

**Bank of N.Y. Mellon Trust Co., N.A.
v Everest Homes, Inc.**

2025 NY Slip Op 34903(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 512005/2018

Judge: Menachem M. Mirocznik

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This opinion is uncorrected and not selected for official publication.

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

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST EBO I FOR THE BENEFIT OF THE HOLDERS OF THE SERIES 2017-1 CERTIFICATES,

Plaintiff,

-against-

EVEREST HOMES, INC.; UNKNOWN HEIRS OF THE ESTATE OF IRVIN JUSTICE A/K/A IRVIN JUSTICE, JR., DECEASED; UNITED STATES OF AMERICA O/B/O INTERNAL REVENUE SERVICE; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; APPROVED OIL CO.; VENUS JUSTICE FORD; JASON JUSTICE; KRISTINA JUSTICE; WINFRED JUSTICE; "JOHN DOE" AND "JANE DOE", said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,

Defendant.

Index No. 512005/2018

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

Papers	Numbered
Notice of Motion	NYSCEF Doc. 61-82

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

Relevant Procedural and Factual History

This action was commenced on June 11, 2018, seeking to foreclose a mortgage (the "mortgage") executed by non-party decedent Irvin Justice A/K/A Irvin Justice, Jr. (the "decedent") which encumbers the property known as 473 Putnam Avenue, Brooklyn, New York 11221 (the "property"). Title to 2/3 of the property was purportedly conveyed to defendant Everest Homes, Inc. by certain alleged heirs of decedent prior to commencement of the instant action.

On June 19, 2018, defendant Everest Homes, Inc. was allegedly served with the summons and complaint through service on the Secretary of State.

By order dated January 25, 2019, the Court granted plaintiff's motion to add parties, serve a supplemental summons and amended complaint, to appoint a guardian ad litem and to serve by publication.

On March 4, 2019, defendant Everest Homes, Inc. was allegedly served with the supplemental summons and amended complaint through service on the Secretary of State.

On March 20, 2019, defendant Winfred Justice served an answer asserting various affirmative defenses, including lack of standing and several counterclaims.

On May 23, 2019, the guardian ad litem filed an answer on behalf of the unknown heirs of the decedent which asserted various affirmative defenses including lack of standing.

On October 14, 2019, plaintiff filed the instant motion seeking summary judgment, a default judgment, including as against defendant Everest Homes, Inc., to appoint a referee to compute and to amend the caption. Annexed to plaintiff's moving papers is an affirmation contending that the subject property is not owner occupied and therefore settlement conferences were not required. To establish its standing to commence this action, plaintiff annexes a Lost Note Affidavit of Susan A. Huber, a purported Vice President of Wells Fargo Bank, N.A dated November 1, 2007 attesting to the loss of the subject note.

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 [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]; See also *First Intern. Bank of Israel, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436 [1983][“Where, as here, plaintiff moves for summary judgment on a debt instrument, the non-movant can only defeat the motion by raising material issues of fact which are “genuine and based on proof, not shadowy and conclusory statements.”]

“[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 Vasishtha*, 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... Where the note has been indorsed in blank, the holder must establish its standing by demonstrating that the original note was physically in its possession at the time of the commencement of the action... Unlike UCC 3–301, which permits [t]he holder of an instrument whether or not he [or she] is the owner ... [to] enforce payment in his [or her] own name, UCC 3–804 expressly bestows only upon an “owner of an instrument which is lost” the right to maintain an action in his [or her] own name and recover from any party liable thereon” *Bank of Am., N.A. v Sebrow*, 180 AD3d 982 [2d Dept 2020][internal citations and quotation marks omitted]

“Pursuant to UCC 3–804, which is intended to provide a method of recovery on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit “due proof of [the plaintiff’s] ownership, the facts which prevent [its] production of [the note,] and its terms” *Deutsche Bank Natl. Tr. Co. v Anderson*, 161 AD3d 1043, 1044 [2d Dept 2018]; See also *Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812, 814 [2d Dept 2019]

Moreover, to rely on an affidavit of lost note, the affidavit must, inter alia, establish the facts about when and who conducted the search for the lost note, when or how the note was lost, and the efforts undertaken to locate the note. See *Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812 [2d Dept 2019]; *Bank of Am., N.A. v Sebrow*, 180 AD3d 982, 985 [2d Dept 2020]

Here, attached to plaintiff's moving papers is a Lost Note Affidavit of Susan A. Huber, a purported Vice President of Wells Fargo Bank, N.A. dated November 1, 2007 attesting to the loss of the subject note. However, the affidavit does not attest to when and who conducted the search for the lost note, when or how the note was lost, and the efforts undertaken to locate the note. Therefore, plaintiff failed to establish its standing to commence this action. See *Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812 [2d Dept 2019]; *Bank of Am., N.A. v Sebrow*, 180 AD3d 982 [2d Dept 2020]; See also *U.S. Bank Trust, N.A. v. Rose*, 176 AD3d 1012 [2d Dept 2019]

Accordingly, plaintiff failed to establish prima facie entitlement to judgment as a matter of law regardless of the sufficiency of the opposition papers. See generally See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]

In any case, “[p]ursuant to CPLR 3215(c), “[i]f the plaintiff fails to take proceedings for the entry of a judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... unless sufficient cause is shown why the complaint should not be dismissed. The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as the courts ‘shall’ dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned” *Noteworthy Foreclosure, LLC v Rodney-Ross*, 220 AD3d 676 [2d Dept 2023]

Here, the instant motion is brought more than a year after defendant Everest Homes, Inc.’s default and plaintiff offers no excuse or explanation for its delay in taking proceedings for entry of a default judgment. Therefore, this action must be dismissed as against defendant Everest Homes, Inc. See full discussion *FVX LLC In Trust For Morgan Stanley Bank, N.A., v. Shaunise Robertson et al*; 2025 NY Slip Op 34250[U] [NY Sup. Ct. Kings County 2025]; and *loanDepot.com LLC v Ortner, Decided on October 31, 2025, ___Misc 3d___*, 2025 NY Slip Op 25242 [2025]

Because defendant Everest Homes, Inc. holds title to the subject property and is an indispensable party, the complaint must be dismissed in its entirety pursuant to CPLR 3215(c). See *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept 2018][“Chittra, as a fee owner of the property which was subject to the mortgage, was a necessary and indispensable party to the action...Once the complaint was dismissed against Chittra, the plaintiff could not continue the action against the other defendants”]; *Newton v Evers*, 215 NY 198 (1915)[“Julia E. Ferguson was the owner of the equity of redemption under her deed...She was a necessary party to any action brought to foreclose that mortgage, and without her presence the action could not proceed.”]; see also *MTGLQ Inv'rs, L.P. v Shay*, 190 AD3d 527 [1st Dept 2021][“Dismissal of the action as against Eaton requires discontinuation of the action as against Meldal as well”]

Lastly, given the dismissal of the complaint, the notices of pendency filed herein must also be cancelled. See CPLR 6514; See also generally, *Nationstar Mtge., LLC v Davis*, 240 AD3d 790 [2d Dept 2025]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]

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

Accordingly, it is hereby

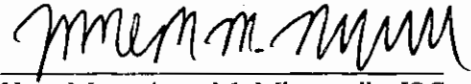
ORDERED, that plaintiff's motion is DENIED with prejudice; and it is further

ORDERED AND ADJUDGED, the complaint is DISMISSED in its entirety; and it is further

ORDERED, that the Clerk is directed to cancel the Notices of Pendency filed on June 11, 2018, February 25, 2019, December 17, 2021, and September 25, 2024.

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