MCLP Asset Co., Inc. v Callender
2026 NY Slip Op 30325(U)
January 13, 2026
Supreme Court, Kings County
Docket Number: Index No. 513453/2023
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 13th of January 2026

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

MCLP ASSET COMPANY, INC.,

Plaintiff,

-against-

WENDY CALLENDER; BEVERLY BECKLES; DANEYA M. BURROUGHS; CRIMINAL COURT OF THE CITY OF NEW YORK (KINGS); NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE #1" through "JOHN DOE #10" inclusive, the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the Complaint,

Defendant.

Index No. 513453/2023

Decision and Order
(Motion Seq. 2)

Papers	Numbered
Notice of Motion	NYSCEF Doc. 82-109
Opposition Papers	NYSCEF Doc. 111
Reply Papers	NYSCEF Doc. 113

Upon the foregoing papers, the motion(s) is/are determined in accordance with this Decision and Order as follows:

Relevant Procedural and Factual History

This action was commenced on April 5, 2023, seeking to foreclose a mortgage (the "mortgage") executed by defendant Wendy Callender (the "borrower") which encumbers the property known as 1362 East 86th Street, Brooklyn, NY 11236 (the "property"). The property was purportedly transferred to defendant Daneya M. Burroughs (the "defendant") prior to commencement of this action.

On December 8, 2023, defendant joined issue with the filing of an answer that asserted several affirmative defenses.

On November 25, 2024, the Court granted defendant's motion to amend her answer to

asserted additional affirmative defenses.

On December 11, 2024, defendant filed her amended answer asserting various affirmative defenses including that plaintiff lacks standing.

Plaintiff now moves for summary judgment, to strike defendant's answer, to appoint a referee to compute, for a default judgment against the non-answering defendants and to substitute non-party U.S. Bank Trust National Association, not in its individual capacity but solely as owner trustee for CF 2 Acquisition Trust ("US Bank") as party plaintiff. In support of the motion, plaintiff annexes the affidavit of Debbie Benzley ("Ms. Benzley" or "Benzley Affidavit") of Selene Finance LP ("Selene") the alleged attorney in fact and servicer for US Bank and the affidavit of Robert Ortega ("Mr. Ortega" or "Ortega Affidavit") of NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") the alleged attorney in fact and servicer for plaintiff.

Plaintiff argues it has established prima facie entitlement to summary judgment by producing the note, mortgage, and proof of default, that summary judgment is warranted and defendant's answer fails to raise an issue of fact. Plaintiff further contends it had standing at commencement because a copy of the note endorsed in blank was annexed to the complaint and the Ortega Affidavit established plaintiff's possession of note at commencement and the Benzley Affidavit established the transfer of the note to US Bank and borrower's default under the terms of the mortgage.

Defendant opposes the motion arguing that plaintiff failed to establish prima facie entitlement to summary judgment and substitution, asserting that no admissible evidence demonstrates possession or transfer of the note with allonge firmly affixed thereto and that the affidavits and testimony are inadmissible hearsay, lack sufficient foundation and are insufficient to demonstrate a default under the mortgage.

In reply to the motion, plaintiff contends that standing was conclusively established by annexing the note endorsed in blank to the complaint, that the affidavits confirm a default under the terms of the note and mortgage and possession of the note with firm affixation of allonges. Plaintiff argues substitution is proper based on a recorded assignment and delivery of the original note and that defendant's opposition raises only speculative or conclusory claims insufficient to defeat summary judgment.

Discussion

"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]

However, "[w]here, 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]

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]

However, "[w]hile 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"]

It is undisputed that the note attached to the complaint contains an endorsement in blank on an allonge. However, the complaint does not allege the existence of the allonge let alone allege that it was "so firmly affixed thereto as to become a part thereof."

Contrary to plaintiff's contention, attaching the note to the complaint alone does not establish the allonge was firmly affixed to the note at the time the action was commenced. See e.g. *Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022] ["Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202 (2)"];

Therefore, to demonstrate standing plaintiff was required to demonstrate that subject allonges were "so firmly affixed thereto as to become a part thereof."

