Brown Bag Series on the State of Moratoriums and Evictions In New York and the Continued Impact on the Bankruptcy Practice

Honorable Tracy Catapano-Fox
Supreme Court Justice
Eleventh Judicial District

June 2022

Synopsis of Relevant Cases[1]:

1. Bank of America, N.A. v. Kessler, 202 A.D.3d 10, N.Y. App. Div. 2d Dep't (December 15, 2021).
   The Second Department held that plaintiffs who include additional items in a RPAPL §1304 notice are in violation of the statutory requirements to maintain a separate mailing for the 90-day notice.

2. Wells Fargo Bank, N.A. v. Yapkowitz, 199 A.D.3d 126, N.Y. App. Div. 2d Dep't (September 29, 2021).
   The Second Department held that plaintiffs must send a separate 90-day notice to each borrower in separate envelopes as a condition precedent to commencing a foreclosure action under RPAPL §1304.

3. U.S. Bank N.A. v. Campbell, 202 A.D.3d 1137, N.Y. App. Div. 2d Dep't. (February 23, 2022).
   The Second Department held that the Supreme Court was without authority to, *sua sponte*, direct dismissal [*of*] the Complaint based upon the plaintiff's failure to comply with its directive to proceed by motion, which would have required a motion for summary judgment, because plaintiff had the option to either move for summary judgment or proceed to trial (language in brackets not originally included in the decision).

4. OneWest Bank, FSB v. Perwaiz, 164 N.Y.S.3d 857, N.Y. App. Div. 2d Dep't (April 20, 2022).
   The Second Department held that the plaintiff's failure to comply with the directives of the status conference order were insufficient grounds upon which to *sua sponte* direct dismissal of the complaint, and specifically that a court may not *sua sponte* dismiss a complaint for failure to move for a judgment of foreclosure and sale by an arbitrary date set by the court.

---

[1] Full text of cases attached.

Bank of Am., N.A. v. Kessler

Supreme Court of New York, Appellate Division, Second Department

December 15, 2021, Decided

2018-00886, (Index No. 54780/14)

Reporter

202 A.D.3d 10 *; 160 N.Y.S.3d 277 **; 2021 N.Y. App. Div. LEXIS 7050 ***; 2021 NY Slip Op 06979 ****; 2021 WL 5913148

[****1] Bank of America, N.A., appellant, v Andrew Kessler, respondent, et al., defendants.

Prior History: [***1] APPEAL by the plaintiff, in an action to foreclose a mortgage, from an order of the Supreme Court (Alan D. Scheinkman, J.), dated November 30, 2017, and entered in Westchester County. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Andrew Kessler and Reiko Kessler, for summary judgment dismissing the second, third, and fourth affirmative defenses of those defendants, and for an order of reference, and granted the cross motion of the defendant Andrew Kessler for summary judgment dismissing the complaint insofar as asserted against him.

Bank of America, N.A. v. Kessler, 2017 N.Y. Misc. LEXIS 13661 (N.Y. Sup. Ct., Nov. 30, 2017)

Core Terms

notice, envelope, borrower, lender, mailing, summary judgment, homeowners, mortgage, additional language, requisite notice, foreclosure, foreclosure action, cross motion, affirmative defense, Appeals, mortgage loan, provisions, assignee, servicer, strict compliance, reference order, fail to comply, plain language, constitutes, courts, mortgage foreclosure, valid notice, counseling, inclusion, agencies

Case Summary

Overview

HOLDINGS: [1]-Inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that was not expressly delineated in these provisions constituted a violation of the separate envelope requirement of RPAPL 1304(2); [2]-The bank acknowledged that the envelope that it sent to the homeowners, which contained the requisite notice under RPAPL 1304, also included other information in two notices pertaining to the rights of a debtor in bankruptcy and in military service; [3]-Since the bank failed to establish, prima facie, that it strictly complied with the requirements of RPAPL 1304, the Supreme Court properly denied those branches of its motion which were for summary judgment on the complaint.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

In matters of statutory interpretation, the primary consideration is to discern and give effect to the Legislature's intention. The text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning. When the plain language of the statute is precise and unambiguous, it is determinative.

Evidence > Burdens of Proof > Allocation

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN2[] **Burdens of Proof, Allocation**

RPAPL 1304 contains specific, mandatory language in keeping with the underlying purpose of the Home Equity Theft Prevention Act to afford greater protections to homeowners confronted with foreclosure, and the language in *RPAPL 1304(2)* with regard to the manner of service of the required notices in a separate envelope from any other mailing or notice is equally precise. Strict compliance with the requisite *RPAPL 1304* notices to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action. The plaintiff has the burden of establishing its strict compliance with this condition. Since, among other requirements, such notice must be sent in a separate envelope from any other mailing or notice, inclusion of any material in the separate envelope sent to the borrower under *RPAPL 1304* that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of *RPAPL 1304(2)*.

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN3[] **Foreclosures, Judicial Foreclosures**

The statute requires that, at least 90 days prior to the commencement of a foreclosure action, a lender must give a borrower certain written notice, *RPAPL 1304 (1)*. *Subdivision (1)* of the statute sets forth the specific language that the 90-day notice shall include, and *subdivision (2)* specifies how the requisite *RPAPL 1304* notices must be sent.

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN4[] **Foreclosures, Judicial Foreclosures**

The Court of Appeals set forth a bright-line rule in mortgage foreclosure cases that a lender's voluntary discontinuance of a prior foreclosure action constitutes a revocation of its election to accelerate the debt, absent a contemporaneous statement by that noteholder to the contrary. More significantly, with respect to evaluating the import of *RPAPL 1304*, the Court of Appeals expressly recognized that the legislature has imposed exacting standards for bringing a foreclosure claim—e.g., prescribing the precise method of providing pre-suit notice to the borrower.

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN5[] **Foreclosures, Judicial Foreclosures**

In analyzing compliance with *RPAPL 1304(2)* the determinative question is not what the lender intended or the borrower perceived, nor for the court to decide what other additional notices might or might not be permissible, but rather, given the clear and unambiguous language of the statute, whether the lender complied with the separate envelope requirement of *RPAPL 1304(2)*.

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN6[] **Foreclosures, Judicial Foreclosures**

Nothing in *RPAPL 1304* prohibits a lender from mailing, in other envelopes, notices to a borrower—whether such notices be federally mandated or consist of any other notice or information that may assist a homeowner to avoid foreclosure. *RPAPL 1304(2)* simply requires that the notices required by its provisions be mailed in a separate envelope from those other notices.

