U.S. Bank N.A. v Wai
2026 NY Slip Op 30473(U)
January 29, 2026
Supreme Court, New York County
Docket Number: Index No. 850187/2024
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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U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS OWNER TRUSTEE OF THE NEW RESIDENTIAL MORTGAGE LOAN TRUST 2021-NQM1R,

Plaintiff,

- v -

HENRY WAI, THE BOARD OF MANAGERS OF 385 FIRST AVENUE CONDOMINIUM, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOE #1 THROUGH JOHN DOE #12, THE LAST TWELVE NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE

Defendant.

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INDEX NO. 850187/2024

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for ORDER OF REFERENCE/REFERENCE TO COMPUTE.

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

This is an action to foreclose on a residential mortgage encumbering a parcel of real property located at 385 First Avenue, Unit 17F, New York, New York. The mortgage, dated May 10, 2018, was given by Defendant Henry Wai ("Wai"), to nonparty Mortgage Electronic Registration Systems, Inc. ("MERS") as a nominee for New Penn Financial, LLC ("New Penn") and secures an indebtedness with an original principal amount of an original principal amount of $1,632,000.00 evidenced by a note the same date as the mortgage. Plaintiff and Wai executed a modification agreement, dated August 17, 2023, wherein Wai acknowledged the indebtedness and reaffirmed his promise to repay that amount.

Plaintiff commenced this action and pled Wai defaulted in repayment on or about October 1, 2023, and on all subsequent installment payments. Wai answered and pled forty-four affirmative defenses, including lack of standing and noncompliance with RPAPL §§ 1303, 1304, and 1306, as well las two counterclaims. Now, Plaintiff moves for summary judgment against Wai, to strike his answer, dismiss his affirmative defenses and counterclaims, for a default judgment against the non-answering Defendants, to appoint a referee, and to amend the caption. Wai 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 §§ 1303, 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]).

Plaintiff's motion was supported with an affirmation from Lucas Bennett ("Bennett"), Document Verification Specialist for NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint"), the mortgage servicer and attorney-in-fact for Plaintiff. Bennett avers that his submission was based on personal knowledge, a review of the records of Shellpoint, and his knowledge of Shellpoint's record keeping practices. Bennett's affirmation laid a proper foundation for the admission of the records 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 upon 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 2020]). Shellpoint's authority to act on Plaintiff's behalf was established with submission of a power of attorney, effective March 5, 2021 (*see U.S. Bank N.A. v. Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Ban Natl. Trust Co. v. Silverman*, 178 AD3d 898 [2d Dept 2019]; *U.S. Bank N.A. v. Louis*, 148 AD3d 785 [2d Dept 2017]). The records of prior servicers, like MERS and Penn, were also admissible since Bennett established that those records were received from the makers and incorporated into the records Shellpoint 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 Bennett were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]) and Shellpoint's authority to act on Plaintiff's behalf was established with submission of a power of attorney dated April 1, 2021 as well as a copy of the servicing agreement (*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 758 [2d Dept 2017]).

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 1S 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] 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 by 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, the plaintiff established that the modification agreement created a direct contractual relationship between the plaintiff and the defendants relating specifically to the subject promissory note and mortgage. By entering into the modification agreement and making monthly installment payments thereunder, [Wai] expressly acknowledged the plaintiff's status as the holder of the subject note as of [September 2023]—well before the commencement of this action" (*Wells Fargo Bank, N.A. v Graffioli*, 167 AD3d 969, 971 [2d Dept 2018]; *see also IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637 [1st Dept 2011]).

Accordingly, Plaintiff established its *prima facie* entitlement to summary judgment with proof of the mortgage, note, and evidence of mortgagor's default in repayment and its standing. This shifted the burden to Defendants to raise a bona fide issue of fact as to one of their affirmative defenses to foreclosure (*see Bernstein v Dubrovsky,* 169 AD3d 692 [1st Dept 2019]).

In opposition to these issues, Defendant Wai only proffered an argument concerning Plaintiff's standing. Given his recognition of Plaintiff as the holder Wai "cannot now be heard to object to the ownership when they embraced it when it suited them" (*IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, *supra*; *see RPI Professional Alternatives, Inc. v Citigroup Global Mkts. Inc.*, 61 AD3d 618, 619 [1st Dept 2009]). Concerning the facts established note, mortgage and default, since none of the salient facts on these issues were contradicted by Wai, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]).

