Wells Fargo Bank, N.A. v Unknown Heirs & Distributees of the Estate of Vargas
2026 NY Slip Op 31589(U)
March 30, 2026
Supreme Court, Kings County
Docket Number: Index No. 516032/2018
Judge: Derefim B. Neckles
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At an IAS Term, Part FRP-2, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of March 2026.

PRESENT:

HON. DEREFIM B. NECKLES,
J.S.C.

Index No.: 516032/2018

x

WELLS FARGO BANK, N.A., AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FFH1, ASSET-BACKED CERTIFICATES, SERIES 2006-FFH1,

Plaintiff,

-against-

UNKNOWN HEIRS AND DISTRIBUTEES OF THE ESTATE OF JUAN VARGAS HIS/HER RESPECTIVE HEIRS-AT-LAW, NEXT-OF-KIN, DISTRIBUTEES, EXECUTORS, ADMINISTRATORS, TRUSTEES, DEVISEES, LEGATEES, ASSIGNEES, LIENORS, CREDITORS, AND SUCCESSORS IN INTEREST AND GENERALLY ALL PERSONS HAVING OR CLAIMING UNDER, BY OR THROUGH SAID DEFENDANT WHO MAY BE DECEASED, BY PURCHASE, INHERITANCE, LIEN OR OTHERWISE, ANY RIGHT, TITLE, OR INTEREST IN THE REAL PROPERTY DESCRIBED IN THE COMPLAINT HEREIN; 39 PINE STREET, LLC; ET AL.,

Defendant,

x

DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affidavits (Affirmations) Annexed	272-316
Opposition to Motion	321
Reply	324

Upon the foregoing papers in this action to foreclose on a tax lien encumbering the subject property at 39 Pine Street in Brooklyn, Wells Fargo Bank ("plaintiff") moves (under mot. seq. 6) for an order confirming the referee's report, granting a judgement of foreclosure and sale and directing the distribution of the sale proceeds.

Background

The summons and complaint were duly filed on August 7, 2018. An order granting an order of reference and summary judgment in favor of the plaintiff was granted by order dated December 8, 2022. The referee appointed executed an oath and report of amount due on March 3, 2025. Plaintiff now moves to confirm the referee's report and for judgement of foreclosure and sale.

In opposition to the plaintiff's motion, 39 Pine Street, LLC ("defendant") contends that plaintiff seeks a judgment of foreclosure and sale predicated upon a conclusory affidavit. Defendant argues that the affidavit of Lucretia Birkinshaw is not accompanied by a Certificate of Conformity in accordance with RPL299-a(c), and CPLR 2309(c). Defendant also alleges that plaintiff's affiant fails to annex in admissible form any books or records reviewed by her. Additionally, defendant maintains that plaintiff is not intitled to attorney's fees as plaintiff has not annexed any documentation demonstrating the purported fees and costs expended in this action. Further, defendant asserts that a mortgagee is not entitled to recover late charges in a foreclosure action where the mortgagee seeks to recover the full accelerated principal debt.

Discussion

I. Certificate of Conformity

Defendant argues that the affidavit of plaintiff's affiant is executed and acknowledged in Utah but is not accompanied by a certificate of conformity. Although defendant is correct, "the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual prejudice" (*Capital One, N.A. v. Mc Cormack,* 183 A.D.3d at 645, 121 N.Y.S.3d 627; *Citimortgage, Inc. v. Zagoory*, 198 A.D.3d 715, 717, 155 N.Y.S.3d 424, 426 (2021)). Here, defendant has not shown or argued actual prejudice, thus the mere irregularity is disregarded by this court.

II. Affidavit of Lucretia Birkinshaw

Contrary to the defendant's contention, the referee's report was not premised upon unproduced business records and was substantially supported by the record."The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*U.S. Bank N.A. v. Moschetta*, 216 A.D.3d 848, 849, 187 N.Y.S.3d 340; see *U.S. Bank N.A. v. Sheth*, 177 A.D.3d 1018, 1020, 113 N.Y.S.3d 166). However, computations based on the "review of unidentified and unproduced business records ... constitute[ ] inadmissible hearsay and lack[ ] probative value" (*Wells Fargo Bank, NA v. Oziel,* 196 A.D.3d 618, 621, 152 N.Y.S.3d 123; *Wells Fargo Bank, N.A. v. Laronga*, 219 A.D.3d 1559, 1560, 197 N.Y.S.3d 531, 533 (2023)).

Here, Lucretia Birkinshaw attests that the affirmation is based upon her review of business records relating to the borrower's loan and from her own personal knowledge of how the records are kept and maintained. Additionally, she provides that the prior servicer's records for the loan were incorporated into the current servicer's records. Further, she accurately attests that the business records supporting the defendant's account history are attached as an exhibit. As such, the referee's report was substantially supported by the record.

III. Attorney's fees

A plaintiff in a foreclosure action may be entitled to attorneys' fees pursuant to the terms of the mortgage (see *People's United Bank v. Patio Gardens III, LLC*, 143 A.D.3d 689, 691, 38 N.Y.S.3d 262). Here, the mortgage provides that "[i]n any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements . . . add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured".

In calculating attorney's fees, 'the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (*Bankers Fed. Sav. Bank v. Off W. Broadway Devs.*, 224 A.D.2d 376, 378, 638 N.Y.S.2d 72). Here, in the affirmation in support of legal fees plaintiff's counsel provides that it charges a total flat fee of $5,650.00. In addition to the flat fee, plaintiff's counsel provides that counsel performed several services in connection with this action and lists them all. Additionally, plaintiff's counsel states that there will be additional legal fees in

the amount of $1,200.00 for the motion for publication and to appoint a military guardian. As such, this court finds that plaintiff sufficiently showed that it was entitled to reasonable attorney's fees pursuant the mortgage.

IV. Late Charges

Defendant argues that a mortgagee is not entitled to recover late charges in a foreclosure action where the mortgagee seeks to recover the full accelerated principal debt. In support, defendant cites *Beal Bank, S.S.B. v. Scelza*, 113 F.3d 1229 (2d Cir. 1997), a District of Connecticut case. However, Second Department precedent provides that a party cannot seek "late charges for nonpayment of installments claimed to be due after acceleration" (*Green Point Sav. Bank v. Varana*, 236 A.D.2d 443, 443, 653 N.Y.S.2d 656 [2d Dept. 1997]). Here, plaintiff is only collecting late charges that were due prior to acceleration of the principal debt. A such, plaintiff is entitled to recover late charges.

V. RPAPL 1304

To the extent that defendant brings up RPAPL 1304, by order dated December 8, 2022, this court determined that The statutory defense created by RPAPL 1302(2) for noncompliance with RPAPL 1304 is a personal defense which cannot be raised by the defendant as it is a stranger to the subject note and mortgage. As such, defendant is barred by the doctrine of law of the case from asserting the defense of non-compliance with RPAPL 1304(see *Pascual v. Rustic Woods Homeowners Assn., Inc.*, 173 A.D.3d at 757, 99 N.Y.S.3d 710; *Matter of Norton v. Town of Islip*, 167 A.D.3d at 626, 90 N.Y.S.3d 59).

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. 6) is denied

This constitutes the decision and order of the Court.

ENTER:

HON. DEREFIM B. NECKLES
J. S. C.

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