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Foreclosure 2019

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… [T]he Supreme Court in the 2009 action determined that the defendant was entitled to dismissal of the complaint insofar as asserted against him for lack of standing. "Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration" … . Further, the record contains no evidence of either a written assignment or physical delivery of the underlying note to the plaintiff prior to April 2, 2009, so as to establish the plaintiff's standing to commence the 2009 action … . Thus, contrary to the defendant's contentions, the commencement of the 2009 action did not accelerate the mortgage debt, and the statute of limitations did not begin to run when the 2009 action was commenced … . HSBC Bank USA v Rinaldi, 2019 NY Slip Op 07878, Second Dept 11-6-19

ACCELERATION OF THE DEBT, STANDING.

A PRIOR FORECLOSURE ACTION DISMISSED FOR LACK OF STANDING DID NOT ACCELERATE THE MORTGAGE DEBT, THE STATUTE OF LIMITATIONS, THEREFORE, DID NOT START TO RUN (SECOND DEPT).

The Second Department noted that the prior foreclosure action, which was dismissed on the ground the plaintiff lacked standing, did not accelerate the mortgage debt. Therefore the statute of limitations was not triggered by the dismissed action:

[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due, and the Statute of Limitations begins to run on the entire debt" … . Acceleration occurs, inter alia, "when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of

the full balance due" … . "[A]n acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so" … .

Auguste contends that the commencement of the prior action in 2007 accelerated the debt, and that the commencement of the instant action, seven years later, was beyond the statute of limitations. Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration … . U.S. Bank N.A. v Auguste, 2019 NY Slip Op 04747, Second Dept 6-12-19

ACCELERATION OF THE DEBT, STANDING.

THE 2008 FORECLOSURE ACTION WAS DISMISSED BECAUSE THE BANK DID NOT HAVE STANDING; THEREFORE THE DEBT WAS NOT ACCELERATED IN 2008 AND THE STATUTE OF LIMITATIONS FOR FORECLOSURE DID NOT START RUNNING; PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined plaintiff's action to cancel and discharge a mortgage on the ground the statute of limitations for a foreclosure action had expired was properly dismissed. Although the bank had attempted to foreclose in 2008, that action was dismissed for lack of standing. Therefore the debt was not accelerated by the 2008 foreclosure proceedings:

Pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced … . An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213[4]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … . However, "an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so" … .

Here, the evidence submitted in support of the defendants' motion, including the order dated December 13, 2011, demonstrated that while CitiGroup purported to accelerate the mortgage debt in the complaint served in the

action to foreclose the mortgage in January 2008, that acceleration was a nullity, inasmuch as CitiGroup lacked standing to commence that foreclosure action … . Therefore, the plaintiff's allegation in this action that the statute of limitations to enforce the mortgage had expired was not a fact at all, and it can be said that no significant dispute exists regarding it … . Q & O Estates Corp. v US Bank Trust Nat'l Assoc., 2019 NY Slip Op 06524, Second Dept 9-11-19

ACCELERATION OF THE DEBT.

A LETTER INDICATING THE DEBT WOULD BE ACCELERATED IF THE ARREARS WERE NOT PAID DID NOT SERVE TO ACCELERATE THE DEBT IN THIS FORECLOSURE ACTION; DEFENDANT DID NOT DEMONSTRATE THE BANK FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment contending the bank's action was time barred and the bank failed to comply with RPAPL 1304 should have been denied. The 2010 letter from the bank which mentioned that the loan would be accelerated if the arreats were not paid did not serve to accelerate the debt. And defendant (Grella) did not demonstrate the bank failed to comply with the notice requirements of RPAPL 1304:

On or about December 12, 2010, the loan servicer sent Grella a notice of default which demanded payment of the arrears, and stated, in relevant part, that "[u]nless the payments on your loan can be brought current by January 11, 2011, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note. . . . If funds are not received by the above referenced date, we will proceed with acceleration." Thereafter, the note and the mortgage were assigned to the plaintiff. …

Contrary to Grella's contention, the language in the 2010 notice of default did not serve to accelerate the loan, as it "was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause" … . …

Here, as the moving party, Grella was required to affirmatively demonstrate that the plaintiff failed to strictly comply with the notice requirements of RPAPL 1304 … . Grella failed to make such a showing. HSBC Bank USA, N.A. v Grella, 2019 NY Slip Op 07388, Second Dept 10-16-19

ACCELERATION OF THE DEBT.

IN THIS ACTION TO CANCEL AND DISCHARGE A MORTGAGE BASED UPON THE RUNNING OF THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION, THE BANK RAISED A QUESTION OF FACT WHETHER THE BANK WHICH SERVED THE 2008 COMPLAINT SEEKING FORECLOSURE HAD STANDING AND, THEREFORE, WHETHER THE DEBT WAS ACCELERATED IN 2008 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank had raised a question of fact about whether the mortgage had been accelerated such that the six-year statute of limitations for bringing a foreclosure action had run:

Pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced … . An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213[4] ….). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … . …

The defendants raised a triable issue of fact as to whether Greenpoint had standing to commence the 2008 foreclosure action and, therefore, whether the service of the 2008 complaint was effective to constitute a valid exercise of the option to accelerate the debt … . The affidavits submitted by the defendants were sufficient to raise a triable issue of fact as to whether the note was physically delivered to the defendant U.S. Bank, National Association (hereinafter US Bank), on September 27, 2006, two years before US Bank's assignor, Greenpoint, commenced the 2008 foreclosure action … . Halfon v U.S. Bank, Natl. Assn., 2019 NY Slip Op 00860, Second Dept 2-6-19

ACCELERATION OF THE DEBT.

MORTGAGE WAS NOT ACCELERATED UNTIL THE FORECLOSURE ACTION WAS COMMENCED IN OCTOBER 2016; ACTION FOR THE INSTALLMENT PAYMENTS MISSED DURING THE SIX YEARS PRIOR TO OCTOBER 2016 IS TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage was not accelerated until the foreclosure action was commenced in October, 2016. Therefore the action was not time-barred, except for the mortgages payments due but not paid more than six years prior to October 2016 (missed payments prior to October 2010):

… [C]ontrary to the defendant's contention, he did not establish that the complaint should be dismissed on statute of limitations grounds through the notices sent to the defendant in February 2009 and May 2009, as those notices did not accelerate the mortgage. The notices indicated that acceleration was a possible future event, but did not constitute an exercise of the mortgage's acceleration clause … . Rather, the mortgage was only accelerated in October 2016, when the plaintiff served the foreclosure complaint on the defendant seeking immediate payment of the balance of the principal indebtedness. Thus, the Supreme Court should not have granted dismissal of the complaint in its entirety as time-barred. Specifically, the defendant failed to show that the causes of action in the complaint, insofar as they relate to unpaid mortgage installments which accrued within the six-year period immediately preceding the plaintiff's October 2016 commencement of this foreclosure action, to wit, the unpaid installments which accrued on or after October 6, 2010, were time-barred … .

However, where, as here, the mortgage was payable in installments, there are "separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due" … . Therefore, since the plaintiff alleged that the defendant made his last payment on mortgage in January 2009 and this action was not commenced until October 6, 2016, the defendant established that any unpaid installments of the mortgage which accrued before the six-year period prior to the plaintiff's commencement of this mortgage foreclosure action, to wit, unpaid installments from January 2009 through October 5, 2010, are time-barred … . Ditech Fin., LLC v Reiss, 2019 NY Slip Op 06208, Second Dept 8-21-19

ACCELERATION OF THE DEBT.

PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE ON THE GROUND THAT THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION HAD EXPIRED SHOULD HAVE BEEN DISMISSED, THE BANK UTTERLY REFUTED THE ALLEGATION WITH DOCUMENTS DEMONSTRATING THE DEBT HAD NEVER BEEN ACCELERATED; CLEAR EXPLANATION OF THE REQUIREMENTS FOR DISMISSAL BASED ON DOCUMENTARY EVIDENCE AND ACCELERATION OF A MORTGAGE DEBT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive dissent, determined that the bank's (Deutsche Bank's) motion to dismiss the plaintiff's RPAPL article 15 action to cancel and discharge the mortgage should have been granted. The bank had started foreclosure proceedings in 2007 and plaintiff alleged in the complaint that the statute of limitations had run. However, the 2007 action had been dismissed because the bank did not have standing at the time it was brought. The Second Department determined the documentary proof of the dismissal of the 2007 action demonstrated, as a matter of law, that the debt had never been accelerated and, therefore, the statute of limitations had never started running. The decision provides a succinct and clear explanation of the requirements for a dismissal based on documentary evidence and the requirements for accelerating a mortgage debt:

… [C]ontrary to the plaintiff's contention and the opinion of our dissenting colleague, the commencement of the foreclosure action, which was dismissed on the ground that Deutsche Bank lacked standing, was ineffective to constitute a valid exercise of the option to accelerate the debt since Deutsche Bank did not have the authority to accelerate the debt at that time … . The plaintiff did not identify the specific time when the mortgage was actually, legally accelerated. Furthermore, the notices of default were nothing more than letters discussing acceleration as a possible future event, which do not "constitute an exercise of the mortgage's optional acceleration clause" … . …

Consequently, the allegations in the complaint that the debt was accelerated as of April 30, 2007, the date when Deutsche Bank commenced the underlying foreclosure action, or prior to April 30, 2007, when the notices of default were sent, are utterly refuted by the documentary evidence submitted by Deutsche Bank, which included the written assignment of the mortgage [dated after April 30, 2007) "together with the . . . note" and the October 2009 order [dismissing the foreclosure action], in support of that branch of its motion which was pursuant to

CPLR 3211(a)(1) to dismiss the complaint … . Moreover, Deutsche Bank, through the evidence it submitted with its motion, demonstrated that the plaintiff's allegation that the statute of limitations to foreclose the subject mortgage had expired was "not a fact at all," and that "it can be said that no significant dispute exists regarding it," warranting dismissal of the complaint pursuant to CPLR 3211(a)(7) … . J & JT Holding Corp. v Deutsche Bank Natl. Trust Co., 2019 NY Slip Op 04366, Second Dept 6-5-19

ACCELERATION OF THE DEBT.

PROVISION IN MORTGAGE WHICH GAVE BORROWER RIGHT TO DE-ACCELERATE THE DEBT DID NOT PRECLUDE PLAINTIFF BANK FROM ACCELERATING THE DEBT BY FILING A SUMMONS AND COMPLAINT, FORECLOSURE ACTION TIME-BARRED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, determined that a reinstatement provision in a mortgage which gives the borrower the option to de-accelerate the debt did not preclude the plaintiff bank from accelerating the debt, rendering the foreclosure action time-barred:

This appeal presents an issue of first impression for this Court. The plaintiff in this mortgage foreclosure action contends that it lacked the authority to exercise its contractual option to accelerate the maturity of the entire balance of the loan it seeks to recover. The plaintiff argues that it was prevented from validly accelerating the debt by virtue of a reinstatement provision in the subject mortgage which gives the borrower the option, under certain circumstances, to effectively de-accelerate the maturity of the debt. The plaintiff further argues that the statute of limitations did not begin to run until the borrower's rights under the reinstatement provision in the subject mortgage were extinguished. * * *

… .[T]he defendant demonstrated that the subject mortgage provided the plaintiff with the right to require the defendant to immediately pay "the entire amount then remaining unpaid under the Note and [mortgage]" if the plaintiff first satisfied certain conditions set forth in the mortgage. The defendant's evidentiary submissions established that the plaintiff complied with those conditions … , and then validly exercised its option to accelerate the entire remaining balance due under the note by filing the summons and complaint in the first foreclosure action in June 2010 … . Accordingly, since this action was not commenced until October 2016, the defendant established, prima facie, that the time in which to commence this action has expired (see CPLR 213[4]). * * *

… [T]the extinguishment of the defendant's contractual right to de-accelerate the maturity of the debt pursuant to the reinstatement provision in paragraph 19 of the mortgage was not a condition precedent to the plaintiff's acceleration of the mortgage … . Bank of N.Y. Mellon v Dieudonne, 2019 NY Slip Op 01732, Second Dept 3-13-19

ACCELERATION OF THE DEBT.

QUESTION OF FACT WHETHER THE DISCONTINUANCE OF A PRIOR FORECLOSURE ACTION DE-ACCELERATED THE MORTGAGE RENDERING THE INSTANT ACTION TIMELY (FIRST DEPT).

The First Department determined there was a question of fact whether the discontinuance of a prior foreclosure action de-accelerated the mortgage. If the mortgage was not de-accelerated the instant action would be time-barred:

Acceleration only takes place when the holder of the note and mortgage takes "affirmative action . . . evidencing the holder's election" to do so … . This may be accomplished in the form of a notice to the borrower … . Affirmative action can also occur when the first foreclosure action is commenced … . The prior foreclosure action sought the accelerated mortgage amount.

There is an issue of fact in this particular case regarding whether plaintiff's discontinuance of the prior foreclosure action de-accelerated the mortgage … . We note that neither the motion seeking discontinuance or the order entered granting that relief provided that the mortgage was de-accelerated or that plaintiff would now be accepting installment payments from the defendant … . U.S. Bank N.A. v Charles, 2019 NY Slip Op 04997, First Dept 6-20-19

ACCELERATION OF THE DEBT.

STIPULATION OF DISCONTINUANCE OF THE PRIOR FORECLOSURE ACTION DID NOT DE-ACCELERATE THE DEBT, INSTANT FORECLOSURE ACTION IS THEREFORE TIME-BARRED (SECOND DEPT).

The Second Department determined the prior action for foreclosure accelerated the debt and the subsequent stipulation of discontinuance did not de-accelerate the debt. The instant foreclosure action was therefore time-barred:

… [D]efendant established that the six-year statute of limitations began to run on the entire debt on April 21, 2008, the date the plaintiff accelerated the mortgage debt by commencing the prior action … . Since the plaintiff did not commence this action until December 15, 2015, more than six years later, the defendant sustained his initial burden of demonstrating, prima facie, that this action was untimely … . The burden then shifted to the plaintiff to present admissible evidence establishing that the action was timely or to raise a question of fact as to whether the action was timely … .

The plaintiff failed to meet its burden. Contrary to its contention, the plaintiff failed to raise a question of fact as to whether it affirmatively revoked its election to accelerate the mortgage within the six-year limitations period. Its execution of the stipulation of discontinuance did not, by itself, constitute an affirmative act to revoke its election to accelerate, since the stipulation was silent on the issue of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant … . **Bank of N.Y. Mellon v Craig, 2019 NY Slip Op 00846 [169 AD3d 627], Second Dept 2-6-19**

ACCELERATION OF THE DEBT.

THE 30-DAY NOTICE PROVISION IN THE MORTGAGE DID NOT PRECLUDE ACCELERATING THE DEBT BY THE ALLEGATIONS IN THE FORECLOSURE COMPLAINT, SUPREME COURT SHOULD NOT HAVE NULLIFIED THE ACCELERATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined Supreme Court should not have nullified the acceleration of the mortgage in this foreclosure action. Because acceleration was optional, the 30-day notice provision in the mortgage did not preclude acceleration by the allegations in the foreclosure complaint:

Supreme Court erred in nullifying plaintiff's assignor's acceleration in the prior action based on Section 22 of the mortgage which provides that the lender may accelerate the mortgage only if, inter alia, it has served defendant with a proper 30-day notice of default. Where the acceleration is optional as here, some affirmative action must be taken to evince the note holder's election to accelerate … . Affirmative action can be in the form of a letter … or the commencement of a foreclosure action … . Plaintiff's assignor accelerated the mortgage debt by commencing the prior action and stating in its complaint that "plaintiff elects herein to call due the entire amount secured by the mortgage(s)." Capital One, N.A. v Saglimbeni, 2019 NY Slip Op 01837, First Dept 3-14-19

APPEALS.

THERE WERE NO GROUNDS TO DISTURB THE FACTUAL FINDINGS MADE BY THE JUDGE IN THIS BENCH TRIAL OF A FORECLOSURE ACTION, TWO DISSENTERS ARGUED THE FINDINGS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, over a two-justice dissent, determined that the evidence at the bench trial in this foreclosure proceeding supported the judge's conclusion that plaintiff bank was not the cause of defendant's inability to obtain financing to payoff the mortgage pursuant to a settlement agreement. The dissenters argued the trial judge's findings were against the weight of the evidence, primarily because the judge found defendant's testimony to be "honest and accurate." The key issue in the appeal was whether there were sufficient grounds to disturb the judge's factual findings:

… [W]e perceive no basis on which to disturb the trial court's determination. As articulated by the Court of Appeals, the standard of review on an appeal from a decision based on findings of fact, resting in large measure on determinations of the credibility of witnesses, made by the court after a bench trial, is as follows:

"[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (Thoreson v Penthouse Intl., 80 NY2d 490, 495 [1992] …).

Supreme Court's rejection of defendant's claim — a claim based on testimony not only lacking support in the contemporaneous documentary evidence, but inconsistent with that evidence — more than passes muster under this highly deferential standard. Security Pac. Natl. Bank v Evans, 2019 NY Slip Op 06138, First Dept 8-13-19

BANKRUPTCY, ACCELERATION OF THE DEBT.

THE DISCHARGE IN BANKRUPTCY DID NOT ACCELERATE THE DEBT AND THEREFORE DID NOT START THE STATUTE OF LIMITATIONS RUNNING; THE IN REM FORECLOSURE ACTION REMAINS VIABLE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Carni, determined that the mortgage debt was not accelerated by a discharge in bankruptcy, therefore the statute of limitations was not triggered and an in rem foreclosure action remains viable:

… [O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … . "Where the acceleration . . . is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" … . Here, the mortgage provided plaintiff the option to accelerate the debt under certain circumstances, but did not state that the debt would be automatically accelerated if defendant obtained a discharge in bankruptcy.

We reject defendant's contention that the discharge in bankruptcy automatically accelerated the debt and thus triggered the statute of limitations with respect to the entire debt … .

"[E]ven after the debtor's personal obligations have been extinguished [by chapter 7 discharge], the mortgage holder still retains a right to payment in the form of its right to the proceeds from the sale of the debtor's property," and a bankruptcy proceeding does not "impair [the mortgage holder's] right to commence an action against [the debtor] in rem to seek payment from the proceeds of a foreclosure sale" … . … [C]hapter 7 discharge removes the "mode of enforc[ement]" against the debtor in personam, but the obligation otherwise remains intact and does not impact an action in rem … . Wilmington Sav. Fund Socy., FSB v Fernandez, 2019 NY Slip Op 08290, Fourth Dept 11-15-19

BANKRUPTCY, STATUTE OF LIMITATIONS.

FEDERAL BANKRUPTCY STAY TOLLED THE STATUTE OF LIMITATIONS IN A FORECLOSURE ACTION COMMENCED BEFORE THE STAY WENT INTO EFFECT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge dissent, determined an automatic bankruptcy stay tolls the statute of limitations where a party has a pending action at the time the stay was imposed:

New York law tolls the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" (CPLR 204 [a]). Federal bankruptcy law automatically stays the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition (see 11 USC § 362 [a]). We must determine whether the bankruptcy stay qualifies as a "statutory prohibition" under CPLR 204 (a), and, if so, whether a party may later avail itself of the toll where, at the time the stay was imposed, that party had a pending action asserting the same claim. … [W]e answer yes to both questions … . * * *

CPLR 204 (a) provides, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." The result here depends on our reading of the term "commencement."

Plaintiff argues that it is impossible for defendant to have been prohibited from "commencing" an action because a foreclosure action had been commenced prior to plaintiff's bankruptcy filing. Application of plaintiff's rule would be as follows: Because defendant filed the first foreclosure claim and defendant responded by filing a bankruptcy petition, invoking the automatic stay, commencement of that first action was not "stayed" under the statute and the toll is inapplicable. And when defendant filed a second foreclosure action, and plaintiff again responded by again filing a bankruptcy petition that invoked the automatic stay, "commencement" of that second action was not stayed, once again making the toll inapplicable … . * * *

Neither this Court nor the Legislature has restricted the term "commencement" to the first time a party files a complaint asserting a cause of action; instead the term may also include the commencement of subsequent actions asserting the same claim … . Lubonty v U.S. Bank Natl. Assn.., 2019 NY Slip Op 08520, CtApp 11-25-19

BORROWER, DEFINITION OF.

DEFENDANT IN THIS FORECLOSURE ACTION WAS A 'BORROWER' AND THEREFORE WAS ENTITLED TO THE 90-DAY NOTICE REQUIRED BY RPAPL 1304; THE BANK HAD ARGUED SHE WAS NOT A BORROWER BECAUSE SHE DID NOT SIGN THE NOTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this foreclosure action was a "borrower" within the meaning of RPAPL 1304 and therefore she was entitled to the required 90-day notice, which she did not receive. That bank argued that she was not a borrower because only her deceased husband signed the note. However she was named on the mortgage and she signed the mortgage:

While RPAPL 1304 provides that the notice shall be sent to the "borrower," that term is not defined in the statute (see RPAPL 1304). It is undisputed that only the defendant's deceased husband, Solomon Forman, is identified as a "borrower" in the note which is secured by the mortgage. That is not determinative in this case. In the mortgage instrument, the defendant is referred to as a borrower. On the first page of the mortgage instrument, under the heading entitled "Words Used Often in this Document," the defendant is identified, along with her husband, as " Borrower.'" The defendant is also designated as "Borrower" under her signature on the signature page of the mortgage instrument. While the plaintiff contends that this standard mortgage form mischaracterizes the defendant as a borrower, any ambiguities in the language of the document must be construed against the plaintiff, as the plaintiff is the party who supplied the document … . Bank of N.Y. Mellon v Forman, 2019 NY Slip Op 07045, Second Dept 10-2-19

DEEDS.

DEED MADE UNDER FALSE PRETENSES IS VOID AB INITIO RENDERING THE RELATED MORTGAGE INVALID; THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE RECONSIDERING A MATTER WHERE THERE IS NEW EVIDENCE (FIRST DEPT).

The First Department, reversing Supreme Court, in this foreclosure action, determined a deed made under false pretenses was void ab initio and therefore the related mortgage was invalid. The court noted that the law of the case doctrine does not prohibit it from reconsidering a matter where there is subsequent evidence affecting the prior determination:

It is undisputed that nonparty Rapsil Corporation conveyed the same property to two different recipients, first, defendant Rafael Pantoja (who obtained a mortgage from CitiMortgage), and, second, a bona fide entity that transferred it to the Salazar defendants. Although the deed that conveyed the property from Rapsil to Pantoja was unacknowledged, which ordinarily would render it only voidable, because Pantoja controlled Rapsil, the deed was made under false pretenses and was therefore void ab initio … . Accordingly, the CitiMortgage mortgage was invalid as well (Weiss v Phillips, 157 AD3d 1, 10 [1st Dept 2017]).

This determination is not inconsistent with our prior related decisions … . In any event, the law of the case doctrine does not limit our power to reconsider issues "where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination" … . CitiMortgage, Inc. v Pantoja, 2019 NY Slip Op 05481, First Dept 7-9-19

DEFAULT, ABANDONMENT.

FORECLOSURE ACTION ABANDONED, BANK FAILED TO INITIATE DEFAULT JUDGMENT PROCEEDINGS WITHIN ONE YEAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff bank had abandoned the foreclosure action by failure to move for a default judgment within one year. The bank's participation in mandatory settlement conferences did not constitute the initiation of an action for a default judgment:

CPLR 3215(c) provides, in part, that if the plaintiff fails to take proceedings for the entry of judgment within one year after the defendant's default, "the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion" … . "The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts shall' dismiss claims … for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" … . However, the failure to timely seek a default judgment may be excused if "sufficient cause is shown why the complaint should not be dismissed" … . To establish sufficient cause as required by CPLR 3215(c), a plaintiff must proffer a reasonable excuse for the delay in timely moving for a default judgment and demonstrate that it has a potentially meritorious cause of action … .

… [A]fter this action was released from the mandatory foreclosure settlement conference part in July 2016, the plaintiff was authorized to proceed with the prosecution of this action. However, despite the fact that the appellants failed to answer or otherwise appear in the action after being served with process, the plaintiff took

no steps to initiate proceedings for the entry of a default judgment against the appellants. The plaintiff's participation in the mandatory foreclosure settlement part conferences did not constitute the initiation of proceedings for the entry of a default judgment. Moreover, more than one year passed from the time that the plaintiff was authorized to resume prosecution of this action prior to the appellants moving in October 2017 to dismiss the complaint as abandoned …. In light of the plaintiff's failure to meet its burden to show sufficient cause why the complaint should not be dismissed as abandoned, it is not necessary to address the issue of whether the plaintiff demonstrated that it had a potentially meritorious cause of action … . HSBC Bank USA, N.A. v Slone, 2019 NY Slip Op 05963, Second Dept 7-31-19

DEFAULT, KINGS COUNTY LOCAL RULE.

DENIAL OF DEFENDANT'S MOTION TO VACATE HIS DEFAULT IN THIS FORECLOSURE ACTION DID NOT PRECLUDE DEFENDANT'S MOTION TO DISMISS BASED UPON PLAINTIFF BANK'S FAILURE TO MOVE FOR A JUDGMENT OF FORECLOSURE WITHIN ONE YEAR AS REQUIRED BY KINGS COUNTY LOCAL RULE 8 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the denial defendant's motion to vacate a default judgment did not preclude defendant's motion to dismiss the foreclosure action based upon plaintiff bank's failure to comply with Rule 8 (Kings County Supreme Court Uniform Civil Rules) :

In August 2013, the plaintiff commenced this mortgage foreclosure action against the defendant Andy McAlpin (hereinafter the defendant) and others. The defendant did not answer or appear in the action, and in February 2014, the plaintiff moved, inter alia, for leave to enter a default judgment and for an order of reference. In an order dated October 24, 2014, the Supreme Court granted the plaintiff's motion. The plaintiff did not move for a judgment of foreclosure and sale, and in May 2016, the defendant moved, inter alia, pursuant to CPLR 5015(a)(4) to vacate the order of reference and to dismiss the complaint insofar as asserted against him on the ground that he had not been served with the summons and complaint, for leave to serve a late answer, and to dismiss the complaint on the ground that the plaintiff failed to comply with Part F, rule 8, of the Kings County Supreme Court Uniform Civil Term Rules (hereinafter Rule 8). Rule 8 requires a plaintiff in a foreclosure action to file a motion for a judgment of foreclosure within one year of entry of the order of reference. …

Contrary to the Supreme Court's determination, the defendant was not precluded from seeking relief under Rule 8 by the denial of that branch of his motion which was to vacate his default … . Bank of Am., N.A. v McAlpin,b2019 NY Slip Op 02843, Second Dept 4-17-19

DEFAULT, NOTICE.

BANK'S PROOF OF DEFAULT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE AND THE PROOF OF MAILING OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 NOTICE WAS DEFICIENT, BANK'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. The proof of default did not meet the requirements of the business records exception to the hearsay rule. And the proof mailing in accordance with Real Property Actions and Proceedings Law (RPAPL) 1304 was deficient:

… [T]he plaintiff's submissions, including the affidavit of Daphne Proctor, a "Document Execution Specialist" employed by the loan servicer, failed to lay a proper foundation for the admission of the business records relied on by the plaintiff to establish the defendant's default in repayment of the subject loan … . Notably, to the extent that Proctor's "purported knowledge of [the defendant's] default was based upon her review of unidentified business records created and maintained by [the loan servicer], her affidavit constituted inadmissible hearsay and lacked probative value" … .

Moreover, the plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304. The record contains a single 90-day notice with no clear indication as to whether the mailing was made by registered or certified mail, or by first-class mail … . Furthermore, Proctor, who asserted that the notices required under RPAPL 1304 were mailed, did not aver in her affidavit that she was familiar with the loan servicer's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … , nor did she aver that she had mailed the notices herself. Wells Fargo Bank, N.A. v Kohli, 2019 NY Slip Op 04751, Second Dept 6-12-19

DEFAULT, NOTICE.

FAILURE TO COMPLY WITH RPAPL 1304 NOTICE REQUIREMENTS IN A FORECLOSURE ACTION IS NOT A JURISDICTIONAL DEFECT; BECAUSE THE ISSUE WAS NOT RAISED BY DEFENDANT, PLAINTIFF BANK NEED NOT DEMONSTRATE COMPLIANCE TO BE ENTITLED TO A DEFAULT JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the failure to comply with Real Property Actions and Proceedings Law (RPAPL) 1304 is not a jurisdictional defect. Therefore, because that issue was not raised by the defendant, the bank need not prove compliance in a motion for a default judgment:

… [T]he plaintiff's unopposed renewed motion for a default judgment was facially adequate pursuant to CPLR 3215(f), and therefore, should have been granted … . Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate its compliance with RPAPL 1304, since the failure to comply with RPAPL 1304 is not a jurisdictional defect, and that defense was never raised by the borrowers, who failed to appear or answer the complaint … . Moreover, the plaintiff established its entitlement to an order of reference (see RPAPL 1321 …). U.S. Bank Trust, N.A. v Green, 2019 NY Slip Op 04988, Second Dept 6-19-19

DEFAULT, REPLY PAPERS.

DOCUMENTS RELIED UPON BY PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT MEET THE CRITERIA FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, DOCUMENTS SUBMITTED IN REPLY DID NOT SATISFY PLAINTIFF'S BURDEN TO MAKE OUT A PRIMA FACIE CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the documentary evidence relied upon by plaintiff in this foreclosure action did not meet the criteria for the business records exception to the hearsay rule. Plaintiff's motion for summary judgment should not have been granted. The court noted that documents submitted in reply could not be considered to satisfy the plaintiff's burden of making out a prima facie case:

Although "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" … . While [plaintiff's vice president] averred, inter alia, that his affidavit was based on books and records maintained by the plaintiff, he did not state that Bank of America's records were provided to the plaintiff and incorporated into the plaintiff's own records, or that the plaintiff routinely relied upon such records in its business, or that he had personal knowledge of Bank of America's business practices and procedures. Thus, he failed to lay the proper foundation for admission of these records … . The affidavit and documents submitted by the plaintiff for the first time in reply to the defendants' opposition could not be used to satisfy the plaintiff's prima facie burden. Tri-State Loan Acquisitions III, LLC v Litkowski, 2019 NY Slip Op 03398, Second Dept 5-1-19

DEFAULT.

BANK'S EVIDENCE OF DEFENDANT'S DEFAULT WAS INADMISSIBLE HEARSAY, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the bank's proof that defendant (Bazigos) defaulted on the loan was inadmissible hearsay:

"In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default" … . "A plaintiff may establish a payment default by an admission made in response to a notice to admit (see CPLR 3212[b]; 3123), by an affidavit from a person having [personal] knowledge of the facts' (CPLR 3212[b]), or by other evidence in admissible form'" … .

Here, Bluford (a bank vice-president), whose knowledge was based on business records, did not actually attach or otherwise incorporate into her affidavit any business records showing that Bazigos had defaulted on the note. Thus, her affidavit constituted inadmissible hearsay and lacked probative value on the issue of Bazigos's default … . HSBC Bank USA, N.A. v Bazigos, 2019 NY Slip Op 06757, Second Dept 9-25-19

DEFAULT.

BANK'S PROOF OF DEFENDANT'S DEFAULT INSUFFICIENT AT BOTH THE SUMMARY JUDGMENT AND TRIAL STAGES IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department determined plaintiff bank was not entitled to summary judgment in this foreclosure action because it did not submit sufficient proof of defendant's default. At trial Supreme Court properly held that plaintiff bank did not meet its prima facie burden because the proper foundation for the admission of business records was not provided:

… [P]laintiff failed to submit evidence establishing her default. Wilson [Wells Fargo vice president] failed to attach or incorporate any of Wells Fargo's business records to her affidavit. Accordingly, her affidavit constituted inadmissible hearsay and lacked probative value … . …

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" … . At the trial in this case, Wiggins [Wells Fargo loan verification officer] testified only that he had access to Wells Fargo's computerized records. He did not testify that he was familiar with Wells Fargo's practices in making those records, and he failed to state that he had any knowledge regarding the plaintiff's records. Moreover, the plaintiff did not attempt to introduce any of the relevant records into evidence. Thus, Wiggins failed to establish an evidentiary basis for his statement that the subject loan was in default … . HSBC Bank USA, Natl. Assn. v Green, 2019 NY Slip Op 06482, Second Dept 9-11-19

DEFAULT.

DEFENDANTS PRESENTED EVIDENCE THE BANK ACCEPTED PAYMENTS IN LESS THAN THE REQUIRED AMOUNT AFTER THE ALLEGED DEFAULT; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT)

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted because defendants presented evidence the bank had accepted payments after the alleged default:

… [T]he defendants presented evidence demonstrating that, subsequent to their alleged default in September 2008, the plaintiff accepted mortgage payments in a lesser amount than originally required, which raises triable issues of fact as to whether the parties entered into a modification agreement subsequent to the defendants' alleged default in September 2008, and whether there was a continuing default by the defendants from 2008 … . U.S. Bank N.A. v McEntee, 2019 NY Slip Op 07636, Second Dept 10-23-19

DEFAULT.

DOCUMENTS SUBMITTED BY FANNIE MAE IN THIS FORECLOSURE ACTION DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, FANNIE MAE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence submitted by the plaintiff (Fannie Mae) in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and, therefore, plaintiff's motion for summary judgment should not have been granted:

In support of those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, Fannie Mae submitted affidavits of foreclosure specialists employed by Seterus, Inc., its loan servicer. The foreclosure specialists attested that they were personally familiar with the record-keeping practices and procedures of Seterus, Inc., but failed to lay a proper foundation for the admission of records concerning the defendants' payment history and default. Accordingly, Fannie Mae failed to demonstrate that the records relied upon in the affidavits were admissible under the business records exception to the hearsay rule (see CPLR 4518[a] …). Since Fannie Mae's motion was based on evidence that was not in admissible form … , Fannie Mae failed to establish its prima facie entitlement to judgment as a matter of law, and those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference should have been denied, regardless of the sufficiency of the defendants' papers in opposition … . Federal Natl. Mtge. Assn. v Marlin, 2019 NY Slip Op 00095, Second Dept 1-9-19

DEFAULT.

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE, MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that law office failure was an adequate excuse and appellants' motion to vacate a default judgment should have been granted in this foreclosure action:

… [T]he appellants moved, among other things, pursuant to CPLR 2005 and 5015(a) to vacate their default … . …

"A motion to vacate a default is addressed to the sound discretion of the motion court" … . "In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" … .

Under the circumstances presented here, the appellants set forth a reasonable excuse for their failure to appear at the centralized motion part of the Supreme Court on the return date of the plaintiff's motion based on evidence of law office failure. In an affirmation, the appellants' attorney explained that upon receiving the plaintiff's motion, he directed his office's legal assistant to note the return date of the motion on the office calendar, but that the return date had not been noted on the calendar. In addition, the appellants demonstrated a potentially meritorious defense based upon the statute of limitations. Bank of N.Y. Mellon v Faragalla, 2019 NY Slip Op 05641, Second Dept 7-17-19

DEFAULT.

MOTION TO VACATE A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED, NO EXCUSE OFFERED (SECOND DEPT).

The Second Department determined plaintiff's motion to vacate a default judgment in this foreclosure action should not have been granted:

With regard to default judgments, CPLR 3215(c) provides, in pertinent part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but

shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion." The "one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint . . . may be excused if sufficient cause is shown why the complaint should not be dismissed'" … . "This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious" … .

Here, the plaintiff did not offer any excuse for its failure to take proceedings for the entry of a default judgment … for more than one year after the action was released from the foreclosure settlement conference part … . "Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and shall' dismiss the claim pursuant to CPLR 3215(c)" … . HSBC Bank USA, N.A. v Uddin, 2019 NY Slip Op 05649, Second Dept 7-17-19

DEFAULT.

PURSUANT TO AN EXCEPTION IN 22 NYCRR 202.5-b, USING THE NYSCEF ELECTRONIC FILING SYSTEM DID NOT CONSTITUTE PROPER SERVICE OF A NOTICE OF ENTRY ON DEFENDANTS, THE TIME FOR DEFENDANTS TO ANSWER THEREFORE NEVER STARTED TO RUN AND DEFENDANTS WERE NOT IN DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a notice of entry in this foreclosure action, although the NYSCEF electronic filing system was used, was not properly served and therefore defendants' time to answer never started running and defendants were not in default:

Contrary to the determination of the Supreme Court, since the plaintiff never served the Dedvukaj defendants with notice of entry of the June 2015 order denying their motion to dismiss the complaint, their answer was timely served, as their time to answer never started to run (see CPLR 3211[f] …). …

Pursuant to 22 NYCRR 202.5-b, the court rule governing electronic filing for the Supreme Court, a party may serve an interlocutory document upon another party by filing the document electronically: "Upon receipt of [the] interlocutory document, the NYSCEF site shall automatically transmit electronic notification to all e-mail service addresses in such action . . . . Except as provided otherwise in subdivision (h)(2) of this section, the electronic

transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein" … .

