Wilmington Sav. Fund Socy., FSB v Marrero
2025 NY Slip Op 35038(U)
December 22, 2025
Supreme Court, New York County
Docket Number: Index No. 850126/2020
Judge: Phaedra F. Perry-Bond
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PHAEDRA F. PERRY-BOND** **PART** **35**

Justice

---X **INDEX NO.** 850126/2020

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiffs,

- v -

JUAN MARRERO, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK SUPREME COURT, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK CITY, TOMOKI "DOE", MEI LEE, and KOREY MARRERO,

Defendants.[1]

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DECISION AND ORDER AFTER TRIAL

After a bench trial held on July 10, 2025, and after considering the parties' post-trial submissions (*see* NYSCEF Docs. 105-106), the Court issues the following findings and directives. The Court finds Plaintiff established its entitlement to a judgment of foreclosure and sale in its favor but directs that the issue of damages owed be referred to a referee to hear and report, with said referee also being appointed to oversee the foreclosure auction and sale once the issue of damages has been determined and judgment entered.

[1] On May 2, 2022, Hon. Francis A. Kahn III, J.S.C. granted Plaintiff's motion to amend the caption to add Korey Marrero, Tomoki "Doe" and Mei Lee as parties and to remove Okryun Marrero a party (NYSCEF Doc. 95). However, it appears Plaintiff never served Justice Kahn's Decision on the Clerk's office so the caption on NYSCEF was never amended. The Court uses the correct caption in this Decision and Order, but Plaintiff is reminded that to effectuate an amendment to the caption, it must follow the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website), which includes filing the notice required by CPLR § 8019(c) and a completed Form EF-22 with the County Clerk.

I. Background

Plaintiff Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust ("Plaintiff") brought this action against the various Defendants seeking a judgment of foreclosure and sale on the mortgaged premises at 225 West 131st Street, New York, New York, Block 1937, Lot 119 (the "Premises"). On July 17, 2007, Defendants Okryun Marrero ("Okryun") and Juan Marrero ("Juan") (collectively the "Marrero Defendants") signed a promissory note in favor of IndyMac Bank, F.S.B. in the amount of $750,000.00, and secured the promissory note with a mortgage of the Premises for $750,000.00 in favor of Mortgage Electronic Registration Systems, Inc., solely as nominee for IndyMac Bank, F.S.B. The promissory note and mortgage were subsequently transferred and assigned to Plaintiff. This action was commenced on September 10, 2020, after the Marrero Defendants allegedly defaulted on their mortgage on or about May 1, 2018.

Hon. Francis Kahn, III presided over pre-trial proceedings in this matter. On March 17, 2021, Plaintiff moved, *inter alia*, to amend the caption to remove Okryun and to add new parties, for summary judgment against Juan and a newly impleaded party, Korey Marrero ("Korey"), and for default judgment against all other defendants. Korey and Juan opposed the motion and cross moved for dismissal of Plaintiff's Complaint and sought leave to serve an amended answer.

On May 3, 2022, Justice Kahn granted Plaintiff's motion seeking leave to amend, granted default judgment against all non-appearing parties, dismissed all affirmative defenses except the first affirmative defense alleging Plaintiff's failure to comply with a condition precedent, and denied Korey and Juan's cross motion (*see* NYSCEF Doc. 95). Justice Kahn also denied Plaintiff's motion for summary judgment. Justice Kahn found that Plaintiff established it had standing to bring this action, and established Defendants defaulted on the promissory note. However, Justice

Kahn found the affidavit of Michael N. Zerulik, offered in support of Plaintiff's motion, failed to describe with specificity the mailing practices and procedures with respect to pre-foreclosure notices. This matter was then assigned for a bench trial before the undersigned. The trial, which took place on July 10, 2025, was brief. Only one witness testified on behalf of Plaintiff and Defendants did not call any witnesses.

Nik Fox, employed by Selene Finance, the entity that serviced the mortgage at issue on behalf of Plaintiff, testified for the Plaintiff. The Court finds Mr. Fox testified credibly. Mr. Fox testified the default notices were created in November of 2019 and a vendor with a tracking system, which is incorporated into Selene Finance's records, detailed when the default notices were given to the United States Postal Service for mailing (NYSCEF Doc. 104 at p. 21). A document detailing creation and mailing of the default notice which contained contemporaneously logged events and transactions with respect to mailing was admitted into evidence (*id.* at 24-27). On cross-examination, defense counsel raised the issue of standing by introducing a document dated November 26, 2024, which purportedly assigned the mortgage on the Premises to non-party US Bank Trust NA as trustee of non-party RCF II Acquisition Trust (*id.* at 38). Defendants then moved for a directed verdict based on lack of standing. Plaintiff opposed, arguing there was never any notice given that the issue of standing would be raised at trial, that the promissory note was in Plaintiff's possession at trial, and it could move under CPLR 1018 to amend the caption if needed.

In their closing argument, Defendants argued that Mr. Fox still did not adequately testify as to the standard practices and procedures in mailing the notice of default. There was no testimony by any party denying receipt of the default notices, nor was any testimony or evidence submitted showing the documents relied on were somehow inaccurate or unreliable. After the trial, the parties submitted post-trial briefs on the issues raised (*see* NYSCEF Docs. 105-106).

II. Discussion

A. Motion for Directed Verdict

Defendants' motion for a directed verdict on the issue of standing is denied. While the Defendants previously raised the issue of standing as an affirmative defense, this argument was expressly rejected by Justice Kahn in his Decision and Order dated May 3, 2022 (NYSCEF Doc. 95). In that same Decision and Order, Justice Kahn dismissed the affirmative defense claiming lack of standing. Despite ample time to do so, Defendants never moved to renew that Decision and Order, pursuant to CPLR 2221(e), based on the purportedly new evidence that Plaintiff's standing was impacted based on an assignment of the mortgage in November of 2024. Moreover, after their affirmative defense based on lack of standing was dismissed in 2022, the Defendants never sought leave to amend their Answer to raise the affirmative defense of lack of standing, this time based on the November 2024 assignment. The failure to amend to include a new affirmative defense of standing based on newly discovered facts after its original affirmative defense claiming lack of standing had been dismissed resulted in waiver of the defense (*see, e.g. Caliber Home Loans Inc. v Xiu Lian Tang*, 172 AD3d 476 [1st Dept 2019] citing *Bank of America, Nat. Ass'n v Brannon*, 156 AD3d 1, 7 [1st Dept 2017] [failure to raise standing as affirmative defense resulted in waiver of that defense in foreclosure action]).

The reason Defendants were required to seek leave to replead their lack of standing affirmative defense is simple: "it is elementary that the primary function of a pleading is to apprise an adverse party of the pleader's claim and to prevent surprise. Absent such notice, a[n] [adverse party] is prejudiced by its inability to prepare a defense" (*Cole v Mandell Food Stores, Inc.*, 93 NY2d 34, 40 [1999] [internal citations omitted]). Defendants' failure to put Plaintiff on notice that it would be relitigating the issue of standing based on newly discovered facts, and after Justice

Kahn substantially narrowed the issues for trial via his Decision and Order on May 3, 2021, deprived Plaintiff of sufficient notice to prepare for the issue at trial.

Further, neither party ever requested that the new entity who was assigned the mortgage be formally substituted as the plaintiff pursuant to CPLR 1018, meaning the action could be continued by the presently named Plaintiff (*see CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 761 [2d Dept 2011]). Assuming, *arguendo*, that Plaintiff assigned both the note and the mortgage after commencing this action, pursuant to CPLR 1018, Plaintiff did not lose the right to continue this action (*see Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576, 577 [2d Dept 2012]; *Central Federal Sav., F.S.B. v 405 W. 45th St., Inc.*, 242 AD2d 512, 512 [1st Dept 1997]). And while the mortgage may have been assigned, the uncontroverted evidence introduced at trial showed that Plaintiff still held the promissory note. As held by the Court of Appeals, "the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York Law…the holder of the note is deemed the owner of the underlying mortgage loan withstanding to foreclose" (*Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 36-362 [2015] [internal citations omitted]). Plaintiff remains the holder of the note, brought an original copy of the note to trial, and it was admitted into evidence without objection (NYSCEF Doc. 104 at 14-17).

Defendants' reliance on *Lehr Assoc. Consulting Engrs., LLP v. Daikin AC (Ams.) Inc.*, 133 A.D.3d 533 (1st Dept. 2015) is without merit. That case, which is not a foreclosure action, involved the assignment of claims to a non-party, and the non-party could not be substituted to assert those claims because they were barred pursuant to a settlement agreement it entered with the named plaintiff and its insurer, which is wholly distinguishable from the facts of the case at bar. The Court has considered the remainder of Defendants' arguments with respect to their request for a directed verdict and finds them unavailing.

B. Pre-Foreclosure Notice and Damages

Having heard the testimony of Mr. Fox, considering the exhibits entered into evidence, and given Defendants' failure to submit any testimony or documentary evidence to the contrary, the Court finds that Plaintiff has established that it mailed the pre-foreclosure notice and therefore satisfied the condition precedent for bringing this action. Contrary to Defendants' contention, Plaintiff's witness, Mr. Fox, properly authenticated and established the reliability and admissibility of the Seline Finance's records detailing the mailing of the default notice. The document was admitted into evidence without objection and after *voir dire* by Defendants' counsel. Mr. Fox testified at length that the document contained contemporaneous entries indicating that a notice of default was mailed on November 13, 2019.

The cases relied upon by Defendants are inapposite. In those cases, the affidavits relied upon did not provide any explanation as to why the affiant concluded the default notice was sent, and in those cases, there was testimony from the defendant denying having ever received the notice (*see, e.g. Federal Natl. Mtge. Assn v Adago*, 219 AD3d 1219, 1220 [1st Dept 2023]). Here, Mr. Fox explicitly testified regarding the contemporaneous entries made to the letter log detailing that the letter was mailed, his knowledge regarding the process by which those entries are made, and there is no evidence from Defendants claiming the notice was neither mailed nor received. Mr. Fox also testified he personally knows about the mailing vendor's tracking system which is incorporated into Seline Finance's own business records.

There is no dispute that Plaintiff is owed damages and thus Plaintiff is entitled to a judgment of foreclosure and sale. However, Defendants' have submitted a good faith argument to challenge the total damages calculated, including, amongst other things, a lack of admissible business records in support of the six-figure escrow advances and lack of supporting

documentation for the $48,535 for attorneys' fees. As a referee will be appointed to oversee the foreclosure sale and auction, the Court refers the issue of damages to that same referee to compute and ascertain the amount owed to Plaintiff for principal, interest, and other applicable costs. The Court will offer the parties an opportunity to meet, confer and jointly propose a referee to appoint to calculate damages and oversee the auction and sale. But if the parties cannot submit a joint proposal within thirty days from entry of this Decision and Order, they shall notify the Court so that the Court may appoint a referee.

Accordingly, it is hereby,

ORDERED that Plaintiff is entitled to a judgment of foreclosure and sale in its favor and against Defendants regarding the premises at 225 West 131st Street, New York, New York, Block 1937, Lot 119; and it is further

ORDERED that the parties shall meet and confer and jointly propose a referee in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36) to hear and report on the total amount of damages owed, and to oversee the foreclosure auction and sale once the judgement has been entered, but if the parties cannot agree to a proposed referee within thirty days, they shall notify the Court so the Court may appoint a referee of its own choosing; and it is further

ORDERED that once appointed the referee shall make his/her report on the issue of damages no later than 60 days from appointment and that, except for good cause shown, the Plaintiff shall move for judgment no later than 60 days of the date of the referee's report; and it is further

ORDERED that once the damages owed has been computed by the referee and confirmed by this Court, a judgment of foreclosure and sale shall be entered; and it is further

ORDERED that should, at any point prior to the entry of judgment, the parties wish to engage with the Court's sponsored ADR program, they shall notify the Court so the appropriate referral order may be made; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

12/22/25
DATE

HON. PHAEDRA F. PERRY-BOND, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE