

**U.S. Bank NA v Bangham**

2025 NY Slip Op 34814(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 510608/2016

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 day of December, 2025

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

U.S. Bank NA, successor trustee to Bank of America, NA, successor in interest to LaSalle Bank NA, on behalf of the registered Holders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2007-AQ1,

Plaintiff,

-against-

Rosalyn Bangham a/k/a Rosalyn M. Baugham, New York State Department of Taxation and Finance, United States of America - Internal Revenue Service, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudicaten Bureau, Deondra Baugham, Rand Baughair Linnel Baugham, Nathaniel Perry

Defendants.

**Index No. 510608/2016**

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

<b>Papers</b>	<b>Numbered</b>
Notice of Motion	NYSCEF Doc. 40-46
Notice of Cross-Motion	NYSCEF Doc. 48-50
Opposition to Cross-Motion/Reply	NYSCEF Doc. 52-60
Reply to Cross-Motion	NYSCEF Doc. 86-87
Interim Order/JHO Referral Order	NYSCEF Doc. 92-93
Decision/Order of JHO/Referee	NYSCEF Doc. 110

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

**Relevant Procedural History**

This action was commenced on June 22, 2016, seeking to foreclose a mortgage (the "mortgage") executed by defendant Rosalyn Bangham a/k/a Rosalyn M. Baugham (the "defendant") encumbering the property known as 1503 East 52nd Street, Brooklyn, NY 11234 (the "property").

Settlement conferences were held on September 6, 2016, October 5, 2016, February 14,

2017, and March 8, 2017 after which the matter was released from the settlement part.

On February 1, 2019, the Court granted plaintiff's motion for a default judgment and order of reference.

On June 4, 2019, plaintiff filed the instant motion to confirm the referee's report and for a judgment of foreclosure and sale.

Defendant cross-moved to dismiss the action pursuant to CPLR 3211 alleging the Court lacks jurisdiction due to plaintiff's failure to serve defendant in accordance with CPLR 308. Defendant further seeks dismissal because plaintiff allegedly lacks standing and because defendant's execution of loan modification constituted a novation extinguishing the subject note and mortgage.

Plaintiff opposed the cross-motion contending that the proffered affidavit of service constitutes prima facie evidence of proper service and defendant failed to rebut same. Plaintiff argues that defendant is not entitled to seek dismissal of the action due to lack of standing and the purported novation because defendant is in default, has not sought to vacate her default and failed to demonstrate a reasonable excuse or meritorious defense to the action. Plaintiff further argues that it has demonstrated it has standing by annexing a copy of the note to the complaint and in any case, defendant failed to demonstrate plaintiff lacks standing and that defendant's novation argument is without merit because the subject modification expressly provides for the continuation of the note and mortgage.

In reply to the cross-motion, defendant for the first time contends that vacatur of the default is warranted pursuant to CPLR 317 and contends that annexation of the note to the complaint is insufficient to demonstrate standing.

By Order dated May 19, 2022, the Court directed a traverse hearing be held and adjourned the motions pending the outcome of the traverse hearing.

On March 22, 2024, after the conclusion of the traverse hearing where the parties agreed to the matter being heard on a hear and determine basis, the referee issued a decision and order rejecting the challenges to service and found defendant was properly served. The referee further noted that defendant was also mailed a copy of the summons and complaint as required pursuant to CPLR 308(2).

### Discussion

Initially, defendant's motion seeking dismissal on jurisdictional grounds was already denied by referee who issued a decision and order after the completion of the traverse hearing. "Where, as here, a referee was appointed to hear and determine, the referee possesses all the powers of a court in performing a like function and the referee's decision shall stand as the decision of a court." *Mukmudova v Cohen*, 216 AD3d 935 [2d Dept 2023][citation and quotation marks omitted]

Therefore, that branch of defendant's motion has already been determined.

Defendant motion in so far as it seeks dismissal of the action due to lack of standing and the

purported novation are denied.

“A defendant in default is not entitled to affirmative relief of a nonjurisdictional nature absent vacatur of his or her default.” *Wells Fargo Bank, N.A. v Laporte*, 235 AD3d 936, 938 [2d Dept 2025]; *US Bank N.A. v Scaffidi*, 238 AD3d 1092 [2d Dept 2025][“A defendant in default is not entitled to affirmative relief of a non-jurisdictional nature absent vacatur...of his or her default”]

Here, defendant did not seek to vacate her default pursuant to CPLR 5015 or CPLR 317 in her cross-motion. Therefore, the Court need not consider defendant’s request for dismissal on grounds of a nonjurisdictional nature. See *Wilmington Tr. N.A. v Ashe*, 189 AD3d 1130 [2d Dept 2020][“The defendant is precluded from raising arguments regarding standing and RPAPL 1304 which are nonjurisdictional and cannot be raised without first vacating her default”]

