Bank of N.Y. Mellon Trust Co., N.A. v Klein
2026 NY Slip Op 30187(U)
January 2, 2026
Supreme Court, Kings County
Docket Number: Index No. 525532/2024
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 2nd of January 2026

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

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., F/K/A THE BANK OF NEW YORK TRUST COMPANY, N.A., AS TRUSTEE, IN TRUST FOR AND FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF MULTI-CLASS MORTGAGE PASS-THROUGH CERTIFICATES, CHASEFLEX TRUST SERIES 2007-M1,

Plaintiff,

-against-

NECHAMA KLEIN; ET AL

Defendants.

Index No. **525532/2024**

Decision and Order
(Motion Seq. 1 and 4)

Papers	**Numbered**
Notice of Motion	NYSCEF Doc. 19
Notice of Cross-Motion/Opposition	NYSCEF Doc. 40-71
Opposition to Cross-Motion/eply	NYSCEF Doc. 72-75
Notice of Rejection	NYSCEF Doc. 76-78
Letter Response	NYSCEF Doc. 79

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

Procedural History

This action was commenced on September 20, 2024 seeking to foreclose a mortgage (the "mortgage") executed by defendant Nechama Klien (the "defendant") encumbering the premises known as 1858 62nd Street, Brooklyn, NY 11203 (the "property"). The mortgage was modified by modification agreement dated June 22, 2016 (the "modification agreement")

On November 5, 2024, defendant joined issue with the service of an answer asserting various affirmative defenses including that plaintiff lacks standing and that the modification agreement was unfair and unconscionable.

On the same day defendant filed the instant motion seeking to dismiss the action with prejudice pursuant to CPLR 3211[a]. Defendant argues that the complaint must be dismissed because Plaintiff engaged in prohibited "dual tracking" by commencing a new foreclosure while a

complete loss-mitigation application was pending in violation of 12 C.F.R. § 1024.41, lacked standing due to defects and "uncertainty" in the chain of assignments and authority to enforce the note, and seeks to enforce a 2016 loan modification that was executed under duress, is unconscionable and inequitable because it dramatically increased the principal balance without adequate disclosure or itemization, allegedly exploiting defendant's post-bankruptcy vulnerability, engaging in bad faith and that plaintiff failed to comply with RPAPL 1304, regulations and banking law warranting dismissal.

On October 14, 2025, defendant's counsel appeared and filed a letter seeking, inter alia, a discovery schedule and to supplement defendant's motion or for "leave" to withdraw same. Plaintiff objected and the Court did not grant defendant's request. Importantly, leave is not required to withdraw a motion.

Plaintiff opposes the motion and cross-moves for summary judgment and to strike defendant's answer, to appoint a referee to compute, for a default judgment against the non-answering parties and to amend the caption. Plaintiff argues that Defendant's motion to dismiss should be denied and that Plaintiff is entitled to summary judgment, an order of reference, and ancillary relief because Plaintiff established its prima facie foreclosure case by submitting the note endorsed in blank, the mortgage, the 2016 modification, and proof of default beginning August 1, 2023; Plaintiff contends it had standing at commencement through physical possession of the original note which annexed to the complaint, did not violate dual-tracking regulations because no foreclosure judgment or sale was pursued during loss-mitigation review, defendant never submitted a completed loss mitigation application, failed to respond to plaintiff's requests for documentation, fully complied with RPAPL 1304 and 1306, and that Defendant's defenses—unconscionability, lack of standing, bad faith, and equitable claims—are legally insufficient, conclusory, or contradicted by documentary evidence.

Although the motions were marked fully submitted on November 12, 2025, on November 19, 2025, defendant filed opposition to the cross-motion and reply to her motion which plaintiff rejected as untimely. Defendant filed a letter claiming that the cross-motion defective having not been served on 16 day's notice and that the Court should accept the late filing.

Defendant argues that Plaintiff's cross-motion must be denied as premature and unsupported because material issues of fact remain regarding standing, the accuracy and fairness of Plaintiff's accounting, strict compliance with RPAPL 1304 and 1306, and Plaintiff's loss-mitigation conduct, that essential evidence—such as full servicing notes, detailed capitalization ledgers for the 2016 modification, complete mailing records, and loss-mitigation files—remains exclusively within Plaintiff's control; Defendant further contends that the record supports a finding of improper dual tracking, raises triable issues of unconscionability and bad faith, and at minimum warrants denial of summary judgment under CPLR 3212(f) to allow discovery before dispositive relief is considered.

