

<b>U.S. Bank N.A. v George</b>
2026 NY Slip Op 30597(U)
February 5, 2026
Supreme Court, Kings County
Docket Number: Index No. 512845/2023
Judge: Menachem M. Mirocznik
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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 5<sup>th</sup> of February 2026

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

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

-against-

GARVIN GEORGE; NEW YORK CITY DEPARTMENT OF FINANCE; "JOHN DOE #1" through "JOHN DOE #10," said names being fictitious and unknown to plaintiff, intended to be possible tenants or occupants of the premises, or corporations, persons, or other entities having or claiming a lien upon the mortgaged premises,

Defendants.

**Index No. 512845/2023**

**Decision and Order  
(Motion Seq. 2 and 3)**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion (Seq. 2)	NYSCEF Doc. 65-73
Opposition Papers (Seq. 2)	NYSCEF Doc. 77-87
Notice of Motion (Seq. 3)	NYSCEF Doc. 88-99
Reply/Opposition Papers (Seq. 2 and 3)	NYSCEF Doc. 101-102

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

**Procedural History**

This action was commenced on May 1, 2023, seeking to foreclose a mortgage (the "mortgage") executed by defendant Garvin George ("defendant") encumbering the property known as 236 Autumn Avenue, Brooklyn, NY 11208 (the "property").

On June 13, 2023, defendant joined issue with the filing of an answer that asserted various affirmative defenses, including that plaintiff lacked standing and non-compliance with RPAPL 1304 as well as several counterclaims.

On August 18, 2023, plaintiff filed a reply to defendant's counterclaims.

Settlement conferences were held on October 31, 2023, January 4, 2024, and February 28, 2024, after which the matter was released from the settlement conference part.

On October 2, 2024, the Court denied plaintiff's motion for summary judgment, order of reference and related relief because plaintiff failed to prove compliance with RPAPL 1304.

Plaintiff now moves to reargue the October 2, 2024, order and upon reargument for the Court to grant its motion for summary judgment. Plaintiff argues that the Court misapprehended the law or facts in denying its motion for summary judgment because it did prove compliance with RPAPL 1304. Specifically, plaintiff contends that it proved compliance with RPAPL 1304 with the submission of the affidavit of merit of Hayley O'Bryan ("Ms. O'Bryan" or "O'Bryan Affidavit"), a purported officer of plaintiff, who attested based upon a review of plaintiff's business records, to plaintiff's compliance with RPAPL 1304, with attached proof of mailing in the form of the notices allegedly sent by certified and first class mail and a "note log".

Defendant opposes the motion and separately moves to dismiss the action due to plaintiff's lack of standing and non-compliance with RPAPL 1304. Defendant argues that Plaintiff's motion to reargue should be denied because the Court correctly denied summary judgment based on Plaintiff's failure to establish compliance with RPAPL 1304, lack of standing, and reliance on inadmissible hearsay affidavits, asserting that Plaintiff failed to prove actual mailing of the 90-day notice, failed to demonstrate possession of the note at commencement, and presented misleading or fraudulent evidence of defective or fabricated mailings and assignment evidence. Defendant further proffers USPS records showing the certified mailing tracking number reflects the label being created but not actually sent and therefore dismissal of the complaint is warranted.

In opposition to the motion and in further support of the motion, plaintiff argues defendant's motion should be denied because defendant failed to establish entitlement to relief pursuant to CPLR 3211, asserting that its affidavits and business records sufficiently demonstrate mailing of the statutory notices, possession of the note prior to commencement, and the borrower's default, and that Defendant's allegations of hearsay, standing defects, and fraud are unsupported legal conclusions that do not create triable issues of fact or warrant dismissal.

### Discussion

#### **I. Plaintiff's Motion for Reargument Is Denied**

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" *Carrillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]; *HSBC Bank USA v Halls*, 98 AD3d 718 [2d Dept 2012]<sup>1</sup>

"While the determination to grant leave to reargue lies within the sound discretion of the court...a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" *Emigrant Bank v Kaufman*, 223 AD3d 650, 651-52 [2d Dept 2024][internal citations and quotation marks omitted]

Here, the Court did not overlook or misapprehend the facts or law in rendering its previous determination.

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<sup>1</sup>The instant motion was referred to this Court after the Hon. Carolyn Mazzu Genovesi transferred to the Supreme Court Nassau County. For purposes of CPLR 2221[a] the underlying issue of forum shopping is thus not present herein.

“[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]

“By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure.” *US Bank N.A. v Pierre*, 189 AD3d 1309 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Fregosi*, 222 AD3d 811 [2d Dept 2023][“A plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened.”]

Here, Ms. O’Bryan did not attest to personally mailing the notices and merely relies on her alleged review of plaintiff’s business records. She does not proffer certified mailing receipts with attendant signatures or postmarks from the post office and does not attest to any standard office mailing procedure. Therefore, plaintiff failed to demonstrate prima facie compliance with RPAPL 1304.

Accordingly, the Court did not misapprehend the facts or law in rendering its previous decision denying plaintiff’s motion for summary judgment and plaintiff’s motion seeking reargument of same is denied.