With respect to compliance with RPAPL §1303, that section "requires the foreclosing party to deliver, along with the summons and complaint, a notice titled 'Help for Homeowners in Foreclosure'" (*PNC Bank, N.A. v Mone*, 231 AD3d 977, 978 [2d Dept 2024]). The notice must include "specific language relating to the summons and complaint, sources of information and assistance, rights and obligations, and foreclosure rescue scams" (*id.*, at 979). The statute also requires that "the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice should be in bold, 20-point type" (*US Bank N.A. v Bamba*, 189 AD3d 1116, 1116-1117 [2d Dept 2020]). "Proper service of an RPAPL 1303 notice is a condition precedent to commencing a foreclosure action, and the 'foreclosing party has the burden of showing compliance therewith'" (*PNC Bank, N.A. v Mone*, *supra* at 979; *quoting OneWest Bank, FSB v Cook*, 204 AD3d 1025, 1026 [2d Dept 2022]). In this case, Plaintiff submitted an affidavit of mailing from Gina Bisetti ("Bisetti"), wherein she averred that "on June 27th, 2024, deponent sent a copy of the RPAPL Section 1303 Tenant Foreclosure Notice which was printed on colored paper … and the notice was in bold fourteen-point type, with the title of the notice in bold twenty-point type pursuant to RPAPL Section 1303 mailed to OCCUPANT." Contrary to Wai's contention, this is *prima facie* evidence of

compliance with RPAPL §1303 (*see HSBC Bank USA, N.A. v Ozcan,* 154 AD3d 822, 828 [2d Dept 2017]).

In response, Wai's argument that a copy of the RPAPL §1303 notice must be submitted to prove the contents of same were statutorily compliant is misplaced. Defendant misconstrues the holding of *Bamba*, supra, which stands for the proposition that proof of the contents of a RPAPL §1304 notice is established either with a copy of the notice or a process server's averments that the notice served complied with the content notice requirements of RPAPL 1303, including the typeface (*id. at* 1117; *see also HSBC Bank USA, N.A. v Ozcan,* supra). Here, "[w]hile the plaintiff failed to include a copy of the RPAPL 1303 notice, the process server attested that the notice served complied with all of the requirements of RPAPL 1303. This was sufficient to establish, prima facie, that the plaintiff provided notice in compliance with RPAPL 1303" (*Tri-State III, LLC v Litkowski*, 239 AD3d 911, 914 [2d Dept 2025]). Wai's assertion that the RPAPL §1303 notice he received was not in proper form is insufficient raise an issue of fact as this claim is conclusory and entirely uncorroborated.

Plaintiff was also required to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). While RPAPL §1304 does not specify the proof necessary to demonstrate compliance therewith, the Court of Appeals "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing . . . or . . . by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). "In other words, there are two methods by which a plaintiff can demonstrate the requisite mailings" (*U.S. Bank N.A. v Romano*, 231 AD3d 1079, 1080 [2d Dept 2024]). Proof of actual mailing may be shown with a contemporaneous affidavit of mailing or other admissible evidence, including loan service documentation or postal records which evidence the required mailings (*see eg U.S. Bank N.A. v Romano*, supra at 1083; *US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]). Alternatively, a plaintiff my proffer evidence of a satisfactory office practice can raise a rebuttable presumption that the required notice was sent and received by the addressee (*Cit Bank N.A. v Schiffman*, supra).

As to the substance of the RPAPL §1304 notice, Wai's assertion concerning lack of proof supporting the requisite fourteen-point typeface fails since a copy of the notice was provided which facially reveals the notice contains the requisite font size (*cf. Tuthill Fin., a Ltd. Partnership v Candlin*, 129 AD3d 1375 [3d Dept 2015]). Regarding the mailing of these notices, Plaintiff submitted an affidavit from Joshua Stolowitz ("Stolowitz"), a Document Verification Specialist employed by Shellpoint. Stolowitz attested to personal knowledge of Shellpoint's standard mailing procedure, as well as that of Covius Services, LLC ("Covius"), a servicer engaged to mail notices to Shellpoint's borrowers. Stolowitz's affidavit and documentation, like the "letter log", sufficiently demonstrated that actual mailing of a 90-day notice occurred (*see Wilmington Sav. Fund Socy., FSB v. Stein,* 240 AD3d 830, 832 [2d Dept 2025]; *Homebridge Fin. Servs., Inc. v Mauras*, 201 AD3d 890, 891-892 [2d Dept 2022]; *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757, 760 [2d Dept 2021]). This is true irrespective of Shellpoint's use of a third-party to mail the notice (*see Nationstar Mtge., LLC v Paganini*, 191 AD3d 790, 794 [2d Dept 2021]). Similarly, Stolowitz explained the office practices of Shellpoint and Covius regarding the mailing of a RPAPL §1304 notice in adequate detail as to raise the presumption of proper mailing of same (*see eg Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]).