In support of the contention that the allonges were firmly affixed to the note at the time the action was commenced, Plaintiff relies on the Ortega Affidavit. Mr. Ortega states that plaintiff "through its Custodian U.S. Bank was in possession of the original Note with the firmly affixed allonge at the time this action was commenced. More specifically, MCLP through its Custodian U.S. Bank came into possession of the original Note on December 8, 2018. Attached hereto as Exhibit 4 is a collateral screenshot of the entry evidencing receipt of the original note as maintained in Shellpoint's electronic record keeping system which is created and relied upon in the regular course of business at or near the time of the event."

First, while Mr. Ortega appears to claim plaintiff, through its custodian US Bank was in possession of the note with an allonge that is firmly affixed thereto and appears to claim knowledge of this fact from the attached records, he does not explain how a review of Shellpoint's records establishes that ***plaintiff*** was in possession of the note with the allonge firmly affixed thereto. Second, a review of the records attached to the Ortega Affidavit do not demonstrate the allonge was firmly affixed to the note. Indeed, the record makes no reference to the allonge. Third, the record is contradictory in as much as it appears to reflect Shellpoint is in possession of the note while also stating that US Bank was in possession of the note. Fourth, it is not clear where the information in the record came from, it appears to reflect that the information was allegedly provided by US Bank. However, no evidence is provided that US Bank was actually plaintiff's custodian and no affidavit is provided by US Bank. Lastly, it appears the information was entered on December 13, 2023, from information provided on March 6, 2023. No explanation is provided for the significant gap between the two dates.

"There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon." *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]

"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]["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]

Indeed, "[w]ithout business records proving the matter asserted, [plaintiff]'s "unsubstantiated and conclusory" statement, by itself, [is] insufficient..." *Wilmington Sav. Fund Socy., FSB v Kutch*, 202 AD3d 1030, 1033 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Bonilla*, 227 AD3d 788, 790 [2d Dept 2024]["Without business records proving the matter asserted, Ranaldi's "unsubstantiated and conclusory" statement, by itself, was insufficient..."]

Accordingly, Mr. Ortega's unsubstantiated, conclusory and hearsay assertions are insufficient to demonstrate plaintiff had standing at the time the action was commenced. See *Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022] ["Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202 (2)"]; See also *LNV Corp. v Almberg*, 194 AD3d 703, 704 [2d Dept 2021]["Here...the plaintiff failed, prima facie, to establish its standing to commence this action. The copy of the note submitted in support of the plaintiff's motion contained two additional pages, the first entitled "Allonge to Note" and the second entitled "Note Allonge." However, as the defendants correctly contend, the plaintiff did not submit any evidence to indicate that the purported allonges were so firmly affixed to the note so as to become a part thereof..."]; See also

Therefore, plaintiff'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"]; *Gregg v Key Food Supermarket*, 50 AD3d 1093 [2d Dept 2008]["Moreover, when the defendant fails to meets its burden, the motion must be denied without regard to the sufficiency of the plaintiff's opposition papers"]

Moreover, similar deficiencies plague the Benzley Affidavit which fails to demonstrate US Bank is plaintiff's successor in interest. While Ms. Benzley avers that US Bank's custodian came into possession of the note on March 28, 2024, it is not clear who US Bank's custodian is. The record appears to reflect the custodian as being Wells Fargo but the location of the note being by Selene. More importantly, the record does not reflect the allonge was firmly affixed to the note and Ms. Benzley does not allege the allonge is firmly affixed to the note, there is no evidence that Wells Fargo is US Bank's custodian and no affidavit is provided by Wells Fargo.

Therefore, US Bank failed to establish it is a holder of the note and has standing to maintain this action. *See 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.

The parties' remaining contentions need not be reached in light of the Court's determinations.

Accordingly, it is hereby

ORDERED, that plaintiff's motion 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 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