

Bayview Loan Servicing, LLC v McBean
2026 NY Slip Op 30214(U)
January 2, 2026
Supreme Court, Kings County
Docket Number: Index No. 503390/2019
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

BAYVIEW LOAN SERVICING, LLC

Plaintiff,

-against-

RUDOLPH MCBEAN A/K/A RUDOLPH MCBEAN,
EGLAH LEWIS-MCBEAN A/K/A EGLAH LEWIS
MCBEAN A/K/A EGLAH LEWIS A/K/A EGLAH
MCBEAN A/K/A EGLAH P. LEWIS, LORRIS
REYNOLDS, KINGS COUNTY HOSPITAL, LVNV
FUNDING LLC, and JOHN DOE,

Defendants.

Index No. 503390/2019

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

Papers	Numbered
Notice of Motion	NYSCEF Doc. 36-49
Notice of Cross-Motion/Opposition Papers	NYSCEF Doc. 50-59
Opposition to Cross-Motion/Reply	NYSCEF Doc. 62-65

Upon the foregoing papers, the motion(s) are/is determined in accordance with this decision, order and judgment

Relevant Factual and Procedural History

On May 19, 2008, Rudolph Mcbean (“decendent Rudolph”), Eglah Lewis-Mcbean (“decendent Eglah”), and Lorris Reynolds (“defendant”) executed a mortgage (the “mortgage”) encumbering the property known as 566 East 26th Street, Brooklyn, New York 11210 (the “property”).

On May 5, 2012, decendent Rudolph and decendent Eglah executed a modification agreement that, *inter alia*, modified the principal balance on the mortgage. Defendant did not execute the modification.

On June 22, 2012 decendent Rudolph died. On January 6, 2014, decendent Eglah died.

This action was commenced on February 15, 2019 seeking to foreclose the mortgage and named, *inter alia*, decendent Rudolph, decendent Eglah and defendant.

On April 10, 2019, defendant joined issue with service of an answer which asserted various

affirmative defenses.

On October 21, 2024, non-party US Bank Trust National Association, Not In Its Individual Capacity But Solely As Owner Trustee For RCAF Acquisition Trust in place and instead of Bayview Loan Servicing, LLC (“US Bank”) filed the instant motion seeking: (1) to substitute US Bank as party plaintiff; (2) leave to issue, file and serve a supplemental summons, amended complaint and amended notice of pendency substituting decedent Rudolph and decedent Eglah with Dawn Eglantine Crawford, Grace Ann Reynolds-Victor, Laiese C. Charles and Jewel Mignon Griffith, as beneficiaries, heirs and distributees of the decedent Rudolph and decedent Eglah as well as the unknown heirs-at-law, holders on interests through decedent Rudolph and decedent Eglah; (3) leave to issue, file and serve a supplemental summons, amended complaint and amended notice of pendency to add the United States of America (Eastern District) and the New York State Department of Taxation and Finance, the New York City Transit Adjudication Bureau by virtue as well as an additional claim against the defendant; (4) to amend the caption (5) leave to serve by publication (6) appoint a guardian ad litem and (7) to extend the time to serve.

Non-party US Bank, argues that substitution and amendment are proper because two original mortgagors died years before judgment, title vested automatically in their heirs by operation of law, and no estate representative is necessary where no deficiency judgment is sought; accordingly, the plaintiff seeks leave under CPLR 1021, 3025, 2001, and related provisions to substitute the proper trust plaintiff, strike the deceased defendants, add identified and unknown heirs, join governmental lienholders, extend service time, permit service by publication, appoint a guardian ad litem, and amend the caption and pleadings, contending there is no prejudice, that due diligence was exercised, and that foreclosure may proceed against heirs directly under settled Second Department authority.

Defendant opposes the motion and cross-moves to dismiss. Defendant contends the foreclosure action is a legal nullity because it was commenced against deceased mortgagors who died years earlier, depriving the court of jurisdiction, and that plaintiff’s attempt to substitute heirs cannot cure that defect; he further argues that one decedent died testate (producing a will), requiring estate administration, that plaintiff failed to show an absolute conveyance of interests necessary to bypass substitution, that the statute of limitations expired as against the decedents due to plaintiff’s delay after commencement of the action, and that foreclosure is independently barred as to him because he never executed the loan modification, warranting dismissal, cancellation of the notices of pendency, and an award of costs and attorneys’ fees.

