

**U.S. Bank N.A. v Thaler**

2025 NY Slip Op 34788(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 518669/2018

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 8<sup>th</sup> day of December 2025

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

U.S. Bank National Association, as Trustee for Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2005-23

Plaintiff,

-against-

Claribel Thaler; JP Morgan Chase, Bank N.A.; John Doe #1 and John Doe #12 said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises

Defendants.

**Index No. 518669/2018**

**Decision and Order  
(Motion Seq. 1 and 2)**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion	NYSCEF Doc. 26-46
Notice of Cross-Motion	NYSCEF Doc. 47-48
Opposition to Cross-Motion/Reply Papers	NYSCEF Doc. 50-51

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

**Relevant Factual and Procedural History**

This action was commenced on September 14, 2018, seeking to foreclose a mortgage (the "mortgage") executed by defendant Claribel Thaler (the "defendant") encumbering the property known as 1222 East 73rd Street, Brooklyn, NY 11234 (the "property").

On October 19, 2018, defendant joined issue with the filing of an answer asserting various affirmative defenses, including plaintiff's lack of standing, the action is barred by the statute of limitations and non-compliance with RPAPL 1304 and several counterclaims.

Settlement conferences were held on March 5, 2019, May 15, 2019, and September 11, 2019, after which the matter was released from the settlement part.

Plaintiff now moves for summary judgment, to strike defendant's answer and counterclaims, to appoint a referee, for a default judgment against the non-appearing parties and to amend the caption to substitute the names of certain John Doe defendants. Plaintiff argues that it established prima facie entitlement to relief and defendant's answer fails to raise an issue of fact. In support of its motion, plaintiff submits, inter alia, an affidavit of Daphne Alexander ("Ms. Alexander" or "Alexander Affidavit"), a purported "Doc Exec Associate" of Nationstar Mortgage LLC, ("Nationstar"), the alleged servicer for plaintiff and various documents including a power of attorney dated August 22, 2013, between plaintiff and Nationstar.

Defendant opposes and cross-moves for summary judgment dismissing the action due to, inter alia, plaintiff's alleged lack of standing and non-compliance with RPAPL 1304. Defendant argues, inter alia, that plaintiff failed to demonstrate prima facie entitlement to judgment as a matter of law, as the Alexander Affidavit is inadmissible hearsay and plaintiff failed to demonstrate it has standing and that it complied with RPAPL 1304. Plaintiff further argues that the action is barred by the statute of limitations.

In opposition to the cross-motion and reply, plaintiff argues that it established prima facie entitlement to judgment as a matter of law and defendant failed to raise an issue of fact. Plaintiff argues that the Alexander Affidavit and supporting documents are admissible pursuant to CPLR 4518. Plaintiff further argues that it demonstrated by annexing the note endorsed in blank to the complaint and that Ms. Alexander's testimony and supporting documents establish that plaintiff complied with RPAPL 1304.

### 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]

"Summary judgment is a "drastic remedy" that should be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issue of fact... Even then, summary judgment should be granted only if, upon the moving party's meeting this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action... Issue finding, not issue deciding, is the court's purpose at the summary judgment stage... Thus, [w]here the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied... When ruling on a motion for summary judgment, the deciding court must view the facts "in the light most favorable to the non-moving party" *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 38 NY3d 169 [2022][internal citations and quotation marks omitted]

Moreover, "a motion for summary judgment will not be granted if it depends on proof that

would be inadmissible at the trial under some exclusionary rule of evidence.” *HSBC Bank USA, N.A. v Vasishta*, 241 AD3d 1299 [2d Dept 2025]

“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]

Initially, in support of the motion, plaintiff relies on the affidavit of Ms. Alexander of Nationstar, the alleged servicer of plaintiff. As proof of authority, Mr. Alexander annexes a “limited power of attorney” executed by plaintiff in favor of Nationstar dated August 22, 2013. However, the power of attorney is expressly limited by that which is “required or permitted under the terms of the related servicing agreement” which has not been proffered. Therefore, the power of attorney is insufficient to demonstrate that plaintiff’s affiant possesses the requisite authority to act on behalf of plaintiff. See *HSBC Bank USA, N.A. v Betts*, 67 Ad3d 735 [2d Dept 2009]; *Citibank, N.A. v Herman*, 215 AD3d 626 [2d Dept 2023]; *US Bank N.A. v Cusati*, 185 AD3d 870 [2d Dept 2020]; See also *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022][“the limited power of attorney submitted...restricted and conditioned its authority based on the terms of other agreements which were not provided by the plaintiff. Thus, the limited power of attorney was insufficient to demonstrate that Nationstar possessed the authority to act on behalf of the plaintiff”]

In any case, “[w]here, as here, the plaintiff’s standing has been placed in issue by the defendant’s answer, the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment” *U.S. Bank N.A. v Moulton*, 179 AD3d 734, 736 [2d Dept 2020]; See also *Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016][“Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief”]

“A plaintiff has standing to commence a foreclosure action where it is the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint...Thus, a plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action” *US Bank Tr., N.A. v Loring*, 193 AD3d 1101 [2d Dept 2021][internal citations omitted]

Additionally, in general a plaintiff can establish prima facie that it had standing to commence the action by annexing a copy of the subject note endorsed in blank to the complaint. *U.S. Bank N.A. v Auguste*, 173 AD3d 930 [2d Dept 2019]; *Bank of New York Mellon v Swift*, 213 AD3d 624 [2d Dept 2023]; *Selene Fin., L.P. v Coleman*, 187 AD3d 1082 [2d Dept 2020]; *U.S. Bank N.A. v Roza-Castellanos*, 201 AD3d 995 [2d Dept 2022]

Here, contrary to defendant’s contentions, plaintiff established prima facie it had standing to commence the action by annexing the subject note, endorsed in blank to the complaint.

