

<b>U.S. Bank Trust N.A. v Francis</b>
2026 NY Slip Op 30439(U)
January 30, 2026
Supreme Court, New York County
Docket Number: Index No. 850135/2023
Judge: Francis A. Kahn III
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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. 850135/2023

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF LSF9 MASTER PARTICIPATION TRUST,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

ALSTON FRANCIS, THE UNKNOWN HEIRS OF THE ESTATE OF ALSTON FRANCIS, JPMORGAN CHASE BANK, N.A., NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA O/B/O INTERNAL REVENUE SERVICE, JOHN DOE (SAID NAME BEING FICTITIOUS TO REPRESENT UNKNOWN TENANTS/OCCUPANTS OF THE SUBJECT PROPERTY AND ANY OTHER PARTY OR ENTITY OF ANY KIND, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PROPERTY),

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for

JUDGMENT - SUMMARY

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

This is an action to foreclose on a mortgage encumbering a parcel of residential real property located at 10 East 127th Street, New York, New York. The mortgage, dated June 17, 2003, was given by non-party Jeanette Frucci a/k/a Jeanette Angulo a/k/a ("Frucci"), now deceased, and Defendant Alston Francis ("Francis") to non-party Wells Fargo Home Mortgage ("Wells Fargo"). The mortgage secures a loan with an original principal amount of \$571,000.00, memorialized by a note of the same date as the mortgage. Defendant Francis and non-party Caliber Home Loans, Inc. ("Caliber"), the loan servicer at that time, executed a modification agreement, dated February 3, 2016, wherein Francis acknowledged the indebtedness and reaffirmed his promise to repay that amount.

Plaintiff commenced this action and pled that Defendant Francis defaulted in repayment on or about May 1, 2017. Francis answered and pled sixty-eight affirmative defenses, including lack of standing, and seven counterclaims against Plaintiff. Now, Plaintiff moves for summary judgment against Francis, to strike Francis's answer and affirmative defenses, for a default judgment against the non-appearing Defendants, for an order of reference, and to amend the caption. Defendant Francis opposes the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law through proof of the mortgage, the note, and evidence of Francis's default in repayment (see *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]). 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]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (see *eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]). In support of a motion for summary judgment on a cause of action for foreclosure, 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]).

Plaintiff's motion was supported with an affirmation from Lisa Benson ("Benson"), an Assistant Secretary of Fay Servicing, LLC ("Fay"), the servicer and attorney-in-fact for Plaintiff. Benson avers that her submission was based on a review of the records of Plaintiff and Fay, as well as her knowledge of Fay's record keeping practices. Benson's affidavit laid a proper foundation for the admission of the records of Plaintiff and Fay into evidence under CPLR §4518 by sufficiently showing that the records relied upon "a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record", and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 205 [2d Dept 2019]; see also *Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of prior servicers were also admissible in that Benson established that those records were received from the makers and incorporated into the records that Fay kept and that it routinely relied upon such documents in its business (see *eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). The records referenced by Benson were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]) and Fay's authority to act on Plaintiff's behalf was established with submission of a power of attorney, dated October 26, 2022 (see *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 785 [2d Dept 2017]).

Proof of the loan documents, including the note and mortgage, was established with the affirmation of Benson and the documents (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). A defendant's default "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Bennett's affidavit and the loan history demonstrated Wai's default in repayment under the note (see *eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; see also *Bank of NY v Knowles, supra*; *Fortress Credit Corp. v Hudson Yards, LLC, supra*). Further, the indebtedness and default were also established based on the acknowledgements in the modification agreement (see *Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

Standing in a foreclosure action is evaluated when an action is commenced, not thereafter (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 the issue of standing is raised as a defense, a plaintiff must demonstrate it 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, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]).

Here, there is no dispute that Plaintiff was not the original lender when the note and mortgage were given. To demonstrate holder status, Plaintiff submitted a copy of the note attached to the complaint that has an indorsement in blank on a separate page, but not an allonge. “Holder 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]).

Here, the indorsement is the only marking on the page, but “it cannot be ascertained from the copy of the note provided by the plaintiff whether the separate page that bears the endorsement in blank was stamped on the back of the note ... or on an allonge, and if on an allonge, ‘whether the allonge was so firmly affixed ... as to become a part thereof,’ as required under UCC 3-202(2)” (*Bayview Loan Servicing, LLC v Charleston*, 175 AD3d 1229 [2d Dept 2019]). Further, Benson does not offer any description of the location of the endorsement (*see IS REO Opportunity 1, LLC v Harlem Premier Residence, LLC, supra; HSBC Bank, USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]; *cf. U.S. Bank N.A. v Mave Hotel Invs. LLC*, 231 AD3d 607 [1<sup>st</sup> Dept 2024]). As such, there is insufficient indicia of firm annexation of the indorsement in blank to the note.

To the extent Plaintiff relies on a series of written assignments of the mortgage, when relying on same the validity of each assignment in the chain is obligatory to prove standing (*see eg GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]). Moreover, 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 that mortgage assignment includes transfer of the note, or similar language (eg. loan, indebtedness, the moneys due and owing, etc.), which can be sufficient to transmit the note (*see eg Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1<sup>st</sup> Dept 2023]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *GRP Loan, LLC v Taylor, supra*). Here, neither assignment contains language indicating transfer of the note or indebtedness. As a result, Plaintiff failed to establish, *prima facie*, that it had standing when this action was commenced.

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted without opposition (*see CPLR §3215; SRMOF II 2012-I Trust v. Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff’s motion to amend the caption is granted without opposition (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment and an order of reference are denied, and it is

ORDERED that a default judgment is entered against the non-appearing parties: New York City Parking Violations Bureau; New York City Environmental Control Board; Mia Dejus; Jessica Frucci; Martin Scott and Cole Winterstein; and it is

ORDERED that the caption of this action is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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U.S. BANK TRUST NATIONAL ASSOCIATION, NOT  
IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS  
TRUSTEE OF LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

-against-

ALSTON FRANCIS A/K/A ALSTON S. FRANCIS;  
JPMORGAN CASE BANK, N.A.; NEW YORK CITY  
PARKING VIOLATIONS BUREAU; NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD; NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE;  
UNITED STATES OF AMERICA O/B/O INTERNAL  
REVENUE SERVICE; MIA DEJUS; JESSICA FRUCCI;  
MARTIN SCOTT; COLE WINTERSTEIN,

Defendants.  
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and it is

ORDERED that this matter is set down for a status conference on **April 8, 2026, at 10:20 am** via Microsoft Teams.

1/30/2026  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

*Francis A. Kahn III*  
FRANCIS KAHN, III, A.J.S.C.  
**HON. FRANCIS A. KAHN III**  
J.S.C.