NEW YORK APPELLATE DIGEST, LLC

Year in Review
Foreclosure 2020
"Lessons in Hearsay"

An Organized Compilation of the Summaries of Selected Decisions Addressing Foreclosure Released by Our New York State Appellate Courts in 2020 and Posted on the New York Appellate Digest Website in 2020. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

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The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the conditional order dismissing the action for failure to prosecute pursuant to CPLR 3216:

The conditional order constituted a defective 90-day notice pursuant to CPLR 3216. The court was without authority to issue a 90-day notice since issue was not joined in the action (see CPLR 3216[b][1] …). Moreover, the conditional order failed to state that the plaintiff's failure to comply "will serve as a basis for a motion" by the court to dismiss the action for failure to prosecute … . The purported dismissal was not properly effectuated since the court never directed the parties to show cause why the action should not be dismissed, and failed to issue a formal order of dismissal on notice to the parties as required by CPLR 3216 … . Moreover, the conditional order was erroneous since it directed the plaintiff to move for an order of reference, even though the plaintiff had already moved for an order of reference. Accordingly, we grant the plaintiff's motion to vacate the conditional order and restore the action to the active calendar. U.S. Bank N.A. v Thompson, 2020 NY Slip Op 08098, Second Dept 12-30-20

90-DAY NOTICE, CPLR 3216.

THE CONDITIONAL ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE DID NOT MEET THE CRITERIA OF CPLR 3216; THEREFORE THE MATTER SHOULD NOT HAVE BEEN ADMINISTRATIVELY DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's motion to vacate the conditional order of dismissal should have been granted because the conditions in CPLR 3216 were not met by the order:

"CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with" … . As relevant here, an action 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 or her 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 of dismissal here "'was defective in that it failed to 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 action for failure to prosecute'" … . The Supreme Court should not have administratively dismissed the action without further notice to the parties and without benefit of further judicial review … . Deutsche Bank Natl. Trust Co. v Henry, 2020 NY Slip Op 07863, Second Dept 12-23-20

ABANDONMENT, 22 NYCRR 202.48.

PLAINTIFF'S FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, AS ABANDONED PURSUANT TO 22 NYCRR 202.48; THE 60-DAY TIME LIMIT ONLY APPLIES TO THE DIRECTION TO SUBMIT A JUDGMENT "ON NOTICE" (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should not have dismissed plaintiff's foreclosure action, sua sponte, as abandoned pursuant to 22 NYCRR 202.48. Supreme Court, after plaintiff's unopposed motion for a judgment of foreclosure and sale, directed the plaintiff to "submit judgment." When plaintiff submitted a proposed judgment for signature, Supreme Court dismissed the action because the proposed judgment was not submitted within 60 days. The 60-day time limit only applies when a party is directed to submit the judgment "on notice:"

Pursuant to 22 NYCRR 202.48, an order or judgment which is directed to be settled or submitted on notice must be submitted for signature within 60 days after

the signing and filing of the decision directing that the order or judgment be settled or submitted. A party who fails to submit the order or judgment within the 60-day time period will be deemed to have abandoned the action or motion, absent good cause shown … . In this case, when the Supreme Court initially granted the plaintiff's motion, inter alia, for a judgment of foreclosure and sale, it did not direct that the proposed judgment had to be settled or submitted on notice. 22 NYCRR 202.48 does not apply where, as here, the court merely directs a party to submit an order or judgment without expressly directing that the order or judgment be submitted on notice … . James B. Nutter & Co. v McLaughlin, 2020 NY Slip Op 07178, Second Dept 12-2-20

ABANDONMENT, CONFERENCE PARTICIPATION.

DEFENDANT'S PARTICIPATION IN A SETTLEMENT CONFERENCE DID NOT WAIVE HIS RIGHT TO SEEK DISMISSAL OF THE FORECLOSURE ACTION AS ABANDONED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant in this foreclosure action did not waive his right to seek dismissal of the complaint by participating in a settlement conference. The plaintiff bank had abandoned the action:

CPLR 3215(c) states that "if [a] 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…upon its own initiative or on motion." The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned … . Notwithstanding, a claim will not be deemed abandoned if the party seeking a default judgment provides sufficient cause as to why the complaint should not be dismissed (CPLR 3215[c]). Here, plaintiff waited almost three years to seek a default judgment, and it failed to provide sufficient cause as to why the complaint should not be dismissed. As such, plaintiff's complaint is dismissed as abandoned.

Plaintiff's argument that defendant waived his right to seek dismissal pursuant to 3215(c) because he participated in the settlement conferences is equally unavailing.

Although a party may waive it rights under CPLR 3215(c) "by serving an answer or taking any other steps which may be viewed as a formal or informal appearance"…, defendant's participation in settlement conferences did not constitute either a formal or an informal appearance "since [he] did not actively litigate the action before the Supreme Court or participate in the action on the merits" … . Wells Fargo Bank, N.A. v Martinez, 2020 NY Slip Op 01693, First Dept 3-12-20

ABANDONMENT, DEFAULT JUDGMENT NOT ENTERED WITHIN ONE YEAR, CPLR 3215.

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE TO DEMONSTRATE IT TOOK ACTION TO ENTER A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION WITHIN ONE YEAR OF DEFENDANT'S DEFAULT; THE ACTION SHOULD HAVE BEEN DISMISSED AS ABANDONED PURSUANT TO CPLR 3215 (c) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient evidence that it commenced proceedings to enter a default judgment within one year of the default. Therefore the bank had abandoned the action:

… [T]he plaintiff … relies upon two pages in the record. The first of those two pages is a "CamScanner" copy of the face sheet of a proposed order of reference reflecting the caption of this action, a blank line over the words "(ORD OF REF) FEE PAID," and a pagination of "Page 1 of 2." The page is devoid of markings that it was ever presented to any Justice of the Supreme Court as no name is written next to "Hon." above the caption, and no presentment date is reflected in the blank spaces at the upper right-hand corner of the document where the date and month of presentments are typically identified. There is nothing that indicates that this document was ever filed with the court. The second "CamScanner" page relied upon by the plaintiff, delineated as "Page 2 of 2," reflects what appears to be either a 2010 or 2019 date stamp, in an unreadable month and date, at 12:07 p.m., with two looping lines that may or may not be a penned signature. The date stamp does not identify it as being

placed upon the document by any particular person, entity, or court, and does not contain the word “Filed.” Both of the pages relied upon by the plaintiff contain in their lower right-hand corners the notation “Printed: 10/5/20,” without a full readable year. No other pages comprising the purported proposed order of reference were provided, though the first page, which ends in mid-sentence, is clearly not the entirety of the document.

Since CPLR 3215(c) provides that courts “shall” dismiss actions as abandoned where the plaintiff fails to take proceedings within one year after a default “unless sufficient cause is shown,” the burden was upon the plaintiff to establish sufficient cause as to why the complaint should not be dismissed in this instance … . Here, the burden was not met. HSBC Mtge. Corp. v Hasan, 2020 NY Slip Op 05036, Second Dept. 9-23-20

ACCELERATION, SUA SPONTE REVOCATION WAS ERROR.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, REVOKED THE ACCELERATION OF THE DEBT IN THIS FORECLOSURE CASE BECAUSE PLAINTIFF DID NOT SEEK THAT RELIEF (SECOND DEPT).

The Second Department noted that Supreme Court in this foreclosure action should not have, sua sponte, revoked the previous acceleration of the debt because plaintiff did not request that relief:

… [T]he Supreme Court should not have revoked the previous acceleration of the mortgage debt and directed that the mortgage remain an installment contract, inasmuch as the plaintiff did not seek such relief in its motion or cross-move for it in response to the defendant’s cross motion … . CitiMortgage, Inc. v Salko, 2020 NY Slip Op 00566, Second Dept 1-29-20

APPEALS, MOOT AFTER VALID TRANSER OF FORECLOSED PROPERTY.

THE APPEAL WAS RENDERED MOOT BY DEFENDANT'S TRANSFER OF THE PROPERTY AFTER SUPREME COURT RULED DEFENDANT HAD TITLE TO THE PROPERTY (THIRD DEPT).

The Third Department dismissed the appeal as moot. Property which had been validly foreclosed by defendant was transferred to a third party. Plaintiff had brought an action pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 15 to determine its rights to a portion of the foreclosed property. Supreme Court granted defendant's motion for summary judgment on its counterclaim for strict foreclosure (RPAPL 1352) and plaintiff appealed. The appeal was deemed moot and dismissed because defendant had a right to transfer the property after Supreme Court's ruling:

[T]he jurisdiction of this Court extends only to live controversies and, as such, an appeal will be considered moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" … . "Since the ability to transfer clear title is a natural incident of [property] ownership, it follows that when a complaint involving title to or the right to possess and enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim" … . "'[A] purchaser's actual knowledge of litigation and a pending appeal is not legally significant and[,] absent a validly recorded notice of pendency, an owner has the ability to transfer clear title'" … .

Here, Supreme Court canceled plaintiff's notice of pendency and this Court denied his motion for a stay pending appeal. Therefore, defendants had the right to transfer the property when they did, and the purchaser obtained clear title despite its knowledge of the pending appeals. Govel v Trustco Bank, 2020 NY Slip Op 02306, Third Dept 4-16-20

BANKRUPTCY, NOTICE, RPAPL 1304, NOTICE NOT PROVEN.

THE FACT THAT THE DEFENDANT IN THIS FORECLOSURE ACTION FILED FOR BANKRUPTCY DID NOT RELIEVE THE PLAINTIFF OF THE OBLIGATION TO COMPLY WITH THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the fact that defendant had filed for bankruptcy did not relieve the plaintiff in this foreclosure action from the obligation to comply with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

… [T]he plaintiff submitted, among other things, the affidavit of Kyle Lukas, a Senior Loan Analyst for … the purported parent company of the plaintiff's loan servicer. Lukas averred that a 90-day notice was not required to be sent to the defendant pursuant to RPAPL 1304(3) due to the defendant's bankruptcy filing … . In addition, while the plaintiff submitted, inter alia, copies of the note and mortgage, the pleadings, and the notice of default, it did not submit any documentation evidencing service of the 90-day notice required by RPAPL 1304. Contrary to the plaintiff's contention, the fact that the defendant previously filed for bankruptcy protection did not relieve the plaintiff of its obligation to send the RPAPL 1304 notice to her prior to commencing the action … . Accordingly, since the plaintiff did not demonstrate its strict compliance with the statute, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike her answer, and for an order of reference, regardless of the sufficiency of the opposing papers … . Mastr Adjustable Rate Mtges. Trust 2007-1 v Joseph, 2020 NY Slip Op 04935, Second Dept 9-16-20

BANKRUPTCY.

PLAINTIFFS SOUGHT TO FORECLOSE ON LOANS TO THE BORROWERS WHO THEN STARTED BANKRUPTCY PROCEEDINGS; PLAINTIFFS THEN SUED DEFENDANTS, WHO ARE NOT PARTIES TO THE FORECLOSURE/BANKRUPTCY ACTIONS, FOR TORTIOUS INTERFERENCE WITH THE LOAN AGREEMENTS; THE TORTIOUS INTERFERENCE WITH CONTRACT ACTIONS ARE NOT PREEMPTED BY FEDERAL BANKRUPTCY LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, determined the tortious interference with contract claims, against defendants who are not parties in the foreclosure/bankruptcy proceedings, were not preempted by federal law. Plaintiff sought to foreclose on a loan and the borrowers commenced bankruptcy proceedings. Plaintiff then sued defendants, who are not parties to the foreclosure, alleging tortious interference with the loan agreements. The opinion focuses on the law of preemption:

It is not disputed that valid contracts existed between plaintiff and the borrowers. Plaintiff's claims arising out of the borrowers' breach of those contracts as asserted against the borrowers were resolved by the bankruptcy proceeding. Here, plaintiff alleges that defendants knew of the relevant contractual terms and deliberately induced the borrowers' violations of those terms prior to the bankruptcy proceedings. In other words, plaintiff's allegations state a claim for tortious interference with contract, and the remedy for that tort will not affect the debtor's estate. As such, these claims will not encroach upon the province of the bankruptcy court. Stated simply, plaintiff's claims "do[] not require the adjudication of rights and duties of creditors and debtors under the Bankruptcy Code" … . Sutton 58 Assoc. LLC v Pilevsky, 2020 NY Slip Op 06939, Ct App 11-24-20

CANCELLATION AND DISCHARGE OF MORTGAGE, RPAPL 1501.

CANCELLATION AND DISCHARGE OF A MORTGAGE PURSUANT TO RPAPL 1501 (4) MUST BE SOUGHT BY AN ACTION OR COUNTERCLAIM, NOT BY A MOTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the motion to cancel and discharge the mortgage pursuant to RPAPL 1501 (4) should not have been granted. That relief must be sought by an action or counterclaim:

Supreme Court should not have granted that branch of the motion which was to cancel and discharge the mortgage pursuant to RPAPL 1501(4), since that relief must be sought in an action or counterclaim and not by motion … . Bank of N.Y. Mellon v 11 Bayberry St., LLC, 2020 NY Slip Op 05175, Second Dept 9-30-20

CONFERENCE, FAILURE TO APPEAR, 22 NYCRR 202.27.

LAW OFFICE FAILURE WARRANTED VACATING THE DISMISSAL OF THE FORECLOSURE ACTION STEMMING FROM PLAINTIFF BANK'S FAILURE TO APPEAR AT A SCHEDULED CONFERENCE (THIRD DEPT).

The Third Department determined Supreme Court properly exercised its discretion and vacated the dismissal of this foreclosure action for plaintiff bank's failure to appear at a scheduled conference (22 NYCRR 202.27):

"22 NYCRR 202.27 gives a court the discretion to dismiss an action where [a] plaintiff fails to appear at any scheduled call of a calendar or at any conference" … . "To vacate a dismissal under 22 NYCRR 202.27, it [is] incumbent upon [a] plaintiff to provide a reasonable excuse for his [or her] failure to appear and to demonstrate a potentially meritorious cause of action" … . "A motion to vacate a prior judgment or order is addressed to the court's sound discretion, subject to reversal only where there has been a clear abuse of that discretion" … .

Here, plaintiff's counsel explained that, due to a scheduling error, the assigned attorney actually appeared in court on the conference date but missed the calendar call. Law office failure may constitute a reasonable excuse for an appearance default … Given the isolated nature of this nonappearance, we find that Supreme Court acted within its discretion in reconsidering and vacating the default dismissal … . Notably, plaintiff supported its vacatur motion with a duly executed affidavit of merit from its representative. We further recognize that plaintiff has a meritorious cause of action, as we affirmed the award of summary judgment in plaintiff's favor … . Under the circumstances presented, we conclude that the court acted within its discretion in granting the motion to vacate. Onewest Bank, F.S.B. v Mazzone, 2020 NY Slip Op 05011, Third Dept 9-17-20

CONFERENCE, FAILURE TO APPEAR, DEFAULT, MOTION TO VACATE.

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE FOR PLAINTIFF'S COUNSEL'S FAILURE TO APPEAR AT THE MANDATORY CONFERENCE IN THIS FORECLOSURE ACTION; PLAINTIFF BANK'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the default judgment should have been granted. The Third Department found that law office failure provided a reasonable excuse for the failure of the bank's counsel to appear at the mandatory conference in this foreclosure action (22 NYCRR 202.27 (b)):

… [P]laintiff was required to demonstrate a reasonable excuse for its failure to appear at the conference and the existence of a potentially meritorious claim … . A determination of reasonable excuse is left to the sound discretion of Supreme Court and will only be disturbed where there has been a clear abuse of that discretion … . In exercising this discretion, Supreme Court may accept law office failure as an excuse "where the claim of law office failure is supported by a detailed and credible explanation of the default" … . …

Counsel explained that he was on vacation in Europe on the day scheduled for the conference. When counsel realized this mistake, he contacted Supreme Court and requested to appear telephonically. Supreme Court accommodated this request and, according to counsel, offered to initiate the call. However, when counsel did not receive a telephone call at the scheduled time, he telephoned chambers, and was informed that defendants had not yet appeared. Counsel avers that he never received a follow-up telephone call from Supreme Court. Counsel also provided his telephone records showing the outgoing calls that he had made that morning to chambers and no incoming calls from Supreme Court. As such, plaintiff demonstrated a reasonable excuse for not appearing at the conference. U.S. Bank, N.A. v Clarkson, 2020 NY Slip Op 05994, Third Dept 10-22-20

DEED INTENDED AS SECURITY, GOOD FAITH PURCHASERS.

THE HOLDER OF A DEED INTENDED AS SECURITY IN THE NATURE OF A MORTGAGE MUST PROCEED BY FORECLOSURE TO EXTINGUISH THE MORTGAGOR'S INTEREST; HERE THE SUBSEQUENT GOOD FAITH PURCHASERS OF THE PROPERTY WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE MORTGAGEE'S CAUSES OF ACTION SEEKING RESCISSION OF THEIR DEED AND A DECLARATION THEIR DEED WAS NULL AND VOID (SECOND DEPT).

The Second Department determined a deed which facially appears to evidence an absolute conveyance was actually intended as security in the nature of a mortgage. The holder of such a deed (here American Lending) must proceed by foreclosure to extinguish the mortgagor's interest. The subsequent purchasers of the property (the Romond defendants) were good faith purchasers. Therefore the Romond defendants were entitled to dismissal of American Lending's complaint seeking rescission of the Romond deed and a declaration the deed was null and void:

In 2009, the defendant Dana Grigg sought to purchase certain property … . When financing for the transaction fell through, Grigg entered into an … agreement with the plaintiff, American Lending Corp. … to borrow … $385,000. The terms of the loan, which were memorialized in a note, included a provision that after 90 days, if

the loan had not been repaid in full, American Lending would be authorized to file a joint deed in the property records and to "seek a Summary Judgment instead of following a regular foreclosure proceedings [sic]." In June 2009, Grigg purchased the subject property and executed … a deed from himself to himself and American Lending (… the joint deed). Grigg subsequently defaulted under the terms of the loan. * * *

Real Property Law § 320 provides, in pertinent part, that a "deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage" … . … "The holder of a deed given as security must proceed in the same manner as any other mortgagee—by foreclosure and sale—to extinguish the mortgagor's interest" … .

… [T]he Romond defendants established … that the joint deed was given as security for the loan from American Lending to Grigg. Therefore, pursuant to Real Property Law § 320, the joint deed must be considered a mortgage, and American Lending's sole remedy for Grigg's breach of its terms was to commence an action sounding in foreclosure. Moreover, under the circumstances at bar, the Romond defendants established that they were good faith purchasers of the subject property (see Real Property Law § 290 …). American Lending Corp. v Grigg, 2020 NY Slip Op 03211, Second Dept 6-10-20

DEFAULT NOT PROVEN, HEARSAY.

PROOF OF DEFENDANTS' DEFAULT 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 bank's motion for summary judgment in this foreclosure action should not have been granted. The evidence of defendants' default was not in admissible form:

To establish its prima facie entitlement to summary judgment in a mortgage foreclosure action, a plaintiff must submit the mortgage, the unpaid note, and evidence of the mortgagor's default … . A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form … .

Here, Ostermann [plaintiff's vice president], in her affidavit, did not specifically state that she had personal knowledge of the default. Moreover, to the extent that her knowledge was based on her review of business records, she did not identify what records she relied on and she did not attach them to her affidavit. Thus, the plaintiff failed to submit evidence in admissible form to establish the defendants' default … . Since the plaintiff failed to establish, prima facie, that the defendants had defaulted on the subject note, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answers, and for an order of reference … . Deutsche Bank Natl. Trust Co. v McGann, 2020 NY Slip Op 02765, Second Dept 5-13-20

DEFAULT NOT PROVEN, HEARSAY.

THE BANK DID NOT PRESENT ADMISSIBLE EVIDENCE OF DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not present admissible evidence of defendants' default in this foreclosure action:

… [T]he plaintiff failed to establish, prima facie, a default in payment by Vanterpool and Chalas [defendants]. While the plaintiff submitted an affidavit by someone with personal knowledge of the plaintiff's loan servicer's business practices and procedures, the affiant failed to submit any business record to substantiate the alleged default … . Further, "[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" … . U.S. Bank Trust, N.A. v Vanterpool, 2020 NY Slip Op 07946, Second Dept 12-23-20

DEFAULT NOT PROVEN, HEARSAY.

THE EVIDENCE OF DEFENDANT'S DEFAULT WAS HEARSAY, 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's motion for summary judgment in this foreclosure action should not have been granted. The proof of defendant's default was hearsay:

For evidence of default, the plaintiff relied upon the affidavit of a foreclosure manager employed by the plaintiff, wherein she attested, among other things, that the defendant defaulted under the loan in February 2011. By attesting that she was familiar with the record-making practices of her employer, that the records were made in the regular course of business, that it was the regular course of such business to make the record, and that the records were made "at or about the time of the event being recorded" … , the foreclosure manager satisfied the requirements for establishing a foundation for the admission of business records (see CPLR 4518[a] …). However, since the foreclosure manager failed to submit any of the business records upon which she contends she relied in making her affidavit, her averment as to the defendant's purported default "'constitute[s] inadmissible hearsay and lack[s] probative value'" … . As "it is the business record itself, not the foundational affidavit, [*2]that serves as proof of the matter asserted" … , and "a witness's description of a document not admitted into evidence is hearsay" … , the assertions by the foreclosure manager as to the contents of the records were "inadmissible hearsay to the extent that the records she purport[ed] to describe were not submitted with her affidavit" … . Selene Fin., L.P. v Coleman, 2020 NY Slip Op 05962, Second Dept 10-21-20

DEFAULT, MOTION BY BANK FOR DEFAULT JUDGMENT, CPLR 3215.

PLAINTIFF BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR; DESPITE THE WITHDRAWAL OF THE MOTION, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, PURSUANT TO CPLR 3215 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint in this foreclosure action should not have been, sua sponte, dismissed for failure to take steps to procure a default judgment within one year. Plaintiff moved for an order of reference within one year. It doesn't matter that the motion was withdrawn:

Pursuant to CPLR 3215(c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." 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)" … .

Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference in May 2010, within one year of the defendants' default … . In such cases, the complaint should not be dismissed pursuant to CPLR 3215(c), even if, as here, the plaintiff's motion is later withdrawn … . Deutsche Bank Natl. Trust Co. v Hasan, 2020 NY Slip Op 06243, 11-4-20

DEFAULT, MOTION BY BANK FOR DEFAULT JUDGMENT.

ALTHOUGH IT IS POSSIBLE TO ENTER AN 'INFORMAL APPEARANCE' IN AN ACTION WHICH WILL AVOID A DEFAULT, THE APPEARANCE MUST BE MADE WITHIN THE STATUTORY TIME LIMITS; THE PLAINTIFF BANK'S MOTION FOR A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department affirmed the default judgment granted to plaintiff bank in this foreclosure action. The court rejected the argument that defendant (Hall) had entered a valid "Informal appearance:"

It is true that "[i]n addition to the formal appearances listed in CPLR 320(a), the law continues to recognize the so-called informal' appearance" … . "It comes about when the defendant, although not having taken any of the steps that would officially constitute an appearance under CPLR 320(a), nevertheless participates in the case in some way relating to the merits" … .

Although "an informal appearance can prevent a finding that the defendant is in default, thereby precluding entry of a default judgment" … , this is only true when the participation constituting the informal appearance occurred within the time limitations imposed for making a formal appearance … . Indeed, even service of a formal "notice of appearance will not protect the defendant from entry of a default judgment if, after service of the complaint, the defendant does not timely make a CPLR 3211 motion or serve an answer" … . Accordingly, an informal appearance, without more, does not somehow absolve a defendant from complying with the time restrictions imposed by CPLR 320(a) which govern the service of an answer or the making of a motion pursuant to CPLR 3211 … . Deutsche Bank Natl. Trust Co. v Hall, 2020 NY Slip Op 04292, Second Dept 7-29-20

DEFAULT, MOTION BY BANK FOR DEFAULT JUDGMENT.

PLAINTIFF DID NOT HAVE AN EXCUSE FOR FAILING TO MOVE FOR A DEFAULT JUDGMENT FOR FOUR YEARS; THE ACTION WAS DISMISSED AS ABANDONED WITH NO NEED TO CONSIDER WHETHER THE ACTION WAS MERITORIOUS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to timely seek a default judgment in this foreclosure action required the action to be dismissed as abandoned. Plaintiff's failure to offer an adequate excuse mandated dismissal without considering whether plaintiff had a meritorious action:

… [T]he Supreme Court should have granted that branch of the defendant's cross motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against her as abandoned. CPLR 3215(c) provides, inter alia, 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, . . . unless sufficient cause is shown why the complaint should not be dismissed." "To establish sufficient cause,' the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action" … .

Here, the plaintiff provided no explanation for the almost four-year delay after the defendant defaulted in 2011 before it filed a request for judicial intervention in February 2015 requesting a residential mortgage foreclosure settlement conference. Under such circumstances, the Supreme Court should have found that the plaintiff had not demonstrated a reasonable excuse for its delay in seeking a default judgment … . Since the plaintiff failed to proffer a reasonable excuse, this Court need not consider whether the plaintiff demonstrated a potentially meritorious action … . Flushing Bank v Sabi, 2020 NY Slip Op 02461, Second Dept 4-29-20

DEFAULT, MOTION BY BANK FOR DEFAULT JUDGMENT.

PLAINTIFF MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT'S DEFAULT IN THIS FORECLOSURE ACTION; EVEN THOUGH THE MOTION WAS WITHDRAWN, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (US Bank's) motion to dismiss the complaint as abandoned pursuant to CPLR 3215(c) should not have been granted in this foreclosure action. Plaintiff had moved for an order of reference within one year of defendant's default but then withdrew the motion:

CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "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)" … . "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)" … . Moreover, " the withdrawal of the plaintiff's motion for an order of reference [does] not demonstrate that the plaintiff failed to initiate proceedings for entry of a judgment of foreclosure and sale'" … .

Here, the Supreme Court should have denied that branch of US Bank's motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against it as abandoned, because the plaintiff moved for an order of reference within one year of US Bank's default … . "In such cases, the complaint should not be dismissed, even if, as here, the plaintiff's motion is later withdrawn'" … . Bank of Am., N.A. v Wessen, 2020 NY Slip Op 04141, Second Dept 7-22-20

DEFAULT, MOTION TO VACATE.

DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION GRANTED IN THE INTERESTS OF SUBSTANTIAL JUSTICE; THE EVIDENCE SUGGESTED DEFENDANT WAS THE VICTIM OF A SCHEME TO DEFRAUD; SUPREME COURT, HOWEVER, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department determined defendant's decedent's (Renda's) motion to vacate a default judgment in this foreclosure action should have been granted in the interests of substantial justice. There was evidence Renda was the victim of a scheme to defraud and foreclosure triggers the equitable powers of the court. Supreme Court should not have, sua sponte, dismissed the complaint, however:

… [W]e find that the defendant is entitled to vacatur of her default in the interests of substantial justice. "In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests 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, the evidence submitted strongly suggests that Renda was the victim of a scheme to defraud … .

… [T]he Supreme Court erred in, sua sponte, directing dismissal of the complaint. Here, there were no extraordinary circumstances warranting the sua sponte dismissal, and there is no indication that the court gave the parties an opportunity to be heard regarding the dismissal of the complaint … . Caridi v Tanico, 2020 NY Slip Op 06236, Second Dept 11-4-20

DISCONTINUANCE PENDING FEDERAL FORECLOSURE.

MOTION TO DISCONTINUE STATE FORECLOSURE ACTION WHILE FORECLOSURE WAS PURSUED IN FEDERAL COURT SHOULD HAVE BEEN GRANTED WITHOUT PREJUDICE BECAUSE THERE WAS NO SHOWING OF PREJUDICE ON THE PART OF DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to discontinue the foreclosure action should not have been granted with prejudice because there was no showing of prejudice on the part of the defendant (Jach):

… [T]he plaintiff commenced this action … seeking to foreclose the subject mortgage. After interposing an answer, in which he alleged lack of standing as an affirmative defense, Jach moved for summary judgment dismissing the complaint insofar as asserted against him, and the plaintiff cross-moved, inter alia, for summary judgment on the complaint. The Supreme Court referred the action to a referee to hear and report on the issue of standing. After conducting a hearing, the referee issued a report finding, in effect, that the plaintiff had failed to establish its standing for purposes of its cross motion for summary judgment on the complaint.

… [W]ith this action still pending and the referee's report not yet confirmed, the plaintiff commenced an action in federal court seeking to foreclose the subject mortgage. Subsequently, … the plaintiff moved before the Supreme Court, among other things, for leave to discontinue the action without prejudice, which Jach opposed.

In the order appealed from, the Supreme Court, inter alia, in effect, upon granting that branch of the plaintiff's motion which was for leave to discontinue the action, did so with prejudice. The plaintiff appeals.

The Supreme Court, in granting that branch of the plaintiff's motion which was for leave to discontinue the action, should have done so without prejudice. Pursuant to CPLR 3217(b), "an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." As a general rule, "a plaintiff should be permitted to discontinue an action without prejudice unless the defendant would be prejudiced thereby" … . Here, there

was no evidence that Jach would be prejudiced by a discontinuance … . Onewest Bank, FSB v Jach, 2020 NY Slip Op 01357, Second Dept 2-26-20

DISCONTINUANCE.

MOTION TO VOLUNTARILY DISCONTINUE THE FORECLOSURE ACTION WAS PROPERLY GRANTED WITHOUT PREJUDICE (THIRD DEPT).

he Third Department determined plaintiff's motion to voluntarily discontinue the foreclosure action (CPLR 3217(b)) was properly granted without prejudice. The litigation was still in the early stages and, although defendant had interposed a counterclaim, defendant did not move for a default judgment within a year and thereby abandoned the counterclaim:

Although this action had been pending for approximately three years at the time of the motion, the litigation itself remained in its early stages. In addition, the record confirms that defendant never sought default nor moved to compel discovery. Furthermore, the parties had not yet participated in the mandatory settlement conference (see CPLR 3408). Indeed, determination of plaintiff's motion was the first occasion where Supreme Court was called upon to intervene in this action. Although defendant alleged that she would sustain prejudice if her discovery went unanswered, Supreme Court correctly determined that there was no evidence of prejudice to defendant or other improper consequences flowing from the discontinuance, as the parties can engage in necessary discovery in a subsequent foreclosure action … . …

… [T]he interposition of a counterclaim in and of itself is not dispositive with respect to the discontinuance. The discontinuance must work a particular prejudice against a defendant. Here, defendant is not prejudiced, as she will be able to assert her counterclaim in a subsequent foreclosure action. Although defendant argues that "one's home is an interest that is unquantifiable," she will be able to continue to reside in the mortgaged premises pending another action and will have the same rights available to her as were in the discontinued action … . Green Tree Servicing LLC v Shiow Fei Ju, 2020 NY Slip Op 02307, Third Dept 4-16-20

DISMISSAL OF COMPLAINT, SUA SPONTE.

JUDGE'S SUA SPONTE DISMISSAL OF THE FORECLOSURE COMPLAINT WAS NOT WARRANTED; NO EXTRAORDINARY CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the sua sponte dismissal of the foreclosure complaint should have been granted:

… [I]n a status conference order … , the Court Attorney Referee … directed the plaintiff to file an application seeking an order of reference by the date of the final status conference. Following the final status conference … , the Court Attorney Referee … determined that the plaintiff failed to show good cause for its failure to move for an order of reference as directed, and recommended that the action be dismissed. … [T]he Supreme Court directed dismissal of the complaint. …

"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 Supreme Court was not presented with any extraordinary circumstances warranting a sua sponte dismissal of the complaint … . Indeed, at the time the plaintiff was directed to file an application for an order of reference, an order of reference, as well as a judgment of foreclosure and sale, had already been issued. Bank of N.Y. v Ramirez, 2020 NY Slip Op 05024, Second Dept 9-23-20

DISMISSAL OF THE COMPLAINT, SUA SPONTE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION, THEREBY DEPRIVING PLAINTIFF OF AN OPPORTUNITY TO BE HEARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the default in this foreclosure action should have been granted. Supreme Court had, sua sponte, dismissed the complaint without affording plaintiff an opportunity to be heard:

Following the plaintiff's failure to move for an order of reference … , the Court Attorney Referee found … that the plaintiff failed to show good cause for its failure to move for the order of reference as directed and recommended that the action be dismissed. … Supreme Court directed dismissal of the 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" … . As no such extraordinary circumstances were present in this case, we disagree with the Supreme Court's determination to sua sponte direct dismissal of the complaint, without affording the plaintiff notice and opportunity to be heard … , which "amounted to a denial of the plaintiff's due process rights" … . Accordingly, the Supreme Court should have granted those branches of the plaintiff's motion which were to vacate the October 4, 2016, order and to restore the action to active status … . Deutsche Bank Natl. Trust Co. v Winslow, 2020 NY Slip Op 01325, Second Dept 2-26-20

ESTATE IS A NECESSARY PARTY, DEFICIENCY JUDGMENT.

THE ESTATE WAS A NECESSARY PARTY IN THIS FORECLOSURE ACTION BECAUSE OF THE POTENTIAL FOR A DEFICIENCY JUDGMENT AGAINST THE DECEDENT; DEFENDANT'S CROSS MOTION FOR LEAVE TO SUBSTITUTE HERSELF AS ADMINISTRATOR OF THE ESTATE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined decedent's estate was a necessary party in this foreclosure action and defendant's cross motion pursuant to CPLR 1015 for leave to substitute herself as administrator should have been granted:

In a mortgage foreclosure action, "[t]he rule is that a mortgagor who has made an absolute conveyance of all his [or her] interest in the mortgaged premises, including his equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought" … . Here, the judgment of foreclosure and sale contains language providing for a potential deficiency judgment against the decedent if the sale of the property does not cover the amount due to the plaintiff.

Consequently, the decedent's estate was a necessary party to the action … . Specialized Loan Servicing, LLC v Kalinin, 2020 NY Slip Op 07417, Second Dept 12-9-20

ESTATE NOT A NECESSARY PARTY, PROPERTY TRANSFERRED UPON DEATH.

THE PROPERTY TRANSFERRED TO THE DEFENDANT BY WILL UPON THE DEATH OF THE PROPERTY OWNER; THEREFORE THE ESTATE WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the estate was not a necessary party in this foreclosure action because the property transferred upon the property owner's death by operation of the will:

Pursuant to a deed dated March 27, 1991, Marjorie Colwell became the owner of certain real property located in Brooklyn (hereinafter the subject property). Colwell died on November 8, 2004. Colwell's will bequeathed the subject property to the defendant Sonia Gaines, and also named Gaines as the executrix of the estate. …

We disagree with the Supreme Court's determination that the estate was a necessary party to this action, and that the failure to join the estate warranted vacatur of the order of reference and the judgment of foreclosure and sale and dismissal of the complaint insofar as asserted against Gaines … . Pursuant to RPAPL 1311(1), "necessary defendants" in a mortgage foreclosure action include, among others, "[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein." Under the circumstances of this case, the estate was not a necessary party to this mortgage foreclosure action. "Generally, title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death and not at the time of probate" … . US Bank Trust, N.A. v Gaines,2020 NY Slip Op 07623, Second Dept 12-16-20

FAILURE TO PROSECUTE, CPLR 3216.

THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO PROSECUTE DID NOT DESCRIBE THE SPECIFIC CONDUCT CONSTITUTING NEGLECT BY THE PLAINTIFF AS REQUIRED BY CPLR 3216; PLAINTIFF'S MOTION TO VACATE THE ORDER SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's motion to vacate the order dismissing the complaint for failure to prosecute should have been granted because the conditions required by CPLR 3216 were not met:

A court may not dismiss a complaint for want of prosecution pursuant to CPLR 3216 on its own initiative unless certain conditions precedent have been complied with, including the requirement that "where a written demand to resume prosecution of the action is made by the court . . . 'the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation'" … .

Here, the Supreme Court should have granted the plaintiff's motion, among other things, to vacate the … order, as that order failed to set forth the specific conduct constituting neglect by the plaintiff … . Wells Fargo Bank, N.A. v Brown, 2020 NY Slip Op 06576, Second Dept 11-12-20

INTERVENTION BY POST-FORECLOSURE PURCHASER, NO STANDING TO CONTEST NOTICE, ESTATE NOT A NECESSARY PARTY.

PARTY WHICH PURCHASED THE PROPERTY AFTER FORECLOSURE WAS COMMENCED WAS ENTITLED TO INTERVENE IN THE FORECLOSURE PROCEEDINGS BUT DID NOT HAVE STANDING TO ALLEGE PLAINTIFF BANK DID NOT COMPLY WITH NOTICE REQUIREMENTS; THE ESTATE OF THE ORIGINAL BORROWER IS NOT A NECESSARY PARTY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the party (appellant) which purchased the property after foreclosure was commenced should have been allowed to intervene in the foreclosure proceedings. The Second Department further determined the estate of the original borrower was not a necessary party, the appellant did not have standing to allege plaintiff bank's noncompliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and plaintiff's failure to serve a notice of default:

On September 10, 2015, the plaintiff commenced this action to foreclose a mortgage on premises owned by the defendant Shawn A. Carrington. Carrington failed to answer the complaint. On March 23, 2016, Carrington sold the premises to the appellant 1698 Management Corp. …

The appellant was entitled to intervene as of right pursuant to CPLR 1012(a) since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale … . Contrary to the court's determination, the appellant was not limited to continuing the action in Carrington's name pursuant to CPLR 1018. The fact that the appellant obtained its interest in the premises after the action was commenced and the notice of pendency was filed does not definitively bar intervention … , nor does the fact that Carrington defaulted in answering the complaint … . Furthermore, under the circumstances of this case, the appellant's motion, made less than five months after it purchased the premises, and before an order of reference was issued, was timely … . **US Bank N.A. v Carrington, 2020 NY Slip Op 00173, Second Dept 1-8-20**

JURISDICTION, CORPORATION LAW, DOING BUSINESS IN NEW YORK.

DEFENDANT DID NOT DEMONSTRATE THE FOREIGN CORPORATION WAS DOING BUSINESS IN NEW YORK WITHOUT AUTHORIZATION; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT IN THIS FORECLOSURE ACTION ON THAT GROUND SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a defendant in this foreclosure action brought by a foreign corporation did not demonstrate the corporation was doing business in New York without authorization. Therefore defendant's motion to dismiss the complaint on that ground should not have been granted:

"Business Corporation Law § 1312(a) constitutes a bar to the maintenance of an action by a foreign corporation found to be doing business in New York without . . . the required authorization to do business there" … . "The purpose of that section is to regulate foreign corporations which are doing business' within the State, not . . . to enable the avoidance of contractual obligations" … . "[T]he party relying upon this statutory barrier bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction"… . "[A]bsent proof establishing that the [subject corporation] is doing business in New York, it is presumed that [it] is doing business in [the] State of incorporation, and not in New York" … .

The defendant failed to establish, prima facie, that "[the appellant] conducted continuous activities in [New York] essential to its corporate business" … . Therefore, "the presumption that [the appellant] does business, not in New York but in its State of incorporation has not been overcome" … . JPMorgan Chase Bank, N.A. v Didato, 2020 NY Slip Op 03903, Second Dept 7-15-20

JURISDICTION, DEFENDANT'S ATTORNEY NEVER RECEIVED SUMMARY JUDGMENT MOTION.

DEFENDANT'S ATTORNEY'S AFFIRMATION STATING HE NEVER RECEIVED THE PLAINTIFF'S SUMMARY JUDGMENT MOTION WAS NOT REBUTTED BY PLAINTIFF; THE COURT NEVER HAD JURISDICTION OVER THE MOTION AND THE RESULTING JUDGMENT WAS A NULLITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's (White's) attorney's affirmation stating he never received the bank's summary judgment motion for a judgment of foreclosure deprived to court of jurisdiction and rendered the judgment a nullity:

"The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void" … . White's opposition to the plaintiff's motion, inter alia, for a judgment of foreclosure and sale included his attorney's affirmation, wherein his attorney stated that the attorney never received the summary judgment motion. In reply, the plaintiff did not submit an affidavit of service or other proof of service demonstrating that the summary judgment motion had been served on White's counsel. The plaintiff's assertions are insufficient to raise a presumption that White was served with the summary judgment motion … . At the time White's attorney brought to the Supreme Court's attention that the attorney had not received the motion for summary judgment and, in response, the plaintiff failed to submit any proof of service of the motion, the court was presented with evidence that the order … , was a nullity … . Under such circumstances, there was never a default in opposing the motion for summary judgment, and thus, there was no need for White to demonstrate a reasonable excuse or a potentially meritorious opposition to the motion … . Accordingly, the Supreme Court should have denied the plaintiff's motion, inter alia, for a judgment of foreclosure and sale and vacated so much of the order … as granted the summary judgment motion … . MTGLQ Invs., L.P. v White, 2020 NY Slip Op 00269, Second Dept 1-17-20

LOAN MODIFICATION.

AN INFORMAL JUDICIAL ADMISSTION BY PLAINTIFF BANK'S FORMER COUNSEL IN THIS FORECLOSURE ACTION RAISED A QUESTION OF FACT WHETHER THE LOAN HAD BEEN MODIFIED (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 of an informal judicial admission made by plaintiff's former counsel. The admission raised a question of fact whether the note and mortgage had been superseded by a loan modification:

… [T]he averment of the plaintiff's former counsel, in support of the voluntary discontinuance of the prior foreclosure action, that the loan had been modified, constituted an informal judicial admission by the plaintiff of that fact … . Informal judicial admissions are not conclusive, but are evidence of the fact admitted … .

On its motion, the plaintiff failed to proffer any evidence to explain the alleged error of its former counsel in a manner which would negate the probative value of his statement as an informal judicial admission. Accordingly, even assuming that the plaintiff's submissions were otherwise sufficient to demonstrate, prima facie, the absence of a loan modification (see generally CPLR 4518[a] …) the former counsel's admission raised a triable issue of fact as to the existence of a loan modification, which precluded summary judgment … . HSBC Bank USA, N.A. v Fortini, 2020 NY Slip Op 07873, Second Dept 12-23-20

LOST NOTE, STANDING NOT PROVEN, NOTICE, RPAPL 13O4, NOTICE NOT PROVEN, MAILING.

LOST NOTE AFFIDAVIT INSUFFICIENT TO ESTABLISH STANDING; PROOF OF COMPLIANCE WITH RPAPL 1304 INSUFFICIENT; OUT OF STATE AFFIDAVIT LACKED A CERTIFICATE OF CONFORMITY; NEITHER PLAINTIFF NOR DEFENDANT ENTITLED TO SUMMARY JUDGMENT (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 lost note affidavit was insufficient to establish standing the proof of compliance with the notice requirements of RPAPL 1304 was insufficient and the out of state affidavit lacked a certificate of conformity. Defendants' cross-motion for summary judgment, however, was properly denied:

… [T]he plaintiff failed to proffer evidence establishing that the note was assigned to it, and the affidavit of lost note submitted in support of its motion failed to establish the facts that prevented the plaintiff from producing the original note (see UCC 3-804 …). We also note that the out-of-state affidavit from the vice president of loan documentation for Wells Fargo 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 ,,, ,

… [A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to the defendants, it failed to submit an affidavit of service or other proof of mailing establishing that it properly served them by registered or certified mail and first-class mail in accordance with RPAPL 1304 … . …

The defendants' bare denial of receipt of the RPAPL 1304 notice, without more, was insufficient to establish their prima facie entitlement to judgment as a matter of law … . Trust v Moneta, 2020 NY Slip Op 05181, Second Dept 9-30-20

LOST NOTE, STANDING.

DEFENDANT'S MOTION TO RENEW HIS OPPOSITION TO THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; THE BANK HAD ORIGINALLY ALLEGED IT POSSESSED THE NOTE AND THEREFORE HAD STANDING TO FORECLOSE; SUBSEQUENTLY THE BANK SUBMITTED A LOST NOTE AFFIDAVIT IN SUPPORT OF ITS MOTION TO CONFIRM THE REFEREE'S REPORT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to renew his opposition to the bank's motion for summary judgment should have been granted in this foreclosure action. In support of its summary judgment motion the bank alleged it had standing based upon possession of the note. However, in support of the bank's subsequent motion to confirm the referee's report the bank submitted a lost note affidavit:

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]).

