

**PNC Bank, N.A. v Birnbaum**

2025 NY Slip Op 34904(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 512585/2015

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>day</sup> of December 2025

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

PNC BANK, NATIONAL ASSOCIATION  
SUCCESSOR BY MERGER TO NATIONAL CITY  
BANK,

Plaintiff.

-against-

JACOB BIRNBAUM; BOARD OF MANAGERS OF  
THE BEDFORD PLACE CONDOMINIUM; 460  
FLUSHING AVENUE 1A/1B, LLC; CITY OF NEW  
YORK ENVIRONMENTAL CONTROL BOARD;  
"JOHN DOE #1" to "JOHN DOE #10," the last 10  
names being fictitious and unknown to plaintiff, the  
persons or parties intended being the persons or parties,  
if any, having or claiming an interest in or lien upon the  
mortgaged premises described in the complaint.

Defendants.

**Index No. 512585/2015**

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

Papers	Numbered
Notice of Motion	NYSCEF Doc. 56-79
Opposition	NYSCEF Doc. 82-85
Reply	NYSCEF Doc. 86-87

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 October 15, 2015, seeking to foreclose a credit line mortgage (the "mortgage") executed by defendant Jacob Birnbaum (the "defendant") encumbering the property known as 460 Flushing Avenue, Apartment 1A, Brooklyn, NY 11205 (the "property").

On December 24, 2015, defendants joined issue with the filing of an answer that asserted various affirmative defenses.

Settlement conferences were held on January 12, 2016, February 10, 2016, April 18, 2016,

and June 13, 2016, after which the matter was released from the settlement part.

On August 18, 2017, the Court denied plaintiff's first motion for summary judgment finding that plaintiff failed to submit evidence that defendant received the advances claimed under the credit line mortgage.

On July 16, 2018, the Court denied plaintiff's second motion for summary judgment because among other deficiencies plaintiff failed to demonstrate mailing of the notice of default required by the mortgage and when, and it appeared that less than then required 30 days were given. The Court specifically directed the "Parties to complete discovery and proceed to trial."

On August 24, 2020, plaintiff filed a note of issue and certificate of readiness.

Plaintiff now moves for a third time for summary judgment, to strike defendant's answer, to appoint a referee, for a default judgment against the non-answering 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 precluding judgment as a matter of law. In support of its motion, plaintiff submits, inter alia, an affidavit of Thomas W. Morris ("Mr. Morris" or "Morris Affidavit"), a purported "Officer and Default Litigation Specialist SR" of plaintiff and "Nicolle Marie Krongel" ("Ms. Krongel" or Krongel Affidavit") a purported "Office Manager" of McCabe Weisberg & Conway, LLC ("McCabe")

Defendant opposes objecting to plaintiff's third attempt at summary judgment and that plaintiff failed to establish prima facie entitlement to judgment as a matter of law. Specifically, defendant contends plaintiff failed to allege or demonstrate that the subject credit line was advanced to defendant. Defendant further contends that plaintiff failed to demonstrate it sent the notice of default allegedly required by the mortgage and failed to demonstrate it strictly complied with RPAPL 1304 in as much as plaintiff failed to demonstrate prima facie that the notices were sent, that the notices also failed to comply with the separate notice requirement citing the Appellate Divisions holding in *Bank of America v. Kessler*, 202 AD3d 10 [2d Dept 2021] and did not provide 90 days cure. Lastly, defendant contends that plaintiff failed to meet its prima facie burden because the note plaintiff relies upon is not admissible pursuant to CPLR 4544 in as much as it is not legible and is in small print.

In 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 it demonstrated the loan was funded with the submission of monthly bank statements and the Morris Affidavit whose statements are admissible pursuant to CPLR 4518. As it pertains to compliance with CPLR 4544, plaintiff contends defendant failed to provide an expert opinion demonstrating non-compliance. Regarding compliance with the notice provision of the mortgage and RPAPL 1304, plaintiff contends that the mortgage does not require a notice of default, RPAPL 1304 does not apply in as much as the property was not owner occupied at commencement of the action, that the notices do not run afoul of the Appellate Division holding in *Kessler* and in any case its submission of the Krongel Affidavit supporting documentation are sufficient to establish compliance.