Counsel: Bryan Cave Leighton Paisner LLP, New York, NY (Jonathan E. Ginsberg and Suzanne M. Berger of counsel), for appellant.

Charles Wallshein Esq. PLLC, Melville, NY, for respondent.

Judges: HECTOR D. LASALLE, P.J., WILLIAM F. MASTRO, ROBERT J. MILLER, COLLEEN D. DUFFY, JJ. LASALLE, P.J., and MASTRO, J., concur. MILLER, J., dissents.

Opinion by: DUFFY

Opinion

[**278] [*11] DUFFY, J.

OPINION & ORDER

This appeal requires this Court to address the issue of how exacting the requirement of strict compliance is with respect to the "separate envelope" mandate of RPAPL 1304; to wit, in a mortgage [***2] foreclosure action, how should the "separate envelope" requirement of RPAPL 1304(2), which provides that "notices required [**279] by this section shall be sent . . . in a separate envelope from any other mailing or notice," be construed?

For the reasons that follow, we find that the Supreme Court properly determined that the plaintiff failed to comply with the strict requirements of RPAPL 1304, and thus, a condition precedent to this foreclosure action was not met. As such, the court properly denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Andrew Kessler and Reiko Kessler (hereinafter together the defendants), for summary judgment dismissing the defendants' second, third, and fourth affirmative defenses, and for an order of reference, and granted [*12] Andrew Kessler's cross motion for summary judgment dismissing the complaint insofar as asserted against him.

Background of the Action

As is relevant to this appeal, in March 2014, the plaintiff commenced this action against, among others, the defendants to foreclose a mortgage on real property located in Croton-on-Hudson, Westchester County. The plaintiff alleged, among other things, [***3] that it was the owner and holder of the note and the mortgage at issue and that Andrew Kessler defaulted in payment of the mortgage as of September 2013. Thereafter, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants, for summary judgment dismissing the defendants' second, third, and fourth affirmative defenses, and for an order of reference. Andrew [****2] Kessler opposed the plaintiff's motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff failed to comply with RPAPL 1304. In an order dated November 30, 2017 (hereinafter the November 2017 order), the Supreme Court denied the plaintiff's motion and granted Andrew Kessler's cross motion. The plaintiff appeals from so much of the November 2017 order as denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, for summary judgment dismissing the defendants' second, third, and fourth affirmative defenses, and for an order of reference, and granted Andrew Kessler's cross motion. We affirm.

Statutory Interpretation

HN1[↑] In matters of statutory [***4] interpretation, the primary consideration is to discern and give effect to the Legislature's intention (*see Yatauro v Mangano, 17 NY3d 420, 426, 955 N.E.2d 343, 931 N.Y.S.2d 36*). "[T]he text of a provision 'is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning'" (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 120, 968 N.E.2d 967, 945 N.Y.S.2d 613*, quoting *Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660, 860 N.E.2d 705, 827 N.Y.S.2d 88*; *see Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966*). "When the plain language of the statute is precise and unambiguous, it is determinative" (*Matter of Washington Post Co. v New York State [*13] Ins. Dept., 61 NY2d 557, 565*; *see Loehr v New York State Unified Ct. Sys., 150 AD3d 716, 720, 57 N.Y.S.3d 40*). Here, the language of the statute is clear, precise, and unambiguous.

Specifically, RPAPL 1304, in effect at the time this action was commenced, provides as follows:

"Required prior notices.

"1. Notwithstanding any other provision of law, with regard to a home loan, at [**280] least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action

against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type *which shall include the following*:

. . .

"2. The notices required by this section shall be sent by such lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified [***5] mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage. The notices required by this section shall be sent by the lender, assignee or mortgage loan servicer *in a separate envelope from any other mailing or notice*. Notice is considered given as of the date it is mailed. The notices required by this section shall contain a current list of at least five housing counseling agencies serving the county where the property is located from the most recent listing available from department of financial services. The list shall include the counseling agencies' last known addresses and telephone numbers. The department of financial services shall make available on its websites a listing, by county, of such agencies. The lender, assignee or mortgage loan servicer shall use such lists to meet the requirements of this section" (emphasis added).

HN2[↑] *RPAPL 1304* "contains specific, mandatory language in keeping with the underlying purpose of [the Home Equity Theft Prevention Act] to afford greater protections to homeowners confronted with foreclosure" (*Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 103, 923 N.Y.S.2d 609*), and the language in *RPAPL 1304(2)* [*14] with regard to the manner of service of the required notices [***6] "in a separate envelope from any other mailing or notice" "is equally precise" (*Aurora Loan Servs., LLC [****3] v Weisblum, 85 AD3d at 104* [internal quotation marks omitted]). Strict compliance with the requisite *RPAPL 1304* notices to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action (*see CV XXVII, LLC v Trippiedi, 187 AD3d 847, 850*; *USBank N.A. v Haliotis, 185 AD3d 756, 758, 128 N.Y.S.3d 17*). The plaintiff has the burden of establishing its strict compliance with this condition (*see USBank N.A. v Haliotis, 185 AD3d at 758*; *Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106*). Since, among other requirements, such notice must be sent "in a separate envelope from any other mailing or notice" (*RPAPL 1304[2]*), we hold that inclusion of any material in the separate envelope sent to the borrower under *RPAPL 1304* that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of *RPAPL 1304(2)*.

This strict approach precluding any additional material in the same envelope as the requisite *RPAPL 1304* notices not only comports with the statutory language, it also provides clarity as a bright-line rule to plaintiff lenders and "promotes stability and predictability" (*Freedom Mtge. Corp. v Engel, 37 NY3d 1, 20, 146 N.Y.S.3d 542, 169 N.E.3d 912*) in foreclosure proceedings.