Subdivision (h)(2), which appears in a subsection entitled "Entry of Orders and Judgments and Notice of Entry," provides, in relevant part: "[a] party may serve [an order or judgment and written notice of its entry] electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, which shall constitute service . . . by the filer. In the alternative, a party may serve a copy of the order or judgment and written notice of its entry in hard copy by any method set forth in CPLR 2103(b)(1) to (6). If service is made in hard copy by any such method and a copy of the order or judgment and notice of its entry and proof of such hard copy service are thereafter filed with the NYSCEF site, transmission by NYSCEF of notification of receipt of those documents shall not constitute additional service of the notice of entry on the parties to whom the notification is sent" … . JBBNY, LLC v Dedvukaj, 2019 NY Slip Op 02692, Second Dept 4-10-19

DEFAULT.

RECORDS SUBMITTED BY THE BANK DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the records submitted by the bank (Deutsche Bank) did not meet the requirements of the business records exception to the hearsay rule:

Here, in support of its motion, Deutsche Bank submitted the mortgage, the note, and the affidavit of Nicholas Collins, a vice president of Ocwen Loan Servicing, LLC (hereinafter Ocwen), Deutsche Bank's loan servicer, in which Collins averred, inter alia, that the defendant defaulted by failing to make the payments due under the note and mortgage after January 1, 2008. The plaintiff also submitted a limited power of attorney dated June 7, 2012, which demonstrated that Ocwen was authorized to act on Deutsche Bank's behalf. However, Deutsche Bank failed to demonstrate that the records relied upon by Collins, including those relating to the defendant's alleged default, were admissible under the business records exception to the hearsay rule, since Collins, who was employed by Ocwen, did not attest that he was personally familiar with the record-keeping practices and procedures of the plaintiff (see CPLR 4518[a] …). Thus, Collins failed to lay a proper foundation for admission of the records on which he relied, including the records concerning the defendant's payment history, and

therefore, his assertions based on those records were inadmissible … . Deutsche Bank Trust Co. Ams. v Blount, 2019 NY Slip Op 02500, Second Dept 4-3-19

DEFAULT.

THE BANK'S MOTION TO VACATE A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED BECAUSE OF THE BANK'S UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED CONFERENCE IN VIOLATION OF 22 NYCRR 202.27(c) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's unexcused failure to appear at a scheduled conference required denial of the bank's motion to vacate a default judgment:

Although CPLR 3215(c) was not an appropriate ground upon which to dismiss the complaint because the plaintiff initiated proceedings for the entry of a judgment by moving for an order of reference within one year of the defendant's default …, dismissal of the complaint was appropriate pursuant to 22 NYCRR 202.27(c) since the plaintiff failed to appear for the scheduled October 2012 conference.

A plaintiff seeking to vacate a default in appearing at a conference is required to demonstrate both a reasonable excuse for its default and a potentially meritorious cause of action (see CPLR 5015[a][1] …). Although "[t]he determination of whether an excuse is reasonable is committed to the sound discretion of the motion court" … , the defaulting party must submit evidence in admissible form establishing both a reasonable excuse and a potentially meritorious cause of action or defense … .

Here, the plaintiff alleged only that the failure of its two prior attorneys to timely file the attorney affirmation in accordance with the January 2011 order caused the delay in prosecuting this action, and failed to proffer any evidentiary support therefor or any excuse for its failure to appear at the October 2012 conference. Moreover, the record reflects that the plaintiff did not take any action for almost four years to cure its default after the action was marked off the calendar. Since the plaintiff failed to demonstrate a reasonable excuse for its default … , we need not reach the issue of whether it had asserted a potentially meritorious cause of action … . Wells Fargo Bank, N.A. v McClintock, 2019 NY Slip Op 06015, Second Dept 7-31-19

EQUITABLE SUBROGATION.

BANK ENTITLED TO JUDGMENT UNDER THE DOCTRINE OF EQUITABLE SUBROGATION (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment pursuant to the equitable subrogation theory in this foreclosure action:

… [T]he plaintiff commenced this action to foreclose a mortgage in the principal amount of $480,000, which it alleged was secured by real property in Brooklyn, owned by the defendants Tzilia Dalfin (hereinafter Tzilia) and Angel E. Daflin (hereinafter Angel), who have been divorced since the 1990s. It is undisputed that $453,900.03 of the proceeds of the mortgage were used to pay off Tzilia and Angel's prior mortgage on the property as well as outstanding taxes. * ** *

Under the doctrine of equitable subrogation, "[w]here property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder" … . Even if, as Angel contends, his signature on the subject mortgage was forged, the plaintiff could still recover against him on the theory of equitable subrogation based upon its payoff of the prior mortgage and liens against his property at the closing of the subject mortgage … .

… [T]he plaintiff established its … entitlement to judgment as a matter of law on a theory of equitable subrogation by submitting evidence that $453,900.03 of the proceeds of the subject mortgage were used to pay off the prior mortgage and taxes for which Angel was liable … . Wells Fargo Bank, N.A. v Dalfin, 2019 NY Slip Op 01255, Second Dept 2-20-19

FILING REQUIREMENTS.

THE BANK DID NOT SUBMIT PROOF OF COMPLIANCE WITH THE FILING REQUIREMENTS OF RPAPL 1306 IN THIS FORECLOSURE ACTION, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the bank's motion for summary judgment in this foreclosure action should not have been granted because the bank did not submit proof of compliance with the filing requirements of RPAPL 1306:

Pursuant to RPAPL 1306, lenders "shall file with the superintendent of financial services . . . within three business days of the mailing of the notice required by [RPAPL 1304]" a form containing certain information regarding the borrower and the mortgage (RPAPL 1306[1]; see RPAPL 1306[2]). RPAPL 1306(1) further states that "[a]ny complaint served in [an action] initiated pursuant to [RPAPL article 13] shall contain, as a condition precedent to such [action], an affirmative allegation that at the time the [action] is commenced, the plaintiff has complied with the provisions of this section."

Here, in support of its motion, the plaintiff failed to submit any evidence of compliance with RPAPL 1306. JPMorgan Chase Bank, N.A. v Lyon, 2019 NY Slip Op 07060, Second Dept 10-2-19

FORECLOSURE SALE, TIME OF THE ESSENCE, SANCTIONS.

PLAINTIFF LOAN SERVICING COMPANY WAIVED THE TIME OF THE ESSENCE PROVISION BY ITS RELENTLESS EFFORTS TO PREVENT THE FORECLOSURE SALE TO THE HIGHEST BIDDER (TO EXACT A HIGHER PRICE); THE SANCTIONS IMPOSED ON PLAINTIFF WERE NOT SUPPORTED BY A WRITTEN DECISION AS REQUIRED BY THE CONTROLLING REGULATION; SANCTIONS ASPECT REMITTED (FOURTH DEPT).

The Fourth Department determined plaintiff loan company waived the time of the essence provision in this foreclosure sale to the highest bidder, Fox, by its relentless attempts to prevent the sale from going forward (to exact a higher purchase price). The Fourth Department noted that the sanctions imposed upon plaintiff were not

supported by a written decision as required by 22 NYCRR 130-1.1 and remanded for compliance with the regulation:

We reject plaintiff's contention that the court erred in determining that Fox did not breach the time is of the essence clause. It is well settled that "[a] party may waive timely performance even where the parties have agreed that time is of the essence" … , and that such a waiver may be accomplished by the conduct of a party … . Here, we agree with the court that plaintiff's relentless attempts to prevent the sale from going forward constituted a waiver of the time is of the essence clause.

We also reject plaintiff's further contention that the court erred in determining that plaintiff engaged in frivolous conduct and in imposing sanctions for such conduct. We conclude that plaintiff's conduct was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[, and was] undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1 [c] [1], [2] …). Nevertheless, we conclude that the court erred in failing to comply with 22 NYCRR 130-1.2 because "it failed to set forth in a written decision the conduct on which . . . the imposition [of sanctions] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate' " … . We therefore modify the order by vacating the fourth ordering paragraph and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2 … . Bayview Loan Servicing, LLC v Strauss, 2019 NY Slip Op 05866, Fourth Dept 7-31-1

FORECLOSURE SALE.

PETITIONER IS NOT ENTITLED TO SURPLUS PROCEEDS AFTER A TAX FORECLOSURE SALE (FOURTH DEPT).

The Fourth Department determined petitioner was not entitled to the surplus proceeds after a tax foreclosure sale:

We reject petitioners' contention that they have a right to the surplus proceeds of the foreclosure sale. As respondent correctly contends, petitioners' application for surplus proceeds was improperly predicated upon provisions of RPAPL article 13 that apply to surplus monies arising from the sale of property in mortgage foreclosure proceedings (see e.g.RPAPL 1361 [1]). RPAPL article 13, entitled "Action to Foreclose a Mortgage," does not apply to properties acquired by a tax district pursuant to an in rem foreclosure proceeding under RPTL article 11. Thus, petitioners' reliance on RPAPL article 13 and cases involving mortgage foreclosures is misplaced … . …

Moreover, petitioners are not entitled to surplus proceeds under RPTL article 11. Contrary to petitioners' assertion that RPTL article 11 is "silent" regarding any remaining interest that former property owners may have, such as entitlement to surplus proceeds upon the sale of the property following a default judgment of foreclosure, the statute provides that, when property owners neither redeem the property nor interpose an answer, the tax district is entitled to a deed conveying an estate in fee simple absolute and the property owners are "barred and forever foreclosed of all . . . right, title, interest, claim, lien or equity of redemption" that they may have had in the property (RPTL 1136 [3] …). Where the tax district obtains a valid default judgment of foreclosure, which is presumed here given that the default judgment is not subject to challenge on this appeal, the formr property owners are not "entitled to any compensation upon the resale of the property" … , and the tax district may "retain . . . the entire proceeds from [the re]sale" … . Matter of Hoge v Chautauqua County, 2019 NY Slip Op 04821, Fourth Dept 6-14-19

JOINDER OF ISSUE, ABANDONMENT.

SUPREME COURT DID NOT HAVE THE AUTHORITY TO DISMISS THIS FORECLOSURE ACTION PURSUANT TO CPLR 3216 OR CPLR 3215 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed pursuant to CPLR 3216 or 3215 because the statutory criteria were not met. Issue had not been joined so dismissal pursuant to CPLR 3216 was not permitted. And plaintiff had not abandoned the action pursuant to CPLR 3215:

We agree with the plaintiff's contention that the Supreme Court was without authority to direct dismissal of this action pursuant to CPLR 3216. CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. Indeed, "[a] court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" … . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined.

We also agree with the plaintiff's contention that the Supreme Court had no authority to direct dismissal of this action under CPLR 3215(c). "An action is deemed abandoned where a default has occurred and a plaintiff has failed to take proceedings for the entry of a judgment within one year thereafter" (…see CPLR 3215[c]). It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) … . Nor is a plaintiff required to specifically seek the entry of a judgment

within a year … . As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c) … .

Here, the plaintiff commenced the action on April 16, 2009. The Supreme Court granted the plaintiff's motion for an order of reference only five months later, on September 14, 2009—well within one year of the commencement of the action. Although the plaintiff later withdrew its motion for a judgment of foreclosure and sale, in doing so, it stated that it "will not be discontinuing [this] action." Thus, the plaintiff explicitly informed the court that it was not abandoning the action … . National City Mtge. Co. v Sclavos, 2019 NY Slip Op 03605, Second Dept 5-8-19

JOINDER OF ISSUE, RECORD ON APPEAL.

THE CONDITIONAL ORDER OF DISMISSAL WAS NOT AUTHORIZED BECAUSE ISSUE HAD NOT BEEN JOINED AT THE TIME THE ORDER WAS MADE; THE BANK'S MOTION TO VACATE THE CONDITIONAL ORDER IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; AN UNAUTHORIZED SUPPLEMENTAL RECORD ON APPEAL TO WHICH THE PARTIES STIPULATED WAS NOT CONSIDERED (SECOND DEPT).

The Second Department determined the conditional order upon which dismissal of the complaint was based was not authorized because issue had not been joined at the time the order was made. Therefore the bank's motion to vacate the conditional order in this foreclosure action should have been granted. However, because of the two year delay in moving to vacate the order, the bank is not entitled to interest, late charges, fees, costs and attorney's fees incurred after the date of the 2014 conditional order. An unauthorized supplemental record on appeal, which was stipulated to by the parties, contained material that was not in the record and was not considered by the Second Department:

A pleading cannot be dismissed pursuant to CPLR 3216(a) "unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed'" … . While a conditional order of dismissal may have "the same effect as a valid 90-day notice pursuant to CPLR 3216" … , the conditional order here was defective in that it did not state that the plaintiff's failure to comply with the notice will serve as a basis for a motion by the court to dismiss

the complaint for failure to prosecute … . Additionally, it appears that the complaint was ministerially dismissed, without a motion, and without the entry of any formal order by the court dismissing the complaint … . U.S. Bank Natl. Assn. v Spence, 2019 NY Slip Op 06529, Second Dept 9-11-19

JOINDER OF ISSUE.

FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED OR FOR FAILURE TO PROSECUTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed as abandoned pursuant to CPLR 3215(c) or for neglect to prosecute pursuant to CPLR 3216:

It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) … . Rather, it is enough that the plaintiff timely takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of a judgment within one year of the default for the purposes of satisfying CPLR 3215(c) … . Within one year after the defendant's default, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]) and, thus, did not abandon this action … . …

Furthermore, the Supreme Court was without power to direct dismissal of the complaint pursuant to CPLR 3216 on the ground of lack of prosecution. While CPLR 3216 authorizes the dismissal of a complaint for neglect to prosecute, joinder of issue and service of a 90-day notice are conditions precedent to a dismissal under that statute … . Here, dismissal was improper, as issue was never joined in the action … . US Bank, N.A. v Picone, 2019 NY Slip Op 02141, Second Dept 3-20-19

JOINDER OF ISSUE.

JUDGE WAS WITHOUT AUTHORITY TO DISMISS THE FORECLOSURE COMPLAINT; ISSUE HAD NOT BEEN JOINED AND THERE WAS NO EVIDENCE PLAINTIFF FAILED TO APPEAR AT A SCHEDULED CONFERENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court was without authority to dismiss (sua sponte) the complaint in this foreclosure action because (1) issue had not been joined, and (2) there was no evidence plaintiff failed to appear at a conference:

CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. "A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" … . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] …). "Since at least one precondition set forth in CPLR 3216 was not met here, the Supreme Court was without power to dismiss the action pursuant to that statute" … . …

Contrary to the defendant's contention, where, as here, a party "appeared as scheduled, [22 NYCRR 202.27] provides no basis for the court to summarily dismiss the action" for failure to prosecute … . In general, "[t]he procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b) … . Bank of N.Y. v Harper, 2019 NY Slip Op 07378, Second Dept 10-16-19

JOINDER OF ISSUE.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE COMPLAINT IN THE ABSENCE OF THE PRECONDITIONS REQUIRED BY CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the court was without power to dismiss for neglect to prosecute because the preconditions in CPLR 3216 were not met. Supreme Court dismissed the complaint in this foreclosure action, finding that plaintiff bank had not complied with an oral directive issued at a status conference:

Following settlement conferences held pursuant to CPLR 3408, the action was released from the foreclosure settlement conference part without any resolution. In an order … (hereinafter the dismissal order), the Supreme Court directed dismissal of the action on the ground that the plaintiff failed to comply with an oral directive issued at a status conference … , to resume prosecution of the action. …[T]he plaintiff moved to vacate the dismissal order and to restore the action to the calendar. [T]he Supreme Court … denied the plaintiff's motion. …

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . Specifically, issue must have been joined, at least one year must have elapsed since joinder of issue, the defendant or the court must have served on the plaintiff a written demand to serve and file a note of issue within 90 days, and the plaintiff must have failed to serve and file a note of issue within the 90-day period (see CPLR 3216[b] …). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days … . Citimortgage, Inc. v Ferrari, 2019 NY Slip Op 02847, Second Dept 4-17-19

JURISDICTION, ATTORNEYS.

DEFENDANTS' COUNSEL WAIVED ANY LACK OF PERSONAL JURISDICTION BY FILING A NOTICE OF APPEARANCE, NOTWITHSTANDING THE STATEMENT IN THE NOTICE THAT JURISDICTIONAL DEFENSES WERE NOT WAIVED (SECOND DEPT).

The Second Department determined defendants' counsel had waived any lack of personal jurisdiction in this foreclosure action by filing a notice of appearance, notwithstanding the statement in the notice that jurisdictional defenses were not waived:

" The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction'" … .

Here, the defendants' counsel filed a notice of appearance dated February 25, 2015, and the defendants did not move to dismiss the complaint insofar as asserted against them on the ground of lack of personal jurisdiction at that time, or assert lack of personal jurisdiction in a responsive pleading … . It is immaterial that the notice of

appearance, in addition to requesting that all papers in the action be served on the defendants' counsel, stated that "[t]he Defendants do not waive any jurisdictional defenses by reason of the within appearance." This language is not a talisman to protect the defendants from their failure to take timely and appropriate action to preserve their defense of lack of personal jurisdiction. The defendants did not move to dismiss the complaint insofar as asserted against them on the ground of lack of personal jurisdiction until January 2016, more than 10 months after filing the notice of appearance. Under these circumstances, the defendants waived any claim that the Supreme Court lacked personal jurisdiction over them in this action. JP Morgan Chase Bank, N.A. v Jacobowitz, 2019 NY Slip Op 07773, Second Dept 10-30-19

JURISDICTION, DEATH OF A PARTY.

THE DEATH OF A PARTY TO THIS FORECLOSURE ACTION AFFECTED THE MERITS OF THE CASE; SUPREME COURT DID NOT HAVE JURISDICTION TO DETERMINE DEFENDANT'S MOTION AND THE RELATED ORDER IS A NULLITY; THE APPEAL THEREFORE MUST BE DISMISSED (THIRD DEPT).

The Third Department determined the death of a party to this foreclosure proceeding deprived the court of jurisdiction. Therefore the court should not have considered defendant's motion and the related order was a nullity:

In 2003, defendant Sharon A. Harris (hereinafter defendant) and defendant Marion D. Schubnel executed a note in favor of plaintiff that was secured by a mortgage on real property located in Albany County. Defendant and Schubnel owned the subject property as joint tenants with rights of survivorship. …

… [P]laintiff commenced this mortgage foreclosure action against defendant and Schubnel, among others. Defendant served an answer but Schubnel failed to do so. In November 2016, Schubnel died. In July 2017, defendant moved for leave to serve an amended answer and, as relevant here, sought to add a statute of limitations affirmative defense. In an amended order entered November 2017, Supreme Court granted the motion and sua sponte dismissed the complaint as time-barred. …

The death of a party generally stays an action until a personal representative is substituted for the deceased party … . Strict adherence to this rule, however, is unnecessary where a party's demise does not affect the merits of the case … .

