

Wilmington Sav. Fund Socy., FSB v Benscher
2026 NY Slip Op 31669(U)
April 9, 2026
Supreme Court, Kings County
Docket Number: Index No. 528119/2022
Judge: Derefim B. Neckles
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At an IAS Term, Part FSMP, 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 9th day of April 2026.

P R E S E N T:

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

Index No.: 528119/2022

_____ X
WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT
IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS
OWNER TRUSTEE OF CSMC 2019-RPL11 TRUST,

Plaintiff,

DECISION AND ORDER

-against-

DAVID BENSCHER, LEAH BENSCHER, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU, ET
AL

Defendant.

_____ X
The following e-filed papers read herein:

Notice of Motion/Affidavits (Affirmations) Annexed
Opposition to Motion
Affirmation in Reply

NYSCEF Doc Nos.

51, 52, 62, 70
95, 96, 97
99

Upon the foregoing papers in this action to foreclose on a mortgage encumbering the subject property at 655 East 2nd Street in Brooklyn, plaintiff Wilmington Savings Fund Society, (“plaintiff”) moves (under mot. seq. 1) for an order (1) granting plaintiff summary judgment and the relief sought in plaintiff’s complaint and dismissing the defendants’ counterclaims; (2) striking the answer interposed on behalf of the defendants; (3) awarding

the plaintiff a default judgment against the defaulting parties; (4) appointing a referee to compute the total sums due and owing to plaintiff; and (5) amending the caption.

Background

A note and mortgage were executed by defendants David Benscher and Leah Benscher (“defendants”) on October 11, 2002. The loan was subsequently modified pursuant to a loan modification agreement dated October 19, 2012. Plaintiff asserts that defendants defaulted under the terms of the modified note and mortgage by failing to make payment due on March 1, 2021. Thereafter, plaintiff commenced the instant action on September 27, 2022, by filing a summons and complaint. On November 1, 2022, defendants interposed a verified answer with counterclaims. Plaintiff filed its reply to defendants’ counterclaims on January 18, 2023. Plaintiff now moves, *inter alia*, for summary judgment.

In opposition to plaintiff’s motion, defendants contend that plaintiff failed to demonstrate compliance with RPAPL § 1306, RPAPL § 1304, and with the default notices required by the mortgage. Additionally, defendants argue that plaintiff does not have standing to maintain this action.

Discussion

I. Standing

In residential mortgage foreclosure actions, a plaintiff establishes its *prima facie* entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the default (see *RBS Citizens, N.A. v Galperin*, 135 AD3d 735, 736, 23 NYS3d

307 [2d Dept 2016]; *Midfirst Bank v Agho*, 121 AD3d 343, 347, 991 NYS2d 623 [2d Dept 2014]; *CitiMortgage, Inc. v Guillermo*, 143 A.D.3d 852, 853 [2d Dept 2016]). When standing is placed in issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief (see *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 46 NYS3d 185 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 973-974, 995 NYS2d 118 [2d Dept 2014]). In a mortgage foreclosure action, plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362, 12 NYS3d 612, 34 NE3d 363 [2015]; *Wells Fargo Bank, N.A. v Heiney*, 168 A.D.3d 1126, 1126 [2d Dept 2019]).

Here, plaintiff established, prima facie, its standing by attaching a copy of the note endorsed in blank to the summons and complaint at the time the action was commenced (*Midfirst Bank v Agho*, 121 A.D.3d 343, 348 [2d Dept 2014]). As was similarly held in *Bank of N.Y. Mellon v. Swift*, defendants' argument regarding the validity of the mortgage assignments is not relevant to the issue of the plaintiff's standing as, the attachment of the note to the complaint obviates the need to demonstrate the factual details of the physical delivery (see *Deutsche Bank Natl. Trust Co. v Kingsbury*, 171 AD3d at 872 [2d Dept 2019]; *Bank of N.Y. Mellon v. Swift*, 213 A.D.3d 624, 626 [2d Dept 2023]).

II. Servicer's Affidavit

Defendants argue that the limited power of attorney for plaintiff's servicer is insufficient to prove that the servicer has authority to act on behalf of plaintiff, because it references a servicing agreement that plaintiff failed to produce. Courts have consistently

held that a power of attorney is insufficient to establish authority when it is conditioned on an external agreement that has not been provided (*U.S. Bank Nat'l Ass'n v. Tesoriero*, 204 A.D.3d 1066, 167 N.Y.S.3d 533 [2d Dept 2022]; *US Bank N.A. v. Cusati*, 185 A.D.3d 870 [2d Dept 2020]; *Citimortgage, Inc. v. Lofria*, 191 A.D.3d 838 [2d Dept 2021]).