Legislative History of RPAPL 1304

We note that this strict interpretation of the "separate envelope" requirement is consistent with the Legislature's intent. *RPAPL 1304* was first enacted by the New York Legislature and signed [***7] by the Governor [**281] of New York in 2008, along with a series of additional amendments to laws governing mortgage foreclosure proceedings (*see* L 2008, ch 472, § 2 [eff Sept. 1, 2008]). *HN3*[↑] The statute requires that, at least 90 days prior to the commencement of a foreclosure action, a lender must give a borrower certain written notice (*see RPAPL 1304[1]*). *Subdivision (1)* of the statute sets forth the specific language that the 90-day notice "shall include" (*id.*), and *subdivision (2)* specifies how the requisite *RPAPL 1304* notices must be sent (*see id. § 1304[2]*). In 2009, several amendments to *RPAPL 1304* were enacted, effective in January 2010, which added a new sentence to *RPAPL 1304(2)* to include the requirement that the requisite *RPAPL 1304* notice shall be sent in "a separate envelope from any other mailing or notice" (*id. § 1304[2]*; [*15] *see* L 2009, ch 507, § 1-a [eff Jan. 14, 2010]). Notably, the "separate envelope" requirement of *RPAPL 1304* appears to be exclusive to this section and is not found in other notice provisions applicable to mortgage foreclosure proceedings (*see e.g. RPAPL 1303, 1305*; *see also UCC 9-611*). Although *RPAPL 1304* has been amended since its adoption in 2008, the "separate envelope" provision which was added to *RPAPL 1304* in 2009 has consistently remained (*see e.g.* L 2009, ch 507, § 1-a [eff Jan. 14, 2010]; L 2011, ch 62, part A, § 104 [eff Oct. 3, 2011]; L 2012, ch 155, § 84 [eff July 18, 2012]; L 2012, ch 155, § 85; L 2016, [***8] ch 73, part Q, §§ 6, 7 [eff Dec. 20, 2016]; L 2017, ch 58, part FF, § 1 [eff Dec. 20, 2016]; L 2018, ch 58, part HH, §§ 1, 5 [eff Apr. 12, 2018, deemed eff Apr. 20, 2017]; L 2018, ch 58, part HH, §§ 3, 4 [eff May 12, 2018]). Moreover, we note that, since its enactment, *RPAPL 1304* has expressly set forth in detail the content and the nature of how the notices are required to be sent pursuant to its terms

(*see e.g.* L 2008, ch 472, § 2 [eff Sept. 1, 2008], as amended by L 2009, ch 507, § 1-a [eff Jan. 14, 2010]; L 2011, ch 62, part A § 104 [eff Oct. 3, 2011]; L 2012, ch 155, § 84 [eff July 18, 2012]; L 2012, ch 155, § 85; L 2016, ch 73, part Q, §§ 6, 7 [eff Dec. 20, 2016]; L 2017, ch 58, part FF, § 1 [eff Dec. 20, 2016]; L 2018, ch 58, part HH, §§ 1, 5 [eff Apr. 12, 2018, deemed eff Apr. 20, 2017]; L 2018, ch 58, part HH, §§ 3, 4 [eff May 12, 2018]).

Policy Considerations

Construing the "separate envelope" requirement of *RPAPL 1304* as exacting also addresses recent concerns articulated by the Court of Appeals when it "[a]dopt[ed] a clear rule that will be easily understood by the parties and can be consistently applied by the courts" in mortgage foreclosure cases involving statute of limitations issues (*Freedom Mtge. Corp. v Engel*, 37 NY3d at 19). *HN4*[↑] In *Freedom Mtge. Corp. v Engel*, the Court of Appeals set forth a bright-line rule in mortgage foreclosure [***9] cases that a lender's voluntary discontinuance of a prior foreclosure action constitutes a revocation of its election to accelerate the debt, absent a contemporaneous statement by that noteholder to the contrary (*see id.*). In its discussion of the application of the statute of limitations, the Court of Appeals "emphasized the need for reliable and objective rules permitting consistent application" (*id.* at 20). More significantly, with respect to evaluating the import of *RPAPL 1304*, the Court of Appeals expressly recognized that "the legislature has imposed exacting [*16] standards for bringing a foreclosure claim—e.g., prescribing the precise method of providing pre-suit notice to the borrower (*see RPAPL 1304*)" (*Freedom Mtge. Corp. v Engel*, 37 NY3d at 23, n 4).

This Court, in *USBank N.A. v Haliotis* (185 AD3d at 758-759) as well as our sister [****4] court, the Appellate Division, [**282] Third Department, in *Tuthill Fin., a Ltd. Partnership v Candlin* (129 AD3d 1375, 1376, 13 NYS3d 599), have already implemented this strict compliance approach with respect to the separate envelope requirement. In each case, this Court and the Third Department, respectively, found that the plaintiff lender failed to establish its requisite compliance with the *RPAPL 1304* notice requirements because, among other things, the records did not show that the *RPAPL 1304* notice was "served in an envelope that was separate from any other [***10] mailing or notice" (*USBank N.A. v Haliotis*, 185 AD3d at 758-759; *see Tuthill Fin., a Ltd. Partnership v*

Flexible Standard Unworkable

In articulating this bright-line rule that compliance with the "separate envelope" requirement of *RPAPL 1304* mandates that no material other than the notices specifically described in *RPAPL 1304* be contained in that envelope, we expressly reject the position of the plaintiff that an analysis undertaken by certain trial courts in New York should apply; to wit, that a court should evaluate whether the additional material contained in the envelope sent by the lender pursuant to *RPAPL 1304* prejudices or assists the borrower when ascertaining the lender's compliance with the "separate envelope" requirement of *RPAPL 1304* (*see e.g. Deutsche Bank Natl. Trust Co. v Delisser*, Sup Ct, Suffolk County, Sept. 14, 2017, Heckman, J., Index No. 8685/13 [no violation of *RPAPL 1304* where defendant failed to show prejudice from lender's inclusion of notice to veterans and notice regarding consumer rights]). Nor do we agree with our dissenting colleague's assertion, and some trial courts that have found, that the language of *RPAPL 1304(1)* is nonexclusive with respect to other information that can be included in the envelope as long as the information in the envelope also contains the specific language [***11] set forth in the statute (*see e.g. Citimortgage, Inc. Sbm ABN Amro Mortgage Group, Inc. v Bunger*, 58 Misc 3d 333, 341, 66 NYS3d 788 [Sup Ct, Suffolk County] [inclusion of additional notice referring to quality [*17] controls on phone calls, advisement to give the letter to the party's attorney, and language setting forth debtors' rights in bankruptcy in same envelope with the requisite *RPAPL 1304* notices did not violate *RPAPL 1304(2)*]).