Here, in support of his cross motion for leave to renew, the borrower had a reasonable justification for his failure to present the new facts in opposition to the original motion, since the plaintiff had previously—and unequivocally—represented that the original note was in Investors' possession, and only later disclosed that the original note had in fact been lost, without providing any further details as to when the search for the note occurred, who conducted the search, and when the note was lost … .

Under these circumstances, the Supreme Court should have granted the borrower's cross motion for leave to renew and, upon renewal, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the borrower, to strike his answer and counterclaims, and for an order of reference, based on unresolved issues of fact regarding the plaintiff's standing … . CitiMortgage, Inc. v Barbery, 2020 NY Slip Op 04377, Second Dept 8-5-20

LOST NOTE, STANDING.

THE LOST NOTE AFFIDAVITS SUBMITTED BY THE PLAINTIFF IN THIS FORECLOSURE ACTION WERE INVALID; PLAINTIFF'S MOTION FOR LEAVE TO ENTER A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank's motion to leave to enter a default judgment in this foreclosure action should not have been granted. The lost note affidavits were invalid:

Pursuant to UCC 3-804, "[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name and recover from any party liable thereon upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms."

Here, although the plaintiff submitted sufficient evidence establishing that it was the owner and holder of the note and establishing the note's terms, the lost note affidavits submitted by the plaintiff failed to establish the facts that prevent the production of the original note … . Neither affidavit identifies who conducted the search for the lost note or explains "when or how the note was lost" … . Capital One, N.A. v Gokhberg, 2020 NY Slip Op 07345, Second Dept 12-9-20

NOTICE, CONTRACTUAL NOTICE REQUIREMENTS IN MORTGAGE NOT PROVEN, MAILING.

EVIDENCE SUBMITTED IN PLAINTIFF BANK'S REPLY PAPERS PROPERLY CONSIDERED; THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE MORTGAGE AGREEMENT 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 plaintiff bank's reply papers were properly considered but plaintiff did not submit sufficient proof that a

condition precedent in the mortgage agreement, re: notice of default, was complied with:

… [T]he Supreme Court providently exercised its discretion in considering the affidavit of the plaintiff's employee Jeremiah Herberg, which was submitted with the plaintiff's papers in opposition to the defendant's cross motion and in further support of its motion … . Although "'[a] party moving for summary judgment generally cannot meet its prima facie burden by submitting evidence for the first time in reply . . . , there are exceptions to the general rule, including . . . when the other party is given an opportunity to respond to the reply papers'" … . Here, the defendant had the opportunity to address the Herberg affidavit in her reply papers in further support of her own cross motion.

However, the 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, as required by the terms of the mortgage agreement … . Furthermore, Herberg's affidavit failed to lay a proper foundation for the admission of records concerning the plaintiff's mailing of the notices of default (see CPLR 4518[a] …). Wells Fargo Bank, N.A. v McKenzie, 2020 NY Slip Op 05086, Second Dept 9-23-20

NOTICE, CPLR 4213.

THE REFEREE'S FAILURE TO PROVIDE NOTICE AND A HEARING TO THE DEFENDANT DID NOT REQUIRE REVERSAL OF THE JUDGMENT OF FORECLOSURE (SECOND DEPT).

The Second Department determined the referee's failure to provide notice and a hearing to the defendant in this foreclosure action did not require reversal of the judgment of foreclosure:

It is undisputed that the referee failed to provide notice to the defendant pursuant to CPLR 4313, or to hold a hearing on the issues addressed in the referee's report. However, as long as a defendant is not prejudiced by the inability to submit evidence

directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed … . Where, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing … . Bank of N.Y. Mellon v Viola, 2020 NY Slip Op 01895, Second Dept 3-18-20

NOTICE, DEFENDANT'S DENIAL OF RECEIPT OF NOTICE.

DEFENDANT'S BARE DENIAL OF THE RECEIPT OF NOTICE OF THE FORECLOSURE ACTION WAS NOT A SUFFICIENT BASIS FOR GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's bare denial of the receipt of notice of the foreclosure action was not a sufficient basis for granting defendant's motion for summary judgment:

The bare denial by the defendant … of receipt of a notice of default, required to be served by the terms of the mortgage, and a notice required by RPAPL 1304 is insufficient to establish his prima facie entitlement to judgment as matter of law dismissing the complaint insofar as asserted against him … . Deutsche Bank Natl. Trust Co. v Mendick, 2020 NY Slip Op 00262, Second Dept 1-17-20

NOTICE, FAILURE TO FILE NOTICE PURSUANT TO RPAPL 1306.

PLAINTIFF BANK DID NOT COMPLY WITH RPAPL 1306; DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's failure to comply with RPAPL 1306 required that defendant's cross-motion for summary judgment be granted:

"RPAPL 1306 provides, in pertinent part, that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1), every lender or assignee shall file' certain information with the superintendent of financial services, including at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent to ascertain the type of loan at issue'" … . "Any complaint served in a proceeding initiated pursuant to [RPAPL article 13] shall contain, as a condition precedent to such proceeding, an affirmative allegation that at the time the proceeding is commenced, the plaintiff has complied with . . . this section" (RPAPL 1306[1]). Compliance with RPAPL 1306 is a condition precedent to the commencement of a foreclosure action.

RPAPL 1306(1) became effective on February 13, 2010 (see L 2009, ch 507, § 5), one month before this action was commenced. Contrary to the plaintiff's contention, it was not absolved from compliance with the statute by virtue of the fact that its RPAPL 1304 notices were purportedly mailed prior to the effective date of RPAPL 1306. …

… [I]t is … clear from the face of the complaint that it contains no "affirmative allegation that at the time the proceeding [wa]s commenced, the plaintiff ha[d] complied with" RPAPL 1306 … . Deutsche Bank Natl. Trust Co. v Spanos, 2020 NY Slip Op 01324, Second Dept 2-26-20

NOTICE, NO NEED TO PROVE COMPLIANCE WITH STATUTORY OR CONTRACTUAL NOTICE REQUIREMENTS IN ABSENCE OF AFFIRMATIVE DEFENSES.

PLAINTIFF'S MOTION TO RESTORE THE FORECLOSURE ACTION TO THE CALENDAR SHOULD HAVE BEEN GRANTED; ABSENT SPECIFIC AFFIRMATIVE DEFENSES PLAINTIFF BANK NEED NOT PROVE COMPLIANCE WITH STATUTORY AND CONTRACTUAL NOTICE REQUIREMENTS (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff's motion to restore the matter to the calendar should have been granted and plaintiff's motion for summary judgment should have been granted. The court noted that defendant had not waived the defense of standing but plaintiff submitted sufficient proof of standing and held plaintiff, in the absence of specific affirmative defenses, need not present proof of compliance with statutory and contractual notice requirements:

The defendant's contention that the plaintiff was required to demonstrate its compliance with statutory and/or contractual notice requirements in order to establish its entitlement to judgment as a matter of law is without merit … . Specifically, the defendant's sixth affirmative defense generally and conclusorily alleged that the "plaintiff has failed to comply with all conditions precedent to commencement of this action." This Court has held such language to be insufficient to raise the issue of the plaintiff's compliance with either statutory or contractual notice requirements (… CPLR 3013). Absent there being a cognizable affirmative defense alleging non-compliance with statutory or contractual notice requirements, the plaintiff was not required to address those issues as part of its prima facie burden in moving for summary judgment … . In opposition, the defendant failed to raise a question of fact that the plaintiff failed to comply with statutory or contractual notice requirements. One W. Bank, FSB v Rosenberg, 2020 NY Slip Op 08070, Second Dept 12-30-20

NOTICE, RPAPL 1304, CONTRACTUAL PROVISIONS IN MORTGAGE, NOTICE NOT PROVEN, MAILING.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 13O4 AND A CONDITION PRECEDENT IN THE MORTGAGE 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 the bank did not demonstrate compliance with the notice requirements of RPAPL 1304 and a condition precedent in the mortgage and therefore was not entitled to summary judgment in this foreclosure action:

Here, the plaintiff failed to establish, prima facie, that it complied with the requirements of RPAPL 1304 … . Contrary to the plaintiff's contention, its submission of an affidavit of an employee of the loan servicer was not sufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that he had personal knowledge of the purported mailings, that he was familiar with the mailing practices and procedures of the plaintiff, which allegedly sent the notice, or that the plaintiff's records had been incorporated into the records of the loan servicer and were routinely relied upon by the loan servicer in its business … . Further, the plaintiff's submission of an affidavit of its own employee was insufficient to establish the plaintiff's strict compliance with RPAPL 1304, since that employee had no personal knowledge of the purported mailings, and his unsubstantiated and conclusory statements failed to establish that the notice was mailed to the defendant not only by certified or registered mail, but also by first-class mail … . Although the plaintiff submitted tracking information from the United States Postal Service for certified mailings of the notice, the redacted proof of first-class mailing did not contain any information linking a first-class mailing to the RPAPL 1304 notice, and thus, failed to establish that the notice was mailed by first-class mail … . Likewise, the plaintiff's submission of a "Proof of Filing" statement pursuant to RPAPL 1306 contained no information indicating that the mailing was done by both registered or certified mail and first-class mail as required by RPAPL 1304 … .

The plaintiff similarly failed to establish, prima facie, that it mailed a notice of default to the defendant by first-class mail as required by the terms of the mortgage as a condition precedent to acceleration of the loan … . JPMorgan Chase Bank, N.A. v Nellis, 2020 NY Slip Op 02621, Second Dept 5-6-20

Similar issues and result in Deutsche Bank Natl. Trust Co. v Nelson, 2020 NY Slip Op 02604, Second Dept 5-6-20

NOTICE, RPAPL 1304, CONTRACTUAL PROVISIONS IN MORTGAGE, NOTICE NOT PROVEN, MAILING.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF THE MORTGAGE AND THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient evidence of compliance with the notice-of-default provisions of the mortgage and did not demonstrate the loan was a reverse mortgage exempt from the notice requirement of Real Property Actions and Proceedings Law (RPAPL) 1304:

Although the plaintiff submitted a purported notice of default … , the plaintiff failed to submit an affidavit attesting to the mailing of the purported … notice, whether it was mailed at all, and if so, whether the mailing was by first class mail or, if otherwise, whether notice was actually delivered to [defendant's] notice address, as required by the provisions in sections 15 and 22 of the mortgage agreement. …

… [T]he attorney's affirmation submitted by the plaintiff which stated that the purported … notice was "in full compliance with the terms of the mortgage" was unsubstantiated and conclusory. Neither the attorney's affirmation nor the copy of the purported … notice established "that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the mortgage agreement" … . …

… [T]he plaintiff also failed to establish, as a matter of law, its compliance with the 90-day notice requirements of RPAPL 1304. "[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" … . Deutsche Bank Natl. Trust Co. v Crimi, 2020 NY Slip Op 03376, Second Dept 6-17-20

NOTICE, RPAPL 1304, MAILING REQUIREMENTS PROVEN, STANDING NOT PROVEN.

THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 WAS SUFFICIENT, BUT THE BANK'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION WAS NOT SUFFICIENT; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's proof of compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 was sufficient, but the bank's proof of standing to bring the foreclosure action was insufficient:

… [T]he plaintiff demonstrated, prima facie, that it complied with RPAPL 1304 … . The plaintiff submitted the affidavit of a person employed by the plaintiff as a business operations analyst, who described the procedure by which mailings were documented in a correspondence log, and laid a foundation for consideration of business records he submitted. Annexed to the affidavit was a copy of excerpts of the correspondence log, which indicated that notices pursuant to RPAPL 1304 were sent to the defendant by certified and first-class mail. The plaintiff also submitted, inter alia, a copy of an envelope addressed to the defendant bearing a USPS certified mail barcode, and a copy of an envelope addressed to the defendant bearing a USPS first-class mail barcode, along with copies of the RPAPL 1304 notices sent to the defendant. …

… [T]he plaintiff submitted a copy of the note, along with a paper, which was labeled an allonge, containing an endorsement in blank. However, the plaintiff did not

submit evidence to indicate that the purported allonge was so firmly affixed to the note so as to become a part thereof, as required under UCC 3-202(2) … . Moreover, at the time the action was commenced, the plaintiff appended a copy of the note to the complaint, but the plaintiff did not append a copy of the purported allonge … . The affidavits submitted by the plaintiff do not eliminate triable issues of fact as to whether the plaintiff was in possession of the note at the time the action was commenced. Therefore, the plaintiff failed to establish, prima facie, that it had standing to commence the action … . Citimortgage, Inc. v Ustick, 2020 NY Slip Op 06489, Second Dept 11-12-20

NOTICE, RPAPL 1304, NO NEED TO PROVE COMPLIANCE WITH STATUTORY OR CONTRACTUAL NOTICE REQUIREMENTS IN ABSENCE OF AFFIRMATIVE DEFENSES.

THE DEFENDANTS DEFAULTED IN THIS FORECLOSURE ACTION; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT BASED ON THE BANK'S ALLEGED FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, WHICH IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE RAISED AS A DEFENSE (SECOND DEPT).

The Second Department determined the judge should have, sua sponte, dismissed the complaint in this foreclosure action on the ground the bank did not comply with the notice requirements of RPAL 1304. The defendants defaulted and failure to comply with RPAPL 1304 is not a jurisdictional defect. Therefore it must be raised as a defense before a judge can rule on it:

In this action to foreclose a mortgage, in which the defendants failed to appear or answer the complaint, the Supreme Court should have granted the plaintiff's motion for leave to enter a default judgment and for an order of reference, and should not have, sua sponte, directed dismissal of the complaint based on its determination that the plaintiff failed to establish that it complied with RPAPL 1304 … . Therefore, a plaintiff is not required to disprove the defense unless it is raised by defendants, and in this case the defendants failed to appear in the action or answer the complaint … . Chase Home Fin., LLC v Guido, 2020 NY Slip Op 07854, Second Dept 12-23-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, BUSINESS RECORDS, HEARSAY.

PLAINTIFF BANK DID NOT LAY A SUFFICIENT FOUNDATION FOR BUSINESS RECORDS SUBMITTED TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (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 the evidence of compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 was insufficient:

The plaintiff in this mortgage foreclosure action, on its motion, inter alia, for summary judgment on the complaint … failed to demonstrate, prima facie, its compliance with RPAPL 1304 because it failed to lay a proper foundation for the business records submitted as proof that the RPAPL 1304 notice was sent by first-class mail (see RPAPL 1304[2]; CPLR 4518[a]). In particular, the representative of the plaintiff who attempted to lay such a foundation failed to attest either that the records, which were created by a different entity, were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its business, or that she had personal knowledge of that entity's business practices and procedures … . Wells Fargo Bank, N.A. v Hirsch, 2020 NY Slip Op 04996, Second Dept 9-16-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, BUSINESS RECORDS, HEARSAY.

THE PROPER FOUNDATION FOR BUSINESS RECORDS WAS NOT LAID AND COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS NOT DEMONSTRATED, 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:

Harrell [bank vice president] failed to establish that Wells Fargo was servicing the subject loan at the time of Bhatti's [defendant's] alleged default, and that she was personally familiar with the recordkeeping practices and procedures of the plaintiff and/or the loan servicer at that time. Therefore, the plaintiff failed to establish a proper foundation for the admission of the records relied upon to establish Bhatti's default under the business records exception to the hearsay rule (see CPLR 4518[a] …). …

"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 … affidavits were insufficient to establish that the plaintiff mailed the 90-day pre-foreclosure notice required by RPAPL 1304, "as the representative[s] did not provide evidence of a standard office mailing procedure and provided no independent evidence of the actual mailing" … .

Moreover, the Harrell and Green affidavits were also insufficient to establish that a notice of default was in fact mailed to Bhatti by first-class mail, or actually delivered to the designated address if sent by other means, which was required by the terms of

the mortgage … . HSBC Bank USA, Natl. Assn. v Bhatti, 2020 NY Slip Op 04734, Second Dept 8-26-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, CONTENT OF NOTICE.

THE RPAPL 1304 NOTICE WAS DEFECTIVE ON ITS FACE; PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate compliance with RPAPL 1304 in this foreclosure action:

… [T]he plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304. In support of its motion, the plaintiff submitted copies of both its RPAPL 1304 notice and the 30-day notice of default required by the mortgage agreement. Both notices were dated April 15, 2013; however, these notices contained a factual discrepancy regarding the cure date, to wit, the cure date stated in the RPAPL 1304 90-day notice was May 15, 2013, whereas the cure date stated in the 30-day notice was May 20, 2013. Given the factual inaccuracy contained in at least one of the notices, and because the potential inaccuracy in the 90-day notice involved information that was required under RPAPL 1304, the plaintiff's submissions did not eliminate the existence of a triable issue of fact as to whether the RPAPL 1304 notice was defective on its face … . Sparta GP Holding Reo Corp. v Lynch, 2020 NY Slip Op 04803, Second Dept 8-26-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING, APPEALS.

ALTHOUGH THE QUESTION WHETHER THE NOTICE REQUIREMENTS OF RPAPL 1304 APPLIED ONLY TO HIGH-COST OR SUBPRIME LOANS WAS NOT RAISED BELOW, THE QUESTION WAS CONSIDERED AND REJECTED ON APPEAL; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department considered an issue raised for the first time on appeal because it raised an issue of law which could not have been avoided if raised below. The defendant argued that the strict compliance with the notice requirements of RPAPL 1304 applies only to high-cost or subprime loans, not the loan at issue in the case. The Second Department rejected the argument and reversed Supreme Court finding the plaintiff did not demonstrate compliance with RPAPL 1304:

We decline to construe RPAPL 1302(2) in a manner that would render the amendment to RPAPL 1304 superfluous and the requirements set forth in that statute ineffective. Thus … compliance with RPAPL 1304 was a component of its prima facie burden on its motion for summary judgment … . …

Although Mahdak [plaintiff's representative] stated in her affidavit that the notices were sent to the defendant at his last known address and the subject property, Mahdak did not have personal knowledge of the mailing, and [plaintiff] failed to provide any documents to prove that the notices were actually mailed … . [Plaintiff] also failed to submit a copy of any United States Post Office document indicating that the notices were sent by registered or certified mail as required by the statute … . Furthermore, Mahdak did not aver that she was familiar with [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 … . H&R Block Bank, FSB v Liles, 2020 NY Slip Op 04733, Second Dept 8-26-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING, CONTENT OF NOTICE.

PLAINTIFF DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304 IN THIS FORECLOSURE ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff (CV) did not provide the proof required by Real Property Actions and Proceedings Law (RPAPL) 1304:

The version of RPAPL 1304(2) as it existed at the time this action was commenced, provided that, "[t]he notices required by this section shall contain a current list of at least five housing counseling agencies that serve the region where the borrower resides from the most recent listing available from the department of financial services" …

… CV failed to submit evidence to demonstrate that the 90-day notices contained either five housing agencies that served the region where the defendants resided or were from the most recent listing available from the department of financial services. …

Additionally, CV did not submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that the defendants were properly served pursuant to RPAPL 1304. Instead, CV relied upon the affidavit of Matthew W. Regan, its executive vice president, who averred that 90-day notices were sent in accordance with the statute. In his affidavit, Regan referenced copies of 90-day notices, which, however, did not bear any postmark. Moreover, "[t]he presence of 20-digit numbers on the copies of the 90-day notices . . . standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304" … . Also, Regan's affidavit was insufficient to establish that the required notices were sent in the manner required by RPAPL 1304, as Regan did not attest to personal knowledge of the mailing practices of the entity which sent the notices, and provided no

independent evidence of the actual mailing … . CV XXVIII, LLC v Trippiedi, 2020 NY Slip Op 05721, Second Dept 10-14-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING, CONTENT OF NOTICE, DEFAULT.

PLAINTIFF BANK DID NOT STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 AND DID NOT DEMONSTRATE DEFENDANT HAD DEFAULTED IN THIS FORECLOSURE ACTION; THE DECISION ILLUSTRATES THE LEVEL OF STRICT COMPLIANCE WITH RPAPL 1304 WHICH IS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. Plaintiff did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 and did not demonstrate defendant defaulted. The decision illustrates the level of strict compliance with RPAPL 1304 which is required by the courts:

The version of RPAPL 1304(2) as it existed at that time required that the 90-day notice provide a list of five housing counseling agencies "that serve the region where the borrower resides." …

… Here, the notice prepared by the plaintiff listed, as one of the required five housing counseling agencies, an agency located more than 300 miles away from the defendants' residence. … [I]t is the plaintiff's burden, on its motion for summary judgment, to demonstrate its strict compliance with the applicable provisions of RPAPL 1304. By failing to submit evidence that the Watertown agency served the region wherein the defendants resided, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law and thus its motion for such relief should have been denied … . …

Additionally, the affidavit submitted by the plaintiff for the purpose of demonstrating that it properly served its 90-day notice did not specify that the notice was served in an envelope that was separate from any other mailing or notice

(see RPAPL 1304 [2]). While the plaintiff attempted to remedy this deficiency in its reply papers, even assuming that its reply affidavit may properly be considered … , that affidavit contained only a conclusory assertion that the mailing was done in a separate envelope, with no assertion by the affiant that she had any personal knowledge of the actual mailing or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed … .

