

MTGLQ Invs., L.P. v Elcock
2025 NY Slip Op 35212(U)
December 29, 2025
Supreme Court, Kings County
Docket Number: Index No. 512966/2018
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 29th of December 2025

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

MTGLQ INVESTORS, L.P, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> EDNA ELCOCK, TANIA ELCOCK, "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, <p style="text-align: center;">Defendant.</p>

Index No. 512966/2018

**Decision and Order
(Motion Seq. 1, 2 and 3)**

Papers	Numbered
Notice of Motion (Seq. 1)	NYSCEF Doc. 21-39
Notice of Cross-Motion/Opposition Papers (Seq. 2)	NYSCEF Doc. 40-58
Notice of Motion (Seq. 3)	NYSCEF Doc.59-72
Opposition to Cross-Motion/Reply (Seq. 1 and 2)	NYSCEF Doc. 73-74
Opposition Papers (Seq. 3)	NYSCEF Doc. 104-105
Reply Papers (Seq. 3)	NYSCEF Doc. 106-107

Upon the foregoing papers, the motions and cross-motion are determined in accordance with this Decision and Order as follows:

Relevant Procedural and Factual History

This action was commenced on June 25, 2018, seeking to foreclose a mortgage (the "mortgage") executed by defendants Edna Elcock and Tania Elcock which encumbers the property known as 798 HendriK Street, Brooklyn, New York 11207 (the "property").

On January 22, 2019, defendant Tania Elcock joined issue with the filing of an answer with various affirmative defenses, including lack of standing and non-compliance with RPAPL 1304, and a counterclaim for attorney's fees.

Settlement conferences were held on October 30, 2018, December 5, 2018, March 7, 2019, April 11, 2019, May 23, 2019, July 18, 2019, and September 19, 2019, after which the matter was released from the settlement conference party. Settlement conferences were again held on

September 23, 2020, October 23, 2020, December 7, 2022, April 5, 2023, and July 19, 2023.

On December 11, 2019, non-party U.S. Bank National Association, as Indenture Trustee on behalf of and with respect to Ajax Mortgage Loan Trust 2018-B, Mortgage-Backed Notes (“US Bank”), as alleged successor in interest to plaintiff, filed the instant motion seeking summary judgment on its claim to foreclosure the mortgage, to strike defendants answer for an order of reference, for a judgment on its second cause of action to reform the mortgage and to amend the caption. The motion is supported by an affidavit of Naomi Hernandez (“Ms. Hernandez” or Hernandez Affidavit”), of Gregory Funding, LLC (“Gregory Funding”), the alleged attorney in fact of US Bank and the affidavit of Roberto Montoya (“Mr. Montoya” or “Montoya Affidavit”) of Rushmore Loan Management Services, LLC (“Rushmore”). Annexed to the affidavits are, inter alia, a disclosure statement, note and security agreement (the “note”), the mortgage, several assignments of mortgage and notices allegedly sent pursuant to RPAPL 1304.

Non-party US Bank contends that it established prima facie entailment to judgment as a matter of law and defendant’s answer fails to raise an issue of fact. Non-party US Bank contends that plaintiff had standing at the time the action was commenced by virtue of the assignments of mortgage. Specifically, non-party US Bank contends that on November 6, 2009, Citicorp Trust Bank, FSB (“Citicorp”), the original lender, assigned the note and mortgage to Citimortgage, Inc. (“Citimortgage”) and that on October 21, 2010, Citimortgage assigned the note and mortgage to plaintiff. US Bank contends it has standing by virtue of an assignment of the mortgage and note from plaintiff to US Bank dated September 6, 2019 as well as being possession of the note endorsed in blank, which although lost when the action was commenced, was subsequently discovered. Non-party US Bank further argues that plaintiff strictly complied with RPAPL 1304 with the affidavit of Mr. Montoya.