We also reject the fact-intensive analyses adopted by some trial courts which focus on whether the additional information in the *RPAPL 1304* envelope is included as a separately paginated sheet of paper or some other physical demarcation of the information exists, or whether the additional information is on the same page as the requisite notice—suggesting that the latter would preclude a finding that the separate envelope requirement was not complied with but the former would not (*see e.g. Beneficial Homeowner Serv. Corp. v Jordon-Thompson*, 57 Misc 3d 1213[A], 2017 NY Slip Op 51424[U], *4 [Sup Ct, Suffolk County]). Likewise, we reject the plaintiff's contention that this Court should follow the determination of some trial courts in concluding that the inclusion of additional notices in the envelope along with the requisite *RPAPL 1304* notice is a de minimis deviation from the requirements of the

statute and, thus, does not constitute a failure to comply with the separate envelope requirement (*see e.g. Deutsche Bank Natl. Trust Co. v Bonal*, [***12] Sup Ct, Suffolk County, Oct. 23, 2017, Heckman, J., Index No. 61217/13). We also disagree with our dissenting colleague's contention that "clarifying language" that a plaintiff includes in the envelope with the requisite *RPAPL 1304* [**283] notice, such as language concerning the rights of a debtor in bankruptcy or in the military service, or any language that may be relevant to the warnings in *RPAPL 1304*, falls within the prescriptions of *RPAPL 1304* and does not require a separate envelope.

As an initial matter, we find that such approaches could entirely vitiate the unambiguous requirement imposed by the Legislature of a "separate envelope" for the purposes of mailing the requisite notice under *RPAPL 1304*. Such a requirement could also place the burden on a defendant to show a lack of prejudice or show that the information is not relevant to the notice mandated under *RPAPL 1304*, rather than on the plaintiff to show compliance. Moreover, such analyses, which purport to interpret what the Legislature intended, rather than what it said, would require courts to engage in exactly the type of judicial scrutiny that the Court of Appeals has recently rejected in mortgage foreclosure cases (*see Freedom Mtge. Corp. v Engel*, *37 NY3d at 30-31*). In *Freedom Mtge. Corp. v Engel*, the Court of Appeals, holding that a lender's [***13] voluntary discontinuance [*18] of an action, without more, constitutes a revocation of the lender's election to accelerate the debt, determined that an exploration of the lender's intent and scrutinization of "the course of the parties' post-discontinuance conduct and correspondence" was "unworkable from a practical standpoint" and would require a court to engage in an "exhaustive examination" of the parties' conduct (*id. at 30*). This same sort of unworkable exercise would be required in order for [****5] a court to ascertain whether the additional material included by a lender in the envelope with the requisite notice under *RPAPL 1304* constitutes information relevant, helpful, or prejudicial to the borrower. Under such analyses, a lender could argue that any additional material included in the envelope that may be construed as helpful or is neither deceptive nor prejudicial to the borrower meets the requirements of *RPAPL 1304*. In opposition, the borrower could argue that the myriad of information provided by the lender in the envelope overshadowed the requisite notice under *RPAPL 1304* such that the borrower failed to recognize its import or did not even see it in the pages sent. Such analyses into the parties' subjective perceptions [***14] are impracticable. Moreover, to the extent that the Legislature adopted the separate envelope" requirement to obviate a borrower becoming confused or distracted by extraneous information, such analyses are inconsistent with the legislative intent and plain language of *RPAPL 1304*. *HN5*[↑] Indeed, we find that the approach taken by the Court of Appeals in *Freedom Mtge. Corp. v Engel* is instructive in analyzing compliance with *RPAPL 1304(2)*: "The determinative question is not what the [lender] intended or the borrower perceived" (*Freedom Mtge. Corp. v Engel, 37 NY3d at 23*), nor for the court to decide what other additional notices might or might not be permissible, but rather, given the clear and unambiguous language of the statute, whether the lender complied with the separate envelope requirement of *RPAPL 1304(2)*.

Nor will our determination as to strict compliance with the dictates of *RPAPL 1304(2)* undermine the legislative goal of providing information about additional protections and foreclosure prevention opportunities to homeowners at risk of losing their homes (*see* Senate Introducer's Mem in Support, Bill Jacket, L 2008, ch 472 at 7), as *HN6*[↑] nothing in *RPAPL 1304* prohibits a lender from mailing, in other envelopes, notices to a borrower—whether such notices be federally mandated or consist of [**284] any other notice or information [***15] that may assist a [*19] homeowner to avoid foreclosure. *RPAPL 1304(2)* simply requires that the notices required by its provisions be mailed in a separate envelope from those other notices.

The Plaintiff Failed to Comply with RPAPL 1304

Here, the plaintiff acknowledged that the envelope that it sent to the defendants, which contained the requisite notice under *RPAPL 1304*, also included other information in two notices pertaining to the rights of a debtor in bankruptcy and in military service. Since the plaintiff failed to establish, prima facie, that it strictly complied with the requirements of *RPAPL 1304*, the Supreme Court properly denied those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants, for summary judgment dismissing the defendants' second, third, and fourth affirmative defenses, and for an order of reference (*see e.g. USBank N.A. v Haliotis, 185 AD3d at 758-759*; *Citibank, N.A. v Conti-Scheurer, 172 AD3d 17, 21, 98 N.Y.S.3d 273*). Further, on his cross motion, Andrew Kessler established his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by showing that the plaintiff failed to comply with *RPAPL 1304* when it sent

additional material in the same envelope as the requisite notice under RPAPL 1304. In opposition, the plaintiff [***16] failed to raise a triable issue of fact.

Conclusion

The plaintiff's remaining contentions are without merit.

Accordingly, for the reasons set forth herein, the Supreme Court properly denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, for summary judgment dismissing the defendants' second, third, and fourth affirmative defenses, and for an order of reference, and properly granted Andrew Kessler's cross motion for summary judgment dismissing the complaint insofar as asserted against him.

The order is affirmed insofar as appealed from.

LASALLE, P.J., and MASTRO, J., concur.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Dissent by: MILLER

Dissent

MILLER, J., dissents, and votes to reverse the order insofar as appealed from, on the law, grant those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Andrew Kessler and Reiko Kessler, for summary judgment dismissing the second, third, and fourth affirmative defenses of those defendants, and for an order [****6] of reference, and deny the cross motion [*20] of the defendant Andrew Kessler for [***17] summary judgment dismissing the complaint insofar as asserted against him, with the following memorandum:

The additional language included on page seven of the RPAPL 1304 notice that was received by the borrower in this case did not violate any of the content provisions of that statute (*see id.* § 1304[1]). Nor did the additional language frustrate the statute's overarching purpose or intent. Since the additional language was relevant to, and in fact clarified, the warnings and instructions mandated by the statute, it did not constitute a separate "mailing or notice" (*id.* § 1304[2]), and was properly included in "[t]he notice[ ] required by this section" (*id.*). In the absence of an explicit prohibition against [**285] such additional language in a valid RPAPL 1304(1) notice, the statute should not be extended beyond its plain language in a manner that renders every inconsequential addition fatal. Both common sense and settled principles of statutory construction support this view. For although the requirements of the statute must be strictly complied with, the statute itself must be strictly construed in the first instance. The failure to do so here is error, as a matter of law. Accordingly, I must respectfully dissent.

On September [***18] 11, 2009, the defendant Andrew Kessler (hereinafter the borrower) executed a note in which he promised to repay a loan in the principal sum of $590,302, plus interest. The note was secured by a mortgage of the same date, encumbering certain real property located in Croton-on-Hudson, New York. The mortgage was executed by the borrower and the defendant Reiko Kessler (hereinafter together the homeowners).

By summons and complaint, both dated March 27, 2014, the plaintiff commenced this action against the homeowners and another defendant to foreclose the mortgage. The complaint alleged that the borrower had defaulted under the terms of the note and mortgage by failing to make the required monthly payment that was due on September 1, 2013, and by failing to make all of the required monthly payments due thereafter. Copies of the note and mortgage were annexed to, and referenced in, the complaint.

In a paper denominated "Proposed Amended Answer," the homeowners "den[ied] knowledge or information sufficient to form a belief as to the truth of the allegations contained in each and every paragraph [of the] Plaintiff's Complaint." In [*21] addition to this blanket denial, the homeowners asserted four [***19] affirmative defenses. As relevant here, the fourth affirmative defense alleged, inter alia, that the plaintiff failed to comply with RPAPL 1304.

The plaintiff subsequently moved for, among other relief, summary judgment on the complaint insofar as asserted against the homeowners, summary judgment dismissing the homeowners' second, third, and fourth affirmative defenses, and for an order of reference. The borrower cross-moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff failed to comply

with RPAPL 1304.

In an order dated November 30, 2017, the Supreme Court concluded that the plaintiff had sustained its prima facie burden in support of its motion, but that, in opposition and in support of his cross motion, the borrower had successfully demonstrated that the plaintiff failed to comply with RPAPL 1304. Accordingly, the court denied the plaintiff's motion and granted the borrower's cross motion. The plaintiff appeals. On appeal, the plaintiff contends, inter alia, that the court erred in concluding that the plaintiff failed to comply with RPAPL 1304. The plaintiff is correct.

"[A]n RPAPL 1304 notice is a notice pursuant to the Home Equity Theft Prevention Act (Real Property Law § 265-a; hereinafter HETPA), the underlying purpose of **[***20]** which is 'to afford greater protections to homeowners confronted with foreclosure'" (Bank of N.Y. Mellon v Forman, 176 AD3d 663, 665, 110 N.Y.S.3d 136, quoting Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 103, 923 N.Y.S.2d 609; see generally 264 Siegel's Practice Review, *When Does P's Proof of Service Suffice to Make D's Mere Denial of Receipt Ineffective? Treatment of Service Inadequacies in Foreclosure Cases Turns Into Broader Treatment for All Cases* at 1 [Dec. 2013]).

[286]** "Where a loan is a home loan for the borrower's principal residence, the mortgage creditor contemplating a mortgage foreclosure action is required, pursuant to RPAPL 1304, to serve the borrower with notice of his or her default in a specified form by registered or certified mail and first class mail at least 90 days prior to the commencement of the action" (Flagstar Bank, FSB v Jambelli, 140 AD3d 829, 830, 32 N.Y.S.3d 625 [citation omitted]; see RPAPL 1304[1], [2], [6][a][1][iii]).

RPAPL 1304(1) provides that the relevant

[*22] "lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include the following:

'YOU MAY BE AT RISK OF FORECLOSURE. PLEASE READ THE FOLLOWING NOTICE CAREFULLY'

'As of __, your home loan is __ days and __ dollars in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home.

Attached to this notice is a list of **[***21]** government approved housing counseling agencies in your area which provide free counseling. You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at http://www.aghomehelp.com/. A statewide listing by county is also available at http://www.dfs.ny.gov/consumer/mortg nys np counseling agencies.htm. Qualified free help is available; watch out for companies or people who charge a fee for these services.

Housing counselors from New York-based agencies listed on the website above are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation. If you wish, you may also contact us directly at __ and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If you have not taken any actions to resolve this matter within 90 days from the date this notice was **[***22]** mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Department of Financial Services' **[*23]** toll-free helpline at (show number) or visit the Department's website at (show web address).[']"

"The notice warns the homeowner, in essence, that their mortgage is in default, placing the homeowner at risk of losing the home, and specifying the amount of arrears that needed to be paid in order to cure the default" (Mark C. Dillon, *Unsettled Times Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law*, 76 Alb L Rev 1085, 1110 [2012-2013]). "[T]he notice advises that if the default issues are not resolved within ninety days, a foreclosure action may be commenced against the homeowner" (id. at 1110).

"The notice must also inform the homeowner of government approved housing counseling agencies that provide free or low-cost housing advice" (*id.*). "The number of government approved housing counselors **[**287]** identified in the notice

shall be at least five, along with their last known addresses and telephone numbers" (*id. at 1110-1111*; *see USBank N.A. v Haliotis, 185 AD3d 756, 758, 128 N.Y.S.3d 17*). "The notice must also encourage the **[***23]** homeowner to contact one of the counseling agencies" (Mark C. Dillon, *Unsettled Times: Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law*, *76 Alb L Rev at 1110*).

As indicated, "[t]he notices required by [*RPAPL 1304*] shall be sent by such lender, assignee . . . or mortgage loan servicer to the borrower, by registered or certified mail and also by **[****7]** first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage" (*RPAPL 1304[2]*). The statute further provides that "[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice" (*id.*).

The "[c]ontent, timing, and service provisions of *RPAPL 1304* are very specific and couched in mandatory language" (*Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 103-104*; *see H & R Block Bank, FSB v Liles, 186 AD3d 813, 815-816, 130 N.Y.S.3d 521*). Where applicable, "proper service of the *RPAPL 1304* notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action" (*Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 103*; *see Flagstar Bank, FSB v Jambelli, 140 AD3d at 830* [citing *RPAPL 1302*]). "Strict compliance with *RPAPL 1304*" is required (*Citibank, N.A. v Conti-Scheurer, 172 AD3d 17, 20, 98 N.Y.S.3d 273*; *see Aurora Loan [*24] Servs., LLC v Weisblum, 85 AD3d at 103*), "and the plaintiff has the burden of establishing satisfaction of this condition" (*Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106* [citing *RPAPL 1302*]).