It is true that defendant, as the surviving joint tenant, obtained Schubnel's interest in the subject property upon Schubnel's death. Notwithstanding this transfer of interest, Schubnel's estate can still be held liable for any deficiency in the event that a sale of the subject property fails to satisfy the debt. Indeed, the complaint specifically requests that such relief be granted should it be necessary … . In the absence of a substitution of Schubnel, a discontinuance of the action insofar as asserted against Schubnel or a representation by plaintiff that it would be waiving its right to seek a deficiency judgment against Schubnel, the death of Schubnel affects the merits of the case … . Because an automatic stay was in effect upon Schubnel's death, Supreme Court was without jurisdiction to consider defendant's motion and, therefore, the November 2017 amended order is a nullity … . Wells Fargo Bank, N.A. v Schubnel, 2019 NY Slip Op 07462, Third Dept 10-17-19

JURISDICTION.

NEW YORK COURTS DO NOT HAVE THE AUTHORITY TO ENJOIN A TENNESSEE MORTGAGE FORECLOSURE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined New York did not have the authority to decide issues affecting title to real property in another state, here Tennessee:

Plaintiff financed its purchase of the property in 2007 with a note secured by a deed of trust. In 2015, plaintiff and defendant trustee entered into a loan modification agreement (LMA) that, inter alia, bifurcated the original loan and allowed Note B to be forgiven if a subsequent sale or refinancing was insufficient to pay the principal and interest thereon. The LMA is governed by Tennessee law but requires plaintiff to submit to the jurisdiction of the courts of this State. It does not similarly require defendant-appellants to submit to the jurisdiction of this State.

Defendant trustee advertised a nonjudicial foreclosure sale (Tenn Code Ann 35-5-101) based on plaintiff's apparent failure to pay the entire amount due upon maturity, and its failure to cause all rents to be deposited into a lockbox. Plaintiff sued, alleging, among other things, breach of the LMA provision prohibiting the trustee from unreasonably withholding consent to refinancing.

"[T]he courts of one State may not decide issues directly affecting title to real property located in another State" … . Although a court with personal jurisdiction over the parties may adjudicate their rights with respect to foreign realty … , plaintiffs cite no authority allowing an out-of-state foreclosure sale to be enjoined … . Contrary to plaintiff's argument, its one-sided agreement to submit to personal jurisdiction in New York does not confer

upon the New York courts a contractual right to enjoin an out-of-state foreclosure sale. Clark Tower, LLC v Wells Fargo Bank, N.A., 2019 NY Slip Op 08975, First Dept 12-17-19

NECESSARY PARTIES, ESTATES.

THE ESTATE OF A JOINT TENANT WAS NOT A NECESSARY PARTY IN THE FORECLOSURE ACTION BECAUSE THE INTEREST IN THE PROPERTY PASSED UPON DEATH, THE ESTATE'S MOTION TO INTERVENE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the estate's motion to intervene in a foreclosure proceeding was properly denied. When Sydney Burt, a joint tenant with right of survivorship, died, his interest in the property subject to the foreclosure action passed to the joint tenant, Karyn Berkley, and not to Sydney's estate. Therefore the estate did not have the right to intervene in the foreclosure:

… [T]he issue of whether the proposed intervenor was a necessary party in the action was determined on the merits by the Supreme Court in its order … , wherein it denied the defendant's motion, inter alia, to dismiss the complaint for failure to join the proposed intervenor. Thus, the parties had a full and fair opportunity to litigate the issue of whether the proposed intervenor was a necessary party. … [W]e agree with the Supreme Court's determination to deny intervention. New York defines a joint tenancy as "an estate held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and creating in each joint tenant a right of survivorship" … . "The right of survivorship has been defined as a right of automatic inheritance' where, upon the death of one joint tenant, the property does not pass through the rules of intestate succession, but is automatically inherited by the remaining tenant" … . Therefore, when one joint tenant dies, the other joint tenants automatically inherit the property. This is in marked contrast to tenancies in common which allow a decedent's share of property to pass under the rules of inheritance … . Thus, here, upon the Sydney Burt's death, his interest in the property did not pass to his estate, the proposed intervenor; rather, it automatically passed to the remaining joint tenants, the defendant and Berkley. Therefore, the proposed intervenor was not a necessary party and did not have the right to intervene in the foreclosure action. PHH Mtge. Corp. v Burt, 2019 NY Slip Op 07802, Second Dept 10-30-19

NECESSARY PARTIES, SERVICE OF PROCESS, STATUTE OF LIMITATIONS.

SUPREME COURT SHOULD HAVE SUMMONED A NECESSARY PARTY WHICH WAS SUBJECT TO THE JURISDICTION OF THE COURT PURSUANT TO CPLR 1001; SUPREME COURT SHOULD HAVE GRANTED PLAINTIFF'S SECOND MOTION FOR AN EXTENSION OF TIME TO SERVE A DEFENDANT IN THE INTEREST OF JUSTICE, DESPITE THE EXPIRATION OF THE STATUTE OF LIMITATIONS AND LAW-OFFICE-FAILURE EXCUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's second motion to extend the time to serve defendant (Bandolos). after the statute of limitations had run, should have been granted. The court further held that Supreme Court should have summoned a necessary party (Mother of Pearl, the record owner) because the party was subject to the court's jurisdiction:

The Supreme Court should have granted that branch of the plaintiff's motion which was, in effect, for leave to join Mother of Pearl as a party to the action … . "A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the court should not proceed in the absence of a person who should be a party" (CPLR 3211[a][10]). However, CPLR 1001(b) provides that where the party "is subject to the jurisdiction of the court, the court shall order him [or her] summoned." Mother of Pearl, as the record owner of the property, is a necessary party to this action (see CPLR 1001[a]; RPAPL 1311[1]) subject to the jurisdiction of the court. Consequently, the court should have ordered Mother of Pearl summoned, rather than granting that branch of the mortgagors' cross motion which was pursuant to CPLR 3211(a)(10) to dismiss the complaint insofar as asserted against them … . …

Further, under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b for leave to extend the time to serve the summons and complaint upon Kelly Bandalos by publication in the interest of justice … . While the action was timely commenced, the statute of limitations has since expired. Although the plaintiff's only excuse for not serving Kelly Bandalos by publication is law office failure, it did make diligent efforts to serve her prior to the first extension of time to serve and the issuance of the order of publication. Further, Kelly Bandalos had actual notice of the action within 120 days of its commencement, she served and filed an answer, and there is no identifiable prejudice to her attributable to the delay in service … . Deutsche Bank Natl. Trust Co. v Bandalos, 2019 NY Slip Op 05106, Second Dept 6-26-19

NOTICE, DEFAULT.

BANK DID NOT SUBMIT SUFFICIENT PROOF OF DEFENDANT'S DEFAULT OR COMPLIANCE WITH RPAPL 1304 NOTICE REQUIREMENTS; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's (Chase's) motion for summary judgment in this foreclosure action should not have been granted, The court held: (1) the conclusory affidavit submitted by the bank to prove defendant's default had no probative value, the business record itself should have been provided; (2) compliance with the mailing provisions of RPAPL 1304 was not proven by the bank; (3) failure to comply with the notice provisions of RPAPL 1304 can be raised as a defense at any time; and (4) by not raising the failure to provide the notice required by the mortgage in the answer or a motion to amend the answer, the defendant waived that defense:

Here, the affidavit of Mimoza Petreska, a vice president of Chase, submitted in support of Chase's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, was insufficient to establish the defendant's default in payment under the note … . The only business record annexed to Petreska's affidavit with regard to the default was a copy of the notice of default dated May 15, 2012, which merely stated, in conclusory fashion, that the defendant's loan was in default. Conclusory affidavits lacking a factual basis are without evidentiary value … . Moreover, "[w]hile a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay" … . "[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . JPMorgan Chase Bank, N.A. v Akanda, 2019 NY Slip Op 08180, Second Dept 11-13-19

NOTICE, LAW OF THE CASE, SUA SPONTE.

THE DOCTRINE OF THE LAW OF THE CASE PRECLUDED CONSIDERATION OF WHETHER THE BANK COMPLIED WITH THE NOTICE PROVISIONS OF RPAPL 1304; THE ISSUE HAD BEEN DETERMINED IN THE BANK'S FAVOR AT THE SUMMARY JUDGMENT STAGE AND SHOULD NOT HAVE BEEN RECONSIDERED, SUA SPONTE, WHEN THE BANK MOVED FOR A JUDGMENT OF FORECLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the doctrine of the law of the case precluded the court from sua sponte, considering whether the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 were met by the bank in this foreclosure action. The issue was determined in the bank's favor in the initial summary judgment proceeding and should not have been considered again when the bank moved to confirm the referee's report and for a judgment of foreclosure:

… [T]he defendants raised the issue of noncompliance with RPAPL 1304 in their answer, the plaintiff presented evidence of its compliance with the statute on its motion, inter alia, for summary judgment on the complaint, and, in granting that motion, the Supreme Court decided the issue in the plaintiff's favor. Therefore, pursuant to the doctrine of law of the case … , the court was precluded from reconsidering the issue on the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale … . Moreover, since the defendants did not oppose the plaintiff's motion to confirm the referee's report and, therefore, did not raise the issue of the plaintiff's noncompliance with RPAPL 1304 in opposition to the motion, the court should not have raised the issue sua sponte … . Wells Fargo Bank, N.A. v Morales, 2019 NY Slip Op 08891, Second Dept 12-11-19

NOTICE, REPLY PAPERS.

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; EVIDENCE OFFERED FOR THE FIRST TIME IN REPLY CAN BE CONSIDERED IF THE OPPOSING PARTY HAS THE OPPORTUNITY TO RESPOND (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not demonstrate it had complied with the notice requirements of RPAPL 1304. The court noted that evidence submitted in reply was properly considered because the opposing party had an opportunity to respond:

… [T]he plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. RPAPL 1304(1) provides that at least 90 days before a lender, an assignee, or a mortgage loan servicer commences an action to foreclose the mortgage on a home loan as defined in RPAPL 1304, such lender, assignee, or mortgage loan servicer must give notice to the borrower. RPAPL 1304(1) sets forth the requirements for the content of such notice and RPAPL 1304(2) further provides that such notice must be sent "by registered or certified mail and also by first-class mail" to the last known address of the borrower. "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" … .

Here, even considering the affidavit of Victoria Bressner submitted by the plaintiff for the first time in opposition to the defendant's cross motion, the plaintiff failed to establish strict compliance with RPAPL 1304. Bressner did not have personal knowledge of the purported mailing and did not make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures to establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . Moreover, the record indicates that the notices were not mailed by the plaintiff. LNV Corp. v Sofer, 2019 NY Slip Op 02860, Second Dept 4-17-19

NOTICE, REPLY PAPERS.

THE BANK DID NOT PRESENT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF THE MORTGAGE; THE BANK NEED NOT AFFIRMATIVELY ADDRESS COMPLIANCE WITH RPAPL 1304 NOTICE REQUIREMENTS IF THE ISSUE IS NOT RAISED IN THE ANSWER; REPLY PAPERS CAN PRESENT EVIDENCE FOR THE FIRST TIME IN RESPONSE TO ISSUES FIRST RAISED IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; BUT REPLY PAPERS MAY NOT PRESENT, FOR THE FIRST TIME, EVIDENCE ADDRESSING AN ISSUE RAISED IN THE DEFENDANT'S ANSWER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank (Aurora) did not provide sufficient proof of providing notice of default to defendants. The Second Department noted that the bank need not affirmatively prove compliance with the notice requirements of RPAPL 1304 because the issue was not raised in defendant's answer. The court also noted that evidence submitted in reply papers addressing matters raised for the first time in opposition to plaintiff's motion for summary judgment can be considered, but evidence submitted for the first time in reply papers addressing issues which were raised in the answer should not be considered:

In support of its motion, Aurora submitted two affidavits. The first affidavit was from Laura McCann, Vice President of Aurora, the loan servicer responsible for sending the notices of default. The second affidavit was from A.J. Loll, Vice President of Nationstar Mortgage, LLC, the current plaintiff and loan servicer. While McCann attested that Aurora was responsible for "providing notices pursuant to the terms of the note and mortgage evidencing the mortgage loan at issue, and specifically for providing notices such as the notice required under Section 22 of the mortgage," nowhere in her affidavit did she attest to the actual mailing or delivery of those notices. As to the second affidavit, while Loll attested, inter alia, that "[t]he servicing records show that a 30-day letter was mailed to [the] defendants . . . … , which letter advised Defendants of their default," and attached a purportedly "true copy" of the 30-day letter as Exhibit I, the affidavit did not contain a statement that the 30-day notice was sent in a manner according with the terms of the mortgage, i.e., "mailed by first class mail or . . . actually delivered to [borrower's] notice address if sent by other means." Moreover, Loll's affidavit "did not contain a statement that [Loll] was familiar with [Aurora's] mailing practices and procedures," so as to establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . While Loll claimed that servicing records show that a 30-day letter was mailed to

the defendants, she did not identify what those records are and did not authenticate them as business records and attach them to her affidavit … . Nationstar Mtge., LLC v Tamargo, 2019 NY Slip Op 08197, Second Dept 11-13-19

NOTICE, STANDING.

PLAINTIFF DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH RPAPL 1304 AND DID NOT SUBMIT SUFFICIENT PROOF OF STANDING; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate compliance with the RPAPL 1304 notice requirements and did not demonstrate standing:

… [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. In support of its motion, the plaintiff submitted the affidavit of a representative of its loan servicer. The affidavit was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not attest to knowledge of the mailing practices of the entity which sent the notice, and provided no independent proof of the actual mailing … . Since the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 … . …

… [T]he plaintiff appended a copy of the note to the complaint, but the plaintiff is not the original lender, and the note was not endorsed. In support of its motion for summary judgment, the plaintiff submitted an allonge bearing an undated endorsement in blank, as well as the affidavit of a representative of the loan servicer, dated March 31, 2016, who stated that the plaintiff was in possession of the note, but who did not attest that the plaintiff possessed the note prior to the commencement of the action, or that she had personal knowledge of such possession. The plaintiff's submissions therefore failed to establish, prima facie, that the plaintiff was the holder of the note at the time of commencement of this action in March 2015 … . Bank of N.Y. Mellon v Ettinger, 2019 NY Slip Op 07759, Second Dept 10-30-19

NOTICE.

A PERSON NOT NAMED ON THE NOTE AND MORTGAGE IS NOT ENTITLED TO RPAPL 1304 NOTICE OF THE FORECLOSURE ACTION, NOTWITHSTANDING CORRESPONDENCE REQUESTING THAT HE BE ADDED TO THE DOCUMENTS AS A BORROWER (THIRD DEPT).

The Third Department, reversing Supreme, determined that a person who was not named as a borrower on the note and mortgage was not entitled to notice of the foreclosure action pursuant to RPAPL 1304. The plaintiff mortgage company's motion for summary judgment should have been granted:

The record contains correspondence that reveals that a representative from Monroe Title, the title insurer for PHH Mortgage, recognized that Robert Johnson, not Brad Johnson, was the party making all payments on the mortgage. …The record also contains two letters … , on Robert Johnson's behalf, to PHH Mortgage representative …, wherein [the writer] requests that the mortgage be modified to list Robert Johnson as the borrower. However, despite these communications, the modification did not occur and Brad Johnson continued to be the sole signatory on both instruments. Inasmuch as it is evident from the record that Brad Johnson is the only individual listed as a borrower on all relevant documents, including the note and mortgage, Robert Johnson was not a borrower and was not entitled to RPAPL 1304 notices … . Federal Natl. Mtge. Assn. v Johnson, 2019 NY Slip Op 08472. Third Dept 11-21-19

NOTICE.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE MORTGAGE IN THIS FORECLOSURE PROCEEDING, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the plaintiff bank did not demonstrate compliance with the notice provisions of the mortgage in this foreclosure proceeding. Therefore plaintiff's motion for summary judgment should not have been granted:

… [T]hose branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against [defendant], to strike his answer, and for the appointment of a referee to ascertain and compute the amount due should have been denied. The statements in the affidavit of the plaintiff's employee that was submitted in support of the motion failed to establish, prima facie, that the affiant mailed the required notice of default to [defendant] by first-class mail on any particular date, or actually delivered such notice to the designated address if sent by other means, which was required by the terms of the mortgage as a condition precedent to foreclosure … . Wells Fargo Bank, N.A. v Sakizada, 2019 NY Slip Op 00162, Second Dept 1-9-19

NOTICE.

BANK FAILED TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank failed to demonstrate compliance with the notice requirements of RPAPL 1304. Therefore the bank's motion for summary judgment should not have been granted:

… [T]he plaintiff relied upon the affidavit of an employee who claimed that the plaintiff's business records showed that RPAPL 1304 notices were sent by certified and first-class mail. However, the documentary evidence submitted in support of those claims redacted certain tracking numbers and failed to establish, prima facie, that the notices were mailed by first-class mail … . Citimortgage, Inc. v Succes, 2019 NY Slip Op 02058, Second Dept 3-20-19

NOTICE.

BANK'S FAILURE TO SUBMIT EVIDENCE WHICH MET THE CRITERIA OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE REQUIRED DENIAL OF THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION, THE BANK'S FAILURE TO COMPLY WITH THE RPAPL 1304 NOTICE AND MAILING CRITERIA REQUIRED THAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's evidence in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and therefore the bank's summary judgment motion should not have been granted in this foreclosure action. The court further held that defendant's motion for summary judgment based upon the bank's failure to comply with the notice requirements of RPAPL 1304, an issue that can be raised at any time, should have been granted:

The plaintiff failed to demonstrate that the records Wallace relied upon were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]). Wallace did not attest to personal knowledge of SLS's record-keeping business practices and procedures … . Wallace also failed to attest that the records were made in the regular course of SLS's business and that it was the regular course of SLS's business to make them, at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter (see CPLR 4518[a] …). Thus, Wallace failed to lay a proper foundation for the admission of records, and her assertions based on these records were inadmissible … . Bank of N.Y. Mellon v Weber, 2019 NY Slip Op 01383, Second Dept 2-27-19

NOTICE.

BANK'S PROOF OF THE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 INSUFFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's (Nationstar's) motion for summary judgment in this foreclosure action should not have been granted. Defendant alleged in her answer that plaintiff did not comply with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304.