In rely non-arty US Bank argues that the cross-motion lacks merit because the alleged will was never probated and is therefore legally ineffective, rendering the decedent intestate as a matter of law and permitting foreclosure directly against heirs where no deficiency is sought; plaintiff maintains the statute of limitations has not expired because acceleration occurred upon commencement of this action in 2019, well within six years, and in any event limitations defenses are personal and unavailable to Reynolds; plaintiff further argues that Reynolds remains bound by the loan and modification through ratification by years of post-modification payments, that leave to amend must be freely granted absent demonstrable prejudice (which Reynolds failed to show), and that any minor pleading defects are correctable under CPLR 2001 and 2101, requiring denial of the cross-motion and granting of all requested amendment and substitution relief

Discussion

Initially, non-party US Bank's motion is denied.

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria...A party has standing where it has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." *Matter of Eastview Properties, Inc. v Town of Chester Planning Bd.*, 138 AD3d 838, 838 [2d Dept 2016] [internal citations and quotation marks omitted]

"A party generally has standing only to assert claims on behalf of himself or herself...Although there are situations in which representative standing is permitted...one does not, as a general rule, have standing to assert claims on behalf of another" *Cardo v Bd. of Managers, Jefferson Vil. Condo 3*, 67 AD3d 945 [2d Dept 2009] [internal citations and quotation marks omitted] citing *Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006]

Here, the motion is not brought on behalf of plaintiff. Rather US Bank brings the instant motion as the alleged successor in interest to plaintiff. However, US Bank failed to establish that it is in fact the successor in interest to plaintiff.

In support of the motion, plaintiff annexes what is denominated as an "Affidavit of Note Possession" of Denise Sletten ("Ms. Sletten" or "Sletten Affidavit") of Selene Finance LP ("Selene") the alleged servicer and attorney-in-fact for US Bank. No affidavit is provided from plaintiff. However, the Sletten affidavit is insufficient to demonstrate non-party US Bank is the actual successor in interest to plaintiff for two reasons.

First, Ms. Sletten states in her affidavit that "subsequent to the commencement of this action, the above referenced note and mortgage as modified were ultimately transferred and assigned from Plaintiff to US Bank as evidenced by the indorsement affixed to the note and further memorialized by an assignment of mortgage dated July 16, 2024...US Bank is now in and remains in possession of the original note."

However, a review of the note annexed to her affidavit does not contain an endorsement to non-party US Bank, but rather the note appears to be endorsed in blank. While, Ms. Sletten claims based upon a review of records that US Bank is in possession of the subject note, she does not substantiate her contentions or attach any records supporting her claims. Nor does she claim to have personal knowledge of these facts.

"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 asserted...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]

“Here, [Ms. Sletten] failed to identify business records relied upon by [Ms. Sletten] evincing that the plaintiff was in physical possession of the note...” *Deutsche Bank Natl. Trust Co. v Ezeji*, 194 AD3d 909 [2d Dept 2021] see also *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]

While Ms. Sletten attaches several assignments of mortgage from (1) JPMorgan Chase, to plaintiff (2) from plaintiff to MCLP Asset Company, Inc and (3) from MCLP Asset Company, Inc to US Bank, the same are insufficient to demonstrate written assignment of the note.

“While assignment of a promissory note also effectuates assignment of the mortgage...the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it.” *U.S. Bank Nat. Ass’n v Dellarmo*, 94 AD3d 746 [2d Dept 2012][internal citations and quotation marks omitted]; See also *Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2d Dept 2011][“an assignment of the mortgage without assignment of the underlying note or bond is a nullity”]

Second, while Ms. Sletten of Selene attaches a “limited” power of attorney” purportedly appointing Selene as servicer and attorney in fact for non-party US Bank, the same is expressly limited by that which is “required or permitted under the terms of the Servicing Agreement” which has not been proffered. Therefore, the affiant and Selene’s authority has not been established. See e.g. *HSBC Bank USA, N.A. v Betts*, 67 Ad3d 735 [2d Dept 2009]; 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”]

Therefore, US Bank failed to establish it has standing to make this motion or seek any relief. For this reason alone, the motion must be denied. 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.”]

Turning to defendant’s cross-motion. The law is well settled that “[a] party may not commence a legal action or proceeding against a dead person, but must instead name the personal

representative of the decedent's estate.” *Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]. When an action is commenced against a decedent the action is a legal nullity *from inception*. See *Butler v Russo*, 226 AD3d 858 [2d Dept 2024][“It is well established that the dead cannot be sued, and thus, this action was a nullity from its inception”]

It is undisputed that decedent Rudolph and decedent Eglah died prior to commencement of this action. Therefore, the action is dismissed as against decedent Rudolph and decedent Eglah.

