

U.S. Bank N.A. v Jean-Charles

2025 NY Slip Op 35054(U)

December 23, 2025

Supreme Court, Kings County

Docket Number: Index No. 511033/2014

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December, 2025.

P R E S E N T :
HON. WAVNY TOUSSAINT,
Justice.

-----X
U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR CITIGROUP MORTGAGE
LOAN TRUST, INC. 2006-NC1, ASSET-
BACKED PASS-THROUGH CERTIFICATES
SERIES 2006-NC1,

Index No.: 511033/2014
MS # 3
**DECISION AND
ORDER**

Plaintiff,
-against-

JEAN FRANCK JEAN-CHARLES, MARIE
ELVIE PREVOT, CRIMINAL COURT OF
THE CITY OF NEW YORK, NEW YORK
CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK STATE DEPARTMENT
OF TAXATION & FINANCE, UNITED
STATES OF AMERICA ACTING THROUGH
THE IRS, EDELYNE LEFEVRE, JEAN FRANTZ
JEAN-CHARLES, and ESTEFANIA URENA,

Defendants.

-----X
The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

NYSCEF Doc. Nos.
119-124

130
131

Upon the foregoing papers, defendants Jean Franck Jean-Charles and Marie Elvie Prevot (“defendants”) move (Seq. 03) for an order, pursuant to CPLR § 2221 [e], granting leave to renew their prior cross-motion (Seq. 02) for summary judgment and, upon renewal, granting summary judgment dismissing the complaint. Plaintiff opposes the motion.

Background

The married defendants obtained a mortgage from New Century Mortgage Corporation in the original principal amount of \$648,000 (the “mortgage loan”), as set forth in a note dated March 2, 2006. The mortgage loan was secured by defendants’ real property located at 1038 East 85th Street, Brooklyn, NY, in the County of Kings, State of New York, Block 8036, Lot 55 (the “property”). The mortgage loan was assigned to plaintiff herein pursuant to a Pooling and Servicing Agreement dated June 1, 2006, with physical delivery of the note and mortgage following thereafter. Wells Fargo (d/b/a America’s Servicing Company) acted as servicer for plaintiff. Defendants made mortgage loan payments to Wells Fargo until their alleged default as of July 1, 2009.

In so far as further set forth in the complaint, plaintiff alleges defendants defaulted on the mortgage loan. A predicate Real Property Actions and Proceedings Law (“RPAPL”) § 1304 90-day notice (“notice”) was sent to defendants at the property address on or about July 7, 2014, by first-class and certified mail. The notice thereafter was filed with the New York State Department of Financial Services, as required by RPAPL § 1306. Defendants allegedly never cured the default. As a consequence, on November 21, 2014, plaintiff

commenced this foreclosure action by summons and complaint.¹ Defendants interposed an answer, with counterclaims, on or about December 18, 2014, which included various affirmative defenses, among them the assertion that plaintiff never served the notice as alleged in the complaint (NYSCEF Doc. No. 79 at 11th Aff. Def.). Plaintiff replied to the counterclaims on January 12, 2015. Thereafter, plaintiff moved (Seq. 01), *inter alia*, for summary judgment on the complaint (and to strike defendants' answer and affirmative defenses). Defendants opposed and cross-moved (Seq. 02) for summary judgment, seeking dismissal of the complaint.

By order dated June 11, 2018 (entered June 20, 2018), the court (Dear, J.) denied plaintiff's motion (Seq. 01), on the basis plaintiff failed to prove compliance with RPAPL § 1304, and denied defendants' cross-motion (Seq. 02), on the basis that defendants' bare denial of receipt of the notice was insufficient to warrant dismissal (NYSCEF Doc. No. 94).

A trial of the matter was eventually conducted by this Court on March 1, 2019, whereafter an order and judgment was entered July 16, 2019, dismissing the complaint and cancelling the Notice of Pendency (the "July 2019 Order"). Plaintiff appealed the July 2019 Order by Notice of Appeal, filed July 25, 2019. On appeal, the Second Department reversed the July 2019 Order and remanded the matter to the Court with direction "for the entry of an amended judgment, *inter alia*, in favor of the plaintiff and against the defendants, directing the foreclosure sale of the subject property" (*see* the decision dated

¹ Plaintiff filed a prior foreclosure action against defendants on February 7, 2011, which was discontinued, without prejudice, as of September 23, 2014.