Therefore, in moving for summary judgment, the band was required to demonstrate compliance with RPAPL 1304 and its evidence of compliance was insufficient because it did not meet the requirements of the business records exception to the hearsay rule:

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" … . However, where, as here, a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, the moving party is also required to make a prima facie showing of strict compliance with RPAPL 1304 … . * * *

Here, Nationstar relied on the affidavit of its employee, Michael Woods, who averred, in relevant part, that "the 90-day notices required by statute were mailed to [d]efendant by regular and certified mail to the last known mailing address and to the property address on January 3, 2013," and that the letters "were sent in separate envelopes from any other mailing or notice." However, the record contains a single 90-day notice, bearing the plaintiff's letterhead and addressed to the defendant at the subject property, with no clear indication as to whether the mailing was made by registered or certified mail, or by first-class mail. Moreover, Woods—who is not an employee of the plaintiff—did not aver in his affidavit to having any familiarity with the plaintiff's mailing practices and procedures. Bank of Am., N.A. v Bittle, 2019 NY Slip Op 00086, Second Dept 1-9-19

Similar issue and result in Bank of Am., N.A. v Kljajic, 2019 NY Slip Op 00087, Second Dept 1-9-19

NOTICE.

NOTE HOLDER'S COMPLIANCE WITH NOTICE REQUIREMENTS OF RPAPL 1304 NOT DEMONSTRATED, MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined respondent (the holder of the note) did not demonstrate compliance with the notice provisions of RPAPL 1304. Therefore respondent's motion for summary judgment in this foreclosure action should not have been granted:

"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" … . "The statute requires that such notice . . . be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower" … . …

The respondent, which submitted only a copy of the required notice, and did not submit any evidence that the notice was mailed in the manner required by the statute, failed to meet its prima facie burden with respect to the notice requirements of RPAPL 1304. Specifically, the respondent did not submit "an affidavit of service, [or] proof of mailing by the post office evincing that it properly served the defendant pursuant to RPAPL 1304 [by registered or certified mail and also by first-class mail to his last known address]" … , or "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" … . Marchai Props., L.P. v Fu, 2019 NY Slip Op 02511, Second Dept 4-3-19

NOTICE.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304:

… [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 … . Although Menyweather [an assistant secretary employed by Nationstar Mortgage LLC, the plaintiff's loan servicer] stated in his affidavit that the RPAPL 1304 notices were mailed by regular and certified mail, and attached copies of the notices, the plaintiff failed to attach, as exhibits to the motion, any documents establishing that the notices were actually mailed … . The plaintiff failed to submit a copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute … . Further, although Menyweather attested that he had personal knowledge of the loan servicer's records, and that those records included the records of the prior servicer, Bank of America, Menyweather did not attest to knowledge of the mailing practices of Bank of America, the entity that allegedly sent the 90-day notices to the defendant … . Since the plaintiff failed to provide evidence of the a ctual mailing, or evidence of a standard office mailing procedure designed to ensure that the items were properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 … . HSBC Bank USA, N.A. v Sawh, 2019 NY Slip Op 08556, Second Dept 11-27-19

NOTICE.

PLAINTIFF BANK DID NOT DEMONSTRATE NOTICE BY PROOF WHICH MET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, THEREFORE THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 and, therefore, the bank's motion for summary judgment should not have been granted:

… [T]he plaintiff failed to submit an affidavit of service or proof of mailing by the post office evincing that it properly served the defendant pursuant to RPAPL 1304. Contrary to the plaintiff's contention, its submission of an affidavit of the employee of its servicer was not sufficient to establish that the notices were sent to the defendant in the manner required by RPAPL 1304. While mailing may be proved by documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518 … , here, the affiant did not aver that he was familiar with the servicer's mailing practices and procedures and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . The affiant's unsubstantiated and conclusory statements were insufficient to establish that the RPAPL 1304 notice was mailed to the defendant by first-class and certified mail … . Wells Fargo Bank, N.A. v Moran, 2019 NY Slip Op 00637, Second Dept 1-30-19

Similar issue and result in Fifth Third Mtge. Co. v Seminario, 2019 NY Slip Op 00589, Second Dept 1-30-19

NOTICE.

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE NOTICE REQUIREMENTS OF RPAPL 1304 DID NOT APPLY AND DID NOT PRESENT SUFFICIENT EVIDENCE OF THE MAILING OF THE NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate the notice requirements of RPAPL 1304 did not apply and did not demonstrate compliance with RPAPL 1304 in this foreclosure action. The bank did not show that the underlying loan was not a "home loan," and the proof of mailing of the notice was insufficient:

… [T]he plaintiff failed to show, prima facie, that the RPAPL 1304 90-day notice requirement was inapplicable because the loan was not a "home loan" … .

RPAPL 1304 requires the 90-day notice to be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (see RPAPL 1304[2]). "By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure'" … .

Here, the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by an individual with personal knowledge of that procedure. U.S. Bank Trust, N.A. v Sadique, 2019 NY Slip Op 09054, Second Dept 12-18-19

NOTICE.

PLAINTIFF BANK NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE IT FAILED TO DEMONSTRATE COMPLIANCE WITH RPAPL 1304, A CONDITION PRECEDENT; DEFENDANT NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE HE DID NOT DEMONSTRATE THE BANK FAILED TO COMPLY WITH RPAPL 1304 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff bank should not have been awarded summary judgment because it did not demonstrate compliance with RPAPL 1304, but defendant was not entitled to summary judgment on that ground because defendant did not demonstrate RPAPL 1304 was not complied with:

… [T]he evidence submitted in support of the motion failed to establish, prima facie, that the plaintiff strictly complied with RPAPL 1304 … . Compliance with RPAPL 1304 and 1306 is a condition precedent to the commencement of a foreclosure action …

However, contrary to Nathan's contention, he was not entitled to summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff failed to comply with the notice requirements of RPAPL 1304, since he failed to present sufficient evidence to demonstrate, prima facie, that the condition precedent was not fulfilled … . Nathan's affidavit, in which he made a bare denial of receipt of the RPAPL 1304 notice, was improperly submitted for the first time in reply … . Nathan also failed to establish his prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff failed to comply with RPAPL 1306. U.S. Bank, N.A. v Nathan, 2019 NY Slip Op 04989, Second Dept 6-19-19

NOTICE.

PLAINTIFF BANK SUBMITTED EVIDENCE IN INADMISSIBLE FORM AND DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE CONDITIONS IN THE MORTGAGE; DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the evidence submitted by defendant in this foreclosure action was either not in admissible form or did not comply with the requirements of the mortgage:

In support of those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendant and to appoint a referee, the plaintiff submitted an affidavit of an employee of its loan servicer, Ocwen Loan Servicing, LLC (hereinafter Ocwen). The employee attested that she was familiar with business records of Ocwen but failed to lay a proper foundation for the admission of records concerning the defendant's payment history and default. Accordingly, the plaintiff failed to demonstrate that the records relied upon in the affidavit were admissible under the business records exception to the hearsay rule … .

… [T]he defendant … failed to establish that the required notice of default was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by paragraphs 15 and 22 of the mortgage. U.S. Bank N.A. v Kochhar, 2019 NY Slip Op 07439, Second Dept 10-16-19

NOTICE.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISION OF THE MORTGAGE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the plaintiff did not demonstrate compliance with the notice of default provision in the mortgage. Therefore, the plaintiff's motion for summary judgment in this foreclosure action should not have been granted:

… [T]he plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in section 22 of the mortgage agreement regarding the notice of default. The plaintiff's submissions did not establish that the notice was sent by first class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage agreement … . PNMAC Mtge. Opportunity Fund Invs., LLC v Torres, 2019 NY Slip Op 06523, Second Dept 9-11-19

NOTICE.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE/MAILING REQUIREMENTS AND THEREFORE DID NOT DEMONSTRATE PERSONAL JURISDICTION OVER DEFENDANTS, THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because plaintiff did not demonstrate compliance with the notice requirements:

… [T]he Supreme Court should not have confirmed the Referee's report. The plaintiff failed to submit any evidence at the hearing of compliance with the mailing requirement of CPLR 308(2) and, thus, failed to demonstrate that personal jurisdiction had been obtained over the defendants … . Federal Natl. Mtge. Assn. v Puretz, 2019 NY Slip Op 05958, Second Dept 7-31-19

NOTICE.

PLAINTIFF FAILED TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's (PennyMac's) motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not present sufficient proof of compliance with the notice requirements of RPAPL 1304:

… [A]lthough Somarriba and Carras-Gomez "stated in [their] affidavit[s] that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened" … . Instead, the plaintiff submitted a certificate of bulk mailing, which did not identify any particular mailing, and two internal reports generated by the plaintiff, which appear to demonstrate that some unidentified pieces of mail were sent to the borrower's address … . Additionally, no foundation was laid for the admission of these business records, as neither Somarriba nor Carras-Gomez attested that they had personal knowledge of the plaintiff's business practices and procedures, or that the plaintiff's records were incorporated into PennyMac's own records or routinely relied upon by PennyMac in its business … . Finally, the plaintiff failed, alternatively, to provide proof of actual mailing of the RPAPL 1304 notice, to provide proof of "a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" … . Neither Somarriba nor Carras-Gomez averred that they had personal knowledge of any such standard office mailing procedure of the plaintiff. PennyMac Corp. v Khan, 2019 NY Slip Op 09278, Second Dept 12-24-19

NOTICE.

PLAINTIFF SUBMITTED INSUFFICIENT PROOF THAT THE NOTICE REQUIRED BY RPAPL 1304 AND THE MORTGAGE WAS PROVIDED TO DEFENDANTS; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not present sufficient evidence to demonstrate compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 or with the notice provisions of the mortgage:

… [T]he plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened … . Nor did [plaintiff's employee] attest that she had personal knowledge of the mailing practices of her employer at the time the RPAPL 1304 notices allegedly were sent. Accordingly, "[s]ince the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304" … .

The plaintiff also failed to establish, prima facie, that a notice of default in accordance with section 22 of the mortgage was properly transmitted to the defendants prior to the commencement of this action. [Plaintiff's employee's] unsubstantiated and conclusory statements that a representative … mailed such notice "[i]n accordance with the provisions of the Mortgage" to the defendants at their last known address at least 30 days prior to commencement of the action, even combined with copies of the notices of default and envelopes, with no evidence as to the date the envelopes were sent, "failed to establish that the required notice was mailed to the defendant[s] by first-class mail or actually delivered to [their] notice address' if sent by other means, as required by the mortgage agreement" … . U.S. Bank N.A. v defendants., 2019 NY Slip Op 07806, Second Dept 10-30-19

NOTICE.

PLAINTIFF'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW 1304 IN THIS FORECLOSURE ACTION WAS INSUFFICIENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

… [T]he plaintiff failed to submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that it properly served the defendant pursuant to RPAPL 1304. The plaintiff instead relied on the "Affidavit of Mailing" of a vice president of loan documentation of Wells Fargo. However, the affiant did not aver that she personally mailed the notice, and she did not aver that she was familiar with the plaintiff's mailing practices and procedures, and, therefore, she did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed …. Similarly, the presence of numbered bar codes on the copies of the 90-day statutory notices submitted by the plaintiff did not suffice to establish, prima facie, proper mailing under RPAPL 1304 … . U.S. Bank N.A. v Offley, 2019 NY Slip Op 02377, Second Dept 3-27-19

NOTICE.

PROOF DID NOT DEMONSTRATE THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 WERE MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate that the notice requirements of RPAPL 1304 were met:

… Lechtanski [the loan servicer representative] did not have personal knowledge of the purported mailing and failed to make the requisite showing that he was familiar with the plaintiff's mailing practices and procedures, and therefore, did not establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . Moreover, the copy of the notice annexed to the Lechtanski affidavits, while bearing a notation "VIA CERTIFIED AND FIRST CLASS MAIL," bears no indicia of actual mailing such as postal codes and was unaccompanied by any mailing receipts or tracking information … . Wells Fargo Bank, N.A. v Taylor, 2019 NY Slip Op 01817, Second Dept 3-13-19

NOTICE.

PROOF OF MAILING REQUIREMENTS OF RPAPL 1304 NOT MET, BANK'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff bank did not present sufficient proof of compliance with the notice requirements in Real Property Actions and Proceedings Law (RPAPL) 1304:

The plaintiff submitted the affidavit of Sherry Benight, an officer of the plaintiff's loan servicer, Select Portfolio Servicing, Inc. (hereinafter SPS), stating that her review of records maintained by SPS revealed that a "[ninety-day pre-foreclosure notice] dated September 13, 2012, . . . was sent to Borrower(s) by certified and first class mail." A copy of the notice to Fisher was annexed to Benight's affidavit, which contained a bar code with a 20-digit number below it, but no language indicating that a mailing was done by first-class or certified mail, or even that a mailing was done by the U.S. Postal Service … . Further, Benight did not make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a

standard office practice and procedure designed to ensure that items are properly addressed and mailed … . U.S. Bank N.A. v Fisher, 2019 NY Slip Op 01444, Second Dept 2-27-19

Similar issues and result in US Bank N.A. v Rode, 2019 NY Slip Op 01446, Second Dept 2-27-19

NOTICE.

PROOF OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 13O4 NOTICE TO THE DEFENDANT WAS INSUFFICIENT, THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the proof compliance with the Real Property Actions and Proceedings Law (RPAPL) 1304 notice requirements was insufficient:

"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" … .The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (see RPAPL 1304[2]). By imposing these specific mailing requirements, " the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing,' which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure'" … .

Here, although Swayze [plaintiff's vice president] stated in her affidavit that the RPAPL 1304 notice was mailed to Saab [defendant] on May 8, 2013, this assertion falls short of constituting admissible evidence sufficient to demonstrate prima facie that the notice was actually mailed in the manner required by the statute. Swayze did not claim that she personally mailed the notice to Saab. Further, she did not aver that she was familiar with the plaintiff's mailing practices and procedures, and, therefore, did not establish the existence of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . Central Mtge. Co. v Canas, 2019 NY Slip Op 04909, Second Dept 6-19-19

NOTICE.

SUPREME COURT WAS WITHOUT POWER TO DIRECT DISMISSAL OF THE FORECLOSURE ACTION FOR FAILURE TO PROSECUTE BECAUSE A 90-DAY NOTICE HAD NOT BEEN SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed for failure to prosecute because a 90-day notice had not been served:

In April 2009, the plaintiff commenced this action against the defendant Melchior Sansone (hereinafter the defendant), among others, to foreclose a mortgage secured by certain real property located in Suffolk County. In January 2011, following settlement conferences, the action was released from the foreclosure settlement conference part without any resolution. On July 20, 2012, the parties appeared at a compliance conference, at which time the Supreme Court directed the plaintiff to resume the prosecution of this action. By order dated November 21, 2012 (hereinafter the dismissal order), the court directed dismissal of the action upon the plaintiff's failure to resume prosecution of the action. The plaintiff subsequently moved to vacate the dismissal order, and, in effect, to restore the action to the active calendar. By order dated July 30, 2018, the court denied the plaintiff's motion, and the plaintiff appeals.

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . These conditions include, among others, service of a written demand "requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand" (CPLR 3216[b][3] …). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days … . U.S. Bank N.A. v Sansone, 2019 NY Slip Op 07807, Second Dept 10-30-19

NOTICE.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 13O4 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 was not demonstrated by the bank:

… [T]he affidavit of Theresia Ang, assistant vice president for the loan servicer, PHH Mortgage Corporation (hereinafter PHH), which was submitted in support of the motion, was insufficient to establish that the notice was sent to the defendants in the manner required by RPAPL 1304 … . While Ang attested that "a ninety (90) day pre-foreclosure notice" was sent to the defendants "by registered or certified and first class mail," and attached a copy of the notice along with a proof of filing statement from the New York State Banking Department, "the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened" … . The plaintiff did not submit an affidavit of service, or proof of mailing by the post office evincing that it served the defendants pursuant to RPAPL 1304 by registered or certified mail and also by first-class mail to their last known address … . Moreover, while Ang attested that she had personal knowledge of the records maintained in PHH's electronic record keeping system, the plaintiff failed to submit proof of "a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" … . KeyBank N.A. v Barrett, 2019 NY Slip Op 08835, Second Dept 12-11-19

NOTICE.

THE PROOF REQUIRED FOR SUMMARY JUDGMENT, FOR BOTH PLAINTIFFS AND DEFENDANTS, IN FORECLOSURE ACTIONS, ON WHETHER THERE HAS BEEN COMPLIANCE WITH THE RPAPL 1304 NOTICE PROVISIONS, EXPLAINED; PRIOR DECISIONS HOLDING THAT A DEFENDANT'S DENIAL OF RECEIPT OF NOTICE WAS SUFFICIENT SHOULD NO LONGER BE FOLLOWED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Iannacci, reversing Supreme Court, fleshed out the proof required for summary judgment, for both plaintiffs and defendants, with respect to compliance with the

notice requirements of Real Property Actions and Proceedings Law (RPAPL). The court noted that prior decisions holding that a defendant's denial of receipt of notice was enough should no longer be followed:

Here, the plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. Although Crampton [assistant vice president of Specialized Loan Servicing, LLC] stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened. There is no copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute. Further, while Crampton attested that she was in receipt of the prior loan servicer's records, that she had personal knowledge of the business practices for mailing of notices by Wilmington, and that the 90-day notice was sent in compliance with RPAPL 1304, she did not attest to knowledge of the mailing practices of Bank of America, the entity that allegedly sent the notices to the defendant. * * *

Even in the face of a plaintiff's failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, this Court has held that a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled … . Here, the defendant provided no particulars supporting her claim that Bank of America never mailed the RPAPL 1304 notice to her last known address. The defendant only stated that she never received the notice. The defendant did not confirm that she still lived at the address shown on the notice on the date it was purportedly mailed, that she had been receiving other mail at that address, and that she was never contacted by the United States Post Office about mail for which she was required to sign. We hold that a simple denial of receipt, without more, is insufficient to establish prima facie entitlement to judgment as a matter of law dismissing the complaint for failure to comply with the requirements of RPAPL 1304. To the extent that our prior decisions are to the contrary, they should no longer be followed. Citibank, N.A. v Conti-Scheurer, 2019 NY Slip Op 02846, Second Dept 4-17-19

PROOF REQUIREMENTS FOR SUMMARY JUDGMENT IN FORECLOSURE ACTIONS EXPLAINED.

