Wilmington Trust, N.A. v Merkerson
2025 NY Slip Op 35217(U)
December 2, 2025
Supreme Court, Kings County
Docket Number: Index No. 524602/2024
Judge: Menachem M. Mirocznik

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 2nd of December 2025

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

WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS DELAWARE TRUSTEE OF SMRF TRUST VII-A,

Plaintiff,

-against-

NIKKIYA MERKERSON; NAVY FEDERAL CREDIT UNION; SUSTAINABLE NEIGHBORHOODS LLC; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "John Doe" and "Jane Doe" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of the premises being foreclosed herein,

Defendant.

Index No. 524602/2024

Decision and Order
(Motion Seq. 1)

Papers	Numbered
Notice of Motion	NYSCEF Doc. 37-57
Opposition Papers	NYSCEF Doc. 60-71
Reply Papers	NYSCEF Doc. 72-73

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 11, 2024, seeking to foreclose a mortgage (the "mortgage") executed by defendant Nikkiya Merkerson ("defendant") which encumbers the property known as 244 Clifton Place, Brooklyn, NY 11216 (the "property").

On November 1, 2024, defendant pro se, joined issue with the filing of an answer asserting various affirmative defenses including lack of standing, the failure to comply with the notice requirements of the note and mortgage, non-compliance with RPAPL 1304, RPAPL 1306 and asserted several counterclaims.

On November 8, 2024, plaintiff filed reply to defendant's counterclaims.

On March 14, 2025, plaintiff filed the instant motion seeking summary, striking defendant's affirmative defenses and counterclaims, for a default judgment against the non-appearing defendants, appointing a Referee to compute the total allegedly sums due and owing to Plaintiff, and to amend the case caption. In support of the motion, plaintiff annexes the affirmation of Patrick Pittman ("Mr. Pittman" or "Pittman Affirmation"), a purported Officer of Select Portfolio Servicing, Inc. ("SPS"), the alleged attorney in fact plaintiff. Plaintiff contends that it established entitlement to relief with the production of the note, mortgage and evidence of defendant's default under the subject note and mortgage. Plaintiff further argues that the subject mortgage is not a home loan and therefore compliance with RPAPL 1304 and RPAPL 1306 are not required, that the Pittman Affirmation is sufficient to demonstrate that plaintiff sent the required notice of default and plaintiff had standing when it commenced the action which is established by annexing same to complaint and with Pittman Affirmation.

Defendant opposes the motion contending that the loan is a home loan within the meaning of RPAPL 1304 and plaintiff failed to comply. Defendant further contends that plaintiff failed to establish it sent the required notice of default, that it had standing at the time the action was commenced and that plaintiff failed to establish compliance with RPAPL 1303 and RPAPL 1306.

In reply, plaintiff argues that the loan is not a home loan as evidenced by the loan application signed by defendant that reflects the loan was for business purposes and therefore RPAPL 1304 and RPAPL 1306 do not apply. Plaintiff reiterates that it established standing by annexing the note, endorsed in blank to the complaint. Plaintiff further argues that the subject note provides that plaintiff may send a notice of default and therefore the loan does not require a notice of default and in any case the Pitman affidavit demonstrates mailing. As to RPAPL 1303 plaintiff argues that compliance is established with the submission of the affidavit of service with attached RPAPL 1303 notice which attests to service of the notice with the summons and complaint.

Discussion

I. Standard of Review

"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]

II. Plaintiff established prima facie it had standing when 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...Pursuant to article 3 of the Uniform Commercial Code, a note can be endorsed, or signed over, to a new owner. A note can also be endorsed in blank, naming no specific payee, which makes it a bearer instrument under article 3 of the Uniform Commercial Code, so that any party that possesses the note has the legal authority to enforce it." *U.S. Bank N.A. v Moulton*, 179 AD3d 734 [2d Dept 2020][internal citations and quotation marks omitted]; NY UCC 1-201(21); See also *U.S. Bank N.A. for Citigroup Mtge. Loan Tr., Inc., 2006-NC2 v Brody*, 156 AD3d 839 [2d Dept 2017]["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"]

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 defendant's contentions, plaintiff established it had standing at the time is commenced the action by annexing a copy of the note endorsed in blank to the complaint.

III. Plaintiff established prima facie that the subject mortgage is not a home loan within the meaning of RPAPL 1304 and defendant failed to raise and issue of fact.