Further, “where, as here, a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, the moving party is also required to make a prima facie showing of strict compliance with RPAPL 1304...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(2) requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower and to the residence that is the subject of the mortgage.” *Caliber Home Loans, Inc. v Weinstein*, 197 AD3d 1232 [2d Dept 2021][internal citations and quotation marks omitted]

“By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can 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.” *US Bank N.A. v Pierre*, 189 AD3d 1309 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Fregosi*, 222 AD3d 811 [2d Dept 2023][“A plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened.”]

Here, plaintiff failed to establish prima facie it strictly complied with RPAPL 1304. Ms. Alexander does not state that she sent the notices. Nor does she even state it was Nationstar that sent the notices. Rather the notices were allegedly sent by Nationstar’s “agents”. However, Ms. Alexander does not identify the agent or explain the agent’s relationship to Nationstar to plaintiff. Nor does Ms. Alexander claim to have personal familiarity with mailing practices and procedures of its unnamed agent.

Therefore, plaintiff failed to demonstrate prima facie compliance with RPAPL 1304. See *US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718 [2d Dept 2023][“Contrary to the plaintiff’s contention, [the] affidavit was insufficient to establish that notice was sent to the defendant in the manner required by RPAPL 1304. While [the affiant] averred that she had personal knowledge of Fay’s standard office mailing procedures, she did not attest that she was familiar with the standard office mailing procedures of LenderLive, LLC (hereinafter LenderLive), the third-party vendor that apparently sent the RPAPL 1304 notices on behalf of the plaintiff. Thus, Johnson’s affidavit did not establish proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed”]; See also *Wells Fargo Bank, N.A. v Fregosi*, 222 AD3d 811 [2d Dept 2023][“Here, in support of its motion for summary judgment, the plaintiff submitted the affidavit of ...an employee of Nationstar Mortgage LLC (hereinafter Nationstar), the plaintiff’s loan servicer. [She] described Nationstar’s standard office mailing practices for the mailing of RPAPL 1304 notices, and stated that RPAPL 1304 notices were sent to each of the defendants by both certified and first-class mail...Significantly, the tracking information documents, or tracking logs, contain a notation in the upper left corner stating, “Mailed by: LenderLive Facility,” and a notation within the tracking history stating, “LenderLive Event—Mailed.” Although Simmons averred that she had personal knowledge of Nationstar’s standard office mailing procedure, she did

not attest that she was familiar with the standard office mailing procedures of LenderLive, the third-party vendor that apparently sent the RPAPL 1304 notices on behalf of the plaintiff. Thus, her affidavit did not establish proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed.”]

“Because the plaintiff “failed to provide proof of the actual mailing, 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, the plaintiff failed to establish its strict compliance with RPAPL 1304” and, therefore, failed to establish, prima facie, its entitlement to judgment as a matter of law.” *Bethpage Fed. Credit Union v Hernon*, 216 AD3d 895 [2d Dept 2023]; See also *NS194, LLC v Gregg*, 231 AD3d 1162 [2d Dept 2024]; *US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718 [2d Dept 2023]; *MTGLQ Invs., L.P. v Cacioppo*, 217 AD3d 939 [2d Dept 2023]

However, simply because the Court finds that plaintiff failed to demonstrate prima facie compliance with RPAPL 1304, that does not mean that defendant carried her burden in demonstrating prima facie that plaintiff did not comply with RPAPL 1304.

“Even in the face of a plaintiff’s failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, this Court has held that a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled...Nor were the plaintiff’s submissions sufficient to establish the defendant’s prima facie entitlement to judgment as a matter of law dismissing the complaint for failure to comply with RPAPL 1304. There is ample case law providing that a party cannot succeed on a motion for summary judgment by simply pointing out gaps in the opposing party’s case.” *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]

Here, defendant has offered no evidence that plaintiff did not comply with RPAPL 1304. In fact, defendant did not even submit an affidavit claiming she did not receive the notice. In any case, even if defendant denied receipt the same is insufficient to demonstrate prima facie that plaintiff did not send the required notices. See *US Bank, N.A. v Knight*, 227 AD3d 1035 [2d Dept 2024][“the Supreme Court properly denied that branch of the defendants’ motion which was, in effect, for summary judgment dismissing the complaint insofar as asserted against them based on the plaintiff’s failure to comply with RPAPL 1304. The defendants’ bare denial of receipt of the RPAPL 1304 notice was insufficient to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them.”]

Lastly, “[a]s a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action...With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due...However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt.” *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012][internal citations and quotation marks omitted]

Here, defendant executed a loan modification on August 14, 2015 and the complaint alleges

defendant defaulted on January 1, 2018. Therefore, this action was commenced well within the limitations period.

Accordingly, both plaintiff and defendant failed to carry their heavy burden in establishing entitlement to the drastic remedy of summary judgment without regard to sufficiency of the opposition papers. See e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]

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

Accordingly, it is hereby

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

**ORDERED**, that defendant's cross-motion is DENIED with PREJUDICE; and it is further

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

This constitutes the decision, order and judgment of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

**FILED**

DEC 11 2025

KINGS COUNTY CLERK'S OFFICE