The plaintiff also failed to establish, prima facie, the defendants' default in payment. While the affidavit submitted by the plaintiff made the requisite showing that the affiant was familiar with the plaintiff's recordkeeping practices and procedures with respect to the defendants' payment history, the affiant failed to submit any business record substantiating the alleged default. Conclusory affidavits lacking a factual basis are without evidentiary value … . USBank N.A. v Haliotis, 2020 NY Slip Op 03819, Second Dept 7-8-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING, STANDING NOT PROVEN.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 OR THE MORTGAGE AND DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (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. The bank failed to demonstrate compliance with the notice requirements of RPAPL 1304, the notice of default requirements of the mortgage, and standing to bring the action. Evidence submitted in replay papers should not have been considered:

… [T]he plaintiff submitted the affidavit of DiMario Abrams, a vice president for the plaintiff's loan servicer, as well as copies of the notices and the envelopes in which the notices were allegedly mailed. Abrams did not purport to have personal knowledge of the actual mailing of the notices pursuant to RPAPL 1304, he did not purport to have personal knowledge of the mailing procedures utilized by the plaintiff's loan servicer, and he did not lay a proper foundation under the business

records exception to the hearsay rule with respect to the notices and envelopes attached to his affidavit … . * * *

The plaintiff submitted a lost note affidavit prepared by Dereje D. Badada, a vice president for its loan servicer. According to that affidavit, the note had "been inadvertently lost, misplaced or destroyed," and the loan servicer had "not pledged, assigned, transferred, hypothecated or otherwise disposed of the note." There was no allegation in the lost note affidavit that the note had ever been delivered or assigned to the plaintiff, nor were there any details regarding when or how the note was lost, who searched for the note, or when they searched for the note. Therefore, the lost note affidavit did not establish the plaintiff's ownership of the note or the facts preventing it from producing the note (see UCC 3-804 …). U.S. Bank N.A. v Kohanov, 2020 NY Slip Op 07242, Second Dept 12-2-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING, STANDING NOT PROVEN.

THE BANK DID NOT SUBMIT SUFFICIENT EVIDENCE OF STANDING OR COMPLIANCE WITHE THE RPAPL 1304 NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; THE BANKS' 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 of standing to bring the foreclosure action and compliance with the RPAPL 1304 notice requirements:

… [T]he plaintiff failed to establish, prima facie, that it had standing to commence this action. Although the employee of the plaintiff's loan servicer stated in her affidavit, which was submitted by the plaintiff in support of its motion, that the plaintiff was the holder of the note, she never stated that the plaintiff was the holder of the note at the time the action was commenced … . Further, the plaintiff failed to establish that the note was attached to the complaint at the time of the commencement of the action … . …

… [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 because the employee of the plaintiff's loan servicer, in her affidavit, failed to assert personal knowledge of the purported mailing or make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures in order to establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . Bank of Am., N.A. v Palacio, 2020 NY Slip Op 05480, Second Dept 10-7-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING, STANDING NOT PROVEN, HEARSAY.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND DID NOT PRESENT NON-HEARSAY EVIDENCE OF STANDING IN THIS FORECLOSURE ACTION, CRITERIA EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, in an extensive decision explaining the relevant issues and analysis in some depth, determined plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 did not demonstrate standing to bring the foreclosure action:

… [T]he plaintiff failed to submit an affidavit of mailing or proof of mailing by the United States Postal Service evidencing that it properly mailed notice to the defendant pursuant to RPAPL 1304. Instead, the plaintiff relied on an affidavit of Rashad Blanchard, who was employed as a loan analyst by the parent company of the plaintiff's loan servicer, and copies of the purported notices. The plaintiff submitted only one letter that purported to constitute the statutorily required 90-day notice of default … . Although the letter contained the statement "sent via certified mail," with a 20-digit number below it, no receipt or corresponding document issued by the United States Postal Service was submitted proving that the letter was actually sent by certified mail more than 90 days prior to commencement of the action. The plaintiff also failed to submit any documentary evidence that notice was sent by first-class mail. Further, Blanchard did not aver that the notice was sent in the manner required pursuant to RPAPL 1304, i.e., by certified mail and first-class mail. Moreover, since he did not aver that he personally mailed the notice, or that he was

familiar with the mailing practices and procedures of American Home Mortgage Servicing, Inc., the entity that purportedly sent the notices, he did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . * * *

[Vice President] Reyes's affidavit failed to establish a sufficient foundation for the admission of a business record pursuant to CPLR 4518(a) because, although he recited that the records upon which he relied were "regularly maintained by [the plaintiff] in the ordinary course of its business," he "did not indicate that they were made by their author (or authors, whoever they might be) pursuant to an established procedure for the routine, habitual, systematic making of records that would qualify them as trustworthy accounts," or that they "were the records regularly relied on in the business" … . Reyes also failed to indicate "that the record [was] made at or about the time of the event being recorded—essentially, that recollection [was] fairly accurate and the habit or routine of making the entries assured" … . …

… .[T]o the extent that Reyes's purported knowledge of the date the plaintiff received the original note was based upon his review of unidentified business records maintained by the plaintiff, "[his] affidavit constituted inadmissible hearsay and lacked probative value" … . Deutsche Bank Natl. Trust Co. v Dennis, 2020 NY Slip Op 02039, Second Dept 3-25-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

ALTHOUGH PLAINTIFF BANK DID NOT DEMONSTRATE THE RPAPL 1304 NOTICE WAS MAILED TO DEFENDANT IN THIS FORECLOSURE ACTION, DEFENDANT'S DENIAL OF RECEIPT OF THE NOTICE WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant's cross motion for summary judgment in this foreclosure action should not have been granted. Supreme Court properly found that the bank did not provide sufficient proof that the Real Property Actions and Proceedings Law (RPAPL) 1304

notice was mailed to defendant. But defendant's mere denial of receipt of the notice was not enough to warrant summary judgment in defendant's favor:

The plaintiff failed to establish, prima facie, that it mailed the RPAPL 1304 notice, because "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" … .

We disagree, however, with the Supreme Court's determination to grant [defendant] Parker's cross motion for summary judgment dismissing the complaint insofar as asserted against her. Parker offered only a mere denial of receipt of the RPAPL 1304 notice in support of her cross motion, and such a mere denial is insufficient to establish entitlement to such relief … . Bank of N.Y. Mellon v Parker, 2020 NY Slip Op 04376, Second Dept 8-5-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

BANK DID NOT COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 IN THIS FORECLOSURE ACTION; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment should not have been granted in this foreclosure action because compliance with the notice requirements of RPAPL 1304 was not demonstrated:

RPAPL 1304 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 the statute, such lender, assignee, or mortgage loan servicer must give notice to the borrower. The statute provides the required content for the notice and provides that the 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]). "Strict compliance with RPAPL 1304 notice to 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, although the plaintiff provided a photocopy of a "US Postal Service Receipt for Certified Mail" with a 20-digit number along with the purported 90-day notice, the receipt is undated and does not demonstrate that the notice was actually sent by certified mail more than 90 days prior to commencement of the action. The plaintiff also failed to submit sufficient evidence to demonstrate that the notice was sent by first-class mail. M&T Bank v Barter, 2020 NY Slip Op 04548, Second Dept 8-19-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

NOTICE REQUIREMENTS OF RPAPL 1304 NOT PROVEN; PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS FORECLOSURE ACTION (SECOND DEPT)

The Second Department, reversing Supreme Court, determined the proof of compliance with the RPAPL 1304 notice requirements was deficient:

… [T]he plaintiff failed to submit an affidavit of service or any evidence of mailing by the post office demonstrating that it properly served the defendant pursuant to the terms of RPAPL 1304 … . 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 designed to ensure that items are properly addressed and mailed" … , and provided no independent evidence of the actual mailing … . U.S. Bank N.A. v Herzberg, 2020 NY Slip Op 01201, Second Dept 2-19-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PLAINTIFF BANK DID NOT PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; JUDGMENT AFTER TRIAL REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure action did not demonstrate strict compliance with the notice requirements of RPAPL 1304. The judgment after trial was reversed:

… [T]he plaintiff relied upon the testimony of DeCaro [loan verification officer], who, when shown a copy of the 90-day notice, testified that the notice was printed on October 13, 2011, the same date that appears on the notice, that it was sent to the defendants at the subject property, and that such notice was maintained by Wells Fargo in the regular course of business as the plaintiff's loan servicer. Contrary to the plaintiff's contention, DeCaro's testimony was insufficient to demonstrate that it complied with RPAPL 1304. DeCaro did not testify that she had personal knowledge of the purported mailing or of Wells Fargo's mailing practices, and did not describe the procedure by which the RPAPL 1304 notice was mailed to the defendants by both certified mail and first-class mail … . Although the notice itself stated in bold print, "FIRST CLASS MAIL and CERTIFIED MAIL," no receipt or corresponding document issued by the United States Postal Service was submitted proving that the notice was actually sent by certified mail more than 90 days prior to commencement of the action. Moreover, the mailing manifest submitted by the plaintiff failed to establish that the notice was actually mailed to the defendants by both certified mail and first-class mail … .

Since the plaintiff failed to provide evidence 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 … . US Bank N.A. v Pierre, 2020 NY Slip Op 07622, Second Dept 12-16-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not 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 submitted, inter alia, the affidavit of Ray Thacker, a vice president of the plaintiff, based upon his review of his employer's records, which were attached thereto. However, Thacker's affidavit contained no statement as to Thacker's personal familiarity with the mailing practices of his employer … .

Moreover, although Thacker's affidavit laid a proper foundation for the admission of the business records which were attached thereto (see CPLR 4518[a] …), the content of those records did not demonstrate, prima facie, that the requisite RPAPL 1304 mailings were completed. The copies of letters addressed to the defendant, bearing 20-digit bar codes, were insufficient to demonstrate, prima facie, that the certified mailing or first class mailing actually occurred … . The "Proof of Filing Statement" from the New York State Banking Department, pursuant to RPAPL 1306, reflecting a tracking number, a "Mailing Date Step 1" of May 16, 2012, and a "Filing Date Step 1" of May 17, 2012, also was insufficient to demonstrate, prima facie, the plaintiff's compliance with all of the requirements of RPAPL 1304 … . JPMorgan Chase Bank, Natl. Assn. v Gershfeld, 2020 NY Slip Op 05895, Second Dept 10-21-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PLAINTIFF BANK DID NOT DEMONSTRATE STRICT COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND THEREFORE WAS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION; DEFENDANT'S MERE DENIAL OF RECEIPT OF THE NOTICE DID NOT WARRANT SUMMARY JUDGMENT IN DEFENDANT'S FAVOR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the RPAPL 1304 notice requirements and, therefore, the bank's motion for summary judgment in this foreclosure action should not have been granted. Defendant's denial of receipt of the RPAPL 1394 notice, however, was not enough to warrant summary judgment in favor of defendant:

"'Although not jurisdictional, proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a residential foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition'" … . …

… [A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to [defendant], the plaintiff failed to submit an affidavit of service or other proof of mailing by the post office establishing that the plaintiff properly sent the notice by registered or certified mail and first-class mail pursuant to RPAPL 1304 … . Since the plaintiff failed to provide evidence of the actual mailing, or evidence 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 … . TD Bank, N.A. v Roberts, 2020 NY Slip Op 05074, Second Dept 9-23-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PLAINTIFF BANK FAILED TO SHOW COMPLIANCE WITH THE NOTICE PROVISIONS OF THE MORTGAGE AGREEMENT AND 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 plaintiff bank failed to demonstrate the notice of default was provided in accordance with the mortgage agreement, failed to demonstrate compliance with the notice requirements of RPAPL 1304 and failed to demonstrate such compliance was not required:

… [T]he plaintiff failed to demonstrate, prima facie, that it complied with a condition precedent contained in the consolidated mortgage agreement, requiring the lender to send a notice of default prior to the commencement of the action. In this respect, the unsubstantiated and conclusory statements in the affidavit of an employee of the plaintiff's servicer, which indicated that the required notice of default was sent in accordance with the terms of the mortgage, combined with a copy of the notice of default, failed to show that the required notice was mailed by first-class mail or actually delivered to the notice address if sent by other means, as required by the consolidated mortgage agreement … .

… [T]he plaintiff failed to demonstrate, prima facie, that it properly served upon the defendant the notice required by RPAPL 1304. The mailing required under that statute "'is 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 proffered neither evidence of the actual mailings nor evidence of a standard office mailing procedure, but rather relied upon its servicer's conclusory and unsubstantiated affidavit averring that the notice was sent, along with a copy of the notice. This evidence failed to satisfy the plaintiff's burden … . Moreover, contrary to the Supreme Court's conclusion, affidavits of service pertaining to the summons and complaint as well as the defendant's verified answer, which demonstrated that the defendant was present in the State of Florida at the time of service of those

pleadings, failed to demonstrate, prima facie, that the subject property was not the defendant's "principal dwelling," so as to establish that compliance with RPAPL 1304 was not required … . U.S. Bank N.A. v Negrin, 2020 NY Slip Op 05253, Second Dept 9-30-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND THE MORTGAGE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not demonstrate compliance with the notice provisions of RPAPL 1304 and the mortgage:

… [T]he evidence submitted in support of the motion failed to establish, prima facie, the plaintiff's strict compliance with RPAPL 1304 and that the required notice of default was in fact mailed to the defendants by first-class mail, or actually delivered to the designated address if sent by other means, as required by the terms of the mortgage as a condition precedent to foreclosure … . Deutsche Bank Natl. Trust Co. v Buah, 2020 NY Slip Op 05722, Second Dept 10-14-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 AND 1306 IN THIS FORECLOSURE ACTION; PROOF REQUIREMENTS EXPLAINED IN SOME DEPTH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff loan services company (Aurora/Nationstar) did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 13O4 and 1306. Therefore, Aurora's motion for summary judgment in this foreclosure action should not have been granted. The court, noting that "lack of notice' may be raised at any time, explained defendant did not waive the "lack of notice" defense because defendant denied the plaintiff's complaint-allegations of compliance and raised the issue in opposition to plaintiff's motion for summary judgment. The Second Department further found defendant was not entitled to summary judgment because "lack of notice" was not demonstrated as a matter of law. The decision provides a valuable explanation of the proof requirements for compliance with RPAPL 1304 and 1306:

In support of its motions, Aurora submitted the affidavit of Jerrell Menyweather, a document execution specialist employed by Nationstar, along with a copy of a 90-day notice addressed to the defendant, and a proof of filing statement pursuant to RPAPL 1306 from the New York State Banking Department. Although Menyweather stated in the affidavit that the RPAPL notices were sent to the defendant at her last known address and the subject property, Menyweather did not have personal knowledge of the mailing, and Aurora failed to provide any documents to prove that the notices were actually mailed … . Aurora also failed to submit a copy of any United States Post Office document indicating that the notices were sent by registered or certified mail as required by the statute … . Furthermore, Menyweather did not aver that he was familiar with Aurora'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 Matles, 2020 NY Slip Op 03793, 7-8-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 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 Bank's motion for summary judgment in this foreclosure action should not have been granted. The proof of the notice required by RPAPL 1304 was insufficient:

Notice must be sent both "by registered or certified mail and also by first-class mail" (RPAPL 1304[2]). "'[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" … . "Proof of the requisite mailing is 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" … .

… [The plaintiff failed to submit an affidavit from a witness who attested to having personal knowledge of either the actual mailing or "a standard office mailing procedure designed to ensure that items are properly addressed and mailed" … . Moreover, the records submitted with the plaintiff's motion did not establish as a matter of law that the requisite RPAPL 1304 mailings were completed. A copy of a letter and envelope addressed to the defendant, each bearing a 20-digit number, was insufficient to eliminate all triable issues of fact as to whether the certified mailing actually occurred … . Moreover, the plaintiff failed to submit any evidence substantiating the assertions that a second copy of the notice was mailed to the defendant by regular first-class mail, as required by the statute … . Deutsche Bank Natl. Trust Co. v Feeney, 2020 NY Slip Op 06753, Second Dept 11-18-20

Similar issues and result in JPMorgan Chase Bank, N.A. v Gold, 2020 NY Slip Op 06765, Second Dept 11-18-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 NOTICE REQUIREMENTS NOT MET; PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (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. Therefore plaintiff's motion for summary judgment in this foreclosure action should not have been granted:

… [T]he plaintiff failed to establish its entitlement to judgment as a matter of law with respect to compliance with the notice requirement of RPAPL 1304. Proper service of RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of the foreclosure action, and failure of a plaintiff to make this showing requires denial of its motion for summary judgment … . The lender must submit proof of mailing (such as an affidavit of service or domestic return receipts with attendant signatures) or an affidavit either from the individual who performed the actual mailing or an individual with personal knowledge of the lender's standard office mailing procedure … . Here, the unsubstantiated and conclusory statement of the plaintiff's attorney in an affidavit submitted in support of the motion that RPAPL 1304 notice was properly mailed to the defendant is insufficient to establish compliance with the statute as a matter of law … . Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC v Williams, 2020 NY Slip Op 03561. Second Dept 6-24-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

THE BANK DID NOT DEMONSTRATE THE NOTICE REQUIREMENTS OF RPAPL 1304 WERE COMPLIED WITH; SUMMARY JUDGMENT IN FAVOR OF THE BANK SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the notice requirements of RPAPL 1304 were not demonstrated and, therefore, the bank's motion for summary judgment in this foreclosure action should not have been granted:

Since the plaintiff failed to provide evidence of the actual mailing by either certified mail or first-class mail, "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" … , it failed to establish, prima facie, that it complied with RPAPL 1304. Since the plaintiff failed to satisfy its prima facie burden with respect to RPAPL 1304, those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference should have been denied, regardless of the sufficiency of the defendants' opposition papers … . US Bank N.A. v McQueen, 2020 NY Slip Op 07423, Second Dept 12-9-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

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

The Second Department, reversing Supreme Court, determined the bank's summary judgment motion should not have been granted because the bank did not demonstrate compliance with the notice requirements of RPAPL 1304:

"In a residential foreclosure action, a plaintiff moving for summary judgment must tender sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" … . RPAPL 1304(1) provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." "The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower" … . Strict compliance with RPAPL 1304 is a condition precedent to the commencement of a foreclosure action … . Proof of the requisite mailings "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" … . …

… [W]ith respect to the mailing by first-class mail, "[t]he 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" … . As to Babik's [the loan servicer's employee's] affidavit, not only did Babik "not attest to personal knowledge of the mailing [or] set forth any details regarding … [the loan servicer's] mailing practices or procedures" … , she did not aver that a 90-day notice was sent in accordance with the statute … . Wilmington Sav. Fund Socy., FSB v Hershkowitz, 2020 NY Slip Op 07427, Second Dept 12-9-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

THE BANK'S COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS NOT DEMONSTRATED WITH ADMISSIBLE EVIDENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined compliance with the notice requirements of RPAPL 1304 was not demonstrated with admissible evidence. Therefore the bank's motion for summary judgment in this foreclosure action should not have been granted:

… [T]he affidavit of an employee of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that he had personal knowledge of the purported mailings, or that he was familiar with the mailing practices and procedures of the plaintiff, which allegedly sent the notice … . In addition, the plaintiff's submission of an affidavit of its own employee was similarly insufficient to establish the plaintiff's strict compliance with RPAPL 1304, since the employee had no personal knowledge of the purported mailings and he did not attest to a standard office mailing procedure designed to ensure that items are properly addressed and mailed … . Further, the plaintiff failed to submit sufficient proof of the actual mailings of the notices by first-class mail … . Ridgewood Sav. Bank v Van Amerongen, 2020 NY Slip Op 08095, Second Dept 12-30-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

THE BANK'S COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1303 AND 1304 WAS NOT DEMONSTRATED IN THIS FORECLOSURE ACTION, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO THE BANK (SECOND DEPT).

The Second Department determined plaintiff bank's motion for summary judgment should not have been granted in this foreclosure action. There was a question of fact whether plaintiff complied with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1303, and plaintiff did not establish it complied with the notice requirements of RPAPL 1304:

… [D]efendant raised a triable issue of fact with respect to whether the RPAPL 1303 notice was in the proper form, as he asserted in his affidavit that the notice with which he was served "was on white colored paper, the same color papers as the summons and complaint and the heading entitled Help for Homeowners in Foreclosure' was smaller than twenty-point type" … .

… [T]he affidavit of Lorene Alford Marsh, an Assistant Vice President of the plaintiff, was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304. Although Marsh attested that the 90-day notices

of default were sent to the defendant by certified mail and first-class mail on March 8, 2013, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailings actually occurred … . Nor did Marsh attest that she had personal knowledge of the mailing practices of her employer at the time the RPAPL 1304 notices allegedly were sent. Instead, she merely stated that she had personal knowledge of the plaintiff's procedures for creating and maintaining notices mailed in connection with the loan. Moreover, rather than establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed, Marsh, in her affidavit, merely described the mailing requirements listed in the statute … . Bank of Am., N.A. v Lauro, 2020 NY Slip Op 04531, Second Dept 8-19-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

THE BANKS' COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS NOT DEMONSTRATED; 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 plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted because compliance with the notice requirements of RPAP 1304 was not demonstrated with admissible evidence:

… [T]he plaintiff submitted, inter alia, an affidavit of a business operations analyst employed by the plaintiff, together with copies of 90-day notices sent to the defendants and proof of filing statements from the New York State Department of Financial Services. Although some of the copies of the 90-day notices contain what appear to be bar codes with 22-digit numbers that include the words "USPS CERTIFIED MAIL," the plaintiff failed to submit any evidence that the mailings were sent by first-class mail in addition to certified mail … . The plaintiff also failed to submit evidence of a standard office mailing procedure or an affidavit of the individual(s) who effected the service … . The submission by the plaintiff of evidence that it filed statements with the New York State Department of Financial Services, without more, is insufficient to establish that the mailing was accomplished

pursuant to RPAPL 1304 … . CitiMortgage, Inc. v McGregor, 2020 NY Slip Op 07855, Second Dept 12-23-20

NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 WERE NOT PROVEN; 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 plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 in this foreclosure action:

… [T]he plaintiff submitted, inter alia, the affidavit of Sherry W. McManus, a Vice President of Loan Documentation for the plaintiff. Although McManus stated in her affidavit that the RPAPL 1304 notice was mailed by regular and certified mail, and attached copies of the notice, the plaintiff failed to attach, as exhibits to the motion, any documents establishing that the notice was actually mailed … . Specifically, 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 McManus attested that she had personal knowledge of the plaintiff's mailing practices, the substance of her affidavit was contradicted by the documents attached to it that purportedly evidenced the plaintiff's compliance with RPAPL 1304, and her averments were contradicted by those made in another affidavit submitted by the plaintiff in support of its motion … . Since the plaintiff failed to provide evidence of the actual mailing, or reliable 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 … . Wells Fargo Bank, N.A. v Bedell, 2020 NY Slip Op 04891, Second Dept 9-2-2020

NOTICE, RPAPL 1304, NOTICE NOT PROVEN.

