

**Wilmington Sav. Fund Socy., FSB v Weiner**

2026 NY Slip Op 30374(U)

February 2, 2026

Supreme Court, New York County

Docket Number: Index No. 850626/2023

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

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INDEX NO. 850626/2023

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A
CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS
TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION
TRUST,

MOTION DATE

MOTION SEQ. NO. 003

Plaintiff,

- v -

PETER N. WEINER, JOSHUA L WEINER AS HEIR TOTHE
ESTATE OF SUSAN N. WEINER AKA SUSAN WEINER IF
LIVING AND IF HE/SHE BE DEAD, ANY AND ALL
PERSONS UNKNOWN TO PLAINTIFF, et al.

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98,
99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119,
120, 121, 122, 124, 125, 126, 127, 128, 129

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a mortgage encumbering a parcel of residential real property
located at 35 Bethune Street, Apt. 1B, a/k/a 33/35 Bethune Street, Unit 1B, New York, New York. The
mortgage, dated September 5, 2007, was given by Defendants Peter Weiner and Susan N. Weiner,
presently deceased, to non-party Mortgage Electronic Registration Systems, Inc. ("MERS") as a
nominee for Countrywide Bank, FSB ("Countrywide"). The mortgage secures an indebtedness with an
original principal amount of 1,750,000.00 memorialized by a note the same date as the mortgage.
Executed with the note and mortgage was a consolidation, extension and modification agreement
("CEMA") that grouped certain existing prior mortgages on the premises. The Weiners and non-party
Caliber Home Loans, Inc. ("Caliber") executed a modification agreement, dated June 1, 2017, wherein
the Weiners acknowledged the indebtedness and reaffirmed their promise to repay that amount.

Plaintiff Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, Not Individually but as
Trustee for Pretium Mortgage Acquisition Trust ("Wilmington") commenced this action on November
9, 2023, alleging the Weiners defaulted in making payments under the note. Defendant Weiner
individually and as heir to the estate of Susan N. Weiner ("Weiner") moved, pre-answer, to dismiss
Plaintiff's complaint based upon supposed non-compliance with CPLR §322[a]. That motion was
denied by order dated May 10, 2024, and Plaintiff filed an amended complaint naming Weiner as a
Defendant in his individual and representative capacities. Defendant Weiner answered, pled seven
affirmative defenses, including standing and noncompliance with RPAPL §§1304 and 1306, as well as a
counterclaim. Now, Plaintiff moves for summary judgment against the Weiners, striking the answer and

affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute, and to amend the caption. Defendant Weiner opposes the motion.

In moving for summary judgment, a plaintiff is required to establish *prima facie* entitlement to judgment as a matter of law through proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see eg U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Based upon Defendants' affirmative defenses, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]), as well as its strict compliance with RPAPL §§ 1304 and 1306 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No specific business records must be proffered, provided the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

In support of the motion, Movant relies on the affidavit of Amanda Harvey ("Harvey"), a Senior Corporate Appearance Representative of Selene Finance ("Selene"), the alleged servicer and attorney-in-fact for US Bank Trust National Association, not in its individual capacity but solely as Owner Trustee for RCF2 Acquisition Trust ("US Bank"), the purported assignee of Wilmington. Since Selene did not bring the action as servicer for Wilmington, nor is it presently being prosecuted as same, for Harvey's affidavit to be sufficient to support a motion for summary judgment, Movant was required to demonstrate Selene's authority to act on behalf US Bank (*see eg U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]). Moreover, a precursor to this proof is a showing that US Bank is presently assignee of the note (*see eg 21st Mtge. Corp. v Adames*, 153 AD3d 474, 476-477 [2d Dept 2017]).

It is established that "[u]pon any transfer of interest, the action may be continued by or against the original parties" (CPLR §1018; *see also Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). Harvey avers that US Bank was assigned the mortgage by Wilmington via a document dated December 2, 2024. However, contrary to Harvey's claim, a copy of that assignment was not annexed to the affidavit. Also, absent is any explanation or evidence of US Bank's relationship to the note or its present holder. As such, no proof that US Bank, much less Selene, is authorized to continue prosecution of the action in Wilmington's name was proffered (*cf. U.S. Bank, N.A. v Duran*, 174 AD3d 768, 769 [2d Dept 2019]; *Central Fed. Sav., F.S.B v 405 West 45th St., Inc.*, 242 AD2d 512 [1st Dept 1997]).