Defendant opposes the motion and cross-moves to amend her answer. Defendant argues that Plaintiff cannot establish standing because the action was commenced with a defective lost-note affidavit that lacked the most basic indicia of reliability required under the UCC and CPLR 4518. Specifically, Defendant notes that the affidavit was executed by Ocwen Loan Servicing, LLC, yet Plaintiff failed to attach any power of attorney or servicing agreement demonstrating Ocwen’s authority to act for plaintiff at the time, rendering the affidavit facially incompetent. Defendant further emphasizes that the affidavit: (1) fails to annex any business records documenting the loss; (2) provides no details regarding when, where, or how the note was allegedly lost; (3) fails to identify who last possessed the note, what search efforts were made, or when the loss was discovered; and (4) contradicts the subsequently-asserted standing theory based on physical possession. Defendant also challenges the reliability of the assignments U.S. Bank relies upon, pointing out that they were executed by D.M. Wileman, a known “robo-signer,” through Orion Financial Group, which Defendant identifies as a “document mill” with a history of executing mass-produced assignments without authority and Pillar Processing, LLC a company associated with the now defunct Steven J. Baum, P.C. Defendant further avers that the loan modification executed by defendant Rushmore does not identify the owner of the note. Defendant asserts that these irregularities—combined with missing corporate authority documents, inconsistencies between the lost-note affidavit and later possession claims, and the absence of any evidence showing plaintiff possessed the note at commencement—demonstrate that issued of fact exist and US Bank failed to meet its burden of establishing standing as a matter of law.

Defendant further argues that Plaintiff also fails to prove strict compliance with RPAPL § 1304, contending that the Montoya affidavit is insufficient as a matter of law because it merely references a review of business records that were never produced, relies on generic descriptions of Rushmore's mailing practices, and fails to identify the specific records reviewed or the precise office procedures used for generating and mailing 90-day notices. Defendant highlights that the affidavit provides no proof of actual mailing, such as USPS tracking data, internal mailing logs, or contemporaneous system entries, and asserts that Plaintiff's documentary exhibits show the notices were addressed to a misspelled street name, calling delivery into question. Defendant further maintains that Plaintiff's reliance on preprinted forms and conclusory statements regarding mailing procedures does not satisfy the strict requirements of RPAPL 1304. Defendant contends that these deficiencies raise multiple triable issues of fact regarding whether the statutory notices were ever properly mailed, thereby precluding summary judgment. Defendant also seeks leave to amend her answer supplement her answer pertaining to its standing defense and counterclaim for attorneys fees.

In opposition to the cross-motion and in further support of its motion, non-party US Bank argues that Defendant's opposition does not rebut Plaintiff's prima facie entitlement to summary judgment because defendant raises no meritorious defenses and allegedly mischaracterizes both the standing and RPAPL 1304 records. US Bank contends that standing was established through (1) the lost-note affidavit annexed to the complaint, (2) the recorded 2011 assignment transferring the note and mortgage to plaintiff prior to commencement, and (3) Defendant's execution of a loan modification constitutes a waiver of standing objections. Non-party US Bank further argues that it's later possession of the original note confirms the earlier transfer and is consistent with the lost-note theory rather than contradictory. Regarding RPAPL 1304, non-party US Bank maintains that the Montoya Affidavit is sufficient and defendant's bare denial of receipt is insufficient to raise an issue of fact precluding judgment as a matter of law. Plaintiff also opposes amendment of the answer, asserting that Defendant offered no reasonable excuse for failing to timely seek amendment and that the proposed amendments are either duplicative of existing defenses or futile and is prejudicial.

Non-party US Bank separately moves for the appointment of a receiver pursuant to RPL 254(10) and CPLR 6401. Ms. Hernandez asserts that plaintiff is incurring costs and expense to "manage and protect the property" while defendant allegedly collects rents. Annexed to moving papers is a lease executed between defendants Edna Elcock and Tania Elcock.

Defendant opposes the motion arguing that non-party US Bank failed to demonstrate the need to a receiver or there is any risk of loss or damage to the property. Defendant further argues that the property is occupied solely by defendants Edna Elcock and Tania Elcock and that plaintiff is not entitled to evict or compel the owners and mortgagors of the property to pay rent.