### 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]

“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 Vasishtha*, 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 e.g. *Gesuale v. Campanelli & Assocs., P.C.*, 126 AD3d 936 [2d Dept 2015]

However, “[s]uccessive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence.” *U.S. Bank Trust, N.A. v Green-Stevenson*, 208 AD3d 1205, 1206 [2d Dept 2022]; See also *Wells Fargo Bank, N.A. v Osias*, 205 AD3d 979, 981-982 [2d Dept 2022][“Successive motions for the same relief burden the courts and contribute to the delay and cost of litigation. A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance.”]

Here, plaintiff failed to show good cause and failed to demonstrate any such motion would be meritorious. Plaintiff will not be provided yet with another opportunity to burden this court with further motion practice to delay proceedings further. All the parties’ substantive arguments can be raised at trial and need not be reached today. See *Bayview Loan Servicing, LLC v. Rosalia Schwartz, et al*; Index No. 511829/2015 at NYSCEF Doc. 157

Moreover, even if this Court were to exercise its discretion and entertain plaintiff's third motion for summary judgment, which it does not, the result would be the same. Defendant is correct that plaintiff failed to meet its burden. CPLR 4544 provides in relevant part as follows:

"The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared."

"CPLR 4544 renders inadmissible a document in a consumer transaction, such as the lease, the printing of which fails to meet specified minimum type sizes." *Gulf Ins. Co. v Kanen*, 13 AD3d 579, 580 [2d Dept 2004]

Here, defendant objected to the admissibility of the subject note and plaintiff is seeking to enforce same when it appears that the same is not legible and that the print is smaller than permitted by CPLR 4544.

Plaintiff's sole contention that defendant failed to produce an expert opinion is without merit. On a motion for summary judgment, it is the movant's burden to demonstrate the absence of any issues of fact. It is not apparent on the face of the record that the printed note is in excess of the limitations set forth in CPLR 4544 and plaintiff did not submit an expert opinion demonstrating same. Therefore, issues of fact persist. See *Matter of Filippazzo v Garden State Brickface Co.*, 120 AD2d 663 [2d Dept 1986]; *Hamilton v Khalife*, 289 AD2d 444, 444 [2d Dept 2001]; *Bauman v Eagle Chase Assoc.*, 226 AD2d 488, 488 [2d Dept 1996].

Moreover, while plaintiff's affiant avers based upon a review of a "Loan History" that defendant received advances and defaulted under the terms of the loan, the alleged Loan History is not provided. See *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019][""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"][internal citations and quotation marks omitted]

Lastly, "[p]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition...Alternatively, the plaintiff bears the burden of establishing, prima facie, that RPAPL 1304 is inapplicable" and, therefore, that "the loan is not subject to the notice requirements set forth in [the statute]"..."Home loan" is defined as a loan, inter alia, that is secured by a mortgage on real estate "which is or will be occupied by the borrower as the borrower's principal dwelling" *Bank of Am., N.A. v Reed*, 239 AD3d 800 [2d Dept 2025]

[internal citations and quotations omitted]; See also *Wells Fargo Bank, N.A. v Rodriguez*, 210 AD3d 728, 730 [2d Dept 2022]

Initially, plaintiff's contention that it need not comply with RPAPL 1304 because defendant allegedly did not reside at the subject property at the time the action was commenced is without merit. Even if a defendant ceased to reside at the subject property, the same would not relieve plaintiff of its obligation to comply with RPAPL 1304. See *Nationstar Mgt., LLC v Sim*, 197 AD3d 1178 [2d Dept 2021][“pursuant to RPAPL former 1304(3), the fact that the borrower no longer occupies the residence as his or her principal dwelling would similarly only relieve the plaintiff of the 90-day requirement, and not of the obligation to send the notice prior to commencing the foreclosure action.”]; See also *Bank of Am., N.A. v Reed*, 239 AD3d 800, 804 [2d Dept 2025]; *U.S. Bank N.A. v Reddy*, 220 AD3d 967 [2d Dept 2023]; *U.S. Bank N.A. v Maher*, 219 AD3d 1372 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Rodriguez*, 210 AD3d 728 [2d Dept 2022]

Defendant is also correct that plaintiff failed to establish prima facie it strictly complied with RPAPL 1304 in as much as plaintiff failed to establish that McCabe 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]

Accordingly, plaintiff failed to carry its 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 determination.

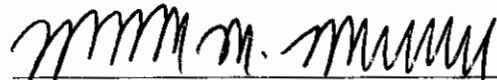
Accordingly, it is hereby

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

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

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

**FILED**  
DEC 11 2025  
KINGS COUNTY CLERK'S OFFICE