THE SECOND DEPT USED THIS OPINION AS A VEHICLE TO EXPLAIN THE COMPLEX PROOF REQUIREMENTS FOR SUMMARY JUDGMENT MOTIONS BROUGHT IN FORECLOSURE ACTIONS, EMPHASIZING THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, explained in detail the proof requirement for a summary judgment motion in a foreclosure action, emphasizing the requirements of the business records exception to the hearsay rule. The court determined that the bank's proof of standing was sufficient, but the proof of defendant's default was not. The opinion is too detailed to be fairly summarized here and should be consulted for guidance in foreclosure actions:

From an appellate perspective, the recent flood of foreclosure appeals has revealed consistent and repeated confusion about some of the most fundamental aspects of the procedural, substantive, and evidentiary law that must be routinely applied in a foreclosure context. In an effort to provide additional clarity in this important area of the law, we deem it appropriate to collect and reiterate some of these foundational principles in the hope that such clarity will eliminate many of the disputes that make up an ever-increasing proportion of trial-level dockets. For the reasons that follow, we modify the order appealed from.

… [I]t bears noting that the business record exception to the hearsay rule applies to a "writing or record" (CPLR 4518[a]). Although "[t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business" … , it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted … . Accordingly, "[e]vidence of the contents of business records is admissible only where the records themselves are introduced" … . Bank of N.Y. Mellon v Gordon,2019 NY Slip Op 02306, Second Dept 3-27-19

RECORDING, LOST MORTGAGE.

PLAINTIFF BANK WAS ENTITLED TO AN ORDER REQUIRING THE COUNTY CLERK TO RECORD A MORTGAGE, THE ORIGINAL OF WHICH HAD ALLEGEDLY BEEN LOST; AN ATTORNEY AFFIDAVIT IS AN APPROPRIATE VEHICLE FOR THE SUBMISSION OF DOCUMENTS IN ADMISSIBLE FORM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was entitled to an order requiring the county clerk to accept a copy of a mortgage for recording (the original allegedly had been lost and was never recorded). The Second Department further determined that an attorney affidavit was an appropriate vehicle for the submission of the documents to be recorded, which were in admissible form:

The plaintiff established its prima facie entitlement to judgment as a matter of law on the first cause of action, which sought an order directing the Suffolk County Clerk to accept a copy of the mortgage for recording. The County Clerk has a statutory duty that is ministerial in nature to record a written conveyance if it is duly acknowledged and accompanied by the proper fee (see Real Property Law §§ 290[3]; 291; County Law § 525[1]). "Accordingly, the Clerk does not have the authority to refuse to record a conveyance which satisfies the narrowly-drawn prerequisites set forth in the recording statute" … . Here, the copy of the mortgage submitted on the motion, which is notarized, was subject to recording … . Contrary to the Supreme Court's determination, the complaint adequately stated a cause of action for this relief … , and the plaintiff's failure to submit an affidavit of someone with personal knowledge of the facts was not fatal to the motion. The affidavit or affirmation of an attorney, even if he or she has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, e.g., documents and transcripts … . JPMorgan Chase Bank, N.A. v Wright, 2019 NY Slip Op 05966, Second Dept 7-31-19

REFEREE'S REPORT.

THE REFEREE'S REPORT RELIED ON HEARSAY AND SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not prove the amount due the plaintiff and therefore the referee's report should not have been confirmed:

… [W]ith respect to the amount due to the plaintiff, the referee based his findings on an affidavit of Theresa Robertson, an employee of the plaintiff, who averred, based on her review of the plaintiff's business records, that the defendant defaulted by failing to make the payment due on May 1, 2010, and "all subsequent payments." However, as the defendant correctly contends, Robertson's assertions in that regard constituted inadmissible hearsay … , since the records themselves were not provided to the referee … . Moreover, even if the records had been provided, " [a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures'" … . Nothing in Robertson's affidavit, in which she averred that the plaintiff received the original note on May 13, 2013, indicated that the plaintiff was the maker of the records relating to the defendant's alleged initial default in May 2010 and her alleged failure to make payments for some period of time thereafter. Robertson also did not aver that the records provided by the maker were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its own business … . Therefore, the plaintiff failed to lay a proper foundation for the business records on which Robertson relied with respect to the amount due to the plaintiff. Contrary to the plaintiff's contention, under the circumstances presented, the Supreme Court's error in relying on the hearsay evidence was not harmless … . Nationstar Mtge., LLC v Durane-Bolivard, 2019 NY Slip Op 06502, Second Dept 9-11-19

REFEREE'S REPORT.

THE REFEREE'S REPORT, WHICH IS MERELY ADVISORY AND IS NOT BINDING ON THE COURT, SHOULD NOT HAVE BEEN ACCEPTED BY THE COURT BECAUSE IT WAS BASED UPON BUSINESS RECORDS THAT WERE NOT PROVIDED TO THE REFEREE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report should not have been accepted because it was based upon business records which were not in evidence:

… Supreme Court should have granted that branch of the defendant's cross motion which was to reject the referee's report. "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" … . "The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute" … .

Here, in addition to the outstanding principal amount of the loan, along with accrued interest and charges, the referee included $507,095.35 in "Tax Disbursements" and $27,705.00 in "Hazard Insurance Disbursements" as

part of the total amount due to the plaintiff. The defendant correctly objected to the inclusion of these disbursements on the ground that they were calculated based on business records that were never produced by the plaintiff or submitted to the referee (see CPLR 4518[a] …). HSBC Bank USA, N.A. v Cherestal, 2019 NY Slip Op 08660, Second Dept 12-4-19

REFEREE'S REPORT.

THERE IS NO REQUIREMENT THAT A MOTION TO CONFIRM A REFEREE'S REPORT IN A FORECLOSURE PROCEEDING BE MADE BEFORE A JUDGMENT OF FORECLOSURE MAY BE GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a plaintiff in a foreclosure action need not make a motion to confirm a referee's report before a judgment of foreclosure can be granted:

… [T]he plaintiff moved … to confirm the referee's report and for a judgment of foreclosure and sale. The court denied the motion without prejudice to renew upon confirmation of the referee's report. The plaintiff appeals.

CPLR 4403 authorizes a court to confirm or reject a referee's report and, thereafter, to "render decision directing judgment in the action." There is no requirement under the statute that a motion to confirm a referee's report be made before a motion for a judgment of foreclosure and sale may be brought. Accordingly, we remit the matter to the Supreme Court, Queens County, for a determination on the merits of the plaintiff's motion … . Real Estate Mtge. Network, Inc. v Pretto, 2019 NY Slip Op 03390, Second Dept 5-1-19

SERVICE OF PROCESS.

AFFIRMATION CONTESTING SERVICE DID NOT CONFORM TO NEW YORK LAW AND THEREFORE DID NOT REBUT THE PROCESS SERVER'S AFFIDAVIT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined that defendant's affirmation did not conform to New York law and therefore was not sufficient to rebut the process server's

affidavit of service. Defendant's made his affirmation in front of a notary in Israel, but the affirmation did not indicate it was made under penalty of perjury:

"[A]ny person who, for religious or other reasons, wishes to use an affirmation as an alternative to a sworn statement may do so," but such affirmation "must be made before a notary public or other authorized official," and the affirmant must "be answerable for the crime of perjury should he make a false statement" … . Furthermore, an affirmation from a person physically located outside the geographic boundaries of the United States must comply with the additional formalities of CPLR 2309 (c), and must, in substance, affirm that the statement is true under the penalties of perjury under the laws of New York (*see* CPLR 2106 [b]). While the defendant's identity was verified by an authorized official in Israel acting in the capacity of a notary, the affirmation itself failed to indicate that the statements made therein were true under the penalties of perjury. Therefore, the affirmation was without probative value … . U.S. Bank N.A. v Langner, 2019 NY Slip Op 00492 [168 AD3d 1021], Second Dept 1-23-19

SERVICE OF PROCESS.

DEFENDANT IN THIS FORECLOSURE ACTION PRESENTED SUFFICIENT EVIDENCE REBUTTING THE PROCESS SERVER'S AFFIDAVIT TO WARRANT A HEARING ON WHETHER SHE WAS PROPERLY SERVED WITH THE SUMMONS AND COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive concurring memorandum, determined that defendant made a sufficient showing to warrant a hearing on whether she was served with the summons and complaint in this foreclosure action:

Although the defendant did not deny having actual notice of the action, "[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" … . "Service is only effective . . . when it is made pursuant to the appropriate method authorized by the CPLR. Actual notice alone will not sustain the service or subject a person to the court's jurisdiction [when there has not been compliance with] prescribed conditions of service" … . * * *

The defendant rebutted the process server's affidavit of service through her specific and detailed affidavit, in which she averred that "[t]he [a]ffidavit of service falsely states that a copy of the Summons and Complaint was affixed to my door." The defendant's affidavit set out in great detail that the defendant was at home each time

that the process server purportedly attempted service, as she was recuperating from a kidney transplant. The defendant averred that April 3, 2009, which happened to be her birthday, was a Friday, and that as an observant Jew she did not leave her home. The defendant submitted a Sabbath calendar printout showing that the sun did not set until 8:04 p.m. on April 4, 2009, approximately one hour after the process server purportedly affixed the summons and complaint to her door. The defendant averred that she never heard anyone knock at her door or ring her doorbell and that, despite various medical problems, she has no issues with her hearing. The defendant averred that her daughter came to pick her up for dinner at 8:30 p.m. on April 4, 2009, and that upon leaving her home, she did not see any documents affixed to her door. The foregoing detailed averments were sufficient to rebut the process server's affidavit and to warrant a hearing on the issue of whether service was properly made … . HSBC Bank USA, N.A. v Assouline, 2019 NY Slip Op 07891, Second Dept 11-6-19

SERVICE OF PROCESS.

PLAINTIFF BANK IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED AN EXTENSION OF TIME TO EFFECT SERVICE FOR GOOD CAUSE SHOWN AND IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action should have been granted more time to serve the defendant by publication:

Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service upon "good cause shown or in the interest of justice" … . "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" … .

If a plaintiff fails to establish good cause for an extension, courts must consider whether an extension is warranted in the interest of justice … . A showing of reasonably diligent efforts at service is not required, but courts may consider diligence along with other factors, including "the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant" … . **Wilmington Sav. Fund Socy., FSB v James, 2019 NY Slip Op 05807, Second Dept 7-24-19**

SERVICE OF PROCESS.

THE PROCESS SERVER WAS AWARE DEFENDANT IN THIS FORECLOSURE ACTION WAS IN THE MILITARY; THE "AFFIX AND MAIL" METHOD OF SERVICE DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT).

The Second Department determined personal jurisdiction was not obtained over defendant in this foreclosure action. The process server, who used the "affix and mail" method of service, was aware defendant was in the military:

After the hearing, the Supreme Court determined that the plaintiff had not established personal jurisdiction over the defendant. Service pursuant to CPLR 308(4), known as "affix and mail" service, "may be used only where service under CPLR 308(1) or 308(2) cannot be made with due diligence'" … . "While the precise manner in which due diligence is to be accomplished is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed, given the reduced likelihood that a summons served pursuant to [CPLR 308(4)] will be received"… . A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the "due diligence" requirement before resort to affix and mail service … . " [D]ue diligence' may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" … . …

According to the affidavit of service and the process server's in-house work order sheet, however, the process server knew that the defendant was in active military service. Since the process server was aware that the defendant was engaged in active military service at the time the process server attempted service at the address, the process server's four attempts at service prior to resorting to affix-and-mail service were not made when the defendant "could reasonably be expected to be found at such location" … . Mid-Island Mtge. Corp. v Drapal, 2019 NY Slip Op 06488, Second Dept 9-11-19

SERVICE OF PROCESS.

TIME TO SERVE DEFENDANT, WHO LIVED IN INDIA, IN THIS FORECLOSURE ACTION WAS PROPERLY EXTENDED IN THE INTEREST OF JUSTICE BUT SUPREME COURT SHOULD NOT HAVE DIRECTED AN ALTERNATIVE METHOD OF SERVICE, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the time for serving defendant (Kothary), who lived in India, in this foreclosure action was properly extended in the interest of justice pursuant to CPLR 306-b. But Supreme Court should not have directed an alternative method of service (service upon the defendant's attorney) pursuant to CPLR 308 (5):

… [W]e agree with the Supreme Court's determination granting, in the interest of justice, that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon Kothary. The plaintiff established, among other things, that the action was timely commenced, and that service was timely attempted and was perceived by the plaintiff to have been within the 120-day period but was subsequently found to have been defective … . Additionally, the plaintiff demonstrated that it has a potentially meritorious cause of action, and that there was no identifiable prejudice to Kothary as a consequence of the delay in service … . …

However, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was pursuant to CPLR 308(5) to direct an alternative method for service of process by permitting service upon Kothary's attorney. "CPLR 308(5) vests a court with discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4) are impracticable" … . "[A] plaintiff seeking to effect expedient service must make some showing that the other prescribed methods of service could not be made" … . Here, at the hearing, Kothary provided the address where he resides in New Delhi … , and the plaintiff failed to submit any evidence that effectuating service in India by any of the authorized methods would have been unduly burdensome … . "That [Kothary] resided in a foreign country did not, by itself, relieve the plaintiff of [its] obligation to make a reasonable effort to effectuate service in a customary manner before seeking relief pursuant to CPLR 308(5)" … . JPMorgan Chase Bank, N.A. v Kothary, 2019 NY Slip Op 08832, Second Dept 12-11-19

STANDING, APPEALS.

WHETHER THE ENDORSEMENT WAS AFFIXED TO THE NOTE, A STANDING REQUIREMENT, WAS NOT RAISED BY THE DEFENDANTS ON APPEAL AND THEREFORE COULD NOT BE CONSIDERED BY THE APPELLATE COURT (SECOND DEPT).

The Second Department, over a partial dissent, determined that the plaintiff had established standing to bring the foreclosure action. The issue whether the endorsement was affixed to the note, the issue raised by the dissent, was not raised on appeal, according to the majority, and therefore could not be considered:

We disagree with our dissenting colleague on the issue of whether the plaintiff established that the note was properly endorsed pursuant to the Uniform Commercial Code and, thus, validly transferred to it. The defendants' brief, at most, mentions in passing UCC 3-202(1) along with other boilerplate legal discussion, but then relates the UCC provision to an argument that the plaintiff failed to prove the authority of the assignor to negotiate the note. Further, in challenging the endorsement itself, the defendants focus in their brief on the plaintiff's failure to establish the signature and authority of David A. Spector, whose name is on the endorsement, and the plaintiff's failure to prove the chain of assignments, but the defendants do not actually raise the issue of the affixation of the endorsement to the note. The defendants' brief focuses almost entirely upon the enforceability of the assignment, not the issue of physical possession of the note or endorsement. To the extent physical possession is argued by the defendants, their argument is that the plaintiff failed to prove when the note was received and the circumstances of its delivery, without raising any issue about this particular endorsement being firmly affixed to the note. As a result, the dispositive basis of the dissent, having not been argued on appeal, is simply not before us to consider. It is not appropriate for us to decide an appeal "on a distinct ground that we winkled out wholly on our own" … , where no party has had notice and an opportunity to be heard on this ground. Green Tree Servicing, LLC v Molini, 2019 NY Slip Op 02686, Second Dept 4-10-19

STANDING, DEFAULT, AMOUNT OWED, REPLY PAPERS.

DEFICIENCIES IN THE BANK'S PROOF OF DEFAULT, STANDING AND THE AMOUNT OWED COULD NOT BE CURED BY SUBMITTING ADDITIONAL PROOF IN THE REPLY PAPERS IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient proof of defendants' default, standing or the amount owed, and the deficiencies could not be cured by a second affidavit submitted in reply:

… [T]he plaintiff submitted the affidavit of its assistant vice president, Keith Weinkauf. As to the defendants' alleged default, Weinkauf stated that the defendants "fail[ed] to make the full payment due on the [m]aturity [d]ate" of the note. On the issue of standing, Weinkauf averred that "[e]ffective March 31, 2016, Montauk Credit Union merged into Bethpage Federal Credit Union." Further, with respect to the amount owed by the defendants, Weinkauf stated that the current unpaid principal balance due on the note was $58,165.61, plus interest, late charges, and fees. However, apart from producing a copy of the note itself, Weinkauf submitted no evidence in admissible form with his affidavit to establish the existence of a default, the plaintiff's standing, or the calculation of the unpaid amount owed by the defendants … . Although the plaintiff later submitted, with its reply papers, a second affidavit from Weinkauf, along with supporting documentary evidence, to establish its standing, the plaintiff could not, under the circumstances presented, rely on the second affidavit to correct deficiencies inherent in the original one … . Bethpage Fed. Credit Union v Luzzi, 2019 NY Slip Op 08550, Second Dept, 11-27-19

STANDING, DEFAULT.

BANK'S EVIDENCE OF DEFAULT WAS INADMISSIBLE HEARSAY; INSUFFICIENT PROOF THE NOTE WAS ENDORSED IN BLANK; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. There was insufficient evidence the note was endorsed in blank and there was insufficient evident of defendant's default:

… [I]t is undisputed that a copy of the underlying note was annexed to the complaint. However, notwithstanding the plaintiff's assertion in its appellate brief that "[t]he note, as attached to the complaint, was indorsed in blank on the reverse side of the signature page (and not a separate allonge)," it cannot be ascertained from the copy of the note annexed to the complaint whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, in which case the plaintiff would have to prove that the endorsement was "so firmly affixed thereto as to become a part thereof," as required under UCC 3-202(2).

… [W]hile Panganiban's [plaintiff bank's vice president's] affidavit was sufficient to establish a proper foundation for the admission of a business record pursuant to CPLR 4518(a) … , the plaintiff failed to submit copies of the business records themselves. "[T]he business record exception to the hearsay rule applies to a writing or record' (CPLR 4518[a]) . . . [and] it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . "While a witness may read into the record from the contents of a document which has been admitted into evidence , … a witness's description of a document not admitted into evidence is hearsay" … . JPMorgan Chase Bank, N.A. v Grennan, 2019 NY Slip Op 06761, Second Dept 9-25-19

STANDING, DISCOVERY.

PRODUCTION OF THE ORIGINAL NOTE AND ENDORSEMENTS WAS "MATERIAL AND NECESSARY" TO THE DETERMINATION WHETHER THE BANK HAS STANDING TO BRING THE FORECLOSURE ACTION, DEFENDANT'S MOTION TO COMPEL DISCOVERY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion pursuant to CPLR 3124 to compel the bank in this foreclosure action to produce the original note and endorsements should have been granted. Defendant had challenged the bank's standing to bring the foreclosure action and the production of the original note and endorsements was "material and necessary" to resolve the standing question:

It is undisputed that a copy of the underlying note was annexed to the complaint. However, it cannot be ascertained from the copy of the note provided by the plaintiff whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, and if on an allonge, whether the allonge was "so firmly affixed as to become a part thereof," as required under UCC 3-202(2). Since the answers to these questions are "material and necessary" to the defense of lack of standing,

the Supreme Court should have granted that branch of the defendant's motion which was pursuant to CPLR 3124 to compel the plaintiff to produce the original note and endorsements … . Bayview Loan Servicing, LLC v Charleston, 2019 NY Slip Op 06463, Second Dept 9-11-19

STANDING, LOST NOTE, NOTICE.