In reply, non-party US Bank argues that it need not demonstrate any risk of loss to the property and that defendant has not submitted sufficient proof there are not tenants occupying the property.

Discussion

I. Standard of Review.

“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 Mtge. 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]

Here, non-party US Bank filed to establish entitlement to the drastic remedy of summary judgment for several reasons.

II. Non-party US Bank Failed to Demonstrate Authority and Compliance with CPLR 3212[b]

Ms. Hernandez failed to establish her authority to act for non-party US Bank. While a

power of attorney between non-party US Bank and Gregory Funding is annexed to her affidavit, the same is expressly limited to that which is “required or permitted under the terms of the related servicing agreements,” which have not been proffered. Therefore, movant failed to establish its affiant has the requisite authority to act on non-party US Bank’s behalf mandating denial of the motion. See CPLR 3212[b]; *US Bank N.A. v Cusati*, 185 AD3d 870 [2d Dept 2020]; *HSBC Bank USA, N.A. v Betts*, 67 Ad3d 735 [2d Dept 2009]; *Citibank, N.A. v Herman*, 215 AD3d 626 [2d Dept 2023];; See also *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022][“the limited power of attorney submitted...restricted and conditioned its authority based on the terms of other agreements which were not provided by the plaintiff. Thus, the limited power of attorney was insufficient to demonstrate that Nationstar possessed the authority to act on behalf of the plaintiff”]

III. Non-party US Bank Failed to Demonstrate Plaintiff Had Standing At the Time the Action Was Commenced.

“Where, 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]

“A “holder” is “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession... Where the note has been indorsed in blank, the holder must establish its standing by demonstrating that the original note was physically in its possession at the time of the commencement of the action...Unlike UCC 3–301, which permits [t]he holder of an instrument whether or not he [or she] is the owner ... [to] enforce payment in his [or her] own name, UCC 3–804 expressly bestows only upon an “owner of an instrument which is lost” the right to maintain an action in his [or her] own name and recover from any party liable thereon” *Bank of Am., N.A. v Sebrow*, 180 AD3d 982 [2d Dept 2020][internal citations and quotation marks omitted]

“Pursuant to UCC 3–804, which is intended to provide a method of recovery on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit “due proof of [the plaintiff’s] ownership, the facts which prevent [its] production of [the note,] and its terms” *Deutsche Bank Natl. Tr. Co. v Anderson*, 161 AD3d 1043, 1044 [2d Dept 2018]; See also *Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812, 814 [2d Dept 2019]

To rely on an affidavit of lost note, the affidavit must, inter alia, establish the facts about when and who conducted the search for the lost note, when or how the note was lost, and the efforts undertaken to locate the note. See *Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812 [2d Dept

2019]; *Bank of Am., N.A. v Sebrow*, 180 AD3d 982, 985 [2d Dept 2020]; See also *U.S. Bank Trust, N.A. v. Rose*, 176 AD3d 1012 [2d Dept 2019]

Here, non-party US Bank failed to establish plaintiff had standing at the time this action was commenced.

First, as correctly noted by defendant, the subject note was not annexed to complaint. Annexed to the complaint is a lost note affidavit executed by Jannette Ingram-Campbell ("Ms. Campbell") a purported "Authorized Signer" of Ocwen Loan Servicing, LLC ("Ocwen"), the alleged servicer of plaintiff. Ms. Campbell asserts based on an alleged review of business records maintained by Ocwen that plaintiff acquired ownership of the Note from Citicorp, that Citicorp was entitled to enforce the note when the alleged loss occurred, and an alleged search for note occurred and that the original note is not in the custody and control of plaintiff. However, Ms. Campbell does not attest to who conducted the search for the lost note, when or how the note was lost, and the specific efforts undertaken to locate the note. See *Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812 [2d Dept 2019]; *Bank of Am., N.A. v Sebrow*, 180 AD3d 982, 985 [2d Dept 2020] See also *U.S. Bank Trust, N.A. v. Rose*, 176 AD3d 1012 [2d Dept 2019]