ALTHOUGH PLAINTIFF BANK DID NOT PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE DEFENDANT DID NOT PROVE PLAINTIFF DID NOT COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department determined that, although plaintiff bank did not prove compliance with the notice requirements of RPAPL 1304, defendant did not prove plaintiff failed to comply with the notice requirements of RPAPL 1304:

"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, . . . 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" … . …

… [W]hile RPAPL 1304 provides that "[t]he notices required by this section shall be sent . . . to the last known address of the borrower, and to the residence that is the subject of the mortgage" (RPAPL 1304[2]), the defendant did not allege, or provide any evidence, that the lender knew her address had changed. Wells Fargo Bank, N.A. v Tricario, 2020 NY Slip Op 01112, Second Dept 2-13-20

NOTICE, RPAPL 13O4, NOTICE NOT PROVEN, MAILING, STANDING NOT PROVEN.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1304 AND DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it met the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and the bank did not demonstrate it had standing the bring the action:

… [T]he plaintiff failed to submit an affidavit of mailing or proof of first-class mailing by the United States Postal Service evidencing that it properly mailed notice to the defendant pursuant to RPAPL 1304. Instead, the plaintiff relied on an affidavit of Sherry Benight, who was employed as a document control officer for Select Portfolio Servicing, Inc. (hereinafter SPS), which began servicing the subject loan on the plaintiff's behalf on July 15, 2015, as well as copies of the purported notices, dated July 22, 2013. Although one of the notices contained a first-class mail 10-digit barcode, the plaintiff submitted no evidence that the letter was actually sent by first-class mail more than 90 days prior to commencement of the action. In her affidavit, Benight stated that she could confirm that the notice was sent to the defendant on July 22, 2013. However, Benight did not have personal knowledge of the purported mailing. Further, since she did not aver that she was familiar with the mailing practices and procedures of Bank of America, N.A., the entity that purportedly sent the notices, she did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . To the extent that Benight relied upon a screenshot of a TrackRight Transaction Report, she failed to establish how or when the report was created, that it was made in the regular course of business, or that it was created soon after the notices were purportedly mailed to the defendant … . …

The plaintiff also attempted to establish standing through the submission of Benight's affidavit, but this also was insufficient. Benight asserted that the original note was delivered to the plaintiff on September 7, 2004, and that the plaintiff had since remained in possession of the note. Benight, however, did not have personal knowledge of the plaintiff's receipt of the note, did not attest that she had personal knowledge of the plaintiff's business practices and procedures, and also did not submit any admissible business records to show that the plaintiff possessed the note at the time this action was commenced … . Bank of N.Y. Mellon v Porfert, 2020 NY Slip Op 06083, Second Dept 10-28-20

NOTICE, SERVICE OF NOTICE, RPAPL 1303.

BANK DID NOT PROVE COMPLIANCE WITH RPAPL 1303; 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 because the bank did not prove compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1303:

"Proper service of the notice required by RPAPL 1303 notice is a condition precedent to the commencement of a foreclosure action, and it is the plaintiff's burden to show compliance with that statute" … .

Here, in support of its motion, the plaintiff submitted the process server's affidavit indicating that a notice was served with the summons and complaint. However, the plaintiff did not submit a copy of the RPAPL 1303 notice allegedly served, and the process server made no averments that the notice served complied with the requirements of RPAPL 1303 concerning content and form. The plaintiff, therefore, failed to demonstrate, prima facie, that it complied with RPAPL 1303 … . Flagstar Bank, FSB v Hart, 2020 NY Slip Op 03217, Second Dept 6-10-20

REFEREE'S REPORT, CONFIRMATION, HEARING.

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT ABSENT A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the referee's report should not have been confirmed in the absence of a hearing on notice to the property owner, TEP:

… [T]he Supreme Court should not have confirmed the referee's report in the absence of a hearing on notice to TEP (see CPLR 4313 …). Although the notice accompanying the plaintiff's proposed referee's oath notified TEP of the due date

for the submission of documents to the referee, it did not indicate that the submission of such papers would be in lieu of a hearing … . Further, the Supreme Court erred in rejecting TEP's contention, raised in opposition to the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, that " [t]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records'" … . Moreover, the referee's report also failed to identify any documents or other sources upon which the referee based her finding that the mortgaged premises should be sold in one parcel … . HSBC Bank USA, N.A. v Tigani, 2020 NY Slip Op 03901, Second Dept 7-15-20

REFEREE'S REPORT, HEARSAY, RPAPL 1351.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED ON HEARSAY; THE SECOND MORTGAGE WAS NOT DEMONSTRATED TO MEET THE REQUIRMENTS OF RPAPL 1351 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report was based upon hearsay and should not have been confirmed. In addition, the proof a second mortgage met the requirements of RPAPL 1351 and 1354 was insufficient:

"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" … . Here, the affidavit executed by an employee of the plaintiff's loan servicer, which was submitted by the plaintiff for the purpose of establishing the amount due and owing under the mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant failed to produce any of the business records upon which she purportedly relied in making her calculations … . Consequently, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … .

… In an action to foreclose a mortgage commenced by a first mortgagee, a second mortgagee may move for a provision in the judgment of foreclosure and sale that any surplus moneys from the foreclosure sale be applied to satisfy the debt owed by

the defendant to the second mortgagee (see RPAPL 1351[3]). Such a motion may be granted if "it appears to the satisfaction of the court" that there exists no more than one other mortgage on the subject premises which is "then due" and subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances other than those described RPAPL 1354(2), and if the motion of the second mortgagee is "made without valid objection of any other party" (RPAPL 1351[3]).

Here, [the] motion papers insufficient, prima facie, to meet the requisite standard (see RPAPL 1351[3]) … . U.S. Rof III Legal Tit. Trust 2015-1 v John, 2020 NY Slip Op 08099, Second Dept 12-30-20

REFEREE'S REPORT, HEARSAY.

REFEREE'S FINDINGS WERE BASED UPON HEARSAY PROVIDED BY THE BANK IN THIS FORECLOSURE ACTION; 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. The report was based upon hearsay provided by the bank and therefore the referee's findings were not supported by the record:

The Supreme Court should have denied the plaintiff's motion, in effect, to confirm the referee's report and for leave to enter a judgment of foreclosure and sale. In support of its motion, the plaintiff relied upon the affidavit of a representative of its loan servicer, who attested, based upon his review of the servicer's books and records, to the amount due under the mortgage loan. However, the plaintiff's affiant failed to annex or otherwise produce the subject business records. Under the circumstances, the affidavit relied upon by the plaintiff constituted inadmissible hearsay and lacked probative value, and the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . Bank of N.Y. Mellon v Fontana, 2020 NY Slip Op 04375, Second Dept 8-5-20

REFEREE'S REPORT, HEARSAY.

REFEREE'S REPORT IN THIS FORECLOSURE ACTION RELIED UPON HEARSAY AND SHOULD NOT HAVE BEEN CONFIRMED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the referee's report should not have been relied upon in this foreclosure action because the report was based on hearsay:

The referee relied on an affidavit sworn to October 2, 2018 by an assistant vice president of plaintiff's loan servicer, who asserted that, according to the books and records of plaintiff pertaining to defendant's loan and payment history, defendant had been in default since March 1, 2009, and owed plaintiff the amount stated. However, because the books and records themselves were not submitted to the court, the affiant's assertions are inadmissible hearsay … . Nor did the affiant lay a foundation for the introduction of the books and records as a business record (see CPLR 4518[a]). Deutsche Bank Natl. Trust Co. v Kirschenbaum, 2020 NY Slip Op 05849, First Dept 10-20-20

REFEREE'S REPORT, HEARSAY.

THE REFEREE RELIED ON HEARSAY TO DETERMINE THE AMOUNT OWED IN THIS FORECLOSURE ACTION; SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence relied upon by the referee to determine the amount owed to plaintiff bank in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule. The bank's motion for summary judgment should not have been granted:

With respect to the amount due to the plaintiff, the referee based his findings on an affidavit of Jillian Thrasher, a vice president of Ocwen Loan Servicing, LLC (hereinafter Ocwen), the servicer of the subject loan. …

"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" … . Here, Thrasher's affidavit was insufficient to establish a proper foundation for the admission of a business record pursuant to CPLR 4518(a), because she failed to attest that she was personally familiar with the record-keeping practices and procedures of her employer, Ocwen, the entity that generated the subject business records. Accordingly, she failed to demonstrate that the records relied upon in her affidavit were admissible under the business records exception to the hearsay rule … . Thus, Thrasher's affidavit, upon which the referee relied, "constituted inadmissible hearsay and lacked probative value" on the issue of the amount due and owing to the plaintiff, including the amount of interest due for the relevant period … , and the Supreme Court erred in confirming the report. The error in relying on hearsay evidence was not harmless, as the referee's determination is not substantially supported by other evidence in the record … . IndyMac Fed. Bank, FSB v Vantassell, 2020 NY Slip Op 05495, Second Dept 10-7-20

REFEREE'S REPORT, HEARSAY.

THE REFEREE REPORT IN THIS FORECLOSURE ACTION RELIED ON HEARSAY AND THEREFORE SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the calculations made by the referee were based on hearsay and therefore the referee's report in this foreclosure action should not have been confirmed:

The calculations of the referee were based upon the affidavit of Veronika Steen, Assistant Vice President of the plaintiff's successor-by-merger. Steen averred that she had personal knowledge of the matter through her review of the relevant documents, and that she had "[a]nnexed . . . a breakdown of the amounts due." However, the documents produced include the agreements between the parties, not

the payment history. Thus the computation was improperly premised upon unproduced business records … . Accordingly, the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale should have been denied. We therefore remit the matter to the Supreme Court … for a new report computing the amount due to the plaintiff in accordance herewith. Hudson City Sav. Bank v DePasquale, 2020 NY Slip Op 08047, Second Dept 12-30-12

REFEREE'S REPORT, HEARSAY.

THE REFEREE'S FINDINGS WERE BASED UPON INADMISSIBLE HEARSAY, JUDGMENT OF FORECLOSURE REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's findings in this foreclosure action were based upon inadmissible hearsay:

"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" … . Here, contrary to the plaintiff's contention, the affidavit of its document execution specialist, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records he purportedly relied upon in making his calculations … . Under the circumstances, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . Nationstar Mtge., LLC v Cavallaro, 2020 NY Slip Op 01624, Second Dept 3-11-20

REFEREE'S REPORT, HEARSAY.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN CONFIRMED; THE REFEREE RELIED ON HEARSAY AND FAILED TO CONDUCT A HEARING ON NOTICE AS REQUIRED BY THE CPLR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed. The evidence of default presented to the referee was hearsay and the referee did not hold a hearing on notice as required by CPLR 4320:

… [W]ith respect to the amount due to the plaintiff, the referee based his findings on the affidavit of Nicholas J. Raab, an employee of Specialized Loan Servicing, LLC, the plaintiff's loan servicing agent for the subject loan. While Raab provided a proper foundation for the admission of business records made by a prior servicer … , he failed to attach the business records themselves to his affidavit. Accordingly, Raab's assertions regarding the date of the defendant's default in making her mortgage payments, the total sum due to the plaintiff, which included the amount of accrued interest calculated from the date of default, and amounts purportedly paid in an escrow advance and for property preservation, without the business records themselves, constituted inadmissible hearsay … .

… [T]he referee should not have computed the amount due to the plaintiff without holding a hearing on notice to the defendant (see CPLR 4313 …). "While [the] Supreme Court has the authority to engage a Referee to compute and report the amount due under a mortgage (see, RPAPL 1321[1]), and can, in its order of reference, define the scope of the reference and delineate the Referee's powers and duties thereunder (CPLR 4311), absent any specified restrictions the Referee has those powers and duties delineated in CPLR article 43 and also must comply with the procedures specified therein … . One of the specified procedures is the conducting of a hearing (CPLR 4320[a]), upon notice (CPLR 4313)" … . Wells Fargo Bank, N.A. v Yesmin, 2020 NY Slip Op 05257, Second Dept 9-30-20

REINSTATEMENT CLAUSE.

THE MERE PRESENCE OF A REINSTATEMENT CLAUSE IN THE MORTGAGE, WHICH ESSENTIALLY ALLOWS A BORROWER IN DEFAULT TO PAY THE ARREARS AND STOP THE ACCELERATION OF THE DEBT, DOES NOT AFFECT OR IMPEDE THE ACCELERATION OF THE DEBT WHEN A FORECLOSURE ACTION IS STARTED; THE DEBT HERE WAS ACCELERATED WHEN THE FIRST FORECLOSURE ACTION WAS COMMENCED IN 2009 RENDERING THE INSTANT FORECLOSURE ACTION TIME-BARRED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Curran, agreeing with the Second Department, determined the mere presence of reinstatement clause in a mortgage, which allows a borrower who has missed payments to pay the amount of the missed payments and resume monthly payments, does not affect or impede the acceleration of the debt when a foreclosure action is brought. Therefore the foreclosure action at issue was time-barred:

The mortgage is a uniform instrument issued by Fannie Mae, among others, for use in New York State and contains several provisions that are relevant on appeal. Section 22 (acceleration provision) permits the lender to require immediate payment of the loan in full upon the borrower's default, provided certain conditions are met. Section 19 (reinstatement provision) grants a borrower in default the right to effectively de-accelerate the maturity of the mortgage debt by paying in full the past due amount, thereby returning the loan to its pre-default status. * * *

… [W]e conclude that the mortgage's reinstatement provision does not in any way affect or impede acceleration of the full mortgage debt. The reinstatement provision is not mentioned anywhere in the text of the mortgage's acceleration provision, which governs when Fannie Mae could exercise its option to accelerate the full debt … . Further, the language of the reinstatement provision "indicates that [Fannie Mae's] right to accelerate the entire debt may be exercised before the [borrower's] rights under the reinstatement provision . . . are exercised or extinguished" … . Thus, in effect, the reinstatement provision merely "gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met" … —which presupposes that an acceleration has already occurred. Federal Natl. Mtge. Assn. v Tortora, 2020 NY Slip Op 05410, Fourth Dept 10-2-20

RESTORE, MOTION TO RESTORE

FORECLOSURE ACTION AFTER ADMINISTRATIVE DISMISSAL. THE BANK'S MOTION TO RESTORE THE 2009 FORECLOSURE ACTION WHICH HAD BEEN ADMINISTRATIVELY, BUT NOT FORMALLY, DISMISSED SHOULD HAVE BEEN GRANTED; THE BANK HAD PREVIOUSLY STATED ITS INTENTION TO DISCONTINUE THE 2009 FORECLOSURE BUT THE MOTION TO RESTORE WAS NOT PRECLUDED BY THE JUDICIAL ESTOPPEL DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank should have been allowed to restore a 2009 foreclosure action which had been administratively, but not formally, dismissed. The court noted that the bank's prior statement of its intention to discontinue the 2009 action did not trigger the judicial estoppel doctrine:

While, in an effort to successfully prosecute the 2015 foreclosure action, the Bank represented that it would seek to discontinue the 2009 action, it is not judicially estopped from changing its position. " [A] party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed'" … . The Bank did not obtain a favorable judgment in the 2015 foreclosure action.

The Supreme Court should have granted that branch of the Bank's motion which was to restore the 2009 action to the active calendar. The 2009 action was never formally dismissed, as the marking-off procedures of CPLR 3404 do not apply to pre-note of issue actions such as this one … . Since the 2009 action could not properly be marked off pursuant to CPLR 3404, the Bank was not required to move to restore within any specified time frame and was not obligated to demonstrate a reasonable excuse and a potentially meritorious claim … . Further, there was neither a 90-day notice pursuant to CPLR 3216 … , nor an order dismissing the complaint pursuant to 22 NYCRR 202.27 … . Finally, [defendant] does not contend that the 2009 action was dismissed pursuant to CPLR 3215(c). Deutsche Bank Natl. Trust Co. v Gambino, 2020 NY Slip Op 01476, Second Dept 3-4-20

SERVICE OF PROCESS, NOTICE, RPAPL 1304, NOTICE NOT PROVEN, MAILING.

DEFENDANTS RAISED A QUESTION OF FACT ABOUT WHETHER THEY WERE SERVED WITH THE SUMMONS AND COMPLAINT AND 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 plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Defendants raised a question of fact whether they were served with the summons and complaint and plaintiff failed to prove compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

… [T]he defendants submitted the affidavit of Vicki Erani, in which she expressly averred that she was never served. She also averred that, on Thursdays, which was the day of the week of the alleged service, she customarily was away from her residence, assisting her mother with errands. The defendants also submitted the affidavit of Vicki Erani's mother confirming that Vicki Erani spent every Thursday with her. The defendants also submitted evidence that, in 2016, this particular process server's application to renew his license as an individual process server had been denied by the New York City Department of Consumer Affairs on the basis that he had falsified affidavits of service. The defendants' submissions rebutted the presumption of proper service established by the process server's affidavit … . * * *

… [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 because neither of the affidavits submitted by the plaintiff of two of its vice presidents asserted personal knowledge of the purported mailing and neither vice president made 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" … . The plaintiff failed to attach, as exhibits to the motion, any documents to prove that the

mailing actually happened. Since the plaintiff failed to provide evidence of the actual mailing, or evidence 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 … . Citimortgage, Inc. v Erani, 2020 NY Slip Op 00843, Second Dept 2-5-20

SERVICE OF PROCESS.

ALTHOUGH THE MOTION TO VACATE THE JUDGMENT OF FORECLOSURE FOR LACK OF PERSONAL JURISDICTION WAS PROPERLY GRANTED FOR THE MOVING DEFENDANT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED THE SAME RELIEF TO DEFENDANTS WHO DID NOT SO MOVE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that the judge should not have, sua sponte, vacated the judgment of foreclosure as against those defendants who did not move for that relief:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . "[T]he defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served'" … . Here, Hickson was the only defendant who moved to vacate the judgment of foreclosure and sale and to dismiss the complaint for lack of personal jurisdiction. Accordingly, under the circumstances of this case, the Supreme Court had no basis to, sua sponte, vacate so much of the judgment of foreclosure and sale as was against the defendants other than Hickson and to direct the dismissal of the complaint insofar as asserted against those defendants for lack personal jurisdiction. Lehman Bros. Bank v Hickson, 2020 NY Slip Op 04932, Second Dept 9-16-20

SERVICE OF PROCESS.

DEFENDANT PRESENTED SUFFICIENT PROOF SHE DID NOT LIVE AT THE ADDRESS WHERE THE FORECLOSURE COMPLAINT WAS SERVED TO WARRANT A HEARING; THERE WAS NO SHOWING THAT HER FAILURE TO UPDATE HER ADDRESS WITH THE DEPARTMENT OF MOTOR VEHICLES WAS TO PREVENT SERVICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to enter a default judgment in this foreclosure action should not have been granted without first holding a hearing on defendant's claim she was never served with the complaint. The defendant presented proof, including a lease, demonstrating she did not live at the address where service was made. The fact that defendant had not updated her address with the Department of Motor Vehicles did preclude defendant from demonstrating she lived at a different address because there was no evidence of a deliberate misrepresentation to prevent service:

… [T]he defendant successfully rebutted the process servers' affidavits through her specific averments that, at the time of each purported service, neither the New York Avenue address, nor the subject premises, was her residence, actual dwelling place, or usual place of abode … . Rather, the defendant averred that at the time of each purported service, she resided at an address on Albany Avenue in Brooklyn. The defendant annexed to her affidavit her lease for the Albany Avenue premises covering the period from January 25, 2014, through January 31, 2015, money orders made payable to the Albany Avenue landlord within the lease period, the defendant's 2015 W-2 bearing the Albany Avenue address, utility bills during the lease period bearing the Albany Avenue address, and bank statements during the lease period bearing the Albany Avenue address. These records, in conjunction with the defendant's sworn statements, are evidence that the defendant did not reside at the locations where process was served, and were sufficient to warrant a hearing … . Nationstar Mtge., LLC v Esdelle, 2020 NY Slip Op 04956, Second Dept 9-16-20

SERVICE OF PROCESS.

DEFENDANTS' CONCLUSORY AND UNSUBSTANTIATED CLAIMS DID NOT REBUT THE SWORN ALLEGATIONS OF PROPER SERVICE AND MAILING OF THE SUMMONS, COMPLAINT AND REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1303 NOTICE IN THIS FORECLOSURE ACTION; THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the complaint in the foreclosure action on the ground defendants were never served should not have been granted:

… [T]he affidavit of service contained sworn allegations reciting that service was made upon Simone Cohen at 4:48 p.m. on March 3, 2009, by delivering to her the summons, complaint, and notice required by RPAPL 1303 at the subject property. The affidavit of service included a description of Simone Cohen. Another affidavit of service of the same process server contained sworn allegations reciting that service was made upon Avi Cohen by delivering a copy of the relevant papers to "SIMONE COHEN (WIFE)," a person of suitable age and discretion, at 4:48 p.m. on March 3, 2009, at the subject property, "[s]aid premises being the Defendant's dwelling place within the State of New York," and described Simone Cohen as above. The process server further averred that on March 4, 2009, he mailed those documents to Avi Cohen at the address of the subject property "by depositing a true copy of the same in a postpaid, properly addressed envelope in a[n] official depository under the exclusive care and custody of the United States post office." Two additional affidavits of service recited that on March 4, 2009, copies of the summons were mailed to each defendant at the subject property.

Contrary to the determination of the Supreme Court, the defendants' submissions failed to rebut the affidavit of service, since they stated only that Simone Cohen could not have been present at the time of the alleged service since she picked up her children from school every Tuesday and that she could not have understood or answered the process server's questions or understood the import of the legal papers since she was not proficient in English. The defendants' conclusory and unsubstantiated submissions did not rebut the sworn allegation that a person fitting

the physical description of Simone Cohen was present at the residence at the time and accepted service … . Moreover, Avi Cohen did not deny that he received the papers in the mail and thus did not overcome the inference of proper mailing that arose from the affidavit of service … . Nationstar Mtge., LLC v Cohen, 2020 NY Slip Op 04312, Second Dept 7-29-20

SERVICE OF PROCESS.

