

East W. Bank v Gelb

2025 NY Slip Op 35201(U)

December 29, 2025

Supreme Court, Kings County

Docket Number: Index No. 517613/2017

Judge: Menchem 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 29th of December 2025

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

EAST WEST BANK,

Plaintiff,

-against-

NATHAN GELB; ESTHER GELB; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; "JOHN DOE" and "JANE DOE",

Defendant.

Index No. 517613/2017

**Decision and Order
(Motion Seq. 5)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 129
Opposition Papers	NYSCEF Doc. 66-79
Reply Papers	NYSCEF Doc. 80

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

Relevant Procedural and Factual History

This action was commenced on September 12, 2017, seeking to foreclose a mortgage (the "mortgage") executed by defendants Nathan Gelb and Esther Gelb (the "defendants") which encumbers the property known as 198 Hooper Street, Brooklyn, NY 11211 (the "property").

On April 9, 2018, defendants joined issue with the filing of an answer asserting various affirmative defenses including lack of standing and non-compliance with RPAPL 1303 RPAPL 1304 and RPAPL 1306.

Settlement conferences were held on November 28, 2017, and December 20, 2017, after which the matter was released from the settlement conference part.

On January 17, 2019, the Court granted plaintiff's motion for summary judgment and order of reference.

On July 22, 2019, the Court granted defendants' motion for reargument and upon reargument denied plaintiff's motion for summary judgment and vacated the order of reference dated January 17, 2019.

Plaintiff now moves again for an order granting summary judgment, to amend the caption and for an order of reference. In support of the motion, plaintiff annexes the affidavit of Peggy O'Donovan (Ms. O'Donovan" or "O'Donovan Affidavit"), a purported Vice President of plaintiff and the affidavit of Letashia Jame ("Ms. James or "James Affidavit"). Plaintiff contends it demonstrated prima entitlement to judgment as a matter of law with production of the note, mortgage and evidence of defendant's default. Plaintiff further contends to established it has standing by being the original lender and being in possession of the note prior to commencement of this action as attested to in O'Donovan Affidavit. Regarding compliance with RPAPL 1304, plaintiff contends it demonstrated compliance with RPAPL 1304 as attested to in the James Affidavit and RPAPL 1303 with the submission of the affidavits of service.

Defendant opposes the motion contending that plaintiff failed to establish prima facie that defendant was advanced funds, that defendants defaulted and the statements in the O'Donovan Affidavit and records attached thereto are inadmissible hearsay lacking sufficient foundation. Defendant argues that alleged loan history appears to be from an entity named Metavante and no explanation is provided as to its relationship with plaintiff. Defendant further argue that plaintiff failed to demonstrate prima facie that it complied with RPAPL 1304 and plaintiff submits conflicting evidence as to who allegedly sent the subject notices and James Affidavit is insufficient to demonstrate strict compliance with RPAPL 1304.

In reply, plaintiff argues that the statements in the O'Donovan Affidavit are admissible and lay sufficient foundation for the business records attached thereto and establish the advancement of funds and defendant's default in payment. Plaintiff submits an additional affidavit from Ms. O'Donovan explaining that Metavante is the name of the software plaintiff uses to service the subject loan and is akin to Microsoft word. Plaintiff further argues that the James Affidavit is sufficient because it attests to personal mailing of the RPAPL 1304 notices and the same may be sent from counsel.

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, 324 [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 Mgt. Capital, Inc.*, 38 NY3d 169 [2022][internal citations and quotation marks omitted]

“[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 Vasishta*, 241 AD3d 1299 [2d Dept 2025][internal citations and quotation marks omitted]

“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]

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.”] *HSBC Bank USA, N.A. v Schwarz*, 2025 NY Slip Op 07001 [2d Dept Dec. 17, 2025][“Evidence is not newly discovered simply because it was not submitted on the previous motion...Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means...Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment”]

Here, plaintiff failed to show good cause. In accordance with this Court’s stated policy as reflected in *Bayview Loan Servicing, LLC v. Rosalia Schwartz, et al*; 2025 NY Slip Op 34430[U] [N.Y. Sup Ct, Kings Cty, Nov. 13, 2025]¹, plaintiff will not be provided with another opportunity to burden this court with further motion practice to delay proceedings. Craig K. Beideman, Esq.