Moreover, Ms. Campbell's testimony is inadmissible hearsay given that she failed to attach records she allegedly reviewed to substantiate her testimony. See *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757 [2d Dept 2021][“However, while the Lee affidavit was sufficient to lay a proper foundation for the admission of a business record pursuant to CPLR 4518 (a)... Lee failed to identify the records upon which she relied in making the statements, and the plaintiff failed to submit copies of the records themselves.”]; *Deutsche Bank Trust Co. Ams. v Miller*, 198 AD3d 867 [2d Dept 2021][“Moreover, even if Lee's affidavit set forth a proper foundation for the admissibility of the unspecified records he relied on... Lee failed to identify the records upon which []he relied in making the statements, and the plaintiff failed to submit copies of the records themselves... It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted”][internal citations and quotation marks omitted]

Therefore, the lost note affidavit is insufficient to demonstrate plaintiff had standing when the action was commenced.

Second, non-party US Bank failed to establish plaintiff had standing through the mortgage assignments. The first assignment from Citicorp to Citimortgage was executed on November 6, 2009, by D.M. Wileman an apparent officer of Orion Financial Group, Inc. ("Orion") The second assignment from Citimortgage to plaintiff was executed on October 21, 2010 and was also signed D.M. Wileman of Orion. US Bank offers no evidence that D.M. Wileman had authority to execute these assignments. Defendant submitted further evidence that D.M. Wileman also claimed to have authority to execute assignments for Ameriquest Mortgage Company, Greentree Financial Servicing Corporation, CTX Mortgage Company LLC, First Choice Mortgage Services LLC and Mortgage Electronic Registration Systems, Inc. as well as assignments executed by other officers of Orion for other lending institutions. Defendant further submitted several publications, bankruptcy filing and settlement agreements evidence that Orion was involved in regular robo-signing activities including with Citicorp and Citimortgage. Moreover, as noted above, non-party US Bank offers no evidence that D.M. Wileman or Orion had authority to execute the subject assignments.

This at the very least raises an issue of fact as to the validity of the alleged assignments.

Third, contrary to non-party US Bank's contentions, defendant did not waive the defense of lack of standing by executing a modification prior to commencement of the instant action. The loan modification was executed with Rushmore and does not identify plaintiff as the owner or holder of the subject note. Non-party US Bank cites to no authority for the notion that an execution of a loan modification with a servicer that does not disclose the identity of the holder of the note amounts to a waiver of any challenge to the standing of any potential stranger who may subsequently commence an action. Therefore, the loan modification is insufficient to demonstrate plaintiff had standing when the action was commenced.

Fourth, non-party US Bank failed to establish that plaintiff was a holder of the note at the time action was commenced. The note was not annexed to the complaint, rather there was a lost note affidavit which expressly states that the note was lost prior to commencement of the action.

More importantly, a review of the note demonstrates that it is not a negotiable instrument within the meaning of the UCC

"[T]o qualify as a negotiable instrument under the UCC, a document must "(a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay *a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article*; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer" *OneWest Bank, N.A. v FMCDH Realty, Inc.*, 165 AD3d 128 [2d Dept 2018][emphasis added] citing NY UCC 3-104[1]

Here, the note contains other provisions and promises. Specifically, the note contains a waiver of homestead exemption and significant dispute resolution and procedural enforcement provisions including the right to depositions. Therefore, the note is not a negotiable instrument and may not be transferred by delivery alone even if allegedly payable to the bearer. See full discussion *NS194, LLC, v Rodriguez et al*; 2025 NY Slip Op. 34235[U] [Sup Ct Kings County Nov. 7, 2025]; See also *OneWest Bank, N.A. v FMCDH Realty, Inc.*, 165 AD3d 128 [2d Dept 2018]; *W. Coast 2014-7, LLC v Moses*, 20CV04101NGGJRC, 2022 WL 20703851 [EDNY Oct. 27, 2022]; *Windward Bora, LLC v Weiss*, 717 F Supp 3d 247 [EDNY 2024]

Therefore, non-party US Bank failed to establish plaintiff had standing when the action was commenced.

