US Bank Trust N.A. v Mermelstein
2026 NY Slip Op 30213(U)
January 13, 2026
Supreme Court, Kings County
Docket Number: Index No. 502827/2023
Judge: Carolyn Walker-Diallo
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At an IAS Term, Part FRP4, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 13th day of January 2026.

PRESENT:

HON. CAROLYN WALKER-DIALLO, J.S.C.

Index No.: 502827/2023

_____ x

US BANK TRUST N.A.,

Plaintiff,

DECISION AND ORDER

-against-

SOL MERMELSTEIN, et al.,

Defendants.

_____ x

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these Motions:

Papers	**Numbered**
Motion, Affirmations in Support, and Exhibits	NYSCEF Doc. Nos. 43-64
Cross-Motion, Affirmations in Support, and Exhibits	NYSCEF Doc. Nos. 71-76
Affirmation in Opposition and Reply	NYSCEF Doc. Nos. 77-81
Affirmation in Reply	NYSCEF Doc. No. 83

Motion Sequence #1 & 2

Upon the foregoing cited papers, the Decision/Order on these Motions is as follows:

Plaintiff moves for an Order granting summary judgment, striking Sol Mermelstein's ("Defendant") answer, default judgment, amending the caption, and for an order of reference. Defendant cross-moves for an Order dismissing the action and/or denying Plaintiff summary judgment, arguing that Plaintiff failed to comply with RPAPL 1301 (2), 1303, and 1304, as well

as the default requirement established in the mortgage. Defendant contends that the default and RPAPL 1304 notices were served while a prior foreclosure action filed under Index Number 501031/2020 ("Prior Action") was pending, and thus were void because Plaintiff's servicer, Fay Servicing LLC ("Fay"), lacked authority to issue the notices because the power of attorney it relies on was executed months later. Defendant further argues that the RPAPL 1303 notice was improperly served on white paper rather than colored paper as required. Finally, Defendant asserts that Plaintiff's business records are inadmissible hearsay and electronic-record certifications, and that the records submitted show a $0.00 loan balance. In the alternative, Defendant seeks tolling of interest for lengthy delays attributable to Plaintiff.

In opposition to the cross-motion and in reply, Plaintiff argues that its motion should be granted and Defendant's motion should be denied, as it established compliance with all prerequisites, in that its affiant properly laid a business-records foundation, as Fay's records incorporated and relied on prior servicer records and that the servicing agreement authorized Fay to issue the notices. Plaintiff also submits a new power of attorney that it contends was in effect at the time the notices were sent, establishing its authority, and provides that the notices were sent after the Prior Action had been de-facto discontinued. Further, Plaintiff maintains that the RPAPL 1303 notice was validly served on colored paper, as confirmed by the affidavit of service of the process server, and that any RPAPL 1301 claim fails because no prior action recovered any part of the mortgage debt. Additionally, Plaintiff submits that tolling is not appropriate, as it has diligently prosecuted this matter.

In reply, Defendant argues that Plaintiff's submissions in its reply papers fail to cure the fatal statutory and evidentiary defects in its motion-in-chief for summary judgment. Defendant asserts that Plaintiff's submission of the 2019 power of attorney for the first time in reply was

improper and that it is inadmissible, as it lacks authentication or a CPLR 4518 foundation. Further, Defendant maintains that Plaintiff's affidavit of merit relies on hearsay summaries of illegible third-party records and does not meet the business-records exception, as the affiant offers no details as to how prior servicer records were created, integrated, or maintained. Lastly, Defendant argues that Plaintiff violated RPAPL 1301, 1303, and 1304 by issuing statutory notices while the Prior Action remained pending. Defendant further argues that Plaintiff violated RPAPL 1303 by serving the notice on white paper, according to Defendant's sworn statement. Defendant contends that this statement is not overcome by the process server's contradictory affidavit, and at minimum, requires a hearing to resolve.

DISCUSSION

I. PLAINTIFF HAS NOT ESTABLISHED ITS PRIMA FACIE BURDEN.

"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 N.Y.2d 320, 324 (1986) (Internal citations omitted). Further, it is well established that "[i]n a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default." *Onewest Bank v. Wellington Roy Mahoney*, 154 A.D.3d 770, 771 (2d Dep't 2017); *Loancare v. Firshing*, 130 A.D.3d 787 (2d Dep't 2015).

However, "[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 A.D.3d 1299, 1300 (2d Dep't 2025) (Internal quotations and citations omitted).

"Accordingly, to establish a foundation for the admission of a business record, the proponent of the record must satisfy the requirements identified in the statute (*see* CPLR 4518[a]). First, the proponent must establish that the record be made in the regular course of business—essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business. Second, the proponent must also demonstrate that it be the regular course of such business to make the record . . . essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record. Third, the proponent must establish that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured." *Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 205 (2d Dep't 2019) (Internal quotations and citations omitted).

Furthermore, "[i]n addition to these statutory requirements, the Court of Appeals has held that [u]nless some other hearsay exception is available, admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he [or she] is under a business duty to report it to the entrant." *Id*. at 199 (Internal quotations omitted,

brackets in original). Finally, if a record submitted is an "electronic record," as defined in State Technology Law § 302, the party proffering such a record must also provide sufficient information to establish that the record is a "true and accurate representation" of the electronic record per CPLR 4518 (a).