Moreover, while defendant sought relief pursuant to CPLR 317 in her reply to plaintiff’s opposition to her cross-motion, it is well settled that affirmative relief cannot be sought for the first time in reply. “The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion.” *USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704 [2d Dept 2016]; *TIG Ins. Co. v Pellegrini*, 258 AD2d 658 [2d Dept 1999][same]; See also *US Bank N.A. v Oliver*, 180 AD3d 843 [2d Dept 2020][“Contrary to the defendant’s contention, the Supreme Court properly declined to review her contention that the complaint should be dismissed...since she sought this relief for the first time in her reply papers”]; *MTGLQ Inv’rs, L.P. v Makhnevich*, 201 AD3d 931, 932 [2d Dept 2022][“The court properly declined to review the defendant’s contention that the complaint should be dismissed insofar as asserted against her...since she sought this relief for the first time in her reply papers”]; *Iacovangelo v Shepherd*, 5 NY3d 184 [2005][“There is no statutory right to amend a motion that is comparable to the right to amend an answer afforded by CPLR 3025 (a)”]

Lastly, even if the Court were to consider the request, defendant failed to demonstrate entitlement to same.

“CPLR 317 permits a defendant who has been served with a summons and complaint other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons and complaint in time to defend and has a potentially meritorious defense...However, to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action.” *Bethpage Fed. Credit Union v Grant*, 178 AD3d 997 [2d Dept 2019][internal citations and quotation marks omitted]

Here, plaintiff’s “evidence that a copy of the summons and complaint were mailed to the defendant’s correct residence address created a presumption of proper mailing and of receipt...The defendant’s mere denial of receipt, without more, did not rebut the presumption of proper mailing” *Deutsche Bank Nat. Tr. Co. v Matos*, 77 AD3d 606 [2d Dept 2010][internal citations omitted]

Therefore, “the defendants’ mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317.” *Deutsche Bank Natl. Tr. Co. v Benitez*, 179 AD3d 891 [2d Dept 2020]; See also *Bethpage*

*Fed. Credit Union v Grant*, 178 AD3d 997 [2d Dept 2019][“The mere denial of receipt of the summons<sup>4</sup> and complaint is ... insufficient to establish lack of actual notice for the purpose of CPLR 317”]

Given that defendant failed to establish lack of notice in time to defend, the Court need to consider whether defendant has a meritorious defense to the action. See *LaSalle Bank, NA v Bernard*, 184 AD3d 816, 818 [2d Dept 2020][“Since the defendant failed to demonstrate a reasonable excuse for her default, it is not necessary to determine whether she demonstrated a potentially meritorious defense”]; See also *US Bank N.A. v Dedomenico*, 162 AD3d 962, 964 [2d Dept 2018][“Moreover, since the appellants failed to demonstrate a reasonable excuse for their default, it is unnecessary to consider whether they sufficiently demonstrated the existence of a potentially meritorious defense”]

Nevertheless, CPLR 4403 provides in relevant part that “[u]pon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part...the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing.”

Pursuant to CPLR 4403, the Court has the express authority to act “on its own initiative” regardless of whether parties so move. See *Breland v Motor Veh. Acc. Indem. Corp.*, 24 AD2d 881 [2d Dept 1965][“Rule 4403 of the CPLR was specifically enacted, in part, to overrule the holding in *Rosenfield v. Rosenfield*, 272 App.Div. 547, 74 N.Y.S.2d 82, that the court must await a formal motion before confirming or rejecting a referee's report, and to reaffirm the court's power to act on its own initiative”]

“The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility...The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute.” *Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017][citations omitted]

The Court notes that it may confirm the report *only* and *when*, the referees finding are substantially supported by the record. If the Court has the authority to reject a report “[u]pon the motion” or “on its own initiative”, the Court must also independently determine whether the referee's report is substantially supported by the record even in the absence of motion of a party seeking to reject same. Otherwise, there would be no way for a Court to reject a referee's report “on its own initiative” rendering the language in the statute superfluous. CPLR 4403 does not suggest that this Court has a ministerial duty to rubberstamp unsupported reports.

Here, the referee's report relied on the affidavit of Samuel Dearden, a purported officer of Select Portfolio Servicing, Inc. (“SPS”), the alleged attorney-in-fact for plaintiff. In support of such authority, plaintiff annexes a limited power of attorney dated May 3, 2013 between plaintiff and JPMorgan Chase Bank, National Association (“Chase”) as servicer, and a second limited power of attorney dated August 5, 2013, between Chase as “Master Servicer” and SPS as “sub-servicer”. However, the limited power of attorney between plaintiff and Chase is expressly limited by those actions “required or permitted under the terms of the related servicing agreements” and said agreement have not been proffered.

Therefore, the power of attorney is insufficient to demonstrate that plaintiff's affiant possessed the requisite authority to act on behalf of plaintiff. See e.g. *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066, 1068 [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”]

Accordingly, the referee's report is not substantially supported by the record and plaintiff's motion to confirm same and for judgment of foreclosure and sale is denied.

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


Accordingly, it is hereby

**ORDERED**, that plaintiff's motion to confirm the referees report and for a judgment of foreclosure and sale is **DENIED**; and it further

**ORDERED**, that defendant's motion to dismiss this action is **DENIED** in its entirety.

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

**FILED**

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KINGS COUNTY CLERKS OFFICE