**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT**

# U.S. Bank Trust v. McGlone

2022 NY Slip Op 00458 (App. Div. 2022) · No. 2018-12424; 2018-12425 · Decided January 26, 2022

## SUMMARY

The New York Appellate Division, Second Department, dismissed the appeal from an intermediate order and affirmed an order and judgment of foreclosure and sale. The court held that the defendants failed to establish fraud, misrepresentation, or other misconduct warranting vacatur under CPLR 5015(a)(3), and rejected their challenges concerning mortgage assignments, certificates of conformity, and standing.

## CASE DETAILS

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| COURT | Appellate Division of the Supreme Court of the State of New York, Second Judicial Department |
| WRITING FOR THE COURT | Francesca E. Connolly, J.P.; Sylvia O. Hinds-Radix, J.; Sheri S. Roman, J.; Deborah A. Dowling, J. |
| JURISDICTION | New York |
| DECIDED | January 26, 2022 |
| DOCKET | 2018-12424; 2018-12425 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | Defendants appealed from an order granting the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale, denying their CPLR 5015(a)(3) cross-motion to vacate a prior summary-judgment order, and from the resulting order and judgment of foreclosure and sale. |
| STANDARD OF REVIEW | A motion under CPLR 5015(a)(3) to vacate an order granting summary judgment in a foreclosure action requires the movant to establish that the order was procured by fraud, misrepresentation, or other misconduct. The appellate court reviewed the legal sufficiency of that showing and the propriety of the foreclosure judgment. |
| PRECEDENTIAL VALUE | precedential |

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| **PARTIES** | Theodore J. McGlone, Susanne Clegg, Other defendants v. U.S. Bank Trust |

### TOPICS

foreclosure · summary judgment · appellate jurisdiction · civil procedure · remedies

### PRACTICE AREAS

real estate · foreclosure · civil procedure · appellate procedure · remedies

### QUESTIONS PRESENTED

1. Whether the appeal from the May 3, 2018 order had to be dismissed after entry of the order and judgment of foreclosure and sale.
2. Whether the defendants established fraud, misrepresentation, or other misconduct warranting vacatur under CPLR 5015(a)(3) of the prior order granting summary judgment in the foreclosure action.
3. Whether the out-of-state acknowledgments and absence of certificates of conformity on the affidavits and assignments of mortgage invalidated the documents or established misconduct.
4. Whether the assignments of mortgage affected the plaintiff's standing to foreclose.

### HOLDINGS

1. The appeal from the May 3, 2018 order was dismissed because the right to take a direct appeal from that order terminated upon entry of the order and judgment of foreclosure and sale; issues raised on the order were reviewable on the appeal from the final order and judgment.
2. To vacate an order granting summary judgment in a foreclosure action under CPLR 5015(a)(3), the movant must establish that the opposing party procured the order through fraud, misrepresentation, or other misconduct; the defendants failed to make that showing.
3. The out-of-state acknowledgments on the affidavits and on the August 14, 2014 and October 24, 2016 assignments of mortgage substantially conformed to New York requirements and therefore did not require certificates of conformity. Even if a certificate was required for any document, its absence was a waivable irregularity rather than a fatal defect absent actual prejudice.
4. A mere assignment of the mortgage is irrelevant to the plaintiff's standing to foreclose because the mortgage is not the dispositive document of title.

### KEY QUOTATIONS

> *"The appeal from the order dated May 3, 2018, must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action"* ([*1])

> *"To prevail on a motion pursuant to CPLR 5015(a)(3) to vacate an order granting summary judgment in a foreclosure action, the proponent must establish that the opponent procured the order by fraud, misrepresentation, or other misconduct"* ([*2])

## FACTUAL BACKGROUND

On September 19, 2009, Theodore J. McGlone executed a note for $485,347 secured by a mortgage on real property in Lynbrook. After McGlone allegedly defaulted, U.S. Bank Trust commenced a foreclosure action in 2013. The plaintiff submitted assignments of mortgage and affidavits in support of its motions, and the defendants argued that those documents demonstrated fraud or misconduct because of out-of-state acknowledgments and the absence of certificates of conformity.

## PROCEDURAL HISTORY

U.S. Bank Trust commenced a mortgage foreclosure action in 2013 after Theodore J. McGlone allegedly defaulted on a note secured by real property in Lynbrook. The Supreme Court, Nassau County, granted the plaintiff summary judgment, appointed a referee, later confirmed the referee's report, entered a judgment of foreclosure and sale, and denied the defendants' motion to vacate the summary-judgment order based on alleged fraud, misrepresentation, or misconduct. The Appellate Division dismissed the appeal from the intermediate order and affirmed the order and judgment of foreclosure and sale.

## DISPOSITION

affirmed

## CASES CITED

- Matter of Aho, 39 NY2d 241, 248
- Citimortgage, Inc. v. Kish, 192 AD3d 659, 659
- Citimortgage, Inc. v. Zagoory, 198 AD3d 715, 716
- Deutsche Bank Natl. Trust Co. v. Le-Mond, 198 AD3d 610, 610
- Midfirst Bank v. Agho, 121 AD3d 343, 351
- Aurora Loan Servs., LLC v. Taylor, 25 NY3d 355, 362
- Bank of N.Y. Mellon v. West, 183 AD3d 683, 685

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