Discussion

I. The Court Does Not Excuse Defendant's Untimely Filings

Initially, defendant's late filings are not excused. Defense counsel's brazen attempt to lay blame on plaintiff's counsel for defendant's default is meritless and at best demonstrates a

profound lack of understanding of the law or at worst frivolous conduct.

First, contrary to defendant's baseless contentions, a cross-motion does not require 16 days' notice. CPLR 2215 provides "[a]t least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers." Therefore, plaintiff was entitled to serve its cross-motion on seven days' notice.

Second, CPLR 2103[b][7] does not provide for "additional time" when papers are served by NYSCEF.[1] Counsel representation as such is simply false.

22 NYCRR § 202.5-b[f][2][i] provides that the "e-mail service address recorded at the time of registration is the e-mail address at which service of interlocutory documents on that party may be made through notification transmitted by the NYSCEF site. It is the responsibility of each filing user to monitor that address and promptly notify the resource center in the event of a change in his or her e-mail service address." 22 NYCRR § 202.5-b[f][2][ii] provides in relevant part "the electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein"

Third, defendant's opposition papers were filed after the motion and cross-motion were already submitted to the Court on November 12, 2025. No duly noticed motion was made to excuse the late filing or to vacate defendant's default. Defendant's excuses for its default in opposing the motion are unconvincing and unsubstantiated. Defendant's counsel appeared on October 14, 2025, and thereby agreed to accept service electronically. Counsel received notice electronically when the cross-motion was filed on NYSCEF and should have simply sought a timely adjournment either on consent or from the Court. No adequate reason has been provided for counsel's neglect and such sloppy practice will not be countenanced.

Even if this Court were to excuse the untimely filing, which it does not, the result would be no different.

II. Standard of Review

"On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory....Moreover, [w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" *U.S. Bank N.A. v Herman*, 174 AD3d 831, 831-32 [2d Dept 2019]

[1] CPLR 2103(b)(7) provides for service "by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule and, unless such rule shall otherwise provide, such transmission shall be upon the party's written consent."

"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]

"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]

III. Plaintiff adequately stated a cause of action and demonstrated prima facie it has standing and entitlement to judgment as a matter of law.

"A facially adequate cause of action to foreclose a mortgage requires allegations regarding the existence of the mortgage, the unpaid note, and the defendant's default thereunder, which, if subsequently proven, will establish a prima facie case for relief...In order to place in issue any of these essential elements of the cause of action, a defendant need only deny them in the answer. However, as a general matter, a plaintiff need not establish its standing (i.e., that it held and/or owned the note at the time the action was commenced) as an essential element of the cause of action...Rather, it is only where the plaintiff's standing is placed in issue by the defendant that the plaintiff must shoulder the additional burden of establishing its standing to commence the action, a burden satisfied by evidence that it was the holder or assignee of the underlying note at the time the action was commenced." *US Bank N.A. v Nelson*, 169 AD3d 110, 113-14 [2d Dept 2019], *affd*, 36 NY3d 998 [2020]

Here, the complaint alleged the existence of the note, mortgage and that defendant defaulted thereunder. This sufficient to state claim to foreclose a mortgage. See *Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79 [2d Dept 2021]["The allegations contained within the four corners of the complaint, which must be deemed to be true...and which need not allege standing, were sufficient to state a cause of action to foreclose upon a mortgage. Further, the defendants' evidence failed to sufficiently demonstrate the absence of standing, for reasons already set forth.]

"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]

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. Nor does defendant dispute the existence of the default under the terms of the subject agreements. Indeed, defendant expressly concedes same. Therefore, plaintiff demonstrated prima facie entitlement judgment as a matter of law.

IV. Defendant failed to demonstrate and raise an issue of fact as to whether plaintiff engaged in prohibited dual tracking.

12 CFR 1024.41[g] provides that "[i]f a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale."

Here, plaintiff has not yet moved for a judgment of foreclosure or otherwise sought to schedule or conduct a sale. Therefore, 12 CFR 1024.41[g] is not applicable.

12 CFR 1024.41[f][2] provides that "[if] a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process."

12 CFR 1024.41(b)(1) provides that "[a] complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application."

Here, defendant failed to demonstrate that a "complete loss mitigation application" was ever submitted to plaintiff. Defendant's contention that she submitted a "complete" on January 18, 2024 and her unsubstantiated, self-serving statements that the servicer verbally told her the application was complete are belied by the numerous letters sent by plaintiff expressly advising her that the application was not complete which requesting further documents.