However, a "failure to comply with *RPAPL 1304* is not jurisdictional" **[***24]** (*Flagstar Bank, FSB v Jambelli, 140 AD3d at 830*; *see Pritchard v Curtis, 101 AD3d 1502, 1504, 957 N.Y.S.2d 440*). "Statutorily, violation of the provisions of *RPAPL 1304* constitutes a defense to a home loan mortgage foreclosure action" (*Pritchard v Curtis, 101 AD3d at 1504* [citing *RPAPL 1302*]; *see Flagstar Bank, FSB v Jambelli, 140 AD3d at 830* [same]). Where the defense is properly raised, "compliance with *RPAPL 1304* [is] a component of [the plaintiff's] prima facie burden" (*H & R Block Bank, FSB v Liles, 186 AD3d at 817*; *see USBank N.A. v Haliotis, 185 AD3d at 758*; *Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106*).

Here, on his cross motion for summary judgment dismissing the complaint insofar as asserted against him, the borrower contended, among other things, that the plaintiff failed to strictly comply with "the form and content" requirements of *RPAPL 1304*. The borrower argued that the plaintiff failed to strictly comply with the requirements of *RPAPL 1304* because the notice that was sent to him by the plaintiff included additional language, in both English and Spanish, which was not explicitly required by *RPAPL 1304*.

In support of his cross motion, the borrower submitted, inter alia, his own affidavit and a copy of the *RPAPL 1304* notice that he allegedly received from the plaintiff. The borrower conceded that he had received the *RPAPL 1304* notice sent to him by the plaintiff, and the notice as reflected in the record included the applicable **[**288]** language set forth in *RPAPL 1304(1)*. However, the borrower contended that the *RPAPL 1304* notice that he received from the plaintiff included language in addition **[***25]** to the language that was required by *RPAPL 1304(1)*. The borrower contended that the inclusion of this additional language constituted a separate notice within the meaning of *RPAPL 1304(2)*, and therefore violated the "separate envelope" requirement imposed in that subdivision (*id.*).

The Supreme Court accepted the borrower's argument and concluded that "as it is undisputed that plaintiff provided additional information in the envelope along with the statutorily required information, this Court finds that plaintiff did not strictly comply with *RPAPL § 1304* and thus, a condition precedent **[*25]** to the foreclosure action was not met."

In affirming the order insofar as appealed from, my colleagues in the majority now similarly "hold that inclusion of any material in the separate envelope sent to the borrower under *RPAPL 1304* that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of *RPAPL 1304(2)*."

Although these formulations use the terms "information" and "material," respectively, those designations both refer to additional language which appeared on page seven of the *RPAPL 1304* notice that was received by the borrower. Under this construction of the statute, any language (i.e., any word, sentence, or paragraph) **[***26]** that is not explicitly *required* by *RPAPL 1304(1)* constitutes, as a matter of law, a separate "mailing or notice" within the meaning of *RPAPL 1304(2)*. The

plain language of the statute does not support this construction. Rather, as quoted above, the plain language merely provides that a "lender, assignee or mortgage loan servicer shall give notice to the borrower . . . which shall *include* the following [language]" (*id.* § 1304[1] [emphasis added]). The statute positively sets forth the language that must be included in a valid RPAPL 1304 notice (*see id.*). The plain language does not purport to restrict the content of a valid notice, or prohibit the inclusion of any other language beyond that which is explicitly required (*see id.*).

Indeed, this Court has recognized that "the word 'includes' is usually a term of enlargement, and not of limitation . . . it therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes" (*Matter of Willow Wood Rifle & Pistol Club v Town of Carmel Zoning Bd. of Appeals*, 115 AD2d 742, 744, 496 N.Y.S. 2d 548 [alterations and internal quotation marks omitted]). The Court of Appeals has similarly recognized that the term "'[i]ncluding' may be used to bring into a definition something that would not be there unless specified, or it may be used to show the meaning [***27] of the defined word by listing some of the things meant to be referred to, *but not by such listing excluding others of the same kind*" (Red Hook Cold Stor. Co. v Department of Labor of State of N.Y., 295 NY 1, 8, 64 N.E.2d 265 [emphasis added]).

If it had been the Legislature's intent to restrict or proscribe additional language in a valid RPAPL 1304 notice, that intent [*26] "would have been expressed" (Burnside v Whitney, 21 NY 148, 149). The statute could have stated that a valid RPAPL 1304(1) notice shall *only* include certain language, but the Legislature chose not to employ any such words of limitation. In its present form, there is no statutory basis to conclude that any language beyond that which is required by RPAPL 1304(1), however slight or innocuous, constitutes a separate "mailing or notice" [**289] within the meaning of RPAPL 1304(2) (*see id.* § 1304[1]; Red Hook Cold Stor. Co. v Department of Labor of State of N.Y., 295 NY at 8; Matter of Willow Wood Rifle & Pistol Club v Town of Carmel Zoning Bd. of Appeals, 115 AD2d at 744-745). In the absence of a specific statutory proscription against additional content in a valid RPAPL 1304(1) notice, basic principles of statutory construction counsel against reading such a prohibition into the statute.

The courts of this state have long recognized that a statute in derogation of the common law, or which infringes upon an existing common right, must "be strictly construed" (Hayes v Davidson, 98 NY 19, 22, 7 Civ. Proc. R. 46, 1 How. Pr. (n.s.) 310; *see* Transit Commn. v Long Is. R.R. Co., 253 NY 345, 355; People v Phyfe, 136 NY 554, 559, 32 N.E. 978, 10 N.Y. Cr. 246; Taylor v Mayor of City of N.Y., 82 NY 10, 10; Burnside v Whitney, 21 NY at 149; *see generally* McKinney's Cons Laws of NY, Book 1, Statutes §§ 301, 311). In addition, "[i]t is a well-settled rule . . . that a party has a right to sue [***28] on any cause of action which he [or she] holds, and any statutory exception to that right must be distinctly expressed" (Saxe v Peck, 139 App Div 419, 420, 124 N.Y.S. 14; *see* Salters v Tobias, 3 Paige Ch 338 [Ch Ct 1832]).