Finally, non-party US Bank failed to establish its standing to even make this motion or continue this action. As noted above, given the Court's determinations as to the negotiability of the note and whether plaintiff had standing at the time the action was commenced, it necessarily follows that plaintiff's alleged assignment of the note and mortgage to US Bank or its possession of the note are insufficient to demonstrate as a matter of law that US Bank has standing to continue this action. See e.g. *Citicorp Mortg. v Adams*, 153 AD3d 779 [2d Dept 2017][“Here, the plaintiff failed to demonstrate that it transferred its interest in the action to FNMA and, therefore, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion pursuant to CPLR 1018”]; *U.S. Bank N.A. v Medina*, 230 AD3d 1371 [2d Dept 2024][“U.S. Bank also failed to establish that the caption should be amended to substitute U.S. Bank as the plaintiff. Leave to

amend a caption to substitute an assignee for the plaintiff may properly be granted upon evidence that the mortgage and underlying debt were assigned to the assignee”]; *Citimortgage, Inc. v Bredehorn*, 160 AD3d 803 [2d Dept 2018][“The Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff’s motion...to amend the caption by substituting FNMA as the plaintiff...Although the plaintiff submitted evidence that the mortgage was assigned to FNMA, there was no evidence in admissible form of an assignment of the note or a transfer of possession of the note to FNMA.”]

Accordingly, non-party US Bank is precluded from participating in these proceedings, until such time as it can demonstrate entitlement to relief pursuant to CPLR 5015[a][2], CPLR 5015[a][5] or CPLR 2221.

IV. Non-party US Bank Failed to Demonstrate Strict Compliance With RPAPL 1304

“[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]

“[I]n order for the presumption to arise, [the] office practice must be geared so as to ensure the likelihood that [the] notice...is always properly addressed and mailed.” *Wells Fargo Bank, N.A. v Shields*, 201 AD3d 1007, 1009 [2d Dept 2022]

Here, defendant is correct that non-party US Bank failed to establish prima facie strict compliance with RPAPL 1304.

In support of the contention that plaintiff complied with RPAPL 1304, non-party US Bank submits the Montoya Affidavit of Rushmore which is deficient.

First, no proof is proffered that Rushmore had authority to send the notices on August 17, 2017, the date the notices were allegedly sent. Defendant further attests to Rushmore rejecting a payment in June of 2017, that Gregory Funding claimed servicing was transferred to it prior to the alleged mailing of the notices and that defendant spoke to Gregory Funding in July of 2017. Notably, Mr. Montoya does not even allege, let alone demonstrate, that Rushmore had authority to send the notices on the date in question. Therefore, non-party US Bank failed to demonstrate strict compliance with RPAPL 1304. 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]

Second, Mr. Montoya does not attest to personally mailing the notices and relies on alleged mailing practices and procedures of Rushmore. However, no proof of mailing in the form of certified mailing receipts or other proof of actual mailing by certified *and* first-class mail is annexed to the affidavit. See *Wells Fargo Bank, N.A. v Shields*, 201 AD3d 1007 [2d Dept 2022][“Although the affidavit, on its face, details an established and regularly followed office procedure, the evidence annexed thereto and relied upon by McManus does not demonstrate compliance with RPAPL 1304 and therefore does not give rise to a presumption that the notices were mailed to and received by the intended recipients. When viewing the affidavit with the evidence relied upon, it is unreasonable to presume that the notice was properly mailed.”][internal quotation marks omitted]; *Wilmington Sav. Fund Socy., FSB v Kutch*, 202 AD3d 1030 [2d Dept 2022][“Although Ranaldi asserted, based upon his review of business records associated with the subject loan, that a ninety-day (90) pre-foreclosure notice...was sent by regular first class and certified mail...it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted...The records attached to Ranaldi's affidavit provided evidence that the 90-day notice was sent to the defendant by certified mail. But none of the documents...provided any information as to whether the 90-day notice was sent to the defendant by regular first-class mail...Without business records proving the matter asserted, Ranaldi's unsubstantiated and conclusory statement, by itself, was insufficient to establish that the RPAPL 1304 notice was mailed to the defendant by first-class mail.”][internal citations and quotation marks omitted]