Additionally, it is undisputed that defendant did not execute the subject modification agreement which this action seeks to enforce, thus defendant established prima facie that he is not bound by modification agreement. See e.g. *Wilmington Sav. Fund Socy., FSB v Stopanio*, 240 AD3d 939 [2d Dept 2025][“The consolidated note and the consolidated mortgage were executed by both of the borrowers, but the loan modification agreement, purporting to modify the borrowers' obligations under the consolidated note and the consolidated mortgage, was executed approximately 10 years later by Stopanio only. The plaintiff offered no explanation for the absence of Conway's signature on the loan modification agreement despite her having been named a borrower thereunder. Based on the foregoing, the Supreme Court was correct in determining that the plaintiff's supporting affidavit failed to set forth facts sufficient to satisfy its burden of establishing a viable cause of action to foreclose the consolidated mortgage.”]; See also discussion *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021][finding complaint that did not reference the correct loan documents (i.e. modified vs. unmodified mortgage) defective which was not “merely technical or *de minimis*”]

In opposition, plaintiff failed to raise an issue of fact in as much as plaintiff failed to establish that the subsequent payments ratified the modification agreement in as much as plaintiff failed to prove with admissible evidence that the payments were made by defendant. See *Bank of New York Mellon v Bissessar*, 172 AD3d 983 [2d Dept 2019][“The plaintiff failed to demonstrate that a “screenshot” it submitted in opposition to the defendant's motion, purportedly showing that the defendant made a payment on the mortgage loan...was admissible under the business records exception to the hearsay rule...In any event, the information contained in the screenshot was insufficient to raise a question of fact as to whether, as the plaintiff contends...The screenshot was not evidence that a payment was made and did not show by whom the alleged payment was made and, thus, did not evidence that it was made by the defendant.”] See also *Big Chief Lewis, Inc. v Stim*, 99 AD2d 501 [2d Dept 1984][“Any payments made by a third party in this case could not, as a matter of law, have revived defendants' obligation under the mortgage”]; *U.S. Bank Nat. Ass'n v Martin*, 144 AD3d 891, 893 [2d Dept 2016][“Moreover, the payment history did not show by whom the payment was made, and thus, did not prove that it was made by the debtor”]

Therefore, defendant's cross-motion is granted.

Here, given the dismissal of the action as against an owner of the property who is an indispensable party, the complaint is dismissed in its entirety. See *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept 2018][“Chitra, as a fee owner of the property which was subject to the mortgage, was a necessary and indispensable party to the action...Once the complaint was dismissed against Chitra, the plaintiff could not continue the action against the other defendants”]; *Newton v Evers*, 215 NY 198 (1915)[“Julia E. Ferguson was the owner of the equity of redemption under her deed...She was a necessary party to any action brought to foreclose that mortgage, and

without her presence the action could not proceed.”]; see also *MTGLQ Inv'rs, L.P. v Shay*, 190 AD3d 527 [1st Dept 2021][“Dismissal of the action as against Eaton requires discontinuation of the action as against Meldal as well”]; *Green Tree Servicing, LLC v Jean*, 2025 NY Slip Op 06997 [2d Dept Dec. 17, 2025][“As a fee owner of the property and mortgagor, [defendant] was an indispensable party to this foreclosure action...The absence of an indispensable party mandates dismissal of the action, and the plaintiff cannot maintain the action as against the other defendants...Therefore, contrary to the plaintiff’s contention, once the complaint was dismissed insofar as asserted against [defendant], the plaintiff could not continue the action against the remaining defendants.”][internal citations omitted]

Lastly, given the dismissal of the complaint, the notices of pendency filed herein must also be cancelled. See CPLR 6514; See also generally, *Nationstar Mtge., LLC v Davis*, 240 AD3d 790 [2d Dept 2025]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]

Accordingly, it is hereby

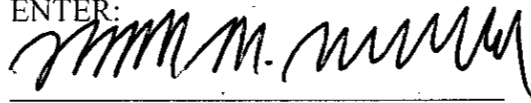
ORDERED, US Bank’s motion is denied in its entirety; and it is further

ORDERED AND ADJUDGED that defendant’s cross-motion is GRANTED and the action is DISMISSED; and it is further

ORDERED, that the Clerk is directed to cancel Notices of Pendency filed on February 15, 2019 and April 7, 2023.

This constitutes the decision, order and judgment of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

KINGS COUNTY CLERK'S OFFICE

JAN 15 2026

FILED