EVEN IF PLAINTIFF BANK DID NOT SATISFY THE GOOD CAUSE STANDARD FOR AN EXTENSION OF TIME TO SERVE DEFENDANT IN THIS FORECLOSURE ACTION, PLAINTIFF WAS ENTITLED TO AN EXTENSION IN THE INTEREST OF JUSTICE PURSUANT TO CPLR 306-b (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff bank's motion to extend the time for service of the complaint in the interest of justice should have been granted. The Third Department noted that defendant had waived the statute of limitations defense by not asserting it in an answer or a motion to dismiss and Supreme Court should not have cancelled the mortgage because defendant did not request that relief:

… [D]efendant contends … that her default was properly vacated due to lack of personal jurisdiction. Plaintiff does not raise any argument as to whether service was properly effectuated upon defendant or whether a traverse hearing should have been granted. … Plaintiff instead argues that it was entitled to an extension of time under CPLR 306-b to cure any service defects.

To that end, a plaintiff may be granted an extension of time to serve process upon a defendant "upon good cause shown or in the interest of justice" … . Even if we agreed with defendant that plaintiff failed to satisfy the good cause standard of CPLR 306-b, we find that plaintiff established its entitlement to an extension of time in the interest of justice. "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" … . The record discloses that, approximately one month after commencing this action, plaintiff made numerous attempts to serve defendant at the

address provided on the mortgage documents. Plaintiff likewise cross-moved for an extension of time to cure any service defects approximately one month after defendant raised the issue of improper service. Furthermore, defendant does not argue, nor does the record indicate, that she would suffer any prejudice if an extension of time was granted. In view of the foregoing, and taking into account that plaintiff demonstrated the merits of its claim, plaintiff's cross motion, to the extent that it sought an extension of time to serve process in the interest of justice, should have been granted … . U.S. Bank Natl. Assn. v Kaufman, 2020 NY Slip Op 06184, Third Dept 10-29-20

SERVICE OF PROCESS.

MOTION TO EXTEND THE TIME TO SERVE DEFENDANT SHOULD HAVE BEEN GRANTED, DESPITE THE FACTS THAT THE FORECLOSURE ACTION HAD BEEN DISMISSED AND THE STATUTE OF LIMITATIONS HAD RUN (SECOND DEPT).

The Second Department, in an extensive opinion by Justice Leventhal, over a two-justice dissent, reversing Supreme Court, determined Supreme Court should have granted plaintiff's motion to extend the time to serve defendant pursuant to CPLR 306-b, despite the facts that the action had been dismissed and the statute of limitations had run. The action had been dismissed after a hearing to determine whether defendant had been served in this foreclosure action. At the time of the hearing the process server had died and plaintiff could not, therefore, meet its burden of proof:

… [W]e agree with the plaintiff that an extension of time to serve the defendant with the summons and complaint was warranted in the interest of justice. The action was timely commenced in December 2009, based on the defendant's alleged default that year in paying his indebtedness that was secured by the mortgage. The statute of limitations, however, had expired by the time the plaintiff moved pursuant to CPLR 306-b to extend the time for service … . The defendant had actual notice of the controversy. The Supreme Court, in its order dated December 17, 2013, wrote, among other things, that the defendant "is prepared to say anything and to conceal anything to stave off a foreclosure sale" and that "[i]t is clear that [the defendant]

has been well-aware that a foreclosure action was pending. (The day before a previously-scheduled foreclosure sale, [the defendant] filed a Chapter 13 bankruptcy petition)." The plaintiff also demonstrated the existence of a potentially meritorious cause of action, and the lack of identifiable prejudice to the defendant attributable to the delay in service … . Moreover, as the interest of justice standard permits consideration of "any other relevant factor" … , we take into account that the process server's death prior to the hearing on the issue of service hampered the plaintiff's ability to meet its burden of proof at that hearing. State of New York Mtge. Agency v Braun, 2020 NY Slip Op 01107, Second Dept 2-13-20

SERVICE OF PROCESS.

PLAINTIFF'S MOTION TO EXTEND THE TIME TO SERVE THE DEFENDANT PURSUANT TO CPLR 306-B SHOULD HAVE BEEN GRANTED IN THE INTEREST OF JUSTICE; IF A PLAINTIFF IS NOT ENTITLED TO EXTEND TIME FOR GOOD CAUSE, THE COURT SHOULD GO ON TO CONSIDER WHETHER THE MOTION SHOULD BE GRANTED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to extend the time to serve defendant should have been granted in the interest of justice. The court described the difference between the "good cause" and "interest of justice" analyses and indicated that if a court finds relief is not warranted for good cause, the interest of justice analysis should then be considered:

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 of the summons and complaint for good cause shown or in the interest of justice … . "'Good cause' and 'interest of justice' are two separate and independent statutory standards" … . "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service" … . If good cause for an extension is not established, the court must consider the broader interest of justice standard of CPLR 306-b … . In considering the interest of justice standard, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statutes of Limitations, the meritorious nature of the cause of action, the length of delay in

service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant'" … .

Although the plaintiff failed to establish good cause for an extension of time to serve the defendant under CPLR 306-b, it established that an extension of time to serve the defendant was warranted in the interest of justice. The plaintiff established, among other things, that it has a potentially meritorious cause of action, that it promptly moved for an extension of time to serve the summons and complaint after the defendant challenged service on the ground that it was defective, and that there was no demonstrable prejudice to the defendant as a consequence of the delay in service … . Wells Fargo Bank, N.A. v Ciafone, 2020 NY Slip Op 06580, Second Dept 11-12-20

SERVICE OF PROCESS.

SUPREME COURT PROPERLY DENIED PLAINTIFF BANK'S MOTION TO EXTEND THE TIME TO SERVE DEFENDANT IN THIS FORECLOSURE ACTION, TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, over a two-justice dissent, determined Supreme Court properly denied plaintiff bank's motion to extend the time to serve defendant in the interest of justice:

… [A] court may, in the interest of justice, extend the time in which a plaintiff may effectuate proper service upon a defendant (see CPLR 306-b) … . Whether to grant an extension of time for service in the interest of justice is a discretionary determination, requiring the trial court to engage in "a careful judicial analysis of the factual setting of the case" and balance competing interests … . The trial court's determination is guided by various factors and circumstances that may be taken into consideration, including the plaintiff's diligence (or lack thereof), the expiration of the statute of limitations, whether the underlying cause of action is meritorious, the length in delay of service, whether the plaintiff promptly sought the extension of time and any prejudice that may be borne by the defendant … . This Court should not disturb the trial court's discretionary determination unless such determination constitutes an abuse of discretion … . …

The statute of limitations had expired prior to plaintiff making its extension motion — a factor that weighs in favor of granting the extension motion. However, plaintiff engaged in a pattern of dilatory conduct throughout the action's pendency over nearly a decade. Indeed, it took plaintiff roughly three years after commencing the action to file a request for judicial intervention and the case was administratively closed by Supreme Court on at least one occasion. Additionally, despite having been made aware of the service issue in April 2016, plaintiff did not ultimately move for an extension to serve the complaint until November 2018, roughly 2½ years later. Further, as Supreme Court recognized, the mortgage contains a significant error, which raises real concerns as to plaintiff's ability to prevail upon the merits. In our view, Supreme Court weighed the appropriate factors and reasonably concluded that they did not militate in favor of plaintiff … . JPMorgan Chase Bank N.A. v Kelleher, 2020 NY Slip Op 06990, Third Dept 11-25-20

STANDING NOT PROVEN, DEFENDANTS' DEFUALT NOT PROVEN, NOTICE, RPAPL 130R, NOTICE NOT PROVEN, MAILING.

THE BANK DID NOT PROVE STANDING, DEFENDANT'S DEFAULT, OR COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; CRITERIA FOR PROVING EACH ISSUE EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment should not have been granted because plaintiff's standing, defendants' default, and plaintiff's compliance with the notice provisions of RPAPL 1304 were not proven. The Second Department explained the proof requirements for each:

… [T]he plaintiff failed to show that the note was properly endorsed and thus validly transferred to it … . * * *

… [T]he plaintiff also failed to submit admissible evidence of the defendants' default in making the mortgage payments due under the terms of the note and mortgage … . * * *

The plaintiff also failed to proffer evidence establishing its compliance with the notice requirements of RPAPL 1304. U.S. Bank N.A. v Moulton, 2020 NY Slip Op 00171, Second Dept 1-8-20

STANDING NOT PROVEN, HEARSAY.

HEARSAY DID NOT PROVE BANK HAD STANDING IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence submitted by plaintiff bank to establish standing in this foreclosure action was inadmissible hearsay:

"… [T]he plaintiff submitted the affidavit of a foreclosure specialist for Seterus, Inc. (hereinafter Seterus), which purports to be a subservicer for the Federal National Mortgage Association as assignee of the plaintiff as assignee of OneWest. The affidavit constitutes inadmissible hearsay, as the foreclosure specialist did not attest that he had personal knowledge of OneWest's business practices and procedures … , or that any records provided by OneWest were incorporated into Seterus's own records … , and also did not submit any documents to show that OneWest possessed the note at the time of the commencement of this action (see CPLR 4518[a] …). Since the foreclosure specialist also failed to establish a foundation to show that he had personal knowledge as to whether OneWest possessed the note prior to commencement of the action (see CPLR 3212[b] …), the plaintiff failed to establish its standing. The documents attached to the affirmation of counsel for the plaintiff are inadmissible hearsay as counsel failed to establish a foundation for admission of such documents as business records and the foreclosure specialist's affidavit does not reference the records attached to counsel's affirmation … . Moreover, even if a proper foundation for the admissibility of the business records had been established, the submitted documents do not show that OneWest had ownership of and the right to enforce the note at the time of the commencement of the action … . The plaintiff also failed to show OneWest's standing based upon a purported written assignment of the mortgage from MERS [Mortgage Electronic Registration system] to OneWest, as the plaintiff did not demonstrate that MERS had the authority to assign

the note …". Ocwen Loan Servicing, LLC v Schacker, 2020 NY Slip Op 04313, Second Dept 7-29-20

STANDING NOT PROVEN, HEARSAY.

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION; BANK'S MOTION FOR SUMMARY JUDGMENT 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. Plaintiff did not demonstrate it had standing to bring the action:

… [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence the action. In support of its motion, the plaintiff relied on the affidavit of Melissa Gallio, the Vice President of Loan Documentation for the plaintiff. Gallio stated that her knowledge of this case was based upon her review of "the books and records" maintained by the plaintiff, and asserted that the plaintiff was "in possession of the Note and Mortgage" "[a]s of January 10, 2007." However, Gallio's assertions as to the contents of the records were inadmissible hearsay to the extent that the records she purported 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 … . Wells Fargo Bank, N.A. v Springer, 2020 NY Slip Op 00176, Second Dept 1-8-20

STANDING NOT PROVEN, HEARSAY.

PROOF OF POSSESSION OF THE NOTE WHEN THE ACTION WAS COMMENCED WAS HEARSAY; PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO FORECLOSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The assertions that the note was in plaintiff's possession when the action was commenced were hearsay and were not supported by business records:

… [T]he plaintiff, to establish its standing to commence this mortgage foreclosure action, submitted an affirmation of Amber A. Jurek, a lawyer with Gross Polowy, LLC (hereinafter Gross Polowy), the plaintiff's counsel. Jurek stated that she was familiar with Gross Polowy's records and record-keeping practices. Jurek stated that on January 28, 2015, Gross Polowy received the plaintiff's file, which included the original endorsed note. Gross Polowy commenced this action on the plaintiff's behalf on February 26, 2015. According to Jurek, "[o]n that date, Gross Polowy, on behalf of Plaintiff, remained in physical possession of the collateral file, including the original endorsed Note dated March 20, 2012." The plaintiff also submitted the note, which bore an undated endorsement to the plaintiff. However, Jurek did not set forth any facts based on her personal knowledge to support her statement that the note in the plaintiff's file was the original endorsed note. Further, the plaintiff failed to attach the business records upon which Jurek relied in her affirmation, and since Jurek did not state that she personally witnessed Gross Polowy receive the plaintiff's file, her statement is inadmissible hearsay … .

The plaintiff also submitted an affidavit of April H. Hatfield, vice president of loan documentation for the plaintiff. Hatfield stated that she was familiar with the plaintiff's records and record-keeping practices. Although Hatfield attached the records upon which she relied, she did not state that the plaintiff had possession of the endorsed note at the time the action was commenced. Rather, she relied on Jurek's affidavit for that fact. Accordingly, Hatfield's affidavit was also insufficient to establish the plaintiff's standing.

Finally, the plaintiff did not attach a copy of the note to the complaint when commencing this action. Therefore, the plaintiff failed to establish, prima facie, that it had standing to commence this action … . Wells Fargo Bank, N.A. v Bakth, 2020 NY Slip Op 01382, Second Dept 2-26-20

STANDING NOT PROVEN, HEARSAY.

THE BANK DID NOT PROVE IT HAD STANDING IN THIS FORECLOSURE ACTION, PRESENTING ONLY HEARSAY; SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure proceeding did not prove it had standing, that the defendant was in default, or that the notice provisions of Real Property Actions and Proceedings La (RPAPL) 1304 were complied with. With respect to standing, the Second Department wrote:

… [T]he plaintiff submitted the note, which contains an undated endorsement in blank, as well as affidavits from two vice presidents of loan documents for its loan servicer, Wells Fargo Bank, N.A. (hereinafter Wells Fargo). In both affidavits … each vice president stated that review Wells Fargo's business records relating to the subject mortgage loan had confirmed that the plaintiff was in possession of the note prior to November 7, 2012. Neither one identified the documents reviewed or any basis for the conclusion that the plaintiff was in possession of the note more than two years prior to the subject review of Wells Fargo's files. The only document relevant to this issue attached to either affidavit was a copy of the note with the undated endorsement in blank. Under these circumstances, the affidavits constituted inadmissible hearsay and lacked any probative value … . HSBC Bank USA, N.A. v Campbell-Antoine, 2020 NY Slip Op 00578, Second Dept 1-29-20

STANDING NOT PROVEN, HEARSAY.

THE BANK'S EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION WAS NOT SUPPORTED BY THE RECORDS ALLEGEDLY REVIEWED BY THE AFFIANT; THEREFORE THE EVIDENCE WAS HEARSAY AND THE BANK'S MOTION FOR SUMMARY JUDGMENT 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 because the evidence of standing to bring the action was deficient:

… [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence the action. In support of its motion, the plaintiff relied on the affidavit of Elizabeth Gonzales, an employee of the loan servicer. Gonzales averred that the plaintiff had been in possession of the note, which was endorsed in blank, since July 1, 2007, prior to the commencement of the action. Gonzales indicated that she had personal knowledge of the assertions set forth in her affidavit based upon, inter alia, her review of various business records. However, since the plaintiff failed to attach the business records upon which Gonzales relied in her affidavit, her assertions based upon those records constituted inadmissible hearsay … . Moreover, the plaintiff did not attach a copy of the note to the complaint when commencing the action … . Deutsche Bank Natl. Trust Co. v Gulati, 2020 NY Slip Op 06754, Second Dept 11-18-20

Similar issues and result in JPMorgan Chase Bank, N.A. v Tumelty, 2020 NY Slip Op 06766, Second Dept 11-18-20

STANDING NOT PROVEN, RES JUDICATA AND COLLATERAL ESTOPPEL NOT APPLICABLE TO SUBSEQUENT ACTION.

PLAINTIFF BANK'S PRIOR FORECLOSURE ACTION WAS DISMISSED FOR FAILURE TO DEMONSTRATE STANDING; RES JUDICATA DOES NOT PRECLUDE THE INSTANT FORECLOSURE ACTION BECAUSE THE PRIOR ACTION WAS NOT DISMISSED ON THE MERITS; COLLATERAL ESTOPPEL DOES NOT PRECLUDE THE INSTANT ACTION BECAUSE THE STANDING ISSUE IS NOT THE SAME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prior dismissal of plaintiff bank's foreclosure action for failure to demonstrate standing did not, under the doctrines of res judicata or collateral estoppel, preclude the present action. The prior dismissal was not on the merits and the standing issue in the current procedure is not the same as in the prior proceeding:

Here, as the prior action was dismissed for lack of standing, without reaching the merits of the foreclosure claim itself, the defendants failed to demonstrate that "a judgment on the merits exists between the same parties involving the same subject matter" … . "To accord res judicata effect to the [judgment in the prior action] would bar a court from ever addressing the merits of plaintiff's mortgage foreclosure claim, even if plaintiff became able to demonstrate its standing to sue, and there is nothing in the record to suggest . . . [that there are] exceptional circumstances or an unreasonable neglect to prosecute that would warrant such an extreme sanction" … . …

… [T]the defendants failed to demonstrate that the issue of whether the plaintiff has standing under the circumstances of this action was identical to the issue adjudicated in the prior action … . In the prior action, the plaintiff failed to establish that it had possession of the original endorsed note at the time that action was commenced, while in the present action, the issue is whether the plaintiff had possession of the original endorsed note at the time this action was commenced … . HSBC Bank USA, N.A. v Pantel, 2020 NY Slip Op 00109, Second Dept 1-8-20

STANDING NOT PROVEN.

PLAINTIFF BANK DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank (US Bank) did not demonstrate it had standing to bring the foreclosure action:

A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced … . Here, the plaintiff established that Chase had possession of the note at issue at the time this action was commenced. However, the plaintiff failed to establish that Chase had the authority to act on its behalf at that time … . US Bank N.A. v Cusati, 2020 NY Slip Op 03943, Second Dept 7-15-20

STANDING NOT PROVEN.

PLAINTIFF BANK DID NOT DEMONSTRATE STANDING WITH ADMISSIBLE EVIDENCE AND THE LOST NOTE AFFIDAVIT WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing with admissible evidence and the lost note affidavit was insufficient:

… [T]he only business record entered into evidence to support DeCaro's [plaintiff's loan verification consultant's] testimony that the plaintiff was in possession of the note on the date of commencement was plaintiff's Exhibit 7, a computer screen printout of a database tracking system. However, plaintiff's Exhibit 7 failed to evince the facts for which it was relied upon. More specifically, while DeCaro contended that the document demonstrated that Wells Fargo, as custodian for the plaintiff, received the note July 16, 2005, and that the note was in Wells Fargo's vault from July 2005 until December 2009, the document, in itself, failed to establish those facts.

Further, pursuant to UCC 3-804, which is intended to provide a method for recovering on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit due proof of the plaintiff's ownership of the note, the facts which prevent the plaintiff from producing the note, and the note's terms … . Here, the lost note affidavit, which failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occurred, who conducted the search, or how or when the note was lost, failed to sufficiently establish the plaintiff's ownership of the note … . HSBC Bank USA, N.A. v Gilbert, 2020 NY Slip Op 07874, Second Dept 12-23-20

STANDING NOT PROVEN.

THE BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank (Wilmington) did not demonstrate defendants' default in this foreclosure action and the bank's motion for summary judgment should not have been granted:

Wilmington failed to establish, prima facie, its entitlement to judgment as a matter of law, as it failed to submit evidence demonstrating the defendants' default in payment … . In support of the motion, Wilmington submitted … copies of the note and the mortgage, and the affidavit of Angela Farmer, a vice president of Rushmore Loan Management Services, LLC (hereinafter Rushmore), the servicer of the loan. Based on her review of business records in the possession of Rushmore, including records created by Ditech [the original plaintiff, note was transferred to Wilmington], Farmer averred that the defendants defaulted in payment in June 2013. While Farmer established that she was familiar with Ditech's recordkeeping practices and procedures, no payment records were proffered with the motion. The only business records annexed and incorporated in the affidavit with regard to the default were two notices of default both dated October 24, 2013 … . "'[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" … . Wilmington Sav. Fund, FSB v Peters, 020 NY Slip Op 07248, Second Dept 12-2-20

STANDING NOT PROVEN.

THE BANK DID NOT PROVE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (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. Plaintiff bank did not submit sufficient proof of standing to bring the action:

Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief … . A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note … . Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident … . Here, the plaintiff failed to meet its burden to establish, prima facie, its entitlement to summary judgment because the affidavit submitted in support of the motion was insufficient to establish standing … . Deutsche Bank Natl. Trust Co. v Conrado, 2020 NY Slip Op 00103, Second Dept 1-8-20

STANDING NOT PROVEN.

THE BANK FAILED TO DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION WITH ADMISSIBLE EVIDENCE; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The bank's motion for summary judgment should not have been granted:

The plaintiff failed to present admissible evidence establishing that the plaintiff or its counsel was in possession of the note at the time of commencement of the action. In support of its motion, the plaintiff submitted the affidavit of Howard R. Handville, a senior loan analyst at Ocwen Financial Corporation whose indirect subsidiary is Ocwen Loan Servicing, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Handville attested that he reviewed the servicing records maintained by Ocwen in its ordinary course of business, that prior servicers' records were integrated into Ocwen's records and relied upon by Ocwen and that "[b]ased on [his] review of the Servicing Records, the original Note and Mortgage for the Loan were physically delivered to Plaintiff's custodian on April 25, 2007, prior to the commencement of this foreclosure action." Handville further averred that "[s]ince that date, the original Note and Mortgage have remained in the physical possession of Plaintiff or its counsel." Even if Handville's affidavit was sufficient to lay a proper foundation for the admission of the "Servicing Records," the affidavit was insufficient to establish standing because the records themselves were not submitted by the plaintiff. "'[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' … , and 'a witness's description of a document not admitted into evidence is hearsay' … . Deutsche Bank Natl. Trust Co. v Schmelzinger, 2020 NY Slip Op 07543, Second Dept 12-16-20

STANDING NOT PROVEN.

THE BANK PRESENTED INADMISSIBLE EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

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

While a witness may always testify as to matters within his or her personal knowledge through personal observation … , here, Klein [plaintiff's counsel] did not provide any factual details concerning when Cohn & Roth [Klein's lawfirm] came into physical possession of the consolidated note and allonges … . Modlin's [an authorized signatory's] affidavit was similarly deficient inasmuch as she failed to identify the documents reviewed or any basis for the conclusion that the consolidated note and allonges had been in the plaintiff's possession and were sent to Cohn & Roth prior to the commencement of the action. Under these circumstances, the statements made by Klein and Modlin constituted inadmissible hearsay and lacked probative value … . U.S. Bank Trust N.A. v Auxila, 2020 NY Slip Op 07945, Second Dept 12-23-20

STANDING NOT PROVEN.