Here, the limited power of attorney submitted by plaintiff references a Securitization Servicing Agreement dated December 16, 2019. The limited power of attorney purportedly permits the servicer to execute and deliver documents if such documents are required or permitted under the Securitization Servicing Agreement. However, plaintiff has failed to provide such Securitization Servicing Agreement. As a result, triable issues of fact exist as to whether the limited power of attorney granted the servicer the authority to act on behalf of plaintiff.

I. RPAPL § 1306

Defendants reason that because the borrower's phone number is redacted from the Proof of Filing as required by RPAPL § 1306, that plaintiff failed to comply with the statute. RPAPL § 1306(1) requires that a lender file certain information with the Superintendent of Financial Services within three business days after mailing the 90-day notice required by RPAPL § 1304. This includes the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage loan (RPAPL § 1306). "Compliance with RPAPL § 1306 is a condition precedent to the commencement of a foreclosure action... [S]trict compliance with the statutory requirement of making the appropriate filing...is required." See, e.g., *Bank of New York Mellon v*

Peralta, 239 AD3d 932 [2d Dept 2025]; *Deutsche Bank Nat. Trust Co. v. Akintewe*, No. 500644/2019, 2026 WL 509595, (N.Y. Sup. Ct. Feb. 13, 2026).

Although not binding on this court, several other trial courts have held that a plaintiff's failure to list the borrower's last telephone number is a material defect (see *Bank of New York Mellon as Tr. for Certificate Holders of CWALT, Inc., Alternative Loan Tr. 2006-31CB, Mortg. Pass-Through Certificates, Series 2006-31CB v. Gargiulo*, 87 Misc. 3d 1243(A), 244 N.Y.S.3d 681 (N.Y. Sup. Ct. 2025)). Here, plaintiff asserts that the phone number was previously redacted for purposes of confidentiality and in reply, submits an unredacted copy of RPAPL § 1306 Proof of Filing Statement. However, this court finds this to be insufficient to prove strict compliance with RPAPL § 1306.

The legislative intent of RPAPL § 1306 is to enable the Superintendent to ascertain the type of loan at issue and to direct appropriate services to borrowers. In furtherance of that purpose, this court strictly construes the statutory requirements and finds plaintiff's showing to be deficient due to the redaction of the borrower's phone number.

Defendant further contends that plaintiff failed to comply with the statute because only one borrower was referenced on the RPAPL § 1306 filing. RPAPL § 1306 does not specify that every borrower's information must be supplied, and a plain reading of the statute supports the conclusion that the requirement is satisfied so long as one borrower's information is listed on the filing (*CIT Bank N.A. v. Schiffman*, 36 N.Y.3d 550, 559, 168 N.E.3d 1138, 1144 [2021]). Accordingly, this contention is without merit and does not provide an independent basis to find noncompliance with the statute.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (mot. seq. 1) is granted to the limited extent that plaintiff may amend the caption. All other relief requested is denied; and it is further

ORDERED that the caption be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Wilmington Savings Fund Society, FSB, Not In Its Individual
Capacity, But Solely As Owner Trustee Of CSMC 2019-RPL11
Trust,

Plaintiff,

-against

David Benscher, Leah Benscher, New York City Environmental
Control Board, New York City Parking Violations Bureau, New
York City Transit Adjudication Bureau, Sam "Doe", (Refused Last
Name) sha John Doe #1, "John Doe", (Refused Name) sha John
Doe #2, "John Doe", (Refused Name) sha John Doe #3, "John
Doe", (Refused Name) sha John Doe #4, "John Doe", (Refused
Name) sha John Doe #5, Amy "Doe", (Refused Last Name) sha
John Doe #6, "John Doe", (Refused Name) sha John Doe #7, "John
Doe", (Refused Name) sha John Doe #8, "John Doe", (Refused
Name) s/h/a John Doe #9, "John Doe", (Refused Name) sha John
Doe #10,

Defendants.
-----X

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2026 APR 13 A 9:21
KINGS COUNTY CLERK
FILED

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES
J. S. C.