Bank of N.Y. Mellon v Smith
2026 NY Slip Op 30567(U)
January 27, 2026
Supreme Court, Kings County
Docket Number: Index No. 534257/2022
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 27th of January 2026

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

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS INDENTURE TRUSTEE FOR THE NOTEHOLDERS OF CWABS, INC., ASSET-BACKED NOTES, SERIES 2007-SEA1,

Plaintiff,

-against-

NICHOLENE A. SMITH, NEW YORK CITY ENVIRONMENTAL CONTROL, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, 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 premises, described in the complaint,

Defendant.

Index No. 534257/2022

Decision and Order
(Motion Seq. 2)

Papers	Numbered
Notice of Motion	NYSCEF Doc. 55-71
Opposition Papers	NYSCEF Doc. 74-88
Reply Papers	NYSCEF Doc. 91-94

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 November 22, 2022, seeking to foreclose a mortgage (the "mortgage") executed by defendant Nicholene A. Smith (the "defendant") which encumbers the property known as 982 East 88th Street, Brooklyn, NY 11236 (the "property").

On August 3, 2023, issue was joined when the parties stipulated to accept defendant's answer which asserted various affirmative defenses including lack of standing and non-compliance with the required contractual and statutory notice provisions.

Plaintiff now moves for summary judgment, to strike defendant's answer, to appoint a referee to compute and to amend the caption. In support of the motion, plaintiff annexes the affidavit of Dorian S. Cook ("Mr. Cook" or "Cook Affidavit") of NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") the alleged attorney in fact 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 contends it had standing at commencement because defendant executed a loan modification with plaintiff creating a direct contractual relationship, by annexing a copy of the note endorsed in blank to the complaint and the though the Cook Affidavit. Plaintiff further contends the Cook Affidavit and records attached demonstrate borrower's default under the terms of the mortgage and mailing of the required notices of default and RPAPL 1304 notices.

Defendant opposes the motion arguing that plaintiff failed to establish prima facie entitlement to summary judgment because no admissible evidence demonstrates possession or transfer of the note with the allonge and that the affidavits and testimony are inadmissible hearsay, lack sufficient foundation and are insufficient to demonstrate standing, compliance with the notice provision of the mortgage and RPAPL 1304. Defendant further argues that the action is time barred given a previous foreclosure action was commenced in 2011 and plaintiff further failed to comply with RPAPL 1301 because it failed to allege the existence of the prior foreclosure actions. Lastly, defendant argues that plaintiff failed to establish that Shellpoint was authorized to act on behalf of plaintiff, that the power of attorney was executed after commencement of the action and failed to provide sufficient evidence regarding the alleged authorized use of a third-party vender to establish compliance with the notice provisions of the mortgage and RPAPL 1304.

In reply to the motion, plaintiff contends that standing was conclusively established by execution of a loan modification with plaintiff's prior servicer and by Cook Affidavit attesting to plaintiff's possession of the note with allonge endorsed in blank firmly affixed thereto and records demonstrating same and that the previous foreclosure action was discontinued by stipulation because the parties entered into the loan modification rendering this action timely. Plaintiff further argues that defendant failed to allege non-compliance with RPAPL 1301 in her answer and therefore waived same, that the power of attorney is sufficient to demonstrate authority and that the reliance on a third party vender is proper, authorized and the Cook Affidavit, with records from the third party vender is sufficient to demonstrate compliance with the notice of default provisions of the mortgage and RPAPL 1304.

Discussion

I. Standard of Review

"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]

"[A] motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence...Records made in the regular course of business are hearsay when offered for the truth of their contents...When a party relies upon the business records exception to the hearsay rule in attempting to establish its prima facie case, '[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures." *HSBC Bank USA, N.A. v Vasishta*, 241 AD3d 1299 [2d Dept 2025][internal citations and quotation marks omitted]

"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]

II. Plaintiff Failed To Establish Prima Facie It Had Standing When The Action Was Commenced

"Where, 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 "holder" is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession...Pursuant to article 3 of the Uniform Commercial Code, a note can be endorsed, or signed over, to a new owner. A note can also be endorsed in blank, naming no specific payee, which makes it a bearer instrument under article 3 of the Uniform Commercial Code, so that any party that possesses the note has the legal authority to enforce it." *U.S. Bank N.A. v Moulton*, 179 AD3d 734 [2d Dept 2020][internal citations and quotation marks omitted]; NY UCC 1-201(21); See also *U.S. Bank N.A. for Citigroup Mtge. Loan Tr., Inc., 2006-NC2 v Brody*, 156 AD3d 839 [2d Dept 2017]["A "holder" is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"]

"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]

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)"];

It is undisputed that the note attached to the complaint contains an endorsement in blank on an allonge. Therefore, to demonstrate standing plaintiff was required to demonstrate that subject allonges were "so firmly affixed thereto as to become a part thereof" at the time the action was commenced. 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."

In support of the contention that plaintiff has standing and that the allonge was firmly affixed to the note at the time the action was commenced, Ms. Cook states that:

> "Plaintiff has standing to prosecute this foreclosure action. The Subject Note includes an allonge, which is firmly affixed to the Note, endorsed to blank. The subject Note was annexed to the complaint at the commencement of this action...In addition, Plaintiff, through its custodian, Bank of New York Mellon, has physical possession of the original Note. The original Note has been stored at 2322 French Settlement Rd, Suite 100, Dallas, TX 75212, since September 8, 2011. It's Shellpoint's business practice and procedure that when original note possession confirmation is requested from and confirmed by the custodian, these details are notated in Shellpoint's computer system. Attached as Exhibit J are screenshots from Shellpoint's computer system which show the note possession details. These screenshots reflect that physical possession of the original note was confirmed on July 27, 2022, prior to the date this foreclosure action was filed, and subsequently the specific address of the BONY Dallas Texas location was confirmed. As a result, Plaintiff has standing to prosecute this foreclosure action."