Even if US Bank's authority to act via Selene was demonstrated, Harvey's affidavit and the supporting documents failed to establish Wilmington had standing at the inception of this action. Standing in a foreclosure action is evaluated when an action is commenced (*see eg IS REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, 234 AD3d 401 [1st Dept 2025]), and it may not be cured retroactively (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]). When raised as a defense, a plaintiff must demonstrate its standing in one, or more, of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status through physical possession of the note prior to

commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario, supra; Wells Fargo Bank, N.A. v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]).

Here, Movant was obligated to show Wilmington had standing when this action was commenced. It is undisputed that Wilmington was not the original lender nor in a direct contractual relationship between through the modification agreement (*cf. Wells Fargo Bank, N.A. v Graffioli*, 167 AD3d 969, 971 [2d Dept 2018]). To the extent Movant claims Wilmington was the holder of the note, “[h]older status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff” (*Wells Fargo Bank, NA v. Ostiguy, supra* at 1376 [citations omitted]). The indorsement must be made either on the face of the note or on an allonge “so firmly affixed thereto as to become a part thereof” (UCC §3-202[2]). “The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement” (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

Plaintiff submitted a copy of the note which appears to contain three indorsements. On the face of the note is an undated special indorsement from Countrywide, the original lender, to non-party “LSF9 Master Participation Trust”. The other indorsements’ also undated, are contained on allonges on separate pages. One allonge contains a special indorsement from “LSFP MASTER PARTICIPATION TRUST, BY ITS TRUSTEE U.S. BANK TRUST, N.A., THROUGH CALIBER HOME LOANS, INC., AS ATTORNEY IN FACT FOR THE TRUSTEE” to “U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST”. The other allonge has in indorsement in blank executed by “U.S. BANK TRUST, N.A., AS TRUSTEE FOR IEF9 MASTER PARTICIPATION TRUST, BY CALIBER HOME LOANS, INC., AS ITS ATTORNEY IN FACT”.

Regarding possession of the note, Harvey states as follows:

The Loan Records confirm that at the time this action was commenced, Wells Fargo Bank (“Wells Fargo”), located at 751 Kasota Avenue SE, Minneapolis, MN55414 was Plaintiff’s document custodian with respect to the Loan. As the document custodian, Wells Fargo kept and maintained possession of the original Note on behalf of Plaintiff, solely as its agent and bailee. Wells Fargo, as document custodian, took possession of the original Note on behalf of the named plaintiff Wilmington on April 2, 2019. A true and correct screenshot of Selene’s business record reflecting that Wells Fargo was the document custodian for the Loan, in redacted form, and the date of possession of the original Note (the date for which appears in the last column of the screenshot) is annexed hereto as Exhibit G.

None of the indorsements are to Wilmington, as trustee, its beneficiary Pretium Mortgage Acquisition Trust, or Wells Fargo. The allonges do not reveal any indicia of firm annexation upon visual inspection and Harvey failed to address this issue entirely (*see 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, 234 AD3d 401, 402-403 [1<sup>st</sup> Dept 2025]; *938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1<sup>st</sup> Dept 2023]; *cf. U.S. Bank N.A. v Mave Hotel Invs. LLC*, 231 AD3d 607 [1<sup>st</sup> Dept 2024]). Confusing this issue further are two written

assignments of the mortgage submitted by Harvey. One assignment, dated June 17, 2019, claims to transfer the mortgage "together with the certain note(s) described therein" from "CITIBANK, N.A., AS TRUSTEE FOR CMLTI ASSET TRUST" to Plaintiff, Wilmington. The other, dated January 30, 2020, states the mortgage together with the note are transferred from LSF9 MASTER PARTICIPATION TRUST to "CITIBANK, N.A., AS TRUSTEE FOR CMLTI ASSET TRUST". A written assignment of a mortgage is often a nullity in this context (see eg U.S. Bank N.A. v Dellarmo, 94 AD3d 746, 748 [2d Dept 2012]), unless, as here, it contains language sufficient to transmit the note (see eg Broome Lender LLC v Empire Broome LLC, 220 AD3d 611 [1st Dept 2023]; Chase Home Fin., LLC v Miciotta, 101 AD3d 1307 [3d Dept 2012]; GRP Loan, LLC v Taylor, 95 AD3d 1172 [2d Dept 2012]). No explanation of Citibank's role herein is given by Harvey other than to recount the contents of the assignments. Further, the assignments are ostensibly chronologically reversed, with Citibank transferring the note and mortgage some seven months before it received same.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment and an order of reference is denied in its entirety, and it is

ORDERED that this matter is scheduled for a preliminary conference on **March 31, 2026 @ 10:00 am** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street.

2/2/2026  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

FRANCIS A. KAHN, III, J.S.C.  
HON. FRANCIS A. KAHN III J.S.C.