

Trinity Fin. Servs., LLC v Awuni

2025 NY Slip Op 34813(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 510416/2017

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 8th of December 2025

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

<p>TRINITY FINANCIAL SERVICES, LLC,</p> <p style="text-align: center;">Plaintiff.</p> <p style="text-align: center;">-against-</p> <p>REUBEN AWUNI, NYC ENVIRONMENTAL CONTROL BOARD, CITIBANK (SOUTH DAKOTA) N.A., and "JOHN DOE" and "JANE DOE", the last two names being fictitious, said parties intended being tenants or occupants, if any, having or claiming an interest in, or lien upon the premises described in the complaint,</p> <p style="text-align: center;">Defendant.</p>

Index No. 510416/2017

**Decision and Order
(Motion Seq. 3)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 50-65
Opposition Papers	NYSCEF Doc. 66-79
Reply Papers	NYSCEF Doc. 80

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 May 25, 2017, seeking to foreclose a mortgage (the "mortgage") executed by defendant Reuben Awuni (the "defendant") which encumbers the property known as 45 De Sales Place, Brooklyn, NY 11207 (the "property"). Defendant initially defaulted in answering.

On December 11, 2017, defendant filed an answer asserting various affirmative defenses including lack of standing and non-compliance with RPAPL 1304.

On March 20, 2018, the Court granted defendant's motion to compel acceptance of defendant's late answer.

On January 2, 2019, the Court denied plaintiff's previous motion for summary judgment without prejudice.

Plaintiff now moves again for an order granting summary judgment, a default judgment against the non-appearing parties, to amend the caption and to appoint a referee to compute. In support of the motion, plaintiff annexes the affidavit of Don A. Madden III, a purported President of plaintiff. Annexed to the Madden affidavit is, inter alia, a copy of a "Fixed Rate Note and Security Agreement" ("note"), the mortgage, assignments of mortgage, a "Notice of Default and Intend to Accelerate" bearing the letterhead of "Kozeny, McCubbin & Katz, LLP", an affidavit of Jordan Katz, a purported "former Supervising Partner of New York" of Aldrige Pite" ("Aldrige Pite") and "also a partner of the law firm of Kozeny, McCubbin & Katz, LLP", ("Kozeny") and a purported RPAPL 1304 notice bearing the letterhead of "Trinity Financial Services LLC". Plaintiff contends it demonstrated prima entitlement to judgment as a matter of law with production of the note, mortgage and evidence of defendant's default. Plaintiff further contends to established it has standing by being in possession of the note endorsed in blank prior to commencement of this action as attested to in Madden affidavit and by annexing a copy of the note to the complaint. Regarding compliance with RPAPL 1304, plaintiff contends it demonstrated compliance with RPAPL 1304 as attested to in the Madden affidavit.

Defendant opposes the motion contending that plaintiff failed to establish prima facie that it had standing to commence this action and that it complied with RPAPL 1304.

Specifically, defendant contends that the subject note is a line of credit, not a negotiable instrument and therefore standing cannot be demonstrated by solely delivery of the note even if endorsed in blank. As it pertains to RPAPL 1304, defendant challenges plaintiff's evidentiary showing. Specifically, defendant argues that the Affidavit of Mr. Katz is insufficient to demonstrate mailing of the required notices in as much as Mr. Katz does not attest to when he was a partner of the respective law firms or provide any evidence that law firm was authorized to send the notice. Defendant further argues that Mr. Katz merely attested to the mailing based upon a review of records maintained by Aldrige Pite which allegedly incorporated the records of Kozeny, but does not attach any records he claims to have reviewed and does not offer any proof that Kozeny was authorized to send the notices and therefore, Mr. Katz's contentions as are insufficient. Defendant points out the Katz affidavit appears to conflict with Madden affidavit submitted in connection with first summary judgment motion wherein Mr. Madden claimed personal knowledge of the mailing of the RPAPL 1304 notice.

In reply, plaintiff argues that the subject note is not a line a credit and therefore is a negotiable instrument within the meaning of UCC 3-104 and that plaintiff demonstrated standing by demonstrating it was the holder of the note endorsed in blank as well as by the assignments of the mortgage which contained an assignment of the note prior to commencement of the action. Plaintiff further argues that plaintiff's affiants need not specifically allege which documents were reviewed as well as produce same and need not document the specific mailing procedures utilized to demonstrate compliance with RPAPL 1304 and need only attest that there are procedures and that they were followed.

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]; *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40 [2015].

“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]

“[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...Records made in the regular course of business are hearsay when offered for the truth of their contents...When a party relies upon the business records exception to the hearsay rule in attempting to establish its prima facie case, “[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.” *HSBC Bank USA, N.A. v Vasishita*, 241 AD3d 1299 [2d Dept 2025][internal citations and quotation marks omitted]

However, “[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]

“A “holder” is “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession...Pursuant to article 3 of the Uniform Commercial Code, a note can be endorsed, or signed over, to a new owner. A note can also be endorsed in blank, naming no specific payee, which makes it a bearer instrument under article 3 of the Uniform Commercial Code, so that any party that possesses the note has the legal authority to enforce it.” *U.S. Bank N.A. v Moulton*, 179 AD3d 734 [2d Dept 2020][internal citations and quotation marks omitted]; NY UCC 1-201(21); See also *U.S. Bank N.A. for Citigroup Mtge. Loan Tr., Inc., 2006-NC2 v Brody*, 156 AD3d 839 [2d Dept 2017][“A “holder” is “the person in

possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession”]

First, plaintiff is correct that the subject note is a negotiable instrument.