Here, Plaintiff's affiant did not aver that the records annexed to the affidavit provided were true and accurate representations of the proffered records. *See* Affirmation of Charles Wallshein in Opposition and in Support of Cross-Motion, dated July 11, 2025, NYSCEF Doc. No. 72 at ¶¶6-23, Affirmation of Lisa M. Benson in Support of Summary Judgment, dated January 21, 2025, NYSCEF Doc. No. 45, Payment History Documentation, NYSCEF Doc. No. 51. Further, Plaintiff's affiant does not attest that the entrants were under a business duty to accurately enter and/or report the relevant information. Therefore, the proffered affidavit fails to lay a sufficient foundation to qualify the annexed records as business records pursuant to CPLR 4518 (a), rendering the underlying records inadmissible. Accordingly, Plaintiff does not establish its prima facie entitlement to summary judgment.

II. PLAINTIFF HAS FAILED TO DEMONSTRATE COMPLIANCE WITH RPAPL 1304.

Defendant demonstrates that Plaintiff failed to comply 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.' The statute further sets forth the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower (*see id.* § 1304 [2]). Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition

precedent to the commencement of a foreclosure action. 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 Nat'l Trust Co. v. Pirozzi*, 230 A.D.3d 736, 738-39 (2d Dep't 2024) (Internal quotations and citations omitted).

Here, Defendant establishes that Plaintiff did not comply with RPAPL 1304 and the mortgage's notice provisions. Plaintiff does not establish that Fay had authority to send these notices on the dates in question. *See* RPAPL 1304 (1); *Siegel v. Ky. Fried Chicken*, 108 A.D.2d 218 (2d Dep't 1985) (mere assertion of authority to act on behalf of another "by a total stranger to the transaction" cannot be deemed notice); *Deutsche Bank Natl Trust Co. v. Pariser*, 207 A.D.3d 518 (2d Dep't 2022) (limited power of attorney authorizing law firm to act on behalf of Plaintiff's servicer was executed over a month after the notices were allegedly sent).

Even if the Limited Power of Attorney initially proffered by Plaintiff were admissible, the document is dated November 9, 2022, whereas the notices are dated May 3, 2022 and May 5, 2022. *See* Limited Power of Attorney dated November 9, 2022, NYSCEF Doc. No. 46, Notices, NYSCEF Doc. Nos. 55, 57. In addition, the Servicing Agreement dated August 27, 2021 also does not establish Fay's authority to act on behalf of Plaintiff, as it is expressly limited to actions after the "Servicing Commencement Date" and "Servicing Transfer Date," both of which are not defined, as constraints detailed in supplemental exhibits and schedules not included with the proffered agreement.[1] *See* Servicing Agreement dated August 27, 2021, NYSCEF Doc. No. 46 at

[1] Though Plaintiff attempts to cure this deficiency by submission of a Power of Attorney dated October 3, 2019, the same authority is limited by an accompanying servicing agreement dated July 23, 2019 that differs from the August 27, 2021 servicing agreement and is not accompanied by an affidavit establishing the documents as business records under CPLR 4518. *See U.S. Bank N.A.*, 204 A.D.3d at 1066.

7. Moreover, Fay's authority under this agreement to utilize a third-party vendor to mail notices is unclear.

As a result, Plaintiff has failed to establish that Fay had the authority to send the notices on its behalf. *See U.S. Bank N.A. v. Tesoriero*, 204 A.D.3d 1066 (2d Dep't 2022); *see MTGLQ Inv'rs, L.P. v. Cacioppo*, 217 A.D.3d 939, 940-41 (2d Dep't 2023) ("[P]laintiff 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.")

In addition, the RPAPL 1304 notices were defective as they were sent during the pendency of the Prior Action. The notices do not demonstrate Plaintiff's strict compliance with its RPAPL 1304 requirements. RPAPL 1304 is construed strictly, requiring exact language and type sizes be utilized in the notices for the fundamental purpose of facilitating communication to avoid foreclosure. Sending such a notice during the pendency of an already existing proceeding undermines the legislative purpose of RPAPL 1304. Plaintiff facially violated RPAPL 1301 (2) by pleading that two prior actions existed, "which will be discontinued." *See* Complaint, NYSCEF Doc. No. 1 at ¶17. As such, this Court agrees with the Honorable Rolf M. Thorsen's holding in *U.S. Bank Trust N.A. v. Sandoval*, 80 Misc.3d 355 (Sup. Ct. Rockland Co. 2023), finding that RPAPL 1304 notices sent during the pendency of the prior action, are defective because they

violate the "remedial purpose" of the statute. Holding otherwise would contravene the fundamental legislative intent and spirit of RPAPL 1304.

Thus, given the dismissal of the complaint in this matter, the notices of pendency filed must also be cancelled. *See* CPLR 6414; *see also Nationstar Mtge., LLC v. Davis*, 240 A.D.3d 790 (2d Dep't 2025). Because this action is dismissed on the basis of Plaintiff's defective RPAPL 1304 notices, this Court need not consider Defendant's argument that Plaintiff's RPAPL 1303 notices are defective.

CONCLUSION

Accordingly, Plaintiff's motion is DENIED and Defendant's cross-motion is GRANTED. The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested was not addressed by the Court, it is hereby DENIED. The summons and complaint and action are DISMISSED. Defendant shall serve notice of entry within fifteen (15) days of upload of the instant order to NYSCEF upon Plaintiff and all parties who have appeared in this action. Further, the Kings County Clerk is hereby directed to discharge the notice of pendency filed under this index number on January 27, 2023, relating to 3849 Ocean View Avenue, Brooklyn, New York 11224, which is also known as Block 6955, Lot 9, and to enter a notice of cancellation upon the margin of record referring to this Order.

This constitutes the Decision and Order of the Court.

ENTER:

Hon. Carolyn Walker-Diallo, J.S.C.