THE BANK'S DOCUMENTARY EVIDENCE DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department determined plaintiff bank did not demonstrate standing to bring the foreclosure action and the bank's motion for summary judgment was properly denied:

"Although the 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" … . "'[E]vidence of the contents of business records is admissible only where the records themselves are introduced'" … . Without submission of the business records, a

witness's testimony as to the contents of the records is inadmissible hearsay (see CPLR 4518[a] …). Here, Herberg's [bank's vice president's] assertion, in effect, that the plaintiff was the holder of the note when it commenced the action appears to be based upon unproduced business records or upon confirmation of information from some other unproduced source, and is therefore not probative on the issue of the plaintiff's standing … . Wells Fargo Bank, N.A. v Atedgi, 2020 NY Slip Op 07247, Second Dept 12-2-20

STANDING NOT PROVEN.

THE PLAINTIFF BANK 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 standing to bring the foreclosure action:

Wells Fargo failed to establish, prima facie, that it had possession of the note prior to the commencement of the action, and thus failed to establish that it had standing to foreclose the mortgage … . Wells Fargo did not attach a copy of the note and allonge to the complaint when the action was commenced to establish, prima facie, that it had possession of the note at that time … . Moreover, the affidavit of Wells Fargo's vice president of loan documentation was insufficient to establish that Wells Fargo possessed the note at the time the action was commenced … . Wells Fargo Bank, N.A. v Elsman, 2020 NY Slip Op 00321, Second Dept 1-15-20

STANDING, WAIVER OF DEFENSE.

ALTHOUGH RPAPL 1320-a, ENACTED WHILE THIS APPEAL WAS PENDING, HAS CHANGED THINGS, THE DEFENDANTS' LACK-OF-STANDING DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN THEIR ANSWERS OR PRE-ANSWER MOTIONS; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED (CT APP).

The Court of Appeals, in a brief memorandum with an extensive concurring opinion, determined the defendants in the foreclosure action had waived the lack-of-standing defense by not raising it in their answers or pre-answer motions. The court noted that Real Property Actions and Proceedings Law (RPAPL) 1320-a, which was enacted when this appeal was pending, may allow standing to be raised "at this stage of the litigation:"

… Supreme Court did not err in granting plaintiff's motions for summary judgment and for a judgment of foreclosure and sale. Defendants failed to raise standing in their answers or in pre-answer motions as required by CPLR 3211 (e) and accordingly, under the law in effect at the time of the orders appealed from, the defense was waived … . Defendants' argument that ownership is an essential element of a foreclosure action, raised for the first time in support of their motion for reargument at the Appellate Division, is unpreserved for our review. We do not reach the issue of whether RPAPL 1302-a, enacted while this appeal was pending, affords defendants an opportunity to raise standing at this stage of the litigation. Defendants are free to apply to the trial court for any relief that may be available to them under that statute. JPMorgan Chase Bank, N.A. v Caliguri, 2020 NY Slip Op 07660, CtApp 12-17-20

STANDING, WAIVER OF DEFENSE.

THE FAILURE TO RAISE THE LACK OF STANDING DEFENSE IN A FORECLOSURE ACTION CAN BE REMEDIED BY A MOTION TO AMEND THE ANSWER AND BY RAISING THE DEFENSE IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Miller, explained the relationship between the waiver provisions in CPLR 3211 (e) and Real Property Actions and Proceedings Law (RPAPL) 1302-a in foreclosure proceedings. The opinion includes a detailed discussion of when defenses are waived by the failure to include them in the answer and when and how such omissions can be remedied by a motion to amend or in a summary judgment motion. The opinion is much too detailed to be summarized here and should be consulted as authoritative on these issues. The narrow issue addressed by the opinion is the effect of failing to raise the defense of a lack of standing in the answer to a foreclosure complaint:

… [W]e now reaffirm that a waiver of the defense of standing pursuant to CPLR 3211(e) should be given the same force and effect as a waiver of the affirmative defenses specifically enumerated in CPLR 3211(a)(3) and (5) … . Accordingly, a waiver of the affirmative defense of standing pursuant to CPLR 3211(e) may be retracted through the amendment of a pleading pursuant to CPLR 3025 … . Case law from this Court should not be read to hold otherwise … . * * *

Where applicable, RPAPL 1302-a places the defense of standing on a footing comparable with the other defenses that are exempt from the waiver provisions of CPLR 3211(e), to wit, those defenses listed in subdivisions CPLR 3211(a)(2), (7), and (10), which may be raised by motion "at any time" … , or by amendment to a pleading, "if one is permitted" (CPLR 3211[e]; see CPL 3025[b]). Even where the defense of standing is omitted from a defendant's answer in violation of CPLR 3018(b), the defense may be raised for the first time in opposition to a plaintiff's motion for summary judgment … . GMAC Mtge., LLC v Coombs, 2020 NY Slip Op 07039, Second Dept 11-25-20

STATUTE OF FRAUDS, ORAL CONTRACT FOR REPAYMENT.

PLAINTIFFS' ACTION ALLEGING BREACH OF AN ORAL CONTRACT REGARDING REPAYMENT OF A LOAN SECURED BY A NOTE AND MORTGAGE SHOULD HAVE BEEN DISMISSED AS BARRED BY THE STATUTE OF FRAUDS; THE FRAUD AND UNJUST ENRICHMENT CAUSES OF ACTION MUST BE DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' action alleging breach of an alleged oral contract concerning the repayment of a loan secured by a note an mortgage should have been dismissed as barred by the statute of frauds. The fraud and unjust enrichment causes of action must also be dismissed as duplicative of the breach of contract cause of action:

The complaint alleged that contemporaneously with executing the note and mortgage, the plaintiffs and the defendant entered into an oral agreement providing, inter alia, that in exchange for assigning a contract to purchase certain real property to the defendant, the plaintiffs would be responsible for paying only the interest on the loan. The complaint, which asserted causes of action sounding in breach of contract, fraud, and unjust enrichment, sought, among other things, recovery of the settlement amount paid by the plaintiffs in the foreclosure action, less the amount of interest allegedly due pursuant to the oral agreement. The defendant moved pursuant to CPLR 3211(a) to dismiss the complaint. The Supreme Court denied the motion, and the defendant appeals.

Accepting the facts as alleged in the complaint as true, and according the plaintiffs the benefit of every possible inference, dismissal of the breach of contract cause of action should have been granted, since enforcement of the alleged oral agreement, ostensibly to modify the note and mortgage, is barred by the statute of frauds (see General Obligations Law §§ 5-703[1]; 5-1103 …). Dismissal of the causes of action alleging fraud and unjust enrichment should also have been granted as they are duplicative of the unenforceable contractual cause of action and thus constitute an impermissible attempt to circumvent the statute of frauds … . Botanical Realty Assoc. Urban Renewal, LLC v Gluck, 2020 NY Slip Op 00099, Second Dept 1-8-20

STATUTE OF LIMITATION, DE-ACCELERATION, DISCONTINUANCE.

A STIPULATION OF DISCONTINUANCE OF THE 2008 FORECLOSURE ACTION DID NOT MENTION DE-ACCELERATION OF THE DEBT OR THE ACCEPTANCE OF FUTURE INSTALLMENT PAYMENTS; THEREFORE THE DEBT WAS NOT DE-ACCELERATED AND THE SUBSEQUENT FORECLOSURE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a stipulation of a discontinuance of the 2008 foreclosure action did not de-accelerate the debt. The foreclosure action was therefore time-barred:

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due … . Once a mortgage debt is accelerated, however, the statute of limitations begins to run on the entire debt … . "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" … .
* * *

Contrary to the plaintiff's contention, Bank of New York's execution of the stipulation of discontinuance of the 2008 action did not, by itself, constitute an affirmative act revoking acceleration … . Notably, the stipulation was silent on the issue of acceleration and did not otherwise indicate that the plaintiff would accept installment payments … . Moreover, a notice of de-acceleration must be "clear and unambiguous to be valid and enforceable" … . Here, the notices of intent and 90-day notices which were sent prior to commencement of this action were completely silent as to de-acceleration. Bank of N.Y. Mellon v Yacoob, 2020 NY Slip Op 02451, Second Dept 4-29-20

STATUTE OF LIMITATION, PAYMENTS MADE AFTER EXPIRATION.

PURPORTED MORTGAGE PAYMENTS MADE AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT REVIVE THE STATUTE OF LIMITATIONS FOR THE PURCHASERS OF THE ENCUMBERED PROPERTY OR THE BANK WHICH ISSUED A MORTGAGE SECURED BY THE ENCUMBERED PROPERTY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined mortgage payments allegedly made after the expiration of the statute of limitations for a foreclosure action did not revive the statute of limitations as against defendants, who purchased the encumbered property, and defendant bank which issued a mortgage secured by the property:

… [T]he tolling or revival effect of partial payments differs as between the payor — the Gureckis — and subsequent purchasers — defendants (see General Obligations Law § 17-107 [2]). [A] qualifying partial payment that is made before the expiration of the statute of limitations will renew the statute of limitations against any subsequent purchaser (see General Obligations Law § 17-107 [2] [2d par] ..). In contrast, a qualifying partial payment that is made after the expiration of the statute of limitations will only revive the statute of limitations as to a subsequent purchaser who did not give value or who had actual notice of the making of the payment … . Here, … at the time that [the payments] were made the statute of limitations had expired. Given that the record is clear that defendants are purchasers for value and plaintiff put forth no evidence that defendants had actual notice of the … payments, the payments did not have the effect of reviving the statute of limitations as to defendants (see General Obligations Law § 17-107 [2] …). Gurecki v Gurecki, 2020 NY Slip Op 07257, Third Dept 12-3-20

STATUTE OF LIMITATIONS, ACCELERATION, DEATH OF PARTY.

UNDER THE TERMS OF THE MORTGAGE, THE DEATH OF THE BORROWER DID NOT ACCELERATE THE DEBT; BECAUSE THE DEBT WAS NOT ACCELERATED THE INSTALLMENT PAYMENTS FOR THE SIX YEARS PRIOR TO THE COMMENCEMENT OF THE FORECLOSURE ACTION WERE STILL OWING AND THE ACTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed as time-barred, noting that the death of the borrower did not accelerate the debt. Therefore the installment payments due during the six year prior to commencing the action were still owing:

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213 [4]). Here, the note provided that decedent agreed to repay the loan in monthly installments from September 2007 to August 2032. "[W]ith respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the [s]tatute of [l]imitations [begins] to run, on the date each installment [becomes] due" … . Plaintiff commenced this foreclosure action on September 15, 2017. Therefore, recovery for the installments due within the six years prior to that date, i.e., September 15, 2011, is not barred by the statute of limitations. To the extent that plaintiff seeks recovery for installments due before that date, recovery is barred by the statute of limitations … . * * *

We reject defendants' contention that the debt accelerated automatically upon decedent's death. The mortgage provides that there is a default upon decedent's death, but it does not provide that the death of decedent would automatically accelerate the debt. Rather, the mortgage provides that the lender may accelerate the debt upon a default and, here, defendants did not establish that plaintiff chose to accelerate the debt at any time before the complaint was filed … . Wilmington Sav. Fund Socy. FSB v Deliberto, 2020 NY Slip Op 03297, Fourth Dept 6-12-20

STATUTE OF LIMITATIONS, ACCELERATION, NOTICE OF DEFAULT.

NOTICE OF DEFAULT DID NOT ACCELERATE THE MORTGAGE DEBT; THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage debt was never accelerated and therefore the six-year statute of limitations did not begin to run in this foreclosure action:

An action to foreclose a mortgage is subject to 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" … .

… [T]he May 3, 2007, notice of default, which advised that the loan would be accelerated if the default was not cured by June 7, 2007, was "nothing more than a letter discussing acceleration as a possible future event, which [did] not constitute an exercise of the mortgage's optional acceleration clause" … . U.S. Bank N.A. v Mongru, 2020 NY Slip Op 03137, Second Dept 6-3-20

STATUTE OF LIMITATIONS, ACCELERATION, REVOCATION OF ACCELERATION.

PLAINTIFF BANK NEVER REVOKED THE ACCELERATION OF THE MORTGAGE DEBT; FIFTH FORECLOSURE ACTION TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was no evidence plaintiff bank revoked the acceleration of the mortgage debt and the foreclosure action was therefore time-barred:

Plaintiff Wells Fargo Bank failed to affirmatively revoke the acceleration of defendant's mortgage debt, as mere voluntary discontinuance of a foreclosure action

is insufficient, in itself, to constitute an affirmative act of revocation … . Wells Fargo admitted that its primary reason for revoking acceleration of the mortgage debt was to avoid the statute of limitations bar, and it proceeded to collect on the accelerated loan amount in a fifth foreclosure action filed shortly after it made its motion to revoke acceleration … .

Moreover, Wells Fargo's fifth foreclosure action, commenced on or around December 11, 2017, is time-barred, as Wells Fargo had accelerated the mortgage debt when it commenced its second foreclosure action on September 16, 2009 (CPLR 213[4] …). The fact that the prior foreclosure actions were dismissed does not undo Wells Fargo's act of accelerating the mortgage debt. Wells Fargo Bank, N.A. v Ferrato, 2020 NY Slip Op 03067, First Dept 5-28-20

STATUTE OF LIMITATIONS, ACCELERATION.

THE NOTICES INFORMED DEFENDANTS THAT THE MORTGAGE PAYMENTS ACCELERATED ON JANUARY 21, 2011; THE FACT THAT NOTICES REITERATING THAT SAME ACCELERATION DATE WERE SENT AS LATE AS NOVEMBER 2013 DID NOT CHANGE THE OPERATIVE DATE; THE FORECLOSURE ACTION COMMENCED IN MARCH 2017 WAS TIME-BARRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the mortgage payments were accelerated on January 21, 2011. The defendants were notified of the acceleration date in December 2010. Additional notices were sent to defendants as late as November 2013, but all the notices reiterated that January 21, 2011 was the acceleration date. The foreclosure action commenced in March 2017 was deemed time-barred:

The December 2010 notice stated that, on January 21, 2011, "the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." Between July 2012 and November 2013, five additional notices were sent to defendants, each reiterating that "[t]he acceleration date of January 21, 2011 . . . remains in effect." * * *

… [T]he December 2010 notice states that, "[i]f the default is not cured on or before January 21, 2011, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." This language, particularly the underlined language in the notice, indicates the date on which the debt was to be accelerated. A plain reading of the notice does not provide any suggestion that, except for curing the default, the outstanding debt would not be accelerated on that date. As such, the notice clearly and unequivocally indicates that the outstanding mortgage payments would be accelerated on January 21, 2011 … . The reiteration of this acceleration date in five subsequent letters only further evinces the acceleration date of January 21, 2011 … . MTGLQ Invs., LLP v Lunder, 2020 NY Slip Op 02690, Third Dept 5-7-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DEMANDED ONLY THE AMOUNT NECESSARY TO CURE THE DEFUALT.

BY NOT SEEKING THE FULL AMOUNT OF THE DEBT IN THE 90-DAY NOTICE PLAINTIFF MAY HAVE DE-ACCELERATED THE DEBT MAKING THE FORECLOSURE ACTION TIMELY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff, by demonstrating it did not demand the full debt, but rather demanded only the amount needed to cure the default, presented sufficient proof that the debt had not been accelerated, and therefore the action was timely, to warrant restoring the matter to the calendar. The action had been dismissed when plaintiff did not appear at a scheduled conference. Defendant had moved to dismiss alleging the debt had been accelerated and the action was time-barred:

Plaintiff … moved, pursuant to CPLR 5015(a)(1), to vacate the dismissal order and reinstate the claim. * * *

… [P]laintiff provided evidence that it took affirmative action to de-accelerate the mortgage, which would have stopped the running of the statute of limitations on the mortgage debt. The 90-day notice provided to defendant sought an amount lower than the accelerated amount, which may evidence an intent to de-accelerate. While

seeking a lower amount in and of itself is not enough to establish, as a matter of law, that the 90-day notice "destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt" … . it is sufficient to meet the "minimal showing" required on a motion to restore … . Federal Natl. Mtge. Assn. v Rosenberg, 2020 NY Slip Op 00814, First Dept 2-4-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTINUANCE.

ATTEMPTS TO DE-ACCELERATE THE DEBT, INCLUDING VOLUNTARY DISCONTINUANCES AFTER THE DEATH OF THE DEFENDANT, WERE INEFFECTUAL, THE FORECLOSURE ACTION IS TIME-BARRED (THIRD DEPT).

The Third Department, over a two-justice concurrence, determined the statute of limitations began to run in 2009 when the mortgage debt was accelerated in this foreclosure action and the attempts to subsequently de-accelerate the debt after the death of the defendant, including voluntary discontinuances, were ineffectual. Therefore the action was time-barred:

With respect to the notices of discontinuance in the 2009 and 2013 actions, we note that we, as well as other Appellate Divisions, have held that the voluntary discontinuance of an action, without more, will not generally constitute an affirmative act that revokes a lender's election to accelerate a debt … . * * *

In the 2009 action, plaintiff filed its notice of voluntary discontinuance roughly 13 months after decedent had passed away, without having sought substitution of a legal representative to act on behalf of decedent's estate (see CPLR 1021; see also SCPA 1002, 1401, 1402 [1] [b]). Thus, as the action was stayed and there was no substitution of a proper defendant, the notice of voluntary discontinuance filed in the 2009 action was without effect. … As for the notice of discontinuance filed in the 2013 action, plaintiff commenced that action against decedent, despite the fact that she had died more than two years earlier. As a result, the 2013 action was a nullity from its inception and the subsequent notice of voluntary discontinuance was void … .

We similarly find that, under the circumstances of this case, the July 2015 and September 2015 notices did not constitute affirmative acts that would notify decedent's legal representative that the prior debt acceleration was revoked, that the debt was de-accelerated and that the loan was reinstated to installment payments. Irrespective of the content and substance of the July 2015 and September 2015 notices, plaintiff addressed the notices to decedent, who had been deceased for more than four years, and mailed them to the mortgaged property. The record reflects that the September 2015 letter, which was sent by both regular mail and certified mail, was returned as undeliverable. Beneficial Homeowner Serv. Corp. v Heirs at Large of Ramona E. Thwaits, 2020 NY Slip Op 03709, Third Dept 7-2-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTINUANCE.

THE DISCONTINUANCE OF THE 2008 FORECLOSURE ACTION DID NOT DE-ACCELERATE THE DEBT SO THE STATUTE OF LIMITATIONS KEPT RUNNING, RENDERING THE INSTANT ACTION UNTIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should have been dismissed as untimely. The debt was accelerated with the first foreclosure action was commenced in 2008, starting the running of the six-year statute of limitations. The discontinuing of the that action did not revoke the acceleration:

"[A] lender's mere act of discontinuing an action, without more, does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt" … .

None of the other facts relied upon by the plaintiff establish that the 2008 acceleration of the loan balance was affirmatively revoked. "[D]e-acceleration notices must . . . be clear and unambiguous to be valid and enforceable" … . While the plaintiff points to the fact that the defendant purportedly received billing statements after the first action was discontinued and that the second complaint alleged a different date of default, these facts do not establish that a clear and unambiguous notice of revocation of the acceleration was given to the

defendant. Wells Fargo Bank, N.A. v Islam, 2020 NY Slip Op 06823, Second Dept 11-18-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTINUANCE.

THE FORECLOSURE ACTION WAS TIME-BARRED; THE DISCONTINUANCE DID NOT DE-ACCELERATE THE DEBT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this foreclosure action should have been granted. The action was time-barred. The debt was accelerated when the foreclosure action was started and the discontinuance did not de-accelerate the debt:

Plaintiff's … contention—that the stipulation of discontinuance in the 2007 action revoked the acceleration of the debt—is likewise without merit. … Here, the stipulation of discontinuance in the 2007 action is silent on the issue of the revocation of the election to accelerate and does not otherwise indicate that the plaintiff would accept installment payments from the defendant and thus did not constitute an affirmative act revoking acceleration … . Deutsche Bank Natl. Trust Co. v Ebanks, 2020 NY Slip Op 08035, Second Dept 12-30-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTINUANCE.

THE MERE DISCONTINUANCE OF THE PRIOR FORECLOSURE ACTION DID NOT DE-ACCELERATE THE MORTGAGE DEBT; EXPLICIT NOTICE OF DE-ACCELERATION IS REQUIRED EITHER IN THE MOTION TO DISCONTINUE ITSELF OR IN A SEPARATE NOTICE; THEREFORE THE INSTANT FORECLOSURE ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, over an extensive partial dissent, determined the discontinuance of a prior foreclosure action did not, standing alone, de-accelerate the debt. Therefore the instant foreclosure action was time-barred. The Second Department noted that the plaintiff did not submit the motion papers for the discontinuance and therefore did not submit any evidence that the debt was explicitly de-accelerated in those papers, or in any other notice to the defendant. Such explicit notice is required:

A de-acceleration of the full debt revives the borrower's right to make the monthly payments that became due between the time the loan was accelerated and the time the acceleration was revoked, together with the right to make future monthly installment payments. Since the borrower may continue to assume that its lender or servicer will not accept post-acceleration monthly payments, the lender, in order to effectively rescind the acceleration, should be required to notify the borrower that the right to make monthly payments is restored and that the lender will accept the tender of such payments … . * * *

A bare discontinuance of litigation does not nullify the fact that a contractual right to accelerate has been unilaterally exercised pursuant to the terms of a note. An acceleration of loan debt by the transmittal of a letter or by the commencement of an action in a court of law has legal implications, such as the financial penalties authorized under the note, the potential negative effect upon the borrower's credit rating, and reliance by the borrower that monthly payments will no longer be expected or accepted and thereby prevent any pay-down of the balance owed. To occur, none of these or other consequences of an acceleration require any permission, ruling, stipulation, decision, or order of a court, as they are independent of the litigation … . Trust v Barua, 2020 NY Slip Op 03095, Second Dept 6-3-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTINUANCE.