“[T]o qualify as a negotiable instrument under the UCC, a document must “(a) be signed by the maker or drawer; and (b) contain an unconditional promise or *order to pay a sum certain in money* and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer” *OneWest Bank, N.A. v FMCDH Realty, Inc.*, 165 AD3d 128 [2d Dept 2018] (“FMCDH”) citing NY UCC 3-104[1]

Here, unlike *FMCDH*, the subject document is for a sum certain and contains no other promises other than what is authorized by statute. Therefore, the note is negotiable instrument.

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]

Therefore, attachment of the note endorsed in blank would generally be sufficient to establish standing to commence this action. However, the analysis does not conclude there.

Here, the endorsement in blank is on an “allonge”. Therefore, to establish standing plaintiff was required to demonstrate the allonge was “firmly affixed” to the note so as to become a part thereof. Plaintiff offers no admissible evidence that the allonge was firmly affixed to the note.

Therefore, plaintiff failed to establish prima facie it had standing to commence this action. See *Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022] [“Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was “so firmly affixed thereto as to become a part thereof,” as required by UCC 3-202 (2)"]; See also *LNV Corp. v AlMBERG*, 194 AD3d 703, 704 [2d Dept 2021][“Here...the plaintiff failed, prima facie, to establish its standing to commence this action. The copy of the note submitted in support of the plaintiff’s motion contained two additional pages, the first entitled “Allonge to Note” and the second entitled “Note Allonge.” However, as the defendants correctly contend, the plaintiff did not submit any evidence to indicate that the purported allonges were so firmly affixed to the note so as to become a part thereof...”]

Second, “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]

“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, defendant is also correct that plaintiff failed to establish prima facie it strictly complied with RPAPL 1304.

First, plaintiff failed to establish that Kozeny had authority to send same on the dates in question. See *Siegel v Kentucky Fried Chicken*, 108 AD2d 218 [2d Dept 1985][“the mere assertion of authority on the face of the notice by a total stranger...that he is authorized to act on the latter's behalf cannot be deemed to provide...notice...”]; See also RPAPL 1304[1][“such lender, assignee or mortgage loan servicer shall give notice”]; *Deutsche Bank Natl. Trust Co. v Pariser*, 207AD3d 518 [2d Sept. 2022][“The plaintiff further failed to establish that the RPAPL 1304 notices were sent by the “lender, assignee, or loan servicer” as required by the statute...Here, the RPAPL notices were allegedly sent on August 7, 2014, by the Law Offices of McCabe, Weisberg, and Conway, P.C., on behalf of Ocwen Financial, the plaintiff's loan servicer. However, the limited power of attorney authorizing Ocwen Financial to act on behalf of the plaintiff, which was submitted by the plaintiff in support of its motion, states that it was executed on and effective as of September 17, 2014.”][citations omitted]; See also *MTGLQ Invs., L.P. v Cacioppo*, 217 AD3d 939 [2d Dept 2023][“Here, the plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. The plaintiff submitted a detailed affidavit of mailing from an assistant secretary of loan documentation at Rushmore Loan Management Services, LLC (hereinafter Rushmore), which demonstrated that the RPAPL 1304 notices had been mailed in accordance with the statute...However, this affidavit failed to demonstrate that Rushmore had the authority to service the loan at the time that it mailed the RPAPL 1304 notices to the defendant...and this record presents triable issues of fact as to whether Rushmore had this authority.”][citations omitted]

Second, it is also not clear from the record who in fact sent the subject notices. The notices bear the letterhead of Trinity Financial Services Inc., and plaintiff's affiant previously attested to the mailing.

Third, only a single notice is attached to plaintiff's motion and plaintiff did not provide any certified mailing receipts or other proof of mailing of the notices by certified and first class mail. While Mr. Katz attests to the mailings by certified and first-class mail based on a review of the records maintained by Aldridge Pite, no such records are attached to his affidavit.

Contrary to plaintiff's contentions, alleging a review of unproduced business records is insufficient and plaintiff must identify and produce the specific records alleged to have been reviewed for the same to be admissible pursuant to CPLR 4518. “Although, [t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business...it is the

business record itself, not the foundational affidavit, that serves as proof of the matter...Accordingly, [e]vidence of the contents of business records is admissible only where the records themselves are introduced...Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay" *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019][internal citations and quotation marks omitted]

Therefore, Mr. Katz' assertion that the records he reviewed demonstrate the notices were sent amounts to nothing more than inadmissible hearsay and is insufficient to demonstrate prima facie compliance with RPAPL 1304. See *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757 [2d Dept 2021][“However, while the Lee affidavit was sufficient to lay a proper foundation for the admission of a business record pursuant to CPLR 4518 (a)...Lee failed to identify the records upon which she relied in making the statements, and the plaintiff failed to submit copies of the records themselves.”]; *Deutsche Bank Trust Co. Ams. v Miller*, 198 AD3d 867 [2d Dept 2021][“Moreover, even if Lee's affidavit set forth a proper foundation for the admissibility of the unspecified records he relied on...Lee failed to identify the records upon which []he relied in making the statements, and the plaintiff failed to submit copies of the records themselves...It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted”][internal citations and quotation marks omitted]

Therefore, plaintiff failed to establish prima facie compliance, let alone strict compliance, with RPAPL 1304.

In light of the above, plaintiff failed to demonstrate prima facie entitlement to the drastic remedy of summary judgment and it'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][“Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers”]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986][“Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers”]

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

KINGS COUNTY CLERKS OFFICE

DEC 11 2025

FILED