Furthermore, Mr. Montoya's allegations as to Rushmore's standard office mailing procedures is conclusory, lacks sufficient detail and does not detail what the standard office mailing practices and procedures are that “ensure that items are properly addressed *and mailed*.” His statements amount to nothing more than a conclusory assertion that plaintiff has undisclosed mailing procedures and that the notices were allegedly properly mailed. This is insufficient. See e.g. *Freedom Mtge. Corp. v King*, 215 AD3d 923 [2d Dept 2023][“Further, the plaintiff failed to present sufficient proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, including how the mail was transmitted to the postal service.”];

Wells Fargo Bank, N.A. v Shields, 201 AD3d 1007 [2d Dept 2022][“[I]n order for the presumption to arise, [the] office practice must be geared so as to ensure the likelihood that [the] notice...is always properly addressed and mailed.”]

Third, Mr. Montoya’s testimony appears to conflict with the records he annexes to his affidavit. Specifically, Mr. Montoya alleges that “[o]nce the notices are mailed, a notation is made in the loan file regarding the mailing of the notices and the manner in which the notices were sent.” However, the letter log proffered contains only a single line item showing “08/17/17 LE PF037 001 W01 90DAY NEW YORK NOI.” It does not state how or in what manner the notices were sent. Nor does the letter log reflect the mailing by certified and first-class mail. To the extent there are other unproduced business records reflecting both mailings Mr. Montoya’s statements are inadmissible.

“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” *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019][internal citations and quotation marks omitted]

Therefore, Mr. Montoya’s contentions that Rushmore strictly complied with RPAPL 1304 are insufficient to demonstrate prima facie compliance with RPAPL 1304. See *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757 [2d Dept 2021][“However, while the Lee affidavit was sufficient to lay a proper foundation for the admission of a business record pursuant to CPLR 4518 (a)...Lee failed to identify the records upon which she relied in making the statements, and the plaintiff failed to submit copies of the records themselves.”]; *Deutsche Bank Trust Co. Ams. v Miller*, 198 AD3d 867 [2d Dept 2021][“Moreover, even if Lee’s affidavit set forth a proper foundation for the admissibility of the unspecified records he relied on...Lee failed to identify the records upon which []he relied in making the statements, and the plaintiff failed to submit copies of the records themselves...It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted”][internal citations and quotation marks omitted]

Fourth, the RPAPL 1304 notices proffered appear to be jointly addressed to both borrowers. To the extent the notices were jointly mailed, the same does not comply with RPAPL 1304. “[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]

“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 Herson*, 216 AD3d 895 [2d Dept 2023]; See also *NS194, LLC v Gregg*, 231 AD3d 1162 [2d Dept 2024]; *US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718 [2d Dept 2023]

In light of all of the above, non-party US Bank failed to establish prima facie entitlement to the drastic remedy of summary judgment 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”]

V. Defendant’s Cross-Motion To Amend Is Denied as Unnecessary.

Defendant’s cross-motion to amend her answer to add detail to her standing defense and a counterclaim for attorneys fees is denied as unnecessary. Defendant’s original answer asserted standing as an affirmative defense which has already sufficiently been placed in issue and already asserted a counterclaim for attorneys fees. Therefore, there is no need for an amendment. See *Bloom v Lugli*, 102 AD3d 715 [2d Dept 2013]; *Siddiqui v Smith*, 207 AD3d 681 [2d Dept 2022]