## **II. Defendant’s Motion for Summary Judgment Is Denied**

“Summary judgment is a “drastic remedy” that should be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issue of fact...Even then, summary judgment should be granted only if, upon the moving party’s meeting this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action...Issue finding, not issue deciding, is the court’s purpose at the summary judgment stage...Thus, [w]here the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied...When ruling on a motion for summary judgment, the deciding court must view the facts “in the light most favorable to the non-moving party.” *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 38 NY3d 169 [2022][internal citations and quotation marks omitted]

“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]

Initially, 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)”];

Here, the note attached to the complaint is endorsed to plaintiff on a separate page (i.e. on an allonge) and is additionally endorsed in blank on the same allonge. Therefore, to establish its standing, plaintiff was required to establish the allonge was “so firmly affixed thereto as to become a part thereof.”

However, the complaint does not allege the allonge is firmly affixed to the note and Ms. O’Bryan does not attest to same. Therefore, plaintiff did not establish the same as a matter of law. However, as noted above, on a defendant’s motion for summary judgment, it is defendant’s burden to establish plaintiff’s lack of standing to be entitled to relief.

“On a cross motion for summary judgment dismissing the complaint based upon the plaintiff’s alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied... To defeat a defendant’s motion, the plaintiff has no burden of establishing its standing as a matter of law... [A] party cannot succeed on a motion for summary judgment by simply pointing out gaps in the opposing party’s case” *U.S. Bank N.A. v Pickering-*

*Robinson*, 197 AD3d 757 [2d Dept 2021][internal citations and quotation marks omitted]; *Aurora Loan Services, LLC v Mercius*, 138 AD3d 650 [2d Dept 2016][“the Supreme Court erred in granting the defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against him for lack of standing and to cancel the notice of pendency filed against the subject property. [T]he burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law...Here, the defendant, as the moving party, failed to make a prima facie showing that the plaintiff lacked standing”][internal citations and quotation marks omitted]; See also *Deutsche Bank Natl. Tr. Co. v Homar*, 163 AD3d 522 [2d Dept 2018][“On a motion for summary judgment, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied...To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law...On a summary judgment motion by a defendant, the defendant does not meet its initial burden by merely pointing to gaps in the plaintiff's case; rather, it must affirmatively demonstrate the merit of its claim or defense”][internal citations and quotation marks omitted].

Here, the defendant failed to meet his burden in establishing plaintiff lacked standing as a matter of law and merely points to gaps in plaintiff's showing. This is insufficient to demonstrate entitlement to summary judgment. Therefore, defendant's motion for summary judgment on this issue of standing is denied.

Lastly, defendant failed to demonstrate prima facie entitlement to summary judgment dismissing the action due to non-compliance with RPAPL 1304. While the Court previously found that plaintiff failed to demonstrate strict compliance with RPAPL 1304, the same is insufficient to demonstrate non-compliance was a matter of law.

“Even in the face of a plaintiff's failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, this Court has held that a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled...Nor were the plaintiff's submissions sufficient to establish the defendant's prima facie entitlement to judgment as a matter of law dismissing the complaint for failure to comply with RPAPL 1304. There is ample case law providing that a party cannot succeed on a motion for summary judgment by simply pointing out gaps in the opposing party's case.” *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]

Here, defendant submits USPS tracking information reflecting that a label was created but that the same was apparently not mailed. However, although the same may normally have been sufficient to demonstrate non-mailing, the tracking number associated with the tracking information is 9314 7100 1170 1110 2589 98 while the tracking number listed on the RPAPL 1304 notice is 9314 7100 1170 1109 0874 55.<sup>2</sup> Other than the USPS tracking information and

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<sup>2</sup> The Court notes that the tracking number associated with the notice of default is 9314 7100 1170 1110 2589 98. However, defendant did not seek summary judgment on the basis of non-compliance with the notice of default provision in the mortgage and while the evidence of non-mailing of the notice of default calls into question the credibility of the plaintiff's other evidence of mailing, the same is not sufficient to meet defendant's prima facie burden.

defendant’s denial of receipt, defendant proffers no other evidence that plaintiff did not comply with RPAPL 1304.

The law is well settled that a mere denial of receipt is insufficient to demonstrate prima facie that plaintiff did not send the required notices. See *US Bank, N.A. v Knight*, 227 AD3d 1035 [2d Dept 2024][“the Supreme Court properly denied that branch of the defendants’ motion which was, in effect, for summary judgment dismissing the complaint insofar as asserted against them based on the plaintiff’s failure to comply with RPAPL 1304. The defendants’ bare denial of receipt of the RPAPL 1304 notice was insufficient to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them.”]

Therefore, defendant’s motion must be denied regardless of 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 meet its burden, the motion must be denied without regard to the sufficiency of the plaintiff’s opposition papers”]

Accordingly, it is hereby

**ORDERED**, that plaintiff’s motion for reargument is DENIED; and it is further

**ORDERED**, that defendant’s motion for summary judgment is DENIED; 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

KINGS COUNTY CLERK  
FILED  
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