V. Defendant failed to demonstrate or raise an issue of fact as to whether the modification agreement is barred by unconscionability or duress

"An unconscionable agreement has been described as one in which "no [person] in his [or her] senses and not under delusion would make on the one hand, and [which] no honest and fair [person] would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense...A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made" *RTT Holdings, LLC v Nacht*, 206 AD3d 836 [2d Dept 2022]; *Cosh v Cosh*, 45 AD3d 798 [2d Dept 2007]["An unconscionable bargain is regarded as one such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other"]

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party...The term "unreasonably favorable" is sometimes referred to as "substantive" unconscionability, while the "absence of meaningful choice" is referred to as "procedural" unconscionability... Generally, both are necessary for unconscionability to be established as grounds to set aside a contract." *Gottlieb v Gottlieb*, 138 AD3d 30 [1st Dept 2016][internal citations and quotation marks omitted]

However, "an agreement will not be overturned merely because it was improvident, not the most advantageous to the dissatisfied party, or because a party had a change of heart" *Etzion v Etzion*, 62 AD3d 646, 653 [2d Dept 2009]["courts will not set aside an agreement on the ground of unconscionability simply because it might have been improvident"]

Here, defendant has not demonstrated that the modification agreement was "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time" or that "no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense." Nor has defendant shown that "the terms of the agreement were unreasonably favorable to plaintiff." *Ancart v Crespo*, 242 AD3d 565 [1st Dept 2025]; See also *Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, [2d Dept 2012]

Moreover, even if "a contract is unconscionable, it is voidable, but it can nonetheless be ratified." *Gendot Assoc., Inc. v Kaufold*, 56 AD3d 421 [2d Dept 2008]; *King v Fox*, 7 NY3d 181 [2006]["Such contracts are usually voidable since a party to a contract has the power to validate or ratify the contract, as well as the power to avoid it."]

The same is true for contracts purportedly entered under duress. "A party who executes a

contract under duress and then acquiesces in the contract for any considerable length of time, ratifies the contract" *Osborn v Osborn*, 144 AD2d 350, 351 [2d Dept 1988]; *Cosh v Cosh*, 45 AD3d 798, 800 [2d Dept 2007]["a party seeking to repudiate a contract procured by duress must act promptly lest he [or she] be deemed to have elected to affirm it"]

Here, defendant does not dispute that executed the modification agreement and made payments under same for over six years. Therefore, she ratified the modification agreement.

VI. Plaintiff demonstrated prima facie that it complied with 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 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]

"By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can 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." *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]["A plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened."]

Here, plaintiff submits the copies of the notices sent by certified and first class mail, its internal letter log substantiating the mailings and plaintiff's affiant attests to personal knowledge of the "standard office mailing procedure designed to ensure that items are properly addressed and mailed". Moreover, even if plaintiff had failed to demonstrate compliance, which it did not, defendant failed to demonstrate non-compliance. *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]["Even in the face of a plaintiff's failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, this Court has held that a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled"]

VII. Defendant failed to establish that discovery necessary and will yield material evidence.

"While summary judgment may be denied when discovery has not been completed

(*see* CPLR 3212[f]), the nonmoving party must produce some evidence indicating that further discovery "will yield material and relevant evidence" *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203 [3rd Dept 2008];

"The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" *Wells Fargo Bank, N.A. v Gonzalez*, 174 AD3d 555 [2d Dept 2019; *HSBC Bank USA. Nat. Ass'n v Armijos*, 151 AD3d 943 [2d Dept 2017]

Here, defendant failed to demonstrate that further discovery will yield material and relevant evidence. As explained at length above, defendant failed to raise an issue of fact as to whether the modification agreement was unenforceable do to unconscionability or duress, whether plaintiff engaged in dual tracking or as to compliance with RPAPL 1304.

By failing to raise any of the remaining affirmative defenses the same are deemed abandoned, waived and now dismissed. See *Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]; *Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]; *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]

Defendant and her counsel are cautioned, and on notice, that misrepresenting the provisions of a statute or holdings of caselaw presented to the Court will not be tolerated and may be sufficient cause for the imposition of sanctions and penalties against defendant and her counsel for frivolous conduct pursuant to 22 NYCRR 130-1.1. See *Deutsche Bank Natl. Trust Co. v LeTennier, 2026 NY Slip Op 00040* [3d Dept January 8, 2026]

Moreover, defendant's counsel shall refrain from seeking affirmative relief by letter in the absence of a duly noticed motion or order to show cause.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss this action pursuant to CPLR 3211[a] is DENIED in its entirety; and it is further

ORDERED, that plaintiff's cross-motion for summary judgment and related relief is GRANTED in its entirety; and it is further

ORDERED, that plaintiff shall settle on order on notice within ten (10) days of entry of this order.

This constitutes the Decision and Order of the Court.

ENTER:

Hon. Menachem M. Mirocznik, JSC