THE STIPULATION OF DISCONTINUANCE DID NOT DEMONSTRATE THE MORTGAGE DEBT WAS DE-ACCELERATED WITHIN THE SIX-YEAR STATUTE OF LIMITATIONS PERIOD IN THIS FORECLOSURE ACTION; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined plaintiff bank did not prove the debt had been de-accelerated and therefore did not demonstrate the foreclosure action was not time-barred. It was not demonstrated that the stipulation of discontinuance affirmatively revoked the initial acceleration of the debt:

"A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" … .

Here, there is no evidence in the record of any affirmative act of revocation occurring during the six-year statute of limitations period following the initiation of the 2008 foreclosure action … . The only evidence submitted by the plaintiff to establish its affirmative act of revocation was a printout of the Queens County Clerk Minutes, showing that a stipulation of discontinuance and a consent to cancel the lis pendens were filed in the 2008 foreclosure action on July 1, 2013. The plaintiff did not submit a copy of the stipulation of discontinuance. A stipulation of discontinuance will not, by itself, constitute an affirmative act of revocation where the stipulation is silent on the issue of the election to accelerate, and does not otherwise indicate that the plaintiff would accept installment payments from the defendant … . Wells Fargo Bank, N.A. v Hussain, 2020 NY Slip Op 04997, Second Dept 9-16-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTINUANCE.

VOLUNTARY DISCONTINUANCES OF PRIOR FORECLOSURE ACTIONS AND THE RELATED CORRESPONDENCE DID NOT UNAMBIGUOUSLY DE-ACCELERATE THE DEBT; THEREFORE THE FORECLOSURE ACTION IS TIME-BARRED; TWO-JUSTICE DISSENT ARGUED THE CORRESPONDENCE DE-ACCELERATED THE DEBT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the foreclosure action was time-barred. The initial foreclosure action was in 2010. That action was discontinued and the mortgage was subsequently assigned three times. After a second discontinuance, the third foreclosure action was commenced in 2017. The majority concluded that the discontinuances and related correspondence did not de-accelerate the debt, so the statute of limitations kept running from the initial action in 2010. The dissenters argued the debt had been de-accelerated by correspondence with the defendant:

… [T]he voluntary discontinuance of the first two actions, without more, did not constitute an affirmative revocation of the initial acceleration of the debt … . That is particularly so because plaintiff's predecessors in interest moved to discontinue each action due to title concerns, without addressing the prospect of revoking the acceleration and resuming installment payments … . * * *

[The plaintiffs'] letters do not indicate a clear and unambiguous return to an installment payment plan and, for all practical purposes, do not actually evidence any real intent to de-accelerate the loan. In effect, "plaintiff simply put defendant[s] on notice of its obligation to cure a . . . default and then promptly embarked on the notices required to initiate a [third] foreclosure action" … . In our view, these notices do not constitute affirmative actions to de-accelerate the mortgage … . U.S. Bank Natl. Assn. v Creative Encounters LLC, 2020 NY Slip Op 02844, Third Dept 5-14-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, DISCONTNUANCE, ADVISORY OPINIONS.

THE BANK'S DISCONTINUANCE OF THE FORECLOSURE ACTION DID NOT REVOKE THE ACCELERATION OF THE DEBT; THE REQUEST, AFTER DISCONTINUANCE, FOR A DECLARATION THE ACCELERATION HAD BEEN REVOKED WAS A REQUEST FOR AN IMPERMISSIBLE ADVISORY OPINION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the acceleration of the debt had not been revoked by the discontinuance of the foreclosure action and plaintiff's request for a declaration the acceleration had been revoked, made after the action was discontinued, was an improper request for an advisory opinion:

Upon discontinuance of the action, a judicial declaration on the issue of whether the plaintiff elected to revoke its acceleration would be merely advisory inasmuch as there was no active case in which such declaration could have an immediate effect. Indeed, by seeking voluntary discontinuance of the action, the plaintiff, in effect, waived any right to seek any further judicial relief in the action … . …

In this Department, a lender's mere act of voluntarily discontinuing an action does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt … . This is so because "the full balance of a mortgage debt cannot be sought without an acceleration, whereas the voluntary discontinuance of a foreclosure action may be occasioned for any number of different reasons, including those that have nothing to do with an intent to revoke the acceleration" … . Thus, it is the plaintiff who has authority to revoke its election to accelerate the mortgage debt under the terms of a note, and not the court. U.S. Bank Natl. Assn. v McCaffery, 2020 NY Slip Op 04805, Second Dept 8-26-20

STATUTE OF LIMITATIONS, DE-ACCELERATION, REVOCATION.

QUESTION OF FACT WHETHER THE ACCELERATION OF THE DEBT IN 2010 WHEN THE FORECLOSURE ACTION WAS STARTED WAS REVOKED BEFORE THE SIX-YEAR STATUTE OF LIMITATIONS RAN OUT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff bank raised a question of the fact whether the acceleration of the debt at the time the foreclosure action was commenced in 2010 was revoked before the six-year statute of limitations ran out:

We nevertheless agree with plaintiff that its submissions in opposition to the motion raised a question of fact whether the present action was timely commenced. It is well settled that "[a] lender may revoke its election to accelerate the mortgage, [although] it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" … .

Here, plaintiff submitted evidence that its predecessor in interest mailed letters to defendants in January 2016, i.e., before the statute of limitations expired, revoking the prior acceleration of the mortgage. As plaintiff correctly contends, the evidence, including an affidavit of mailing, established that the letters were properly mailed to defendants at their address, thereby giving rise to the presumption that the letters were received by defendants … . Defendants' unsubstantiated denial of receipt was "insufficient to rebut the presumption of proper service at the address where all notices under the mortgage were to be sent" … . Moreover, on the limited record before us, we conclude that language of the letters and the surrounding circumstances raised a question of fact whether plaintiff's predecessor in interest validly revoked the prior acceleration of the mortgage and, thus, whether the present action was timely commenced … . U.S. Bank N.A. v Brown, 2020 NY Slip Op 04653, Fourth Dept 8-20-20

STATUTE OF LIMITATIONS, DE-ACCELERATION.

FORECLOSURE ACTION ON THE ENTIRE DEBT TIME-BARRED; QUESTION OF FACT WHETHER THE DEBT WAS DE-ACCELERATED; IF SO, ONLY THOSE INSTALLMENT PAYMENTS DUE WITHIN SIX YEARS OF THE START OF THE FORECLOSURE ACTION ARE RECOVERABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the foreclosure action on the entire debt was time-barred, but there was a question of fact whether the debt was de-accelerated such that the installment payments due during the six years prior to the commencement of the action were recoverable by the plaintiff bank (Chase):

… [T]he defendants demonstrated that the six-year statute of limitations (see CPLR 213[4]) began to run on July 7, 2009, when Chase accelerated the mortgage debt and commenced the prior foreclosure action … . Since the plaintiff did not commence the instant foreclosure action until more than six years later, on January 28, 2016, the defendants sustained their initial burden of demonstrating, prima facie, that the action was untimely … .

… [T]he plaintiff tendered evidence that, in May 2015, it sent letters to each of the defendants that purported to de-accelerate the entire debt … . However, such evidence is sufficient only to raise a question of fact as to whether those causes of action that sought unpaid installments which accrued within the six-year period of limitations preceding the commencement of this action (see CPLR 213[4] …) are barred by the statute of limitations due to this alleged de-acceleration by the plaintiff. Since the plaintiff failed to tender any evidence to rebut the defendants' showing that the statute of limitations bars the causes of action relating to unpaid mortgage installments which accrued on or before January 27, 2010, the Supreme Court should have granted that branch of the defendants' motion which was to dismiss those causes of action. U.S. Bank Trust, N.A. v Miele, 2020 NY Slip Op 04422, Second Dept 8-5-20

STATUTE OF LIMITATIONS, DE-ACCELERATION.

PLAINTIFF BANK'S ATTEMPT TO DE-ACCELERATE THE MORTGAGE JUST BEFORE THE STATUTE OF LIMITATIONS RAN WAS PROPERLY REJECTED (THIRD DEPT).

The Third Department, affirming the dismissal of the foreclosure action, held that the plaintiff bank's attempt to de-accelerate the mortgage just before the statute of limitations ran was properly rejected:

As stated by the [2nd] Department, "acceleration notices must be clear and unambiguous to be valid and enforceable, . . . [and] de-acceleration notices must also be clear and unambiguous to be valid and enforceable" (Milone v US Bank N.A., 164 AD3d 145, 153 [2018] …). Notably, in Milone, the Court cautioned against pretextual de-acceleration letters issued to avoid an impending statute of limitations. … [T]he [2nd] Department reasoned in Milone that "a de-acceleration letter is not pretextual if . . . it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments" or other comparable evidence … .

… [P]laintiff's purported de-acceleration letter was issued on the eve of the expiration of the statute of limitations. Although the letter expressly "reinstates the [l]oan as an installment loan," it does not demand the resumption of monthly payments or provide monthly invoices for payment due. Instead, the letter specifies that defendant remained in default for failing to make the required monthly installment payments since November 1, 2008 and offers to discuss "a variety of homeowner's assistance programs." Not to be overlooked is that the March 2, 2016 letter was followed by two June 13, 2016 letters providing 30 days to cure the default by making a payment due of $101,831, as well as a 90-day notice required under RPAPL 1304 — a condition precedent to initiating a foreclosure action. In our view, this proffer does not constitute a valid de-acceleration, as plaintiff simply put defendant on notice of its obligation to cure an eight-year default and then promptly embarked on the notices required to initiate a second foreclosure action. It follows that plaintiff's second action was properly dismissed as untimely. Wells Fargo Bank, N.A. v Portu, 2020 NY Slip Op 00025, Third Dept 1-2-20

STATUTE OF LIMITATIONS, DE-ACCELERATION.

THE DEFENDANT BANK'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE A MORTGAGE SHOULD HAVE BEEN GRANTED; THE BANK PROVED THE DE-ACCELERATION NOTICE WAS PROPERLY TRANSMITTED TO PLAINTIFF, RENDERING THE UNDERLYING FORECLOSURE ACTION TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court in plaintiff's action to discharge and cancel a mortgage pursuant to RPAPL 1501 (4), determined defendant bank demonstrated that the de-acceleration notice were properly transmitted to plaintiff, rendering the defendant bank's underlying foreclosure action timely:

Wells Fargo's vice president of loan documentation averred that she was familiar with the mailing practices for such notices; that Wells Fargo followed its practices in this instance; that it was Wells Fargo's practice to generate and mail such notices to borrowers on the date indicated on the notice; that Wells Fargo's practice also included keeping a copy of any notice in the corresponding mortgage loan file as a record that the notice was mailed; that the de-acceleration notice was sent on March 11, 2015, by both certified mail and regular mail to the property address and the plaintiff's address; and that a copy of the de-acceleration notice for each of the two addresses was in the plaintiff's loan file in accordance with Wells Fargo's mailing procedures. Contemporaneous business records were attached to the affidavit, showing that a de-acceleration letter was "mailed to property address on 31115." Through the submission of that evidence, Wells Fargo established that de-acceleration letters were, in fact, sent by regular mail in compliance with the expressed terms of the mortgage … . The mailing procedures described in this case appear identical to those that this Court recognized as satisfactory in Pennymac Holdings, LLC v Lane (171 AD3d 774, 775). Indeed, it is difficult to identify what additional evidence could be expected or required for Wells Fargo to demonstrate that it had transmitted the de-acceleration notice to the proper addresses by regular mail on the date indicated. The de-acceleration notice dated March 11, 2015, was mailed within six years from the debt acceleration occurring upon the

commencement of the first action on March 24, 2009. Wells Fargo, in moving for summary judgment, therefore met its prima facie burden of establishing its entitlement to judgment as a matter of law dismissing the complaint … . Assyag v Wells Fargo Bank, N.A., 2020 NY Slip Op 04908, Second Dept 9-16-20

STATUTE OF LIMITATIONS, DEFENSE WAIVED BY FAILURE TO ANSWER.

DEFENDANTS' FAILURE TO ANSWER THE FORECLOSURE COMPLAINT WAIVED THE STATUTE OF LIMITATIONS DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action, by defaulting, had waived the statute of limitations defense:

CPLR 3211(e) provides that a defense based upon the statute of limitations is waived if not asserted in an answer or in a timely motion to dismiss pursuant to CPLR 3211(a). Such a motion is timely if it is made before service of the answer is required (see CPLR 3211[e]). Here, the defendants never answered the complaint, and their cross motion, inter alia, to dismiss the complaint was served at least six months after service of the answer was required. Thus, unless the defendants' default is vacated or excused, the defendants waived their statute of limitations defense, and in their cross motion, the defendants did not seek relief from that waiver. Accordingly, the Supreme Court should not have granted that branch of the defendants' cross motion which was to dismiss the complaint insofar as asserted against them as time-barred without first determining whether the defendants were properly held in default … . Nestor I, LLC v Moriarty-Gentile, 2020 NY Slip Op 00421, Second Dept 1-22-20

STATUTE OF LIMITATIONS, MODIFICATION AGREEMENT IS NOT AN ACKNOWLEDGMENT OF THE DEBT.

THE MORTGAGE-PAYMENT MODIFICATION AGREEMENT DID NOT CONSTITUTE AN ACKNOWLEDGMENT OF THE MORTGAGE DEBT WITHIN THE MEANING OF GENERAL OBLIGATIONS LAW 17-101; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START ANEW; THE FORECLOSURE ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's trial payments as a condition for entering a mortgage-payment modification agreement (the Plan) did not amount to an acknowledgment of the debt such that the statute of limitations would start running anew:

" General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt'" … . "The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" … . "In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" … . * * *

… [T]he Plan did not constitute an "unconditional and unqualified acknowledgment of [the] debt" sufficient to reset the statute of limitations … . While the writing arguably acknowledged the existence of indebtedness, the defendant merely agreed to make three trial payments so as to receive a permanent modification offer. Any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which condition did not occur. Under these circumstances, it cannot be said that the writing contained "nothing inconsistent with an intention on the part of the debtor to pay" the debt … . Indeed, the defendant represented in the Plan that he was unable to afford the mortgage payments. Nationstar Mtge., LLC v Dorsin, 2020 NY Slip Op 01354, Second Dept 2-26-20

STATUTE OF LIMITATIONS, RE-ACCELERATION.

A 2009 AMENDED COMPLAINT SERVED WITHOUT THE REQUIRED LEAVE OF COURT, ALTHOUGH INVALID AS A PLEADING, RE-ACCELERATED THE MORTGAGE DEBT IN THIS FORECLOSURE ACTION, RENDERING THE ACTION TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage debt had been re-accelerated by an amended complaint in 2009, rendering the instant foreclosure action time-barred:

… [T]he defendants also submitted the supplemental summons and amended complaint filed on July 13, 2009, in the 2005 action. In the amended complaint, PCG elected to re-accelerate the debt, which started the running of a new six-year period.

The supplemental summons and amended complaint were filed without the required leave of court (see CPLR 3025[b]). However, PCG's counsel, in an affirmation dated October 9, 2013, submitted with a stipulation to discontinue the 2005 action and a stipulation cancelling the notice of pendency, agreed that the amended complaint, "while arguably insufficient as a pleading, provided that the loan was again accelerated," and stated that "[t]hus, the loan remains accelerated from July 22, 2009, the date the amended complaint was served up and delivered to [the defendants], as per the corresponding affidavits of service."

By the submission of these documents, the defendants established that the time in which to sue expired on July 22, 2015, six years after the service of the supplemental summons and amended complaint (see CPLR 213[4]), PCG's counsel having conceded that the loan was accelerated as of that time. Goshen Mtge., LLC v DePalma, 2020 NY Slip Op 04830, Second Dept 9-2-20

STATUTE OF LIMITATIONS, REVIVAL AFTER EXPIRATION.

GENERAL OBLIGATIONS LAW 17-105, NOT 17-101, APPLIES TO THE REVIVAL OF AN EXPIRED STATUTE OF LIMITATIONS FOR A MORTGAGE FORECLOSURE; THE RELEVANT DOCUMENTS HERE DID NOT MEET THE CRITERIA OF SECTION 17-105; FORECLOSURE WAS THEREFORE TIME-BARRED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Peradotto, determined that General Obligations Law 17-105, not 17-101, applied to the revival of an expired statute of limitations for foreclosure of a mortgage and the documents in this case did not meet the criteria of section 17-105. Therefore the foreclosure action was time-barred. The court noted that Supreme Court should have issued a judgment declaring the rights of the parties pursuant to Real Property Actions and Proceedings Law 1501 and 1521:

General Obligations Law § 17-105 (1) provides, in relevant part:

"A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise."

* * *

… [T]the financial statements submitted by defendant do not meet the requirements of subdivision (1) of section 17-105 because those documents merely list the mortgage as a liability and do not constitute an express promise to pay the mortgage debt … . Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc., 2020 NY Slip Op 05331, Fourth Dept 10-2-20

STATUTE OF LIMITATIONS, RPAPL 1301.

CPLR 204(A) IN CONJUNCTION WITH RPAPL 1301(3) TOLLED THE STATUTE OF LIMITATIONS WHILE THE FIRST FORECLOSURE ACTION WAS PENDING, FROM 2010 TO 2013, RENDERING THE SECOND FORECLOSURE ACTION IN 2017 TIMELY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing Supreme Court, determined the instant foreclosure action was not time barred because CPLR 204(a) in conjunction with Real Property Actions and Proceedings Law (RPAPL) 1301(3) prohibited bringing the instant action while the first action was pending:

In September 2003, defendant, in exchange for a loan to purchase a residence, executed a note secured by a mortgage on that real property. The note and mortgage were later assigned to plaintiff. After defendant failed to make some payments, on May 5, 2010 plaintiff commenced a foreclosure action against defendant, which Supreme Court (Drago, J.) dismissed on October 30, 2013 for failure to prosecute. In April 2015, Supreme Court (Buchannan, J.) denied plaintiff's motion to vacate the dismissal. In 2017, plaintiff commenced a second foreclosure action. * * *

CPLR 204 (a) provides that, "[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 statute that plaintiff relies on, in conjunction with CPLR 204 (a), is RPAPL 1301 (3), which provides that, while an action for a mortgage debt "is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The purpose of RPAPL 1301 (3) is "to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt … . … [P]laintiff established that the statute was tolled during the pendency of the first foreclosure action, from May 2010 to October 2013. Citimortgage, Inc. v Ramirez, 2020 NY Slip Op 07970, Third Dept 12-24-20

STATUTE OF LIMITATIONS, SERVICE ON DECEASED DEFENDANT.

THE 2008 FORECLOSURE COMPLAINT WAS SERVED ON A DECEASED DEFENDANT AND WAS THEREFORE A NULLITY WHICH DID NOT TRIGGER THE SIX-YEAR STATUTE OF LIMITATIONS; THE INSTANT FORECLOSURE ACTION, THEREFORE, IS NOT TIME-BARRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the foreclosure action was not time-barred. Although a foreclosure complaint was served in 2008, it named a deceased defendant and was therefore a nullity which did not accelerate the debt and start the statute of limitations running:

Plaintiff contends that Supreme Court erred in dismissing the action as untimely because the 2008 action was commenced only against the decedent borrower and was thus a legal nullity. We agree. "The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage" … . Accordingly, as a general rule, the commencement of a mortgage foreclosure action triggers the statute of limitations … . As pertinent here, however, "[a] party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate" … . Greenpoint [Mortgage Funding] served but did not substitute the executor of decedent's estate as a party in the 2008 action (see CPLR 1015 [a]). As such, the court lacked jurisdiction over the 2008 action, and that action was a legal nullity from its inception … . It follows that the 2008 action, a legal nullity, did not trigger the statute of limitations. Since this action was commenced within six years of the 2013 acceleration letter, the action was timely. U.S. Bank Natl. Assn. v Stewart, 2020 NY Slip Op 05982, Third Dept 10-22-20

SUCCESSIVE SUMMARY JUDGMENT MOTIONS.

PLAINTIFF'S MOTION TO RENEW SHOULD NOT HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the motion to renew should not have been granted, explaining the criteria:

In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion … . It is well settled that a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation … . Indeed, the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion … . Successive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence. However, evidence is not newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been established through alternate evidentiary means … . Deutsche Bank Natl. Trust Co. v Elshiekh, 2020 NY Slip Op 00570, Second Dept 1-29-20

SUCCESSIVE SUMMARY JUDGMENT MOTIONS.

THE SECOND MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED; SUCCESSIVE SUMMARY JUDGMENT MOTIONS ARE GENERALLY PROHIBITED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prohibition against successive summary judgment motions applied and the second motion should have been denied:

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" … . "Evidence is not newly discovered simply because it was not submitted on the previous motion" … . "Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" … . "Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment" … . Wells Fargo Bank, NA v Carpenter, 2020 NY Slip Op 07426, Second Dept 12-9-20

TAX FORECLOSURE, LIEN ON SURPLUS.

BECAUSE THE HOLDER OF A FIRST MORTGAGE WAS A DEFENDANT IN THE TAX FORECLOSURE PROCEEDINGS, THE MORTGAGE HOLDER DID NOT NEED TO FILE ITS OWN FORECLOSURE ACTION TO ENFORCE ITS LIEN ON THE SURPLUS TAX-FORECLOSURE-SALE PROCEEDS (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined that HPD, the holder of a first mortgage on property which was the subject of a tax foreclosure, was entitled to the surplus funds from the tax foreclosure sale. The issue was whether HPD's action seeking the surplus was time-barred because it didn't enforce the lien on the surplus within six years of the tax foreclosure sale. The Second Department held no further action to enforce the lien was necessary because HPD was a defendant in the tax foreclosure proceedings:

… HPD's appearance in the tax lien foreclosure action put [the property owner] and anyone else interested in a potential surplus on notice of HPD's claims. To require HPD to commence a separate foreclosure action, when an action to foreclose the tax lien was already pending, would serve no useful purpose. NYCTL 1997-1 Trust v Stell, 2020 NY Slip Op 02802, Second Dept 5-13-20