of December 2025

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

<p>FREEDOM MORTGAGE CORPORATION, Plaintiff. -against- NIKITA MARIE WHATLEY AKA NIKITA MARIE Y. WHATLEY, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, DEPT. OF HOUSING PRESERVATION & DEVELOPMENT, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON, SERIES ARMT 2006-1, WEBSTER BUSINESS CREDIT CORPORATION JOHN DOE (Those unknown tenants, occupants, persons or corporations or their heirs, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an interest in the mortgaged premises.) Defendant.</p>

Index No. 505514/2018

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

Papers	Numbered
Notice of Motion	NYSCEF Doc. 52-70
Opposition Papers	NYSCEF Doc. 72-76
Reply Papers	NYSCEF Doc. 89

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 March 20, 2018, seeking to foreclose a mortgage (the "mortgage") executed by defendant Nikita Marie Whatley Aka Nikita Marie Y. Whatley (the "defendant") which encumbers the property known as 954 Lincoln Avenue, Brooklyn, NY 11208 (the "property").

On April 3, 2018, defendant joined issue by filing an answer asserting various affirmative defenses including non-compliance with RPAPL 1304.

On August 1, 2019, the Court denied plaintiff's previous motion for summary judgment because plaintiff failed to establish it sent the notices required by RPAPL 1304. Specifically, the Court held that the "Tracy Affidavit is insufficient to demonstrate proper, timely mailing of the 1304 notices – she merely attests that they were sent based upon unspecified policies and unproduced records. This is insufficient."

Plaintiff now moves again for summary judgment, to strike defendant's answer and for other various relief.

Defendant opposes the motion arguing that plaintiff failed to establish prima facie entitlement to judgment as a matter of law. Specifically, defendant contends that plaintiff failed again to establish compliance with RPAPL 1304 and entitlement to a successive motion for summary judgment. Defendant further contends the new Tracy affidavit fails to identify her, title or authority to make attestation for plaintiff and plaintiff fails to offer an excuse for failing to produce the additional testimony on the previous motion for summary judgment. Defendant further contends that plaintiff relies on conclusory assertions as to the mailing procedures, relies on an "undated, unsigned, unstamped USPS Tracking Document" and failed to produce first-class and certified mailing receipts.

In reply, plaintiff argues that its successive motion for summary judgment is permitted in the interest of judicial economy and is substantively valid. Plaintiff argues it provided copies of the notices sent to the property address which contain barcodes and tracking numbers. Plaintiff further avers that the new Tracy affidavit contains her name and title in her signature block and is employed by plaintiff. Plaintiff argues the Court can take judicial notice of the information contained on USPS tracking printout and plaintiff provided its internal letter log demonstrating the notices were sent. Lastly, plaintiff contends that Ms. Tracy attested to its "standard office practice to prepare, address, mail and store letters used in its mortgage servicing business, and how to retrieve such information."

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];

"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]

“Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause...However, successive motions for summary judgment may be entertained when that motion is "substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the court" *SC Park Lane II, LLC v Dickinson*, 237 AD3d 769 [2d Dept 2025][internal citations and quotation marks omitted]; See also *Aurora Loan Servs. v Yogev*, 194 AD3d 996, 997 [2d Dept 2021] but see *Wells Fargo Bank, N.A. v Osias*, 205 AD3d 979 [2d Dept 2022]

Here, the Court denied the previous motion for summary judgment “without prejudice” and therefore, the Court will entertain plaintiff’s motion. Cf. *Bayview Loan Servicing, LLC v. Rosalia Schwartz, et al*; Index No. 511829/2015 at NYSCEF Doc. 157

“RPAPL 1304(1) provides that, “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, ... including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower...RPAPL 1304 requires that the notice be sent by registered or certified mail, and also by first-class mail to the last known address of the...Strict compliance with RPAPL 1304 notice to the borrower is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of the condition precedent...Proof of the requisite mailings of the RPAPL 1304 notices may be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or 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” *Deutsche Bank Natl. Tr. Co. v Bucicchia*, 193 AD3d 682 [2d Dept 2021][internal citations and quotation marks omitted]

Here, plaintiff failed to establish prima facie that it strictly complied with RPAPL 1304. In support of plaintiff’s contention that it complied with RPAPL 1304, plaintiff annexes the affidavit of Erica D. Tracy a purported “FCL Specialist III” of plaintiff. Ms. Tracy does not contend she has personal knowledge of the mailing and avers in a conclusory manner that the notices were allegedly sent on October 13, 2017. While Ms. Tracy alleges that she is familiar plaintiff standard office practices, she does not detail what the standard office mailing practice and procedure is that “ensure that items are properly addressed *and mailed*.” Her statements amount to nothing more than a conclusory assertion that plaintiff has undisclosed mailing procedures and that the notices were allegedly properly mailed.

Additionally, the USPS tracking provided by plaintiff reflects that the alleged mailing occurred on October 17, 2017, which conflicts with Ms. Tracy’s testimony that the mailing occurred on October 13, 2017, while the letter log provided reflects that the mailing allegedly occurred on October 12, 2017. Furthermore, plaintiff provides only a single 1304 notice pertaining to the certified mailing without proof of the additional mailings. Further still, the letter log only demonstrates a single mailing, which may be the alleged certified mailing but no evidence has been provided substantiating the necessary first-class mailing.

In sum, plaintiff's conflicting and contradictory evidence and testimony is insufficient to demonstrate prima facie entitlement to the drastic relief of summary judgment. 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]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]

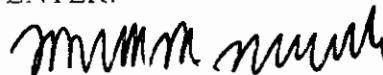
Accordingly, it is hereby

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

ORDERED, that the parties are directed to complete discovery and proceed to trial.

This constitutes the Decision and Order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

FILED

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