

<b>US Bank N.A. v Merchant</b>
2018 NY Slip Op 33678(U)
October 5, 2018
Supreme Court, Westchester County
Docket Number: 51150/2017
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
**US BANK NATIONAL ASSOCIATION, NOT IN ITS  
INDIVIDUAL CAPACITY BUT SOLELY AS  
TRUSTEE OF SW REMIC TRUST 2015-1,**

Plaintiff,

-against-

**ANTHONY MERCHANT, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE;  
AUTOONE SELECT INSURANCE CO, UNITED  
STATES OF AMERICA INTERNAL REVENUE  
SERVICE CCP LIEN UNIT, KIRBY ROWE,**

Defendants.

-----X  
**WOOD, J.**

**DECISION & ORDER  
Index No. 51150/2017  
Sequence Nos. 3**

The following papers were read in connection with plaintiff's motion to reargue:

- Plaintiff's Notice of Motion, Counsels' Affirmations, Exhibits.
- Defendant's Counsel's Affirmation in Opposition, Exhibits.

This is an action to foreclose a mortgage on premises known as 158 Tenth Avenue South, Mount Vernon, New York 10550. Defendant breached his obligations under the terms of the Note and Mortgage by failing to make the required monthly payments. The amount due and owing as of May 1, 2012, was the principal amount of \$297,017.37. On January 26, 2017, plaintiff commenced this foreclosure action.

Plaintiff brought a motion for summary judgment, which was decided by Decision and Order of this court dated August 6, 2018, ("the Prior Decision"), based on a finding that plaintiff failed to

prove its compliance with RPAPL §1304, and the notice of default pursuant to the mortgage. Plaintiff now brings this motion to reargue the Prior Decision, on the grounds that it complied with RPAPL §1304, and the notice of default pursuant to the mortgage, which was overlooked, and thus upon reargument, submits that summary judgment should have been granted. The court agrees, and grants plaintiff leave to reargue the Prior Decision.

NOW based upon the foregoing, the motion is decided as follows:

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 [other] reason mistakenly arrived at its earlier decision (Mazzei v Licardi, 47 AD3d 774 [2d Dept 2008]; Singelton v Lenox Hill Hospital, 61 AD3d 956, 957 [2d Dept 2009]). A motion for reargument is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (Gellert & Rodner v Gem Community Management, Inc. 20 AD3d 388 [2d Dept 2005]). Nor does it function as a forum to proffer arguments different from those originally tendered (Amato v Lord & Taylor, 10 AD3d 374, 375 [2d Dept 2004]) or on a new theory of law not previously advanced (Frisenda v X Large Enterprises, Inc., 280 AD2d 514, 515 [2d Dept 2001]). Rather, the movant must satisfactorily demonstrate matters of fact or law allegedly overlooked or misapprehended on the prior motion (Matter of Hoffman v Debello-Teheny, 27 AD3d 743 [2d Dept 2006]). New facts may not be submitted or considered (Trahan v Gallea, 48 AD3d 791, 792 [2d Dept 2008]; Quinn v Menzel, 282 AD2d 513 [2d Dept 2001]).

RPAPL §1304 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 in at least fourteen-point type” (RPAPL §1304[1]; Deutsche Bank Nat. Trust Co. v. Spanos, 102 AD3d 909, 910 [2d Dept 2013]). Proper service of RPAPL §1304 notice on the borrower is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition (Deutsche Bank Nat. Trust Co., 102 AD3d 909, 910). Plaintiff’s failure to make a prima facie showing of strict compliance with RPAPL §1304 requires denial of its motion for summary judgment, regardless of the sufficiency of the opposing papers (Hudson City Sav. Bank v. DePasquale, 113 AD3d 595, 596 [2d Dept 2014]).

In the Prior Decision, the court found that there was no affidavit of service submitted to establish proper service on defendant, confirming that it was in fact mailed, or a description of plaintiff’s practice in mailing such notices. However, there was in fact, an Affidavit of Service buried within an exhibit to the Lane Affidavit (plaintiff’s attorney in fact representative), that was identified in Lane’s Affidavit as “True and exact copies of the 90 day pre foreclosure notices mailed to Anthony Merchant by first class and certified mail are attached at Exhibit B”. This Affidavit of Service recites that Tracy Berry served a copy of the 90 Day Notice by both first class mail and certified mail to Anthony Merchant on May 17, 2016 to two addresses in Mount Vernon.

Now that plaintiff has unearthed the affidavit from its hiding place and actually brought it to the court’s attention, plaintiff has made a prima facie showing of strict compliance with RPAPL §1304. Moreover, compliance with the 90-day notice requirements of RPAPL §1304 satisfies the 30-day default notice requirements in a mortgage document (Wachovia Bank, N.A. v Carcano, 106 AD3d 724 [2d Dept 2013]). Upon reading defendant’s counsel’s opposition, the court finds that defendant failed to raise a triable issue of fact.

Under these circumstances, the Court is satisfied that plaintiff has complied with all conditions precedent prior to the commencement of this foreclosure action.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

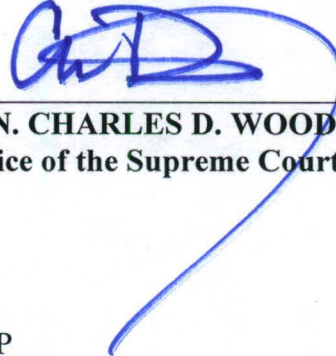
THEREFORE, based upon the stated reasons, it is hereby:

ORDERED, that plaintiff's motion to reargue is granted, and upon reargument, plaintiff's motion (Seq 1) for summary judgment, and an order of reference appointing a referee to compute the amount due, and other relief sought by plaintiff is granted, as modified in the proposed order appointing a referee to compute pursuant to RPAPL § 1321 shall be signed coincident herewith; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the Clerk and the parties within ten (10) days of entry, and file proof of service within five (5) days of service; in accordance with NYSCEF protocols; and it is further

ORDERED, that the Clerk shall mark his records accordingly.

Dated: October 5, 2018  
White Plains, New York



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**HON. CHARLES D. WOOD**  
Justice of the Supreme Court

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