BANK DID NOT SUBMIT SUFFICIENT PROOF OF A LOST NOTE AND COMPLIANCE WITH NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the bank, inter alia, did not demonstrate compliance with the RPAPL 1304 notice provisions and failed to submit sufficient proof of a lost note in this foreclosure action:

… [A]lthough the plaintiff came forward with evidence establishing that the note was assigned to it and establishing the note's terms, the affidavit of lost note submitted in support of its motion failed to establish the facts that prevent the production of the original note (see UCC 3-804 …). Additionally, we note that Riley's out-of-state affidavit lacked a certificate of conformity as required by CPLR 2309(c), although such defect by itself would not be fatal to the plaintiff's motion … .

Further, the evidence submitted in support of the plaintiff's motion failed to establish, prima facie, that the plaintiff strictly complied with RPAPL 1304. Proper service of the RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of a foreclosure action … . The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served the defendant pursuant to the terms of the statute … . Contrary to the plaintiff's contention, the affidavit of a representative of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not provide evidence of a standard office mailing procedure and provided no independent evidence of the actual mailing … .

Likewise, the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in the mortgage requiring it to give notice of default prior to demanding payment in full … . U.S. Bank N.A. v Cope, 2019 NY Slip Op 06111, Second Dept 8-7-19

STANDING, LOST NOTE.

DESPITE LOSS OF THE NOTE, THE BANK CAN DEMONSTRATE STANDING WITH A LOST NOTE AFFIDAVIT WHICH MEETS THE REQUIREMENTS OF UCC 3-803 (SECOND DEPT).

The Second Department determined plaintiff bank properly established standing in this foreclosure proceeding, despite the note having been lost, with a lost note affidavit which met the requirements of UCC 3-803:

… "[P]ursuant to UCC 3-804, the owner of a lost note may maintain an action upon due proof of [1] his [or her] ownership, [2] the facts which prevent his [or her] production of the instrument and [3] its terms'" … . Accordingly, we agree with the referee that, as long as the affidavit of lost note meets the requirements of UCC 3-804, a mortgagee may establish standing based on its possession of the note, even where the original note has been lost. Here, the parties stipulated that "the factual criteria for the application of § 3-804 ha[ve] been satisfied." Moreover, while ownership of the note may be easier to establish where there is a valid assignment of the note and mortgage … , due proof of the plaintiff's ownership may also be provided by an affidavit of lost note setting forth details such as who acquired possession of the note and "when the search for the note occurred, who conducted the search, the steps taken in the search for the note, or when or how the note was lost" … . Bank of N.Y. Mellon v Hardt, 2019 NY Slip Op 05100, Second Dept 6-27-29

STANDING, LOST NOTE.

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF THE LOSS OF THE NOTE IN THIS FORECLOSURE ACTION; THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient evidence concerning the allegedly lost note. The bank's motion for summary judgment in this foreclosure action should not have been granted:

Among the evidence offered by the plaintiff was a lost note affidavit, signed by a representative of Beneficial Homeowner Service Corporation (hereinafter Beneficial), the purported predecessor-in-interest to the plaintiff, stating that the note was deemed lost as of November 14, 2013, and that Beneficial was "in possession of the

original Note prior to its whereabouts becoming undeterminable." The evidence does not establish that the plaintiff was ever in physical possession of the subject note … .

The plaintiff also failed to demonstrate its ownership of the subject note by written assignment. The plaintiff submitted a document dated June 12, 2015, purporting to be a written assignment of the appellants' mortgage and underlying note to the plaintiff by Beneficial, signed by Caliber Home Loans, Inc. (hereinafter Caliber), as Beneficial's "attorney in fact." However, the plaintiff failed to demonstrate as a matter of law the validity of the written assignment, because the plaintiff did not produce sufficient evidence of Caliber's authority to execute the assignment as Beneficial's attorney-in-fact … . …

Moreover, the plaintiff failed to demonstrate, prima facie, the facts that prevented production of the lost note … . The affidavit submitted by the plaintiff failed to identify who conducted the search for the lost note … , and failed to explain "when or how the note was lost" … , but instead described only approximately when the search for the note was conducted and when the loss was discovered, which was "on or about" the date the affidavit was executed.

In light of the plaintiff's failure to satisfy the requirements of UCC 3-804, we need not reach the parties' further contentions regarding the plaintiff's standing to commence this action … . U.S. Bank Trust, N.A. v Rose, 2019 NY Slip Op 07440, Second Dept 10-16-19

STANDING, LOST NOTE.

THE UCC CRITERIA FOR PROOF OF POSSESSION OF A LOST NOTE WERE NOT MET; PLAINTIFF BANK THEREFORE DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it had standing to bring the foreclosure action. The UCC's requirements for demonstrating ownership of a lost note were not met:

… [T]he affidavit of possession of the original note, sworn to by a vice president of loan documentation for the plaintiff, does not contain any details of delivery of the note, except for the claim that it was delivered to the plaintiff sometime after its execution, and that the plaintiff "had possession of the Promissory Note on or before … the date that this action was commenced." The lost note affidavit of another vice president of loan

documentation employed by the plaintiff stated vaguely, and in a conclusory manner, that the note was "inadvertently lost, misplaced or destroyed," that the plaintiff had not "pledged, assigned, transferred, hypothecated or otherwise disposed of the note," and that the plaintiff had made "a diligent and extensive search of its records in a good faith effort to discover the lost note in accordance with its procedures for locating the lost note." The lost note affidavit did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost … . Thus, it "failed to sufficiently establish the plaintiff's ownership of the note" … .

Since the plaintiff failed to demonstrate its ownership of the lost note (see UCC 3-804), or that it had standing, "as the lawful holder or assignee of the subject note on the date it commenced this action, to commence the action … . Wells Fargo Bank, N.A. v Meisels, 2019 NY Slip Op 08243, Second Dept 11-13-19

STANDING, NOTICE.

BANK DID NOT SUBMIT SUFFICIENT EVIDENCE OF ITS STANDING, ITS COMPLIANCE WITH CONDITIONS PRECEDENT IN THE MORTGAGE, OR ITS COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE RPAPL, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action because it presented: (1) insufficient proof of standing; (2) insufficient proof of compliance with the notice provisions of the mortgage; and (3) insufficient proof of compliance with the RPAPL notice requirements:

… [T]he plaintiff failed to establish, prima facie, its standing because it did not show that it was a holder of the note at the time the action was commenced. The affidavits of Melissa Guillote and Myrna Moore, both vice presidents of loan documentation of the plaintiff's loan servicer, nonparty Wells Fargo Bank, N.A. (hereinafter the loan servicer), that were submitted by the plaintiff in support of its motion, conflict as to whether the plaintiff or the loan servicer possessed the note on the date the action was commenced. Moreover, neither affidavit attaches any admissible document to show that the plaintiff possessed the note endorsed in blank prior to the commencement of this action (see CPLR 4518[a] …). The affidavits also fail to show that either Guillote or Moore possessed personal knowledge of whether the plaintiff possessed the note prior to commencement of the action. …

The plaintiff also failed to establish, prima facie, that it complied with the conditions precedent contained in sections 15 and 22 of the mortgage, which provide that required notice to the defendants is considered given when it is mailed by first class mail or when it is actually delivered to the defendants' notice address if sent by any other means … . …

The plaintiff also failed to show, prima facie, that it strictly complied with RPAPL 1304. Proper service of the RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of a foreclosure action … . The plaintiff did not submit an affidavit of service or proof of mailing by the post office demonstrating that it properly served the defendants as prescribed by the statute … . HSBC Bank USA, Natl. Assn. v Dubose, 2019 NY Slip Op 06481, Second Dept 9-11-19

STANDING, NOTICE.

MORTGAGE COMPANY'S PROOF OF STANDING AND MAILING OF RPAPL 1304 NOTICE INSUFFICIENT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not provide sufficient evidence of standing and mailing of the RPAPL 1304 notice in this foreclosure proceeding:

… [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence this action. In support of its motion, the plaintiff relied on the affidavit of its Document Execution Specialist, Jerrell Menyweather, who attested that the plaintiff received physical delivery of the original note on July 6, 2007, and was in possession and the holder of the note, prior to commencement of the action … . While Menyweather attested that his knowledge was based on business records maintained by the plaintiff, he failed to annex the business records that he referred to in his affidavit. Thus, his affidavit constituted inadmissible hearsay and lacked probative value on this issue of the plaintiff's standing … .

… [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. Although Menyweather stated in the affidavit that the RPAPL 1304 notices were sent to certain of the defendants via certified and first-class mail, the plaintiff failed to provide any documents to prove that the mailing actually took place. Moreover, "[w]hile mailing may be proved by documents meeting the requirements of the business records exception to the rule against hearsay," Menyweather "did not make the requisite showing that he was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice

and procedure designed to ensure that items are properly addressed and mailed" … . Nationstar Mtge., LLC v Jean-Baptiste, 2019 NY Slip Op 09011, Second Dept 12-18-19

STANDING, NOTICE.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT SUBMIT ADMISSIBLE PROOF OF STANDING PURSUANT TO A MERGER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff bank in this foreclosure action did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and did not demonstrate it had standing, based upon a merger, to foreclose:

… [T]he plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1304 … . The plaintiff did not submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that the plaintiff properly served the defendants pursuant to RPAPL 1304. Instead, the plaintiff relied upon the affidavit of its employee Lesa Duddey, a vice president of document control. In her affidavit, Duddey averred that her "review of records" maintained by the plaintiff "reveal[ed]" that the plaintiff sent 90-day notices by registered or certified mail and first class mail to each of the defendants, and she described a correspondence log that purportedly evidenced such mailings. "While mailing may be proved by documents meeting the requirements of the business records exception to the rule against hearsay" … , here, the plaintiff failed to submit a copy of the correspondence log in support of its motion. Consequently, the statements in Duddey's affidavit regarding the correspondence log are inadmissible hearsay and lack probative value … . The plaintiff did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . The presence of 20-digit numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304 … .

… [W]e note that the plaintiff also failed to submit sufficient evidence in admissible form of ABN's merger with the plaintiff to establish, prima facie, that the plaintiff was the holder of the note at the time of the commencement of the action … . CitiMortgage, Inc. v Osorio, 2019 NY Slip Op 05383, Second Dept 7-3-19

STANDING.

BANK'S EVIDENCE OF STANDING DID NOT MEET THE CRITERIA OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing Supreme Court. determined that the bank's motion for summary judgment should not have been granted because the evidence of standing submitted by the bank did not meet the requirements of the business records exception to the hearsay rule:

… [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing …. The affidavits of Andrea Kruse, vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's servicer, failed to lay the proper foundation under the business records exception to the hearsay rule to support her assertion that the note was transferred to the plaintiff's custodian prior to commencement of the action and remained in the possession of the plaintiff's custodian at the time of commencement …. While, in attempting to rely upon the documentary evidence that was annexed to the motion, Kruse averred in her first affidavit that she reviewed the books and records regularly created, maintained, and kept by Wells Fargo, and in her second affidavit that she reviewed the books and records regularly created, maintained, and kept by the plaintiff, she did not attest that she was personally familiar with the plaintiff's or Wells Fargo's record-keeping practices and procedures, or that the plaintiff's records were incorporated into Wells Fargo's own records or routinely relied upon in its business … . US Bank Natl. Assn. v Hunte, 2019 NY Slip Op 07311, Second Dept 10-9-19

STANDING.

BANK'S POSSESSION OF THE NOTES CONSOLIDATED BY A CONSOLIDATION, EXTENSION AND MODIFICATION AGREEMENT (CEMA) CONFERRED STANDING TO BRING THE FORECLOSURE ACTION, POSSESSION OF THE ORIGINAL NOTES WAS NOT REQUIRED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissent. determined that defendants' excuse for their default and their argument plaintiff bank (Wells Fargo) did not have standing were properly rejected by Supreme Court. The two dissenting justices agreed with defendants' arguments. Defendants

alleged in their motion to vacate the default that their attorney received the summary judgment motion, filed for bankruptcy and never responded to the motion. On the standing issue defendants argued that possession of the original 2005 and 2008 notes issued by a nonparty, not the subsequent Consolidation, Extension and Modification Agreement (CEMA) note, which consolidated the 2005 and 2008 notes, was required to confer standing:

… [T]he CEMA makes clear that the consolidated note superseded the original notes and is the operative document in this case. As did the plaintiff in Weiss v Phillips (157 AD3d 1 [1st Dept 2017]), Wells Fargo seeks foreclosure based on the CEMA and consolidated note. As we held the plaintiff did in Weiss, Wells Fargo established its entitlement to relief by submitting the CEMA, consolidated note, unchallenged evidence that it is the holder of the consolidated note, and nonpayment of the loan by the borrowers. As we also held in Weiss, "In this case, because of the CEMA, standing is not an issue" and any absence of the underlying notes in this action is likewise accounted for by the CEMA … . In other words, "there is no legitimate question that [Wells Fargo] is the party entitled to enforce under the [consolidated] note, as evinced by . . . the CEMA" … . Wells Fargo Bank N.A. v Ho-Shing, 2019 NY Slip Op 00080, First Dept 1-8-19

STANDING.

DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THAT PLAINTIFF BANK DID NOT HAVE STANDING IN THIS FORECLOSURE ACTION BY MERELY POINTING OUT ALLEGED GAPS IN PLAINTIFF'S CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, THEREFORE, SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant did not make a prima facie showing that plaintiff bank lacked standing in this foreclosure action, as opposed to pointing to alleged gaps in plaintiff's case. Therefore defendant's motion for summary judgment should not have been granted:

"On a motion for summary judgment, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied'" … . "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law" … . Here, the defendant merely pointed to alleged gaps in the plaintiff's case and failed to meet her burden of establishing, prima facie, the plaintiff's lack of standing as a matter of law … . Cenlar FSB v Lanzbom, 2019 NY Slip Op 00092, Second Dept 1-9-19

STANDING.

IN THIS FORECLOSURE ACTION THE MORTGAGE COMPANY DID NOT DEMONSTRATE STANDING WITH PROOF MEETING THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The First Department, reversing Supreme Court, determined plaintiff mortgage company did not demonstrate standing with proof meeting the requirements of the business records exception to the hearsay rule:

In support of its motion, the plaintiff submitted the affidavit of Melissa Black, an employee of the plaintiff's loan servicer, who alleged, based upon a review of business records maintained by the loan servicer, that the plaintiff had been "in continuous possession of the note and mortgage since June 26, 2007." However, because Black did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures, the plaintiff failed to demonstrate that the records relied upon by Black were admissible under the business records exception to the hearsay rule (see CPLR 4518[a] …). In any event, the submissions by the plaintiff of different copies of the note raise a triable issue of fact, inter alia, as to whether the note was assigned to the plaintiff prior to the commencement of the action … . EMC Mtge. Corp. v Tinari, 2019 NY Slip Op 01392, Second Dept 2-27-19

STANDING.

MERE DENIAL OF THE ALLEGATIONS IN A FORECLOSURE COMPLAINT THAT THE PLAINTIFF IS THE OWNER AND HOLDER OF THE NOTE AND MORTGAGE IS NOT SUFFICIENT TO ASSERT THE DEFENSE THAT THE PLAINTIFF LACKS STANDING, PRECEDENT TO THE CONTRARY OVERRULED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Castro, over an extensive dissenting opinion, determined that a denial of the allegations in a foreclosure complaint that the plaintiff is the owner and holder of the note and mortgage is not sufficient to assert that plaintiff lacks standing, a defense that is waived if not asserted:

… [T]he issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose. * * *

Taken to its logical conclusion, the … defendants' position would mean that their denials preserve all conceivable affirmative defenses that can be parsed from reading the factual allegations of the complaint in conjunction with their corresponding and conclusory denials, so that these defenses may be raised at some subsequent point in the case. Such a result would render the obligation under CPLR 3018(b) to specifically plead affirmative defenses in the answer meaningless, delay the legislatively favored prompt adjudication of the defenses at an early point in the litigation, and cause prejudice and surprise to plaintiffs. Moreover, the practical realities of mortgage foreclosure litigation are that foreclosure complaints invariably allege that the plaintiff is the holder and/or assignee of the note, and answering defendants reflexively deny (or deny knowledge as to the truth of) most or all of the allegations in their responsive pleadings. Were such denials by themselves sufficient to place standing in issue, then standing would effectively become a prima facie element of the plaintiffs' claims in all contested foreclosure actions, an unwarranted consequence. Rather, if a defendant in a foreclosure action genuinely believes that she or he has a basis upon which to contest standing, it is not too much to ask her or him to specifically and affirmatively assert that position in the answer as the CPLR requires.

To the extent that some decisions of our Court have strayed from the foregoing principles by indicating that a mere denial in the answer of factual allegations set forth in the complaint will suffice to place standing in issue, thereby injecting uncertainty into this formerly settled area … . US Bank N.A. v Nelson, 2019 NY Slip Op 00494, Second Dept 1-23-19

STANDING.

NO PROOF NOTE WAS IN POSSESSION OF PLAINTIFF WHEN THE ACTION WAS COMMENCED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, over a two justice dissent, reversing Supreme Court, determined the evidence of standing was insufficient and plaintiff's motion for summary judgment in this foreclosure action should not have been

granted. The majority held there was no proof the plaintiff was in possession of the note when the action was brought:

On or about September 17, 2014, plaintiff executed a power of attorney appointing Ocwen Loan Servicing, LLC (Ocwen) as its attorney-in-fact with power to enforce its rights with regard to loans included in the PSA [pooling and service agreement].

Two years after that, on October 19, 2016, plaintiff moved for summary judgment. Plaintiff submitted an affidavit by Kyle Lucas, an employee of a company whose indirect subsidiary is Ocwen. Lucas alleged that plaintiff had had physical possession of the note since June 6, 2007, but he failed to identify any document which provided the basis for his knowledge. A copy of defendant's note, endorsed in blank … , was attached to plaintiff's summary judgment motion. However, there is nothing in the record that proves when the note was physically delivered to plaintiff. Deutsche Bank Natl. Trust Co. v Guevara, 2019 NY Slip Op 02412, First Dept 3-28-19

STANDING.

PLAINTIFF BANK DID NOT SUBMIT SUFFICIENT PROOF OF ITS STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient proof of standing to bring the foreclosure action:

… [W]hile the plaintiff alleged that the note had been endorsed to it, the plaintiff failed to submit sufficient evidence to demonstrate that a copy of the note with the endorsement was attached to the complaint. The only copy of the complaint that appears in the record before us was submitted as an exhibit in support of Williams's [defendant's] motion, and the version of the note accompanying that copy of the complaint did not include the endorsement. The plaintiff's attempt to establish standing through the submission of the affidavit of Morgan Battle Ames, a contract management coordinator for the plaintiff's loan servicer, was also insufficient. Ames stated that she had "personal knowledge of the stated facts and circumstances and books and records maintained by [the loan servicer]," and that the "information in this affidavit is taken from [the loan servicer's] business records," which were "recorded by persons with personal knowledge of the information in the business record." Since Ames failed to attest that she was personally familiar with the record-keeping practices and procedures of

the entity that generated the subject business records, she failed to demonstrate … . HSBC Bank USA, N.A. v Williams, 2019 NY Slip Op 08554, Second Dept 11-27-19

STANDING.

PLAINTIFF BANK WAS PROPERLY ALLOWED TO RECOMMENCE THE FORECLOSURE ACTION AFTER IT WAS DISMISSED AS ABANDONED PURSUANT TO CPLR 3215, HOWEVER PLAINTIFF DID NOT DEMONSTRATE IT HAD STANDING AND ITS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff bank did not demonstrate it had standing to bring this foreclosure action. Therefore plaintiff's summary judgment motion should not have been granted. The court noted that Supreme Court properly allowed plaintiff an additional six months to commence another action (CPLR 205 (a)) after the first was dismissed as abandoned pursuant to CPLR 3215 (c):

… [P]laintiff failed to demonstrate that it has standing as the assignee of the mortgage from MERS. By its express terms, the initial written assignment from MERS only assigns the mortgage, not the note, and no proof was submitted establishing that MERS was ever conferred with the requisite authority to assign the note… . Moreover, contrary to Supreme Court's holding, this Court has held that merely attaching the note with a blank indorsement to the complaint is not sufficient for plaintiff to meet its prima facie burden on the issue of standing or to prove plaintiff's possessory interest in the note; proof of actual possession is required … ….

Plaintiff similarly failed to establish its standing by demonstrating that it had physical possession of the note at the time of the commencement of the action. In support of its motion for summary judgment, plaintiff submitted, among other things, a copy of its complaint, the mortgage, the unpaid note (indorsed in blank), the relevant assignments of the mortgage and proof of defendants' default. Plaintiff also tendered the affidavit of the authorized officer for Caliber Home Loans, Inc., the mortgage loan servicing agent and attorney-in-fact for plaintiff … . The affidavit of the authorized officer indicates the source of her knowledge to be her "review of the electronic records of Caliber Home Loans, Inc." regarding defendants' delinquent account, which includes, among other things, "electronic images of the note and electronic records maintained by Caliber Home Loans, Inc." Other than alleging that she reviewed these electronic records, the authorized officer's affidavit fails to provide any indication that she actually examined the original note, nor did it provide any details with regard to whether plaintiff ever obtained possession thereof and, if so, how and when it came into its possession … .

Moreover, the complaint is equivocal and alleges in the alternative that plaintiff is "the current owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note." Such language is insufficient to establish that plaintiff had physical possession of the note at the time it commenced this action … . U.S. Bank Trust, N.A. v Moomey-Stevens, 2019 NY Slip Op 00016, Third Dept 1-3-19

STANDING.

PLAINTIFF, AFTER FAILING TO ARGUE THAT DEFENDANTS WAIVED THE LACK OF STANDING DEFENSE BEFORE SUPREME COURT, COULD NOT RAISE DEFENDANTS' WAIVER OF THE DEFENSE FOR THE FIRST TIME ON APPEAL, PLAINTIFF DID NOT DEMONSTRATE STANDING TO COMMENCE THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department determined plaintiff did not demonstrate standing to bring the foreclosure action, and, further, could not raise defendant's waiver of the lack-of-standing defense for the first time on appeal:

The defense of lack of standing in an action to foreclose a mortgage is waived if the defendant does not raise it in a pre-answer motion to dismiss or as an affirmative defense (see CPLR 3018[b]…). Here, in opposition to the plaintiff's motion for summary judgment and in support of their cross motion to dismiss, the defendants argued that the plaintiff lacked standing to commence this action. The plaintiff, in its "reply . . . in further support of plaintiff's motion for summary judgment, and in opposition to defendant's [sic] cross-motion to dismiss," entirely disregarded the defendants' waiver of the standing defense. Instead, the plaintiff sought to establish that it had standing to commence the action. Now, having litigated the standing defense on the merits in the Supreme Court—both on the original motion and in opposition to reargument—the plaintiff argues on appeal that the issue of standing was waived. Having neglected to raise that dispositive issue in the Supreme Court, the plaintiff may not raise it for the first time on this appeal … .

The plaintiff also failed, on the merits, to establish prima facie that it had standing to commence the action. The loan servicer's affidavit, which asserted that the named plaintiff "was in possession of the Note at the time of commencement of this action," provided no specifics as to the date of delivery or the date of commencement. The plaintiff's conclusory assertion as to possession on the date of commencement is insufficient to establish standing … . BAC Home Loans Servicing, LP v Alvarado, 2019 NY Slip Op 00584, Second Dept 1-30-19

STANDING.

PLAINTIFF'S PROOF OF STANDING IN THIS FORECLOSURE ACTION WAS NOT IN ADMISSIBLE FORM, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence that the plaintiff had standing in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and plaintiff's summary judgment motion should not have been granted:

In support of its motion, the plaintiff relied on the affidavit of Gabriel De Souza, a contract management coordinator for Ocwen Loan Servicing, LLC (hereinafter Ocwen), which serviced the subject mortgage for the plaintiff. De Souza indicated that his knowledge of this case was based on his "review of the business records," and asserted that the plaintiff was "in possession of the Note at the time of commencement of this action." He did not indicate that the business records of the plaintiff had been incorporated into Ocwen's business records. Moreover, the plaintiff failed to demonstrate the admissibility of the assertions made by De Souza or the records relied upon by him under the business records exception to the hearsay rule (see CPLR 4518[a] …). Inasmuch as the plaintiff's motion was based on evidence that was not in admissible form, it failed to establish its prima facie entitlement to judgment as a matter of law … . Deutsche Bank Natl. Trust Co. v Lee, 2019 NY Slip Op 02313, Second Dept 3-27-19

STANDING.

PROOF OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence of standing did not meet the business record exception to the hearsay rule:

Here, since Thrasher [plaintiff's loan officer] did not allege that she was personally familiar with the plaintiff's record-keeping practices and procedures, a proper foundation for the admission of the records was not provided,

rendering them inadmissible to establish that the subject note was possessed by or assigned to the plaintiff prior to the commencement of the action. Moreover, even if a proper foundation had been set forth in the Thrasher affidavit, Thrasher's assertions as to the contents of the records is inadmissible hearsay to the extent that the records she purports to describe were not submitted with her affidavit. While a witness may read into the record from the contents of a document which has been admitted into evidence … , a witness's description of a document not admitted into evidence is hearsay (seeCPLR 4518[a]…). Furthermore, although the plaintiff submitted an endorsed copy of the note in support of its motion for summary judgment, after having appended an unendorsed copy of the note to the complaint, the plaintiff failed to eliminate a triable issue of fact as to whether the plaintiff was in possession of the original note at the time the action was commenced … . U.S. Bank Natl. Assn. v 22 S. Madison, LLC, 2019 NY Slip Op 01635, Second Dept 3-6-19

STANDING.

THE AFFIDAVIT WHICH PURPORTED TO DEMONSTRATE PLAINTIFF HAD STANDING TO BRING THE FORECLOSURE ACTION REFERRED TO UNIDENTIFIED AND UNPRODUCED RECORDS AND THEREFORE LACKED ANY PROBATIVE VALUE (FIRST DEPT).

The First Department, reversing Supreme Court, over a dissent, determined plaintiff failed to demonstrate standing to bring the foreclosure proceedings:

Plaintiff cannot establish that the note was assigned to it by a written assignment prior to commencement of foreclosure proceedings. Therefore, it must "adequately prove[] that it did, indeed, have possession of the note prior to commencement of this action" … , and where an affiant's knowledge is based on unidentified and unproduced records, "the affidavit lacks any probative value" and cannot be the basis for an award of summary judgment … . Since plaintiff has failed to establish that it had physical possession of the note prior to commencement of this action, we reverse the motion court's award of summary judgment to plaintiff. Residential Credit Solutions, Inc. v Gould, 2019 NY Slip Op 03266, First Dept 4-30-19

STIPULATIONS, ADMINISTRATIVE ORDERS, CERTIFICATE OF MERIT, APPEALS.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE ACTION, AN ADMINISTRATIVE ORDER REQUIRING A FORECLOSURE AFFIRMATION AND A CERTIFICATE OF MERIT SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY, A STIPULATION AWARDING SUMMARY JUDGMENT TO THE BANK SHOULD NOT HAVE BEEN IGNORED, THE IMPROPER APPLICATION OF THE ADMINISTRATIVE ORDER RAISED A MATTER OF LAW THAT COULD BE CONSIDERED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined the plaintiff bank's motion to vacate a dismissal of a foreclosure action should have been granted. Supreme Court had improperly applied an administrative order (AO 548/10) requiring a "Foreclosure Affirmation/Certificate of Merit" that was not in effect at the time the bank made its motion for summary judgment. The parties had entered a stipulation which awarded the bank summary judgment in return for waiver of its right to seek a deficiency judgment. The court noted that the improper retroactive application of AO 548/10 could be raised for the first time on appeal because it is a question of law that could not be avoided if it had been raised at the proper time:

"[A] court may vacate its own judgment for sufficient reason and in the interest of substantial justice"… . "A foreclosure action is equitable in nature and triggers the equitable powers of the court" … . "Once equity is invoked, the court's power is as broad as equity and justice require" … .

Here, equity and justice require vacatur of the dismissal order in the interests of substantial justice … . Countrywide Bank, FSB v Singh, 2019 NY Slip Op 04353, Second Dept 6-5-19

SUA SPONTE, ADMINISTRATIVE ORDERS.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE ACTION WHEN PLAINTIFF BANK ATTEMPTED TO BRING PREVIOUSLY FILED PAPERS INTO COMPLIANCE WITH SUBSEQUENT ADMINISTRATIVE ORDERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the foreclosure action when plaintiff bank attempted to bring previously filed documents into compliance with subsequent administrative orders:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal"… . Here, the plaintiff's counsel attempted to comply, in good faith, with Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge, which did not exist at the time of the commencement of the action, or at the time of the plaintiff's prior motion for an order of reference. Under such circumstances, dismissal was not warranted. Nothing in the Administrative Orders requires the dismissal of an action merely because the plaintiff's counsel discovers that there was some irregularity or defect in a prior submission, nor is the plaintiff effectively required to commence an entirely new action … . JP Morgan Chase Bank, N.A. v Laszlo, 2019 NY Slip Op 01205, Second Dept 2-20-19

SUA SPONTE, STANDING.

DEFENDANT IN THIS FORECLOSURE ACTION DID NOT ASSERT THE BANK LACKED STANDING IN HIS ANSWER AND DID NOT OPPOSE THE BANK'S MOTION FOR SUMMARY JUDGMENT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, RAISED THE STANDING ISSUE AND DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THAT GROUND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, denied plaintiff bank's motion for summary judgment in this foreclosure action on the ground the bank did not establish standing. The bank need not affirmatively demonstrate standing absent the defendant's assertion that the bank lacked standing. Here the defendant did not address the bank's standing in his answer and did not oppose the motion for summary judgment:

… [A]s a general matter, a plaintiff need not establish its standing (i.e., that it held and/or owned the note at the time the action was commenced) as an essential element of the cause of action. Rather, it is only where the plaintiff's standing is placed in issue by the defendant that the plaintiff must shoulder the additional burden of establishing its standing to commence the action, a burden satisfied by evidence that it was the holder or assignee of the underlying note at the time the action was commenced" … .

In the present case, the defendant did not raise the issue of standing by asserting lack of standing as an affirmative defense in his answer or moving to dismiss the complaint on that ground in a pre-answer motion to dismiss … . Inasmuch as the defendant "failed to . . . raise the issue, it was inappropriate for the Supreme Court to, sua sponte, do so on the defendant['s] behalf" … . The issue of standing was not properly before the Supreme Court … . Deutsche Bank Natl. Trust Co. v Matzen, 2019 NY Slip Op 05386, Second Dept 7-3-19

SUA SPONTE.

JUDGE SHOULD NOT HAVE DENIED, SUA SPONTE, PLAINTIFF'S MOTION FOR A JUDGMENT OF FORECLOSURE ON A GROUND NOT RAISED BY ANY PARTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, denied plaintiff's motion for a judgment of foreclosure on a ground not raised by the parties:

… [T]he Supreme Court should not have denied its motion for a judgment of foreclosure and sale upon finding that DLJ [plaintiff] failed to show that the defendants were properly served. The defendants did not oppose DLJ's motion on any ground, including lack of personal jurisdiction. Therefore, the court should not have, sua sponte, raised the issue of the propriety of service …

Moreover, DLJ demonstrated its entitlement to a judgment of foreclosure and sale by submitting evidence establishing the merits of its unopposed motion and the referee's findings and report … . DLJ Mtge. Capital, Inc. v Ramnarine, 2019 NY Slip Op 08392, Second Dept 11-20-19

SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANTS AN EXTENSION OF TIME TO ANSWER IN THIS FORECLOSURE ACTION, RELIEF WHICH WAS NOT REQUESTED BY DEFENDANTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief in this foreclosure action which was not requested by the defendant:

"The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the defendants did not request an extension of time to answer, and the Supreme Court's determination to, sua sponte, grant that relief was an improvident exercise of discretion. Indeed, to extend the time to answer the complaint, a defendant must generally provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action … . Here, the only excuse offered by the defendants for their default was the plaintiff's alleged failure to properly serve them, which excuse was rejected by the Supreme Court. Further, the defendants did not proffer any potentially meritorious defense to the action. We note also that the court's sua sponte determination to extend the time within which the defendants had to answer the complaint is fundamentally inconsistent with its determination to deny that branch of the defendants' motion which was to vacate the judgment of foreclosure and sale. Since the judgment determined the action and the rights of the parties, allowing the defendants to interpose an answer was without practical import. U.S. Bank N.A. v Halevy, 2019 NY Slip Op 07438, Second Dept 10-16-19

SUA SPONTE.

JUDGE WAS NOT PRESENTED WITH ANY EXTRAORDINARY CIRCUMSTANCES JUSTIFYING, SUA SPONTE, DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION (SECOND DEPT)

The Second Department, reversing Supreme Court, determined there was no basis for the judge's, sua sponte, dismissal of the complaint in this foreclosure action:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … .

Administrative Order 548/10, issued by the Chief Administrative Judge on October 20, 2010, and amended by Administrative Order 431-11 [requiring confirmation of the accuracy of the execution and notarization of an affidavit of merit] … , was not in effect at the time the order of reference and the judgment of foreclosure and sale were issued … . In this case, no substantial right of the defendant would have been affected by the substitution of a new affidavit of merit … . Accordingly, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint … . LaSalle Bank N.A. v Lopez, 2019 NY Slip Op 00104, Second Dept 1-9-19

SUA SPONTE.

JUDGE'S SUA SPONTE DISMSSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION DEPRIVED PLAINTIFF OF NOTICE AND A CHANCE TO BE HEARD, A VIOLATION OF DUE PROCESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint as abandoned without giving plaintiff a chance to be heard in this foreclosure action:

… [B]y notice of motion dated August 15, 2014, the plaintiff … moved, inter alia, to extend its time to serve a copy of the order of reference with notice of entry … , nunc pro tunc, to March 23, 2007 (hereinafter the second

extension of time motion). In an order dated February 26, 2015 (hereinafter the February 2015 order), the Supreme Court denied the second extension of time motion, and, sua sponte, directed the dismissal of the complaint as abandoned, noting, inter alia, that "[t]he order of reference at issue was signed in 2007" and the appointed referee was no longer on the fiduciary list. …

The Supreme Court's sua sponte determination to direct dismissal of the complaint deprived the plaintiff of notice and opportunity to be heard and amounted to a denial of the plaintiff's due process rights (see CPLR 3216 …). Accordingly, the court should have granted that branch of the plaintiff's motion which was to vacate the February 2015 order. Chase Home Fin., LLC v Plaut, 2019 NY Slip Op 02494, Second Dept 4-3-19

SUBPOENAS, ATTORNEYS, CONTEMPT.

MOTION TO QUASH SUBPOENA ISSUED TO ATTORNEY WHO REPRESENTED THE ORIGINAL BORROWERS AGAINST PROPERTY SUBJECT TO FORECLOSURE PROCEEDINGS SHOULD NOT HAVE BEEN QUASHED, CIVIL CONTEMPT ACTION AGAINST THE ATTORNEY SHOULD NOT HAVE BEEN DISMISSED, CRITERIA FOR BOTH TYPES OF PROCEEDINGS EXPLAINED (SECOND DEPT).

The Second Department determined the subpoona issued by the current owners of property subject to a foreclosure action (the Frankels) to the attorney (Satran) who represented the parties who initially took out the loan (the Confinos) should not have been quashed, the action for civil contempt against the attorney should not have been dismissed, and attorney-client privilege could only be asserted at a subsequent deposition:

"A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious'" … . " Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action'" … .

Here, Satran failed to meet his initial burden of demonstrating either that the requested disclosure was "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious" … . * * *

Additionally, the Supreme Court should have granted the Frankels' motion to hold Satran in civil contempt for failure to comply with the subpoena by failing to appear for a deposition. "To prevail on a motion to hold another

in civil contempt, the moving party must prove by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct'" … . " To satisfy the prejudice element, it is sufficient to allege and prove that the contemnor's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party'" … .

Here, it was undisputed that Satran failed to comply with the subpoena by failing to appear for a deposition and that he had knowledge of the terms of the subpoena. Moreover, the Frankels demonstrated that Satran's conduct prejudiced their right under CPLR 3101(a)(4) to obtain all information relevant and necessary to their defense of the present action and their cross claims against the Confinos … . Wells Fargo Bank, N.A. v Confino, 2019 NY Slip Op 06114, Second Dept 8-7-19