Nevertheless, Stolowitz failed to attest, even in any general way, "that the notice was sent in that the 90-day notice was mailed to the defendant in a separate envelope from any other mailing or notice, as required by RPAPL 1304(2)" (*Citibank, N.A. v Herman*, 215 AD3d 626, 628 [2d Dept 2023]; *see also Deutsche Bank Natl. Trust Co. v Bonal*, 205 AD3d 884 [2d Dept 2022]). As such, Plaintiff failed to demonstrate strict compliance with RPAPL §1304.

Turning to RPAPL §1306, compliance therewith is a condition precedent to the commencement of a foreclosure action (*see eg Hudson City Sav. Bank v Seminario*, 149 AD3d 706, 707 [2d Dept 2017]). That section states "that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1), every lender or assignee 'shall file' certain information with the superintendent of financial services, including 'at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent to ascertain the type of loan at issue'" (*HSBC Bank USA, N.A. v Bermudez, supra*; *quoting* RPAPL §§ 1306[1][2]). Here, the plaintiff met its burden by submitting proof of filing such a statement (*see eg U.S. Bank Trust, N.A. v. Chiramannil,* 205 A.D.3d 966, 968 [2d Dept 2022]; *Wells Fargo Fin. Credit Servs. N.Y., Inc. v Mammen*, 191 AD3d 737, 739 [2d Dept 2021]).

In opposition, that the Wai asserts the RPAPL §1306 notice filed contains incorrect information. To wit, he posits the statement the loan was not modified as well as an incorrect borrower phone number render the notice void. The "failure to indicate that the loan was modified does not render the filing insufficient to satisfy the requirements of RPAPL 1306" (*U.S. Bank N.A. v Adams*, 202 AD3d 867, 870 [2d Dept 2022]). Wai's contention "the [telephone] number is fictitious and was contrived simply to populate a field in the § 1306 filing" also fails to raise an issue of fact. The purported corroborating evidence of this claim, Wai's phone bill, is unauthenticated and heavily redacted. The cases cited by Wai in this regard are not binding on this Court and, in any event, distinguishable.

As to the branch of Plaintiff's motion to dismiss Wai's affirmative defenses and counterclaims, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory, or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v. Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]). Further, to the extent that legal arguments are not proffered in support of any affirmative defense, those defenses are abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A. v Perez*, 41 AD3d 590 [2d Dept 2007]). Here, Wai proffers arguments only for the first, fourth and thirty-ninth affirmative defenses relating to compliance with RPAPL §§1303, 1304 and 1306. As such, each of the remaining affirmative defenses were abandoned and are dismissed

Defendant's cross-motion fails to demonstrate, as a matter of law, that Plaintiff failed to abide by RPAPL §§1303, 1304 and 1306. At most, Defendant Wai demonstrates gaps in Plaintiff's proof as to the 90-day pre-foreclosure notice which is not sufficient to support dismissal (*see eg* Deutsche Bank Natl. Trust Co. v Starr, 173 AD3d 836, 838 [2d Dept 2019]).

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 all the affirmative defenses in Wai's answer, except the fourth as it relates to compliance with RPAPL § 1304, are to be stricken, and it is

ORDERED that a default judgment is entered against the non-appearing parties: The Board of Managers of 385 First Avenue Condominium, New York City Parking Violations Bureau; 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 NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS OWNER TRUSTEE OF THE NEW RESIDENTIAL MORTGAGE LOAN TRUST 2021-NQM1R,

Plaintiff,

-against-

HENRY WAI; THE BOARD OF MANAGERS OF 385 FIRST AVENUE CONDOMINIUM; NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.
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and it is

ORDERED that this matter is set down for a status conference on **April 8, 2026 @ 10:00 am** via Microsoft Teams.

1/29/2026
DATE

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

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ]	DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE