

# Borrower's Common Defenses in Mortgage Foreclosures Negated

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January 16, 2024

**A**ctions to foreclose a commercial or residential mortgage should be relatively simple. All the lender needs to do is submit the note and mortgage to the court and provide proof that the borrower defaulted.

It seems easy, but when it comes to lenders who did not originate the loan, the path to foreclosure is lined with technical obstacles that borrowers use to frustrate the assignee and delay foreclosure while the borrower fails to pay any debt service, sometimes for many years.

Since the 2008 financial crisis, there has been a tsunami of cases where the undisputed defaulting borrowers of loans that were assigned by the initial lender raised two common defenses to successfully thwart foreclosure: (1) that the assignee plaintiff lacks standing and/or (2) the assignee's affidavit in support of summary judgment was insufficient because the assignee's representative did not have personal knowledge of the loan and/or the default, and the original loan documents were not business records of the assignee.

Recently, in *Broome Lender LLC v. Empire Broome LLC* the Appellate Division, First Department removed these technical obstacles, paving the way for assignees of mortgage loans to foreclose against the defaulting borrower easily and quickly. 220 AD3d 661 (1<sup>st</sup> Dept. 2023).



In *Broome Lender*, the defendant-borrower borrowed \$8.1 million from Sterling National Bank. The loan was secured by a mortgage on a commercial condominium in SoHo that matured on March 31, 2021. The borrower failed to pay off the loan when it became fully due and payable.

Later that year, Sterling assigned the defaulted loan to the plaintiff-assignee by virtue of two instruments—an allonge by which Sterling endorsed the note over to the plaintiff-assignee and an assignment of the recorded mortgage which also expressly assigned the note to the plaintiff-assignee.

Thereafter, in 2021, the plaintiff-assignee, as mortgage holder, commenced an action in New York County Supreme Court to foreclose the mortgage, and thereafter moved

for summary judgment. In opposition, the borrower did not deny the existence or terms of the loan documents and did not dispute its default. Instead, it raised these two common defenses.

Despite the borrower's failure to dispute the underlying facts, the lower court denied the assignee's motion for summary judgment because the assignee failed to (1) establish that it had standing as the holder of the note to bring the case, and (2) submit sufficient proof since the assignee did not have personal knowledge about the loan documents and the default which occurred when Sterling was the lender.

### **Lack of Standing Defense**

A lender does not have to establish standing unless it is raised as a defense by the borrower. *Wells Fargo Bank, N.A. v. Jones*, 139 AD3d 520 (1<sup>st</sup> Dept 2016); *CSFB 2004-C3 Bronx Apts. LLC v. Sinckler, Inc.* 96 AD3d 680 (1<sup>st</sup> Dept 2012). When the borrower asserts the defense, the lender establishes standing—that it is the holder of the note—by submitting proof of:

Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.

*JPMorgan Chase Bank, N.A. v. Esparza*, 213 AD3d 655, 656-57 (2nd Dept 2023) (citations and internal quotation marks omitted). See also *MTGLQ Invs., LP v. Collado*, 183 AD3d 414 (1st Dept 2020); *Deutsche Bank Nat'l Trust Co. v. Afram*, 188 AD3d 593 (1st Dept 2020).

Thus, for an assignee to show it is the holder of the note, the former option is based merely upon the assignment documents, while the latter option requires proof of actual physical possession of the note, which can be more difficult for an assignee. More specifically, to establish physical possession, the assignee must "possesses a note that, on its face or by allonge, contains an

indorsement in blank or bears a special indorsement payable to the order of the plaintiff." *Wells Fargo Bank, N.A. v. Ostiguy*, 127 AD3d 1375, 1376 (2d Dept 2015). The indorsement must be on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-302[2]) by a staple, as compared to a paper clip. See, e.g., *Wells Fargo Bank, N.A. v. Mitselmakher*, 216 AD3d 1056 (2d Dept 2023). An assignee can also establish that it is in physical possession of the note by annexing a copy of the note to the complaint. See, e.g., *Mortgage Stanley Private Bank, N.A. v. Ceccarelli*, 210 AD3d 478 (1st Dept 2022).

In *Broome Lender*, the Supreme Court held that the plaintiff-assignee failed to establish that the allonge was "firmly affixed" to the note by stapling, despite the assignee's affidavit attesting to the same.

On appeal, the assignee argued that there are multiple ways to establish standing, and only one method had to be satisfied. More specifically, the assignee argued that, even if it could not establish that the allonge was "firmly affixed" to the note by stapling, it established standing because the notarized and recorded assignment of mortgage also expressly assigned the note.

In this case, where the assignee sought to establish standing in multiple ways, the Appellate Division, First Department agreed that the plaintiff-assignee was "not required to establish standing through physical delivery prior to the action's commencement or through the allonges purportedly annexed to the note" [220 AD3d at 612], and held that standing was established by the notarized mortgage which also assigned the note to the assignee.

This case is a major win for lenders and their assignees because there had not been a prior decision by a New York state court where it found that, although standing was not established through an allonge, standing

was established on summary judgment by the assignment of the note.

Ultimately, the decision crystallizes that a proper assignment of the note is an easy way to establish standing without regard to any allonge. As a result, this common defense will easily fail, provided the assignee can establish the assignment of the note with admissible documentary evidence or by annexing the note (and mortgage) to the foreclosure complaint.

### **Business Records Defense**

In support of its motion for summary judgment and to establish its *prima facie* case—the existence of the note and mortgage and the loan default—the plaintiff-assignee submitted: (1) the assignee’s affidavit, which laid the business record foundation for the loan documents, and attested to the loan default, (2) the affidavit of a Senior Vice President of Sterling attesting to the loan and the default, and (3) a Hardship Declaration that the borrower filed with the court during the COVID-19 pandemic in which it swore “under penalty of law,” that it was in default as it was “unable to pay the mortgage in full.”

In opposition, the borrower argued that the supporting affidavits were insufficient because the assignee could not have had personal knowledge of the underlying facts when the loan was originated and went into default, as those events occurred before the loan was assigned to the plaintiff. The Supreme Court agreed and held:

[Assignee’s] affidavit is defective as he fails to explain his agency relationship to Plaintiff nor is any corroborating documentation of his authority to act proffered...However, [Sterling] avers the note was not assigned to Plaintiff until June 27, 2021, and Plaintiff annexed an assignment of the mortgage which is notarized January 4, 2022....[Sterling], despite ostensibly

being able to proffer a foundation for Sterling’s records, did not attest to having personal knowledge of the transactions underlying the Borrower’s account and default and did not profess knowledge of Sterling’s record keeping practices. Absent these records being in evidentiary form, all the statements regarding the salient documents and Borrower’s default...are inadmissible...[and] failed to establish any of the *prima facie* elements of the cause of action for foreclosure.

Index No. 850198/21, NYSCEF Doc. No. 196 at 3.

On appeal, the Appellate Division, First Department found that “the affidavit of [assignee’s] agent, who set forth that his personal knowledge of [the borrower]’s default and continuing failure to cure the default was based on his review of plaintiffs’ records maintained in the ordinary course of business” was sufficient to establish the assignee’s *prima facie* case. 220 AD3d at 611. Thus, this common defense will easily fail provided the plaintiff-assignee can adequately lay a foundation for the business record exception to the rule against hearsay.

### **Takeaway**

*Broome Lender* establishes a clear path to foreclosure by assignees and lenders of mortgage loans by removing these technical obstacles used by defaulting borrowers to frustrate lenders. It also guides transactional attorneys to properly document the loan assignments to easily avoid the pitfalls faced by many prior assignees/lenders.

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