However, a review of the record attached to the Cook Affidavit does not demonstrate the allonge was firmly affixed to the note. Indeed, the records attached to her affidavit show makes no reference to an endorsement or allonge and appears to be contradictory given it the record also reflects that Shellpoint was in possession of the note while stating it was in possession of plaintiff's document custodian. Moreover, it appears that the record simply reflects communication with a

third party regarding the alleged possession of the note which is hearsay without any foundation. Mr. Cook does not state the allonge was firmly affixed to the note *at the time the action was commenced* and does not state the basis of his knowledge of same. To the extent, his basis of knowledge is based on a review of Shellpoint's business records, the same has not been provided. Lastly, no evidence is provided that alleged custodian was actually plaintiff's custodian and no affidavit is provided by the custodian.

"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]

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..."]

"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]["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]

Accordingly, Mr. Cook's conclusory and hearsay assertions are insufficient to demonstrate plaintiff had standing 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)"]; 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..."]

Lastly, plaintiff's contention that the execution of the loan modification agreement created a directed relationship with defendant is without merit. The first modification agreement was executed by defendant and BAC Home Loans Servicing, LP and the second modification agreement was executed by Bayview Loan servicing, LLC. Neither agreement references plaintiff.

III. Plaintiff Failed To Establish Shellpoint's Authority To Act On Behalf of Plaintiff.

Plaintiff failed demonstrate the authority of its affiant and Shellpoint. No affidavit of plaintiff is proffered, rather plaintiff relies on the testimony of Ms. Cook of Shellpoint, the alleged attorney in fact of plaintiff. However, the power of attorney annexed to the moving papers is dated August 6, 2024, after the action was commenced, and is expressly limited to acts that are permitted by certain other agreements, including a settlement, subservicing and pooling and servicing agreements which have not been proffered. Moreover, the power of attorney itself expired by its own terms prior to the filing of the instant motion. Therefore, plaintiff failed to establish that Shellpoint and Mr. Cook have authority to act for plaintiff.

This alone mandates denied of the motion. See e.g. *HSBC Bank USA, N.A. v. Betts*, 67 Ad3d 735 [2d Dept 2009]; *Citibank, N.A. v Herman*, 215 AD3d 626 [2d Dept 2023]; *US Bank N.A. v Cusati*, 185 AD3d 870 [2d Dept 2020]; 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"]

IV. Plaintiff Failed To Establish Strict Compliance With RPAPL 1304

"[W]here, as here, a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, the moving party is also required to make a prima facie showing of strict compliance with RPAPL 1304...RPAPL 1304(1) provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower...including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower. RPAPL 1304(2) requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower and to the residence that is the subject of the mortgage." *Caliber Home Loans, Inc. v Weinstein*, 197 AD3d 1232 [2d Dept 2021][internal citations and quotation marks omitted]

Here, Mr. Cook alleges the notices were sent by Shellpoint's third-party vendor on July 14, 2022. However, no proof is proffered that Shellpoint, or its third-party vendor were authorized to send the subject notices.

Therefore, plaintiff failed to establish strict compliance with RPAPL 1304. See *Siegel v Kentucky Fried Chicken of Long Is., Inc.*, 108 AD2d 218 [2d Dept 1985]["the mere assertion of authority on the face of the notice by a total stranger...that he is authorized to act on the latter's behalf cannot be deemed to provide...notice..."], *affd,* 67 NY2d 792 [1986]; See also RPAPL 1304[1]["such lender, assignee or mortgage loan servicer shall give notice"]; *Deutsche Bank Natl. Trust Co. v Pariser*, 207AD3d 518 [2d Sept. 2022]["The plaintiff further failed to establish that

the RPAPL 1304 notices were sent by the "lender, assignee, or loan servicer" as required by the statute...Here, the RPAPL notices were allegedly sent on August 7, 2014, by the Law Offices of McCabe, Weisberg, and Conway, P.C., on behalf of Ocwen Financial, the plaintiff's loan servicer. However, the limited power of attorney authorizing Ocwen Financial to act on behalf of the plaintiff, which was submitted by the plaintiff in support of its motion, states that it was executed on and effective as of September 17, 2014."][citations omitted]; See also *MTGLQ Invs., L.P. v Cacioppo*, 217 AD3d 939 [2d Dept 2023]["Here, the plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. The plaintiff submitted a detailed affidavit of mailing from an assistant secretary of loan documentation at Rushmore Loan Management Services, LLC (hereinafter Rushmore), which demonstrated that the RPAPL 1304 notices had been mailed in accordance with the statute...However, this affidavit failed to demonstrate that Rushmore had the authority to service the loan at the time that it mailed the RPAPL 1304 notices to the defendant...and this record presents triable issues of fact as to whether Rushmore had this authority."][citations omitted]

In this Court's view, a stranger sending the RPAPL 1304 notices, not only contravenes the plain language of the statute and well settled caselaw, it undermines the fundamental legislative intent and spirit of RPAPL 1304 which is to bridge the gap in communication between the borrower and lender to avoid litigation and for the borrower to make arrangements for payment to his or her actual lender. Communications from a stranger does not accomplish these purposes. See e.g. *Bank of NY Mellon v Forman*, 176 AD3d 663 [2d Dept 2019]["The manifest purpose [of the RPAPL 1304 notice] is to aid the homeowner in an attempt to avoid litigation."].

Accordingly, 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"]

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 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