October 27, 2021 at NYSCEF Doc. No. 106; hereinafter the “Second Department Decision”). In accord with the Second Department Decision, an Order for Summary Judgment and Order of Reference was issued by this Court on March 7, 2025, *inter alia*, denying defendants’ cross-motion (Seq. 02) in every respect and, as to Motion Seq. 01, entering an order awarding plaintiff summary judgment on the complaint, while striking defendants’ answer and counterclaims (the “Order of Reference”). A referee was also appointed to compute the amount due plaintiff and to determine whether the subject property may be sold in parcels.

The Parties’ Contentions

In light of the Order of Reference, defendants now seek leave to renew (Seq. 03) that branch of its prior cross-motion (Seq. 02), which sought summary judgment dismissing the complaint. Defendants argue new developments in the law would have changed the decision denying their Motion Seq. 02, relying primarily on the September 29, 2021 Second Department decision in *Wells Fargo Bank NA v. Yapkowitz*, 199 AD3d 126, 134 [2d Dept 2021] [*Yapkowitz*], which held: “the mailing of a 90-day notice jointly addressed to two or more borrowers ... is not sufficient to satisfy the requirements of RPAPL 1304 . . . the plaintiff must separately mail a 90-day notice to each borrower as a condition precedent to commencing the foreclosure action” (NYSCEF Doc. No. 120, par. 10). On the foregoing basis, defendants argue leave to renew is warranted, as it is uncontroverted that the subject RPAPL § 1304 notice was addressed to both defendants, rather than separately to each (NYSCEF Doc. No. 121).

Plaintiff contends, in opposition, that defendants' motion should be denied in its entirety because: 1) the motion is effectively a second summary judgment motion and is therefore untimely, having been filed more than 120 days after the 2017 Note of Issue, with no good cause having been presented for the delayed filing and 2) the motion was not filed within 30 days from notice of entry of the Second Department Decision. Plaintiff also contends defendants are not entitled to renewal, as when defendants brought Motion Seq. 02, defendants only argued thereon that the notice was never mailed by plaintiff (or received by them), rather than arguing that the notice wasn't sent in separate envelopes. Given the inconsistent arguments, plaintiff argues defendants are foreclosed from seeking renewal on Motion Seq. 03.

In reply, defendants argue they can challenge plaintiff's compliance with RPAL § 1304 any time prior to entry of a judgment of foreclosure and sale, and as plaintiff has not yet moved for such judgment, the within motion is timely. Defendants also argue that a determination whether plaintiff complied with RPAPL § 1304 is a question of law, which a court must resolve once brought to the court's attention

Discussion

Applicable Law

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR § 2221 [e] [2]). Such motion "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). "When no reasonable justification is given for

failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal" (*Wells Fargo Bank, N.A. v Gittens*, 217 AD3d 901, 902 [2d Dept 2023], citing *Wells Fargo Bank, N.A. v Osias*, 205 AD3d 979, 981 [2d Dept 2022]). A motion for leave to renew "is addressed to the sound discretion of the Supreme Court" (*Kugler v Kugler*, 174 AD3d 876, 877 [2d Dept 2019] [internal quotation marks omitted]).

Further, as the Second Department instructed in *Flanagan v Delaney*, 194 AD3d 694, 696 [2d Dept 2021], "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (see also *Hallett v City of New York*, 219 AD3d 809, 810 [2d Dept 2023]).

RPAPL § 1304

RPAPL §1304 became effective on September 1, 2008 (see L 2008, ch 472, § 2; *Deutsche Bank National Trust Company v Wentworth*, 211 AD3d 684, 687 [2d Dept 2022]; *First United Mortg. Banking Corp. v Valdivieso*, 45 Misc.3d 1216(A), *3 [Sup Ct., Kings County 2014]). In relevant part, the statute states:

1. . . . at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type . . .
2. The notices required by this section shall be sent by such lender, . . . to the borrower, 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. The notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice. Notice is considered given as of the date it is mailed.

“Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action” (*Deutsche Bank Natl. Trust Co. v Loayza*, 204 AD3d 753, 754 [2d Dept 2022]; *Citibank, N.A. v. Conti-Scheurer*, 172 AD3d 17, 20 [2d Dept 2019]). It is plaintiff’s burden to establish satisfaction of this condition (*Deutsche Bank Natl. Trust Co.*, 204 AD3d at 754).

Since *Yapkovitz*, it is accepted that a plaintiff must separately mail a 90-day notice to each borrower as a condition precedent to commencing a foreclosure action (*see Yapkovitz*, 199 AD3d at 134). Here, plaintiff contends the requisite 90-day notice was mailed to defendants on or about July 7, 2014, in compliance with RPAPL § 1304. Defendants, for the first time on this motion, contend plaintiff did not mail the notice separately to each of them, in accord with *Yapkovitz*.

