

Ditech Fin. LLC v Campbell

2025 NY Slip Op 34906(U)

December 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 521062/2019

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

DITECH FINANCIAL LLC,

Plaintiff,

-against-

DELORES CAMPBELL; WARREN BROWN; PAULINE LOVELACE; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU. "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the Complaint.

Defendants.

Index No. 521062/2019

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

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 September 25, 2019 seeking to foreclose a mortgage (the "mortgage") executed by defendants Delores Campbell and Warren Brown (the "defendants") encumbering the property known as 105 Belmont Avenue, Brooklyn, NY 11212 (the "property").

On November 19, 2019, defendants joined issue with the filing of an answer that asserted various affirmative defenses including lack of standing and non-compliance with RPAPL 1304.

Plaintiff now moves for summary judgment to strike defendants answer, to appoint a referee, for a default judgment and amend the caption to substitute the names of certain John Doe defendants. Plaintiff argues that it established prima facie entitlement to relief and defendants

answer fails to raise an issue of fact precluding judgment as a matter of law. In support of its motion, plaintiff annexes an affidavit of Jamie Inman, a purported "Document Verification Specialist" of Newrez LLC F/K/A New Penn Financial, LLC D/B/A Shellpoint Mortgage Servicing ("Shellpoint"), the alleged assignee of plaintiff.

Defendants oppose the motion arguing that plaintiff failed to demonstrate prima facie entitlement to judgment as a matter of law. Specifically, defendants argue that plaintiff failed to establish it has standing in as much as plaintiff's affiant insufficiently demonstrates possession of the note prior to commencement of the action. Defendants note that plaintiff's affiant is from Shellpoint who attests that plaintiff had possession of the note but relies on the unsworn "Original Note Possession Statement of Ditech Financial LLC" executed by Danielle Harris which states that the custodian of the note is US Bank. Therefore, defendants argue this raises an issue of fact as whether US Bank or plaintiff was in possession of the note at the time the action was commenced. Defendants further argue that plaintiff failed to establish compliance with RPAPL 1304 because plaintiff allegedly only provides a single certified mailing receipt and both defendants are entitled to separate notices and otherwise did not establish prima facie compliance with RPAPL 1304.

In reply, plaintiff argues plaintiff had standing by annexing a copy of the note endorsed in blank to the complaint. Plaintiff further argues the Inman affidavit establishes that *plaintiff* was in possession of the note at the time the action was commenced. As to compliance with RPAPL 1304, plaintiff argues that RPAPL 1304 was not applicable because the loan is not a "home loan" within the meaning of RPAPL 1304 as defendants were served at an address other than the subject property. Plaintiff further contends that plaintiff demonstrated compliance with Inman affidavit which incorporated prior servicers records.

Discussion

"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" *Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683 [2d Dept 2016]

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]

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 Rozo-Castellanos*, 201 AD3d 995 [2d Dept 2022]

Here, contrary to defendants' contentions, plaintiff established prima facie it had standing to commence the action by annexing the subject note to the complaint and defendant failed to raise an issue of fact. Defendants' contention that plaintiff's affiant's testimony as to a different entities possession of the note is hearsay, while having merit, is irrelevant given the attachment of the note to the complaint. See *id.*

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]

"Proper 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]

"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, defendants raised plaintiff's non-compliance with RPAPL 1304 as an affirmative defense and therefore, plaintiff was required to demonstrate prima facie compliance that it strictly complied with RPAPL 1304 to be entitled to relief. Plaintiff has failed to do so.

First, plaintiff failed to demonstrate prima facie that the subject loan is not a home loan

within the meaning of RPAPL 1304¹. The fact that the defendants were served at an address other than the property does not mean that defendants do not in fact reside at the property. More importantly, even if defendants ceased to reside at the subject property, the same would not relieve plaintiff of its obligation to comply with RPAPL 1304. See e.g. *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]

Second, plaintiff failed to demonstrate prima facie strict compliance with RPAPL 1304.

Initially, defendant is correct that annexed to plaintiff’s moving papers appears to be single certified mailing receipt when both borrowers are entitled to separate RPAPL 1304 notices. It also appears that that the notice was jointly addressed to both defendants when each defendant is entitled to a separate notice. “[A] single notice...jointly addressed to both [borrowers] in a single envelope does not satisfy the requirements of RPAPL 1304.” *U.S. Bank N.A. v Zakarin*, 238 AD3d 1194 [2d Dept 2025][internal quotation marks omitted]; *Deutsche Bank Natl. Tr. Co. v Hennessy*, 218 AD3d 740 [2d Dept 2023]; *Capital One, N.A. v Hunter*, 236 AD3d 980 [2d Dept 2025]

Furthermore, movant alleges the subject notices were sent by Everbank, not Shellpoint, and offers the affidavit of Jamie Inman of Shellpoint the alleged assignee of plaintiff. Mr. Inman does not allege he sent the notices, does not allege or offer proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed and offers no proof of authority to establish Everbank was authorized to send the subject notices. 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.”][citation omitted]; *MTGLQ Invs., L.P. v Cacioppo*, 217 AD3d 939 [2d Dept 2023][“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”]

In this Court’s view, a stranger sending the RPAPL 1304 notices, not only contravenes the plain language of the statute and well settled caselaw, it undermines the fundamental legislative intent and spirit of RPAPL 1304 which is to bridge the gap in communication between the borrower

¹ It should be noted that plaintiff did not argue the subject loan was not a home loan in its initial moving papers. Given that plaintiff was required to establish the loan was not a home loan or that it complied with RPAPL 1304 as part of its prima facie burden, it could not do so for the first time in reply. In any case, as addressed herein plaintiff failed in any case to meet its prima facie burden.

and lender to avoid litigation and for the borrower to make arrangements for payment to his or her actual lender. Communications from a stranger does not accomplish these purposes. See e.g. *Bank of NY Mellon v Forman*, 176 AD3d 663 [2d Dept 2019][“The manifest purpose [of the RPAPL 1304 notice] is to aid the homeowner in an attempt to avoid litigation.”].

“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, 1162-63 [2d Dept 2024]; *US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718 [2d Dept 2023]

Lastly, “RPAPL 1304 (2) requires that the RPAPL 1304 notice, “contain a current list of at least five housing counseling agencies serving the county where the property is located from the most recent listing available from department of financial services.” *Hudson Val. Fed. Credit Union v Tavares*, 206 AD3d 891 [2d Dept 2022]; See also *CLXXVIII, LLC v Trippiedi*, 187 AD3d 847 [2d Dept 2020]; *US Bank N.A. v Haliotis*, 185 AD3d 756 [2d Dept 2020]

Here, it is not clear from the face of the subject notices that it includes a list of five housing counseling agencies serving the region where the property is located. Rather notices appear to refer to housing counseling agencies serving Suffolk County.

Therefore, plaintiff failed to demonstrate prima facie entitlement to judgment as a matter of law 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”]

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 complete discovery and proceed to trial.

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

KINGS COUNTY CLERK'S OFFICE

DEC 11 2025

FILED