Here, as already observed, strict compliance with RPAPL 1304 is a "condition precedent" to the commencement of such an action (Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 103), and "a component of [the plaintiff's] prima facie burden" (H & R Block Bank, FSB v Liles, 186 AD3d at 817; *see* Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106). These statutory requirements, which presently constitute "the most-litigated issue in residential mortgage foreclosure [actions]" (Dan M. Blumenthal, 2020 Supp Practice Commentaries, McKinney's Cons Laws of NY, RPAPL 1304), plainly "limit[ ] a mortgage holder's right to commence an action to foreclose on its mortgage" (1 Bergman on New York Mortgage Foreclosures § 4.04B). Case law from this Court indeed reflects that "the foreclosure provisions of RPAPL Article 13 must be strictly construed . . . because the statute is in derogation of a [*27] plaintiff's/mortgagee's common-law right to commence an action in foreclosure and to recover the mortgage debt" (*id.*; *see* Valley Sav. Bank v Rose, 228 AD2d 666, 667, 646 N.Y.S.2d 349; Dollar Dry Dock Bank v Piping Rock Bldrs., Inc., 181 AD2d 709, 710, 581 N.Y.S.2d 361).

In this case, the RPAPL 1304 notice was sent by the plaintiff and received by the borrower within the prescribed time period. The notice itself did, in fact, "include" all of the language that the [***29] statute required (*id.* § 1304[1]). Accordingly, there was "strict compliance with statutory commands as to matters of prescribed content" (Matter of Hutson v Bass, 54 NY2d 772, 774, 426 N.E.2d 749, 443 N.Y.S.2d 57; *see* Red Hook Cold Stor. Co. v Department of Labor of State of N.Y., 295 NY at 8; Matter of Willow Wood Rifle & Pistol Club v Town of Carmel Zoning Bd. of Appeals, 115 AD2d at 744-745). Inasmuch as the statute does not expressly prohibit any additional language in "[t]he notices required by this section" (RPAPL 1304[2]), the additional language included on page seven of the RPAPL 1304

notice here did not violate the content provisions of RPAPL 1304(1).

Statutory support for such a prohibition is also absent from RPAPL 1304(2). That subdivision does not purport to set any restrictions on the content of "[t]he notices [**290] required by this section" (id.). Nor does it define the facts or circumstances that would constitute a separate "mailing or notice" for the purposes of the "separate envelope" requirement (id.). In the absence of such language, there is no statutory basis to conclude that the "separate envelope" requirement is applicable to the additional language that was included in the otherwise valid RPAPL 1304 notice received by the borrower here (id.).

The allegedly separate "mailing or notice" in this case was additional clarifying [****8] language, in Spanish and English, which appeared on page seven of the RPAPL 1304 notice, after the statutorily mandated language. The additional language advised the [***30] borrower that if he was in bankruptcy, he was "not obligated to discuss [his] home loan with [the plaintiff] or enter into a loan modification or other loan-assistance program." Additional language on that page further advised the borrower that if he or his spouse was "a member of the military," he should contact the plaintiff "immediately" as such status could confer "significant protections and benefits."

"The content of [an] RPAPL 1304 notice furthers the legislative intent 'to provide a homeowner with information necessary . . . to preserve and protect home equity'" (Bank of N.Y. Mellon v Forman, 176 AD3d at 665-666, quoting Aurora Loan [*28] Servs., LLC v Weisblum, 85 AD3d at 107 [internal quotation marks omitted]; see Real Property Law § 265-a[1][d]). The "manifest purpose [of the RPAPL 1304 notice] is to aid the homeowner in an attempt to avoid litigation" (Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 107; see Bank of N.Y. Mellon v Forman, 176 AD3d at 666). As set forth above, the additional language included in the RPAPL 1304(1) notice in this case furthered these general legislative purposes.

Indeed, the additional language contained at the end of the RPAPL 1304 notice provided information which, if applicable, superseded the statutorily mandated language. The additional language was clear and unambiguous, and did not serve to negate, confuse, or otherwise impair any of the information that the statute requires to be included in the notice to [***31] the homeowner (see id. § 1304[1]). The additional language was relevant to, and clarified, the statutorily mandated language. Where, as here, the plain language of the statute has not been violated, and where the spirit and intent of the law has not been frustrated, the statute should not be extended in a way that transforms every inconsequential addition into a new dispositive issue. "That seems to [me] to be the common sense of the matter; and common sense often makes good law" (Peak v United States, 353 US 43, 46, 77 S. Ct. 613, 1 L. Ed. 2d 631 [Douglas, J.]).

Since the additional language in this case was relevant to, and clarified, the warnings required by RPAPL 1304(1), it did not constitute a separate "mailing or notice" (id. § 1304[2]), and was properly included in "[t]he notice[ ] required by this section" (id.). The Supreme Court's failure to strictly construe the plain language of the statute in this case constituted legal error. Under the circumstances, the order must be reversed insofar as appealed from, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the homeowners, for summary judgment dismissing the homeowners' second, third, and fourth affirmative defenses, and for an order of reference must be [***32] granted, and the borrower's cross motion for summary [**291] judgment dismissing the complaint insofar as asserted against him must be denied.

End of Document

Wells Fargo Bank, N.A. v. Yapkowitz

Supreme Court of New York, Appellate Division, Second Department

September 29, 2021, Decided

2019-00133, 2019-00134, 2019-00135, 2019-00136, (Index No. 33182/13)

Reporter
199 A.D.3d 126 *; 155 N.Y.S.3d 163 **; 2021 N.Y. App. Div. LEXIS 5248 ***; 2021 NY Slip Op 05139 ****; 2021 WL 4448061

[****1] Wells Fargo Bank, N.A., etc., appellant, v Fred J. Yapkowitz, et al., respondents, et al., defendants.

Subsequent History: Leave to appeal denied by *People v. Williams, 2022 N.Y. LEXIS 547 (N.Y., Feb. 25, 2022)*

Prior History: *Wells Fargo Bank, N.A. v. Yapkowitz, 59 Misc. 3d 1227(A), 108 N.Y.S.3d 290, 2018 N.Y. Misc. LEXIS 1879, 2018 WL 2326174 (May 21, 2018)*

Core Terms

notice, borrowers, mailing, envelope, lender, co-borrowers, foreclosure action, first-class, mortgage, commencement, servicer, mortgage loan, jointly, certified mail, delivery, assignee, default, default notice, inter alia, foreclosure, condition precedent, last known address, strict compliance, compliance, homeowner, registered, singular, appeals, records, plural

Case Summary

Overview

HOLDINGS: [1]-The supreme court properly denied a lender's motion for summary judgment on the complaint to foreclose a mortgage and properly dismissed the complaint. Since the 90-day notice to each of the borrowers was sent in the same envelope, the lender failed to establish its compliance with RPAPL 1304, a condition precedent to the commencement of the action. While 30-day notices of default were separately mailed to each of the borrowers, the 90-day notice, which was sent via certified and first-class mail, was jointly addressed to the borrowers. The mailing of a 90-day notice jointly addressed to two or more borrowers in a single envelope was not sufficient to satisfy the requirements of RPAPL 1304, and the plaintiff had to separately mail a 90-day notice to each borrower as a condition precedent to commencing the foreclosure action.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Banking Law > ... > Banking & Finance > Consumer Protection > Predatory Lending