VI. Non-party US Bank’s Motion For The Appointment of a Receiver Is Denied.

Lastly, the mortgage in question provides as follows in relevant part:

“LENDER'S RIGHTS TO RENTAL PAYMENTS FROM THE PROPERTY AND TO TAKE POSSESSION OF THE PROPERTY As additional protection for Lender, I give to Lender all of my rights to any rental payments from the Property. However, until Leader requires immediate Payment In Full under Paragraphs 19 or 20 above, or until I abandon the Property, I have the right to collect and keep those rental payments as they become due. I have not given any of my rights to rental payments from the Property to anyone other than the holder of the Superior Mortgage, and I will not do so without Lender's consent in writing. If Lender requires Immediate Payment In Full under Paragraphs 19 or 20 above, or if I abandon the Property, then Lender, persons authorized by Lender, or a receiver appointed by the court at Lander's request may: (A) collect the rental payments, including overdue rental payments, directly from the tenants; (B) enter on and take possession of the Property; (C) manage the Property; and (D) sign, cancel and change leases. I agree that if Lender notifies the tenants that Lender has the right to collect rental payments directly from them under this Paragraph 22, the tenants may make those rental payments to Lender without having to ask whether I have failed to keep my promises and agreements under this Mortgage. If there is a judgment for Lender in a lawsuit for foreclosure and sale, I will pay to Lender reasonable rent from the date the judgment is entered for as long as I occupy the Property. However, this does not give me the right to be a tenant on the Property....”

First, the giving of notice of default and notice to tenants are conditions precedent to the relief plaintiff seeks. Here, non-party US Bank failed to establish it complied with said conditions precedent. Therefore, non-party US Bank failed to meet its burden regardless of the sufficiency of the opposition papers. See generally, See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]

Second, [a]lthough the mortgage agreement at issue contains a provision which specifically

authorizes the appointment of a receiver upon application by the mortgagee in any action to foreclose (*see* Real Property Law § 254[10]), it is well settled that “[a]n action to foreclose a mortgage is an action in equity... Thus, a court of equity, in its discretion and under appropriate circumstances, may deny such an application” *ADHY Advisors LLC v 530 W. 152nd St. LLC*, 82 AD3d 619 [1st Dept 2011][internal citations omitted] See also *HSBC Bank USA, N.A. v Rubin*, 210 AD3d 73, 85 [2d Dept 2022]; *Bank of Am., N.A. v Schoharie Senior Hous. Dev. Fund Corp.*, 166 AD3d 1114, 1115 [3d Dept 2018]

While non-party US Bank points to the affidavit of its alleged servicer claiming a risk of tax foreclosure, non-party US Bank has not shown that defendant is not currently paying taxes. Moreover, given the Court’s findings pertaining to non-party US Bank’s standing to maintain this action, non-party US Bank is not entitled to enforce the mortgage and related assignment of rents provision.

Lastly, defendant is correct that the assignment of rents provision does not compel defendants, as the owners and mortgagors of the property, to pay rent. Notably, the assignment of rents provision only provides for defendants to pay rent after a judgment is entered. Here, no judgment has been entered.

Accordingly, it is hereby

ORDERED, that non-party US Bank’s motion (Motion Seq. 1) is DENIED with PREJUDICE; and it is further

ORDERED, that defendant’s cross-motion (Motion Seq. 2) is DENIED as moot; and it is further

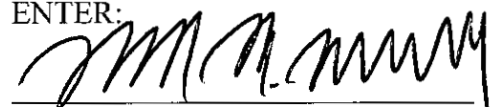
ORDERED, that non-party US Bank’s motion (Motion Seq. 3) for the appointment of a receiver is DENIED with PREJUDICE; and it is further

ORDERED, that non-party US Bank is precluded from participating in these proceedings, until such time as it can demonstrate entitlement to relief pursuant to CPLR 5015[a][2], CPLR 5015[a][5] or CPLR 2221; and it is further

ORDERED, that the named 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

2026 JAN 13 A 9:49

KINGS COUNTY CLERK