"[W]here, as here, a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, the [plaintiff] is also required to make a prima facie showing of strict compliance with RPAPL 1304...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]; See also *U.S. Bank Tr., N.A. v Sadique*, 178 AD3d 984 [2d Dept 2019]

Here, "[i]n support, the plaintiff submitted the uniform residential loan application that the defendant completed in connection with the mortgage loan. The first page of the application includes check boxes to describe how the property will be used. The choices are "Primary Residence," "Secondary Residence," and "Investment." The defendant checked the "Investment" box on the application and left the other two check boxes blank. The "DECLARATIONS" section of the application includes the question: "Do you intend to occupy the property as your primary residence" In response to this question, the defendant checked the box for "No." *Wells Fargo Bank, N.A. v Ranalli*, 236 AD3d 714 [2d Dept 2025]

Therefore, plaintiff established prima facie that the subject loan is not a home loan within the meaning of RPAPL 1304 and defendant failed to raise an issue of fact.

IV. Plaintiff failed to demonstrate prima facie compliance with the contractual condition precedent

However, defendant is correct that plaintiff failed to establish it sent a notice of default as required by the terms of the mortgage.

"Where it is alleged that a plaintiff has failed to comply with a condition precedent to the enforcement of a mortgage, the plaintiff must proffer sufficient evidence to establish, prima facie, that it complied with the condition precedent." *U.S. Bank N.A. v Kochhar*, 176 AD3d 1010 [2d Dept 2019]; *HSBC Bank USA, N.A. v Boursiquot*, 204 AD3d 980 [2d Dept 2022]["Where it is alleged that a plaintiff has failed to comply with a condition precedent to the enforcement of a mortgage, the plaintiff must proffer sufficient evidence to establish, prima facie, that it complied with the condition precedent"]

Here, defendant's answer asserted plaintiff's failure to serve a notice of default as required by the terms of the mortgage as an affirmative defense. Therefore, plaintiff was required to demonstrate prima facie that it sent the subject notice prior to commencement of the action.

Contrary to plaintiff's contention, the subject mortgage requires a notice of default as a condition precedent. Specifically, paragraph 22 of the mortgage provides in relevant:

"Leader may require Immediate Payment in Full under this Section

22 only if all of the following conditions are met:

(a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;

(b) Leader sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states: (1) The promise or agreement that I failed to keep or the default that has occurred; (2) The action that I must take to correct that default; (3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given; (4) That if I do not correct the default by the date stated in the notice, Leader may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale; (5) That if I meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Leader's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and (6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that I may have; and

(c) I do not correct the default stated in the notice from Lender by the date stated in that notice."

The Court of Appeals "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing (*e.g.*.an affidavit of mailing or service)...or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature. Evidence of an established and regularly followed office procedure...may give rise to a rebuttable presumption that such a notification was mailed to and received by [the intended recipient]...In 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" *CIT Bank N.A. v Schiffman*, 36 NY3d 550 [2021]; *Nassau Ins. Co. v Murray*, 46 NY2d 828 [1978]; See also *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]

First, Mr. Pittman does not allege that he personally mailed the subject notice but rather attempts to demonstrate mailing with standard mailing practices and procedures. However, his testimony is conclusory, provides insufficient detail and fails to explain how the procedure is "*geared so as to ensure that items are properly addressed and mailed.*" See e.g. *Freedom Mtge. Corp. v King*, 215 AD3d 923 [2d Dept 2023]["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"]

Second, Mr. Pittman does not explain how he knows the notice was sent by first class mail given that neither the notice nor the letter log show that the notice was sent by first class mail.

"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]; See also 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]

Third, the notice does not appear to comply with paragraph 22 of the mortgage in several respects. First, the notice appears to immediately accelerate the loan[1]. Second, the notice further does not advise that the borrower has "the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses". See the mortgage at paragraph 22[b][6]. Third, the notice misidentifies the governing loan documents by referring to a "Business Promissory Note and Security Agreement," executed in favor of .Wilmington Trust, National Association, not in its individual capacity but solely as Delaware Trustee of SMRF Trust VII-A when the subject loan was originally executed in favor of Home Bridge Financial Services, Inc. and is described as a "Note" and "Mortgage". See e.g. *HSBC Bank USA, N.A. v Schulman*, 236 AD3d 633 [2d Dept 2025][notice insufficient because it did not comply with paragraph 22[b][3] of the mortgage]

Further still, the notice is dated April 4, 2024, but the assignment of mortgage to plaintiff is dated July 16, 2024. Plaintiff has not proffered any evidence that plaintiff was entitled to enforce the mortgage on April 4, 2024. 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]; *Deutsche Bank Natl. Trust Co. v Pariser*, 207AD3d 518 [2d Dept 2022]["The plaintiff further failed to establish that the RPAPL 1304

[1] "This letter is to notify you that an Event of Default has been declared, as defined in the Note, on April 4, 2024 (the Date of Default) in accordance with the Note. The entire unpaid balance of all obligations under the Note or other agreements is immediately due and payable."

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...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]

Therefore, plaintiff failed to demonstrate prima facie that complied with a required condition precedent prior to commencement of this action.

In light of the above, plaintiff failed to demonstrate prima facie entitlement to the drastic remedy of summary judgment 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"]

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