Motion Seq. 03

Defendants filed their initial cross-motion for summary judgment (Seq. 02) on February 20, 2018, nearly ten years following the enactment of RPAPL § 1304. On June 11, 2018, this motion was denied (along with plaintiff’s Seq. 01). Defendants argued on Motion Seq. 02 that plaintiff failed to establish that the requisite notice was mailed and, if mailed, in any event, was never received by them. In their supporting affidavits to Motion Seq. 02, both defendants state, verbatim:

My attorneys, PETROFF AMSHEN LLP, showed me copies of the “90-Day RPAPL § 1304 notice” dated July 7, 2014, that Plaintiff alleged, in their Motion, to have mailed to me by first-class mail and certified mail. ***However, I have not received this July 7, 2014 “90-Day RPAPL § 1304 notice” at any time, by certified mail, first-class mail, or otherwise. In fact, I have never received any letters, by certified mail, first-class mail, or otherwise, which specifically stated***

that I could cure any alleged default by making a payment (NYSCEF Doc. Nos. 76 and 77; pars. 6-8; *emphasis supplied*).

As informed by defendants' affidavits – that the notice was never received – defendants' counsel too reiterated this argument in the affirmation regarding plaintiff's Motion Seq. 01 and defendants' Motion Seq. 02, stating

In the case at bar, Defendants did not receive the mandatory RPAPL § 1304 90-day notices. Moreover, Defendants provide affidavits herein which unequivocally deny receipt of the statutorily required notices . . . ***Here, Defendants testify that they never received any of the required RPAPL § 1304 notices***, and Plaintiff fails, as a matter of well-established precedent, to adduce adequate proof that it complied with RPAPL § 1304, requiring dismissal of this action. (NYSCEF Doc. No. 75, pars. 62, 69; *emphasis supplied*) . . .

Counsel concludes with: “Plaintiff has failed, as a matter of law, to prove that the mandatory RPAPL § 1304 notices ***were ever actually sent***” (*Id.*, pars. 88, 91; *emphasis supplied*).

Based on these forgoing submissions, it is clear to the Court that on Motion Seq. 02, defendants never argued, as they do now on Motion Seq. 03, that the notice was defective because it was not sent separately to each defendant – rather than not mailed at all. This newly articulated argument is distinct from and patently inconsistent with defendants' prior argument supporting Motion Seq. 02. Nevertheless, defendants now contend *Yapkovitz*, issued in 2021 (and other similar precedents), reflects a change in law which the Court must consider to permit renewal. Even so, defendants provide no explanation for the four-year gap from when *Yapkovitz* was issued and their filing of the within motion on February 21, 2025. Notably, defendants also did not seek leave to appeal the Second Department Decision, served by Notice of Entry as of October 27, 2021 (*see* CPLR §§ 5513 [a, b] and

5602), a further indication defendants' have been less than diligent in seeking redress of their mortgage loan default.

Unlike the underlying proceedings in *Yapkovitz*, where counsel for the defendants therein argued that "only one 90-day notice was mailed, rather than single notices addressed to each [of] the defendants individually and in separate envelopes, as required by RPAPL 1304" (*Yapkovitz*, 199 AD3d at 129) here, defendants made no such argument on Motion Seq. 02. The statute had been in effect since 2008, and defendant very readily could have made the same argument on Motion Seq. 02 as did the defendant in the underlying *Yapkovitz* proceedings, regardless whether *Yapkovitz* may be interpreted as a clarification of the statute (*JPMorgan Chase Bank, N.A. v Eze*, 232 AD3d 865, 866 [2d Dept 2024]).

The Court finds defendants have not offered a reasonable explanation for failing to present the argument now offered on Motion Seq. 03 when initially arguing Motion Seq. 02. As a matter of law, defendants cannot be afforded a second chance to do so (*Flanagan*, 194 AD3d at 696). Defendants' reliance on *Yapkovitz* is therefore misguided. Accordingly, the Court finds defendants cannot avail themselves of the relief afforded under CPLR § 2221 [e].

Conclusion

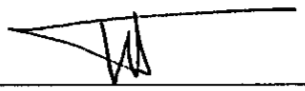
Accordingly, it is hereby

ORDERED, that defendants Jean Franck Jean-Charles and Marie Elvie's motion (Seq. 03) for an order, pursuant to CPLR § 2221 [e], granting leave to renew their prior cross-motion (Seq. 02) for summary judgment, is denied in every respect.

The parties' remaining contentions not specifically addressed herein have been considered and are denied.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

HON. WAVNY TOUSSAINT
J.S.C.

KINGS COUNTY CLERK
FILED
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