¹ “This Court as a matter of policy and discretion over control of its already burdened calendar declines to permit second summary judgment motions let alone a fourth. Otherwise, this Court would invite repetitive reviews of whether good cause has been shown. This alone is sufficient cause not to entertain repetitive motion practice unless extraordinary circumstances are shown. This Court adopts a policy of declining to entertain successive motions for summary judgment considering that the CPLR does not mandate as such and is essentially a motion sounding in renewal or reargument without justification that does not comply with CPLR 2221(d) and (e) which requires in part that the motion be specified as such. The law is well settled that a Court has broad discretion over controlling its calendar and whether to grant a successive motion for summary judgment and therefore this Court adopted the aforementioned policy”

and Fein, Such & Crane, LLP are cautioned and are hereby on notice, that further successive motions for summary judgment in any case before this Court, must be supported by actual good cause, the absence of which may be grounds for the imposition of sanctions, as this Court shall determine is warranted by the facts and circumstances in its discretion. A pattern of such conduct shall be grounds for a referral to the relevant grievance committee for frivolous conduct. Consistent with this Court's stated policy, this Court will not countenance unsupported repetitive motion practice that further burdens this Court's docket and is determined to reduce its significant foreclosure backlog and motion calendar.

All the parties' substantive arguments can be raised at trial and need not be reached today.

Moreover, even if the Court were to permit the instant successive motion, which it does not, the result would be same, as plaintiff failed to demonstrate prima facie entitlement to the drastic remedy of summary judgment.

"[W]here, 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]

"Proof of the requisite mailings of the RPAPL 1304 notices may 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" *Deutsche Bank Natl. Tr. Co. v Bucicchia*, 193 AD3d 682 [2d Dept 2021][internal citations and quotation marks omitted]

Here, defendant is correct that plaintiff failed to establish prima facie it strictly complied with RPAPL 1304.

First, Ms. O'Donovan does not claim that she personally sent the subject notices or that the notices were even sent by plaintiff. Nor does she attest to a standard business practice and procedure that ensures notices are properly addressed and mailed. Rather she avers that Fein, Such and Crane LLP ("FSC") allegedly sent the subject notices and does not claim to have personal knowledge of FSC's standard mailing practices and procedures. Therefore, Ms. O'Donovan's testimony is insufficient to demonstrate compliance.

Separately, while Ms. James alleges that she personally mailed the subject notices, plaintiff failed to establish that Ms. James had authority to send the notices on the dates in question. See *Siegel v Kentucky Fried Chicken of Long Is., Inc.*, 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...”], *affd.*, 67 NY2d 792 [1986]; 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]

Here, Ms. James does not state that (a) she worked for “such lender, assignee or mortgage loan servicer” at the time notices were allegedly sent, (b) offer any proof that FSC was authorized to send the notices on the dates in question and (c) that she even worked for FSC.

Second, Ms. James does not allege the RPAPL 1304 notices were sent in separate envelopes from any other notice as required by RPAPL 1304. See *2010-3 SFR Venture, LLC v Schiavoni*, 199 AD3d 739 [2d Dept 2021][“Moreover, White’s affidavit failed to specify that the RPAPL 1304 notice was served in an envelope that was separate from any other mailing or notice.”]; *USBank N.A. v Haliotis*, 185 AD3d 756 [2d Dept 2020][“Additionally, the affidavit submitted by the plaintiff for the purpose of demonstrating that it properly served its 90-day notice did not specify that the notice was served in an envelope that was separate from any other mailing or notice.”]

Third, Ms. James did not attest that the list of housing counseling agencies provided in the notice serve the region where the property is located. See e.g. *Hudson Val. Fed. Credit Union v Tavares*, 206 AD3d 891 [2d Dept 2022][“The plaintiff failed to demonstrate that at least five housing counseling agencies on the list served Putnam County, thereby satisfying the statutory requirement”]; See also *USBank N.A. v Haliotis*, 185 AD3d 756 [2d Dept 2020]

Therefore, plaintiff failed to establish prima facie compliance, let alone strict compliance, with RPAPL 1304 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 determinations.

Accordingly, it is hereby

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

ORDERED, that Craig K. Beideman, Esq. and Fein, Such & Crane, LLP shall serve a copy of this Order by mail and email on at least ten other law firms that regularly appear before this Court with a notice of this Court's warnings with regarding to the filing of successive motions for summary judgment; and it is further

ORDERED, such notice shall include the following language:

WARNING

Do not file a successive motion for summary judgement before the Hon. Menachem M. Mirocznik, JSC without a clear showing of good cause. To the extent a motion is already pending, such motion must be withdrawn within ten days unless said motion has already been opposed. Non-compliance with this directive may be considered sufficient cause for the Court to impose sanctions against the law firm as well as the filing and signing attorney for frivolous conduct.

ORDERED, that Craig K. Beideman, Esq. and Fein, Such & Crane, LLP shall file affidavit of service demonstrating compliance with this decision and order within ten (10) days of entry of this order; 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

FILED
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KINGS COUNTY CLERKS OFFICE