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A Collection of Summaries of Decisions Addressing Proof of Mailing in the Context of Proving the Notice Requirements of Real Property Actions and Proceedings Law (RPAPL) 1304. These Summaries Were Posted on the New York Appellate Digest Website Between September 2020 and March 2021. 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 of Any Page to Return There.
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How Do You Prove Documents Were Mailed?

Targeted Research Focusing on Proof of the Notice Requirements of Real Property Actions and Proceedings Law 1304 at the Summary Judgment Stage.

Research on March 9, 2021, Going Back to September 2020.

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THIS FIRST TWO SUMMARIES (BELOW) EXPLAIN HOW MAILING CAN BE PROVEN THROUGH DOCUMENTS AT THE SUMMARY JUDGMENT STAGE;

THE REMAINING SUMMARIES DEMONSTRATE THE VARIOUS WAYS PROOF OF MAILING CAN BE DEFICIENT.

DETAILED EXPLANATION OF HOW MAILING OF THE RPAPL 1304 NOTICE CAN (SHOULD) BE PROVEN (SECOND DEPT).

The Second Department, in affirming the judgment of foreclosure in favor of Nationstar, offered a detailed explanation of how mailing of the RPAPL 1304 notice can be proven:

The Supreme Court ... properly determined that ... Nationstar proved sufficient mailing of the statutory 90-day preforeclosure notice as required by 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 (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 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’” The notice must also be in 14-point type Here, at the framed-issue hearing, **Nationstar submitted evidence that a third-party vendor mailed the 90-day preforeclosure notice through the testimony of a**

witness who had personal knowledge of the vendor's standard business practice with regard to sending the 90-day preforeclosure notice to borrowers, and who affirmed, based on the business records she reviewed regarding the subject loan, that the notices had been sent to the defendant in compliance with the requirements of RPAPL 1304 ... Notwithstanding the use of a third party to mail the 90-day preforeclosure notice, Nationstar tendered sufficient evidence demonstrating strict compliance with RPAPL 1304. Nationstar Mtge., LLC v Paganini, 2021 NY Slip Op 00852, Second Dept 2-10-21

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](#)

COMPLIANCE WITH THE NOTICE REQUIREMENT OF RPAPL 1304 WAS NOT PROVEN IN THIS FORECLOSURE ACTION; PROOF REQUIREMENTS EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff mortgage company did not demonstrate compliance with the notice requirements of 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 notice to the borrower is a condition precedent to the commencement of a foreclosure action “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 only purported evidence submitted by the plaintiff in support of its motion to show that it complied with RPAPL 1304 was a hearsay statement in the affidavit of the plaintiff's legal affairs representative. Moreover, contrary to the plaintiff's assertions, the 90-day notice which was attached to her affirmation does not demonstrate that the mailing requirements of RPAPL 1304 were met **The plaintiff failed to submit an affidavit of service or proof of first-class mailing by the United States Postal Service evidencing that the defendant was served by first-class mail in accordance with RPAPL 1304 The plaintiff not only failed to provide proof of the actual first-class mailing, but its legal affairs representative also lacked personal knowledge of the purported mailing and did not aver that she was familiar with the mailing practices and procedures of the entity that purportedly sent the notices Thus, the plaintiff submitted no evidence that the letter had been sent to the defendant by first-class mail more than 90 days prior to commencement of the action** 21st Mtge. Corp. v Broderick, 2021 NY Slip Op 00825, Second Dept 2-10-21

THE BANK DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304 IN THIS FORECLOSURE ACTION; SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED TO DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff bank's motion for summary judgment should not have been granted and, upon a search of the record, summary judgment should have been granted to defendant in this foreclosure action. The proof of mailing of the notice required by RPAPL 1304 was not sufficient:

Plaintiff failed to establish prima facie its strict compliance with RPAPL 1304 The copy of the certified mail receipt it submitted is undated and blank in other parts, and shows the signature of someone other than defendant. The copy of the pre-paid first-class mail envelope has no recipient's name or address on it. Further, **the affidavits plaintiff submitted do not demonstrate the loan servicer's employees' familiarity with the mailing practices and procedures of the servicer that had mailed the 90-day notices and the notice of default.** U.S. Bank, N.A. v Calhoun, 2021 NY Slip Op 00398, First Dept 1-26-21

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

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](#)

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](#)

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](#)

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

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](#)

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

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 to 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](#)

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](#)

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*

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

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

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

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