Real Property Law > Financing > Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN1[] **Consumer Protection, Predatory Lending**

An *RPAPL 1304* notice is a notice pursuant to the Home Equity Theft Prevention Act, *Real Property Law § 265-a*, the

underlying purpose of which is to afford greater protections to homeowners confronted with foreclosure. *RPAPL 1304* was added to the Real Property Actions and Proceedings Law in 2008 as part of the legislative response to the subprime lending crisis and the epidemic of foreclosures. L 2008, ch 472, § 2. *RPAPL 1304* requires 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. Since *RPAPL 1304* notice must be sent at least 90 days prior to the commencement of an anticipated foreclosure action, its manifest purpose is to aid the homeowner in an attempt to avoid litigation.

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Evidence > Burdens of Proof > Allocation

Real Property Law > Financing > Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN2[] **Methods of Service, Mail**

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. The statute requires, inter alia, that (1) the 90-day notice be sent by registered or certified mail, and also by first-class mail, to both (a) the last known address of the borrower and (b) the residence that is the subject of the mortgage; and that (2) the notices required by this section be sent in a separate envelope from any other mailing or notice. *RPAPL 1304(2)*. By requiring the lender or mortgage loan servicer to send the *RPAPL 1304* notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by submission of proof of mailing by the post office.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Conditions Precedent

Real Property Law > Financing > Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN3[] **Contract Conditions & Provisions, Conditions Precedent**

The purpose of *RPAPL 1304* is to provide notice to the borrowers prior to the commencement of the foreclosure action in an attempt to avoid litigation. The failure to send a *RPAPL 1304* notice to each of the borrowers is not a "minor irregularity" that can be disregarded in the absence of prejudice, but rather the condition sought to be disregarded by the plaintiff is a mandatory condition precedent.

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN4[] **Methods of Service, Mail**

Not mailing notices to individual borrowers violates the mailing requirements of RPAPL1304.

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN5[] **Methods of Service, Mail**

The mailing of a 90-day notice jointly addressed to two or more borrowers in a single envelope is not sufficient to satisfy the

requirements of RPAPL 1304, and the plaintiff must separatelynotice in a separate envelope from any other required notice.
mail a 90-day notice to each borrower as a condition precedent
to commencing the foreclosure action.

Real Property Law > Financing > Foreclosures

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN8 **Financing, Foreclosures**

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Since the purpose of RPAPL 1304 is to take measures aimed at ensuring notice to the borrowers of an impending foreclosure action in an attempt to avoid litigation, it would subvert the legislative purpose of the statute to shift the burden of providing notice to each borrower from the lender or mortgage loan servicer to one of the borrowers who happens to sign for the envelope.

HN6 **Methods of Service, Mail**

RPAPL 1304(1) provides that giving notice to the borrower in the singular, at least 90 days prior to the commencement of the foreclosure action, is a prerequisite to commencement of the action against the borrower, or borrowers. By contrast, RPAPL 1304(2), which sets forth the mailing requirements for the 90-day notice, contains no reference to "borrowers" in the plural.

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Foreclosures

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Real Property Law > Financing > Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN9 **Methods of Service, Mail**

HN7 **Methods of Service, Mail**

RPAPL 1304(2) does not require actual notice to a borrower, or to each of multiple borrowers, insofar as notice is considered given as of the date it is mailed. Nevertheless, the mailing requirements of RPAPL 1304(2) were enacted to assure that the transmitted notice is actually received, with the added value of providing the lender with documentary evidence that the delivery requirements of the statute were met.

RPAPL 1304(2) requires the 90-day notice to be sent by registered or certified mail, and also by first-class mail, to both (1) the last known address of the borrower and (2) the residence that is the subject of the mortgage. Further, RPAPL 1304(2) provides that the notices required by this section shall be sent in a separate envelope from any other mailing or notice. While mailing a notice jointly addressed to multiple borrowers at the property which is the subject of the mortgage would clearly be sufficient to satisfy the requirement of sending the 90-day notice to the residence that is the subject of the mortgage, such mailing would not also satisfy the separate requirement under RPAPL 1304(2) to mail the notices required by this section to the last known address of the borrower and to mail each such

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Foreclosures

Real Property Law > Financing > Mortgages & Other

Security Instruments > Mortgagor's Interests

HN10[] **Methods of Service, Mail**

While notice is considered given as of the date it is mailed, *RPAPL 1304(2)*, that provision cannot be complied with unless and until each notice "required by this section" has been sent in a separate envelope from any other mailing or notice. Thus, notice cannot be deemed given until the date of mailing, in separate envelope, of each 90-day "notice to the borrower," (*1304(1)*), means notice to each borrower.

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN11[] **Methods of Service, Mail**

Insofar as strict compliance with *RPAPL 1304* is a condition precedent to the commencement of a foreclosure action, the obligation to send all required notices in a separate envelope from any other mailing or notice cannot be satisfied by including the required notice for each borrower in the same envelope. *RPAPL 1304(2)*.

Counsel: [***1] McCalla Raymer Leibert Pierce, LLC, New York, NY (Daniel LoPresti of counsel), for appellant.

Becker Law Firm, PLLC, New City, NY (Steven H. Becker of counsel), for respondents.

Judges: MARK C. DILLON, J.P., SYLVIA O. HINDS-RADIX, BETSY BARROS, PAUL WOOTEN, JJ. HINDS-RADIX and BARROS, JJ., concur.

Opinion by: WOOTEN

Opinion

[**165] [*128] APPEALS by the plaintiff, in an action to foreclose a mortgage, from (1) an order of the Supreme Court (Gerald E. Loehr, J.), dated September 26, 2017, and entered in Rockland County, (2) a decision of the same court (Paul I. Marx, J.) dated May 21, 2018, (3) an order of the same court (Paul I. Marx, J.) dated July 23, 2018, and (4) a judgment of the same court (Paul I. Marx, J.) dated July 23, 2018. The order dated September 26, 2017, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint and for an order of reference. The decision, after a nonjury trial, determined that the plaintiff failed to comply with *RPAPL 1304*. The order dated July 23, 2018, denied the plaintiff's motion pursuant to *CPLR 4404(b)* to set aside the decision. The judgment, upon the decision, is in favor of the defendants Fred J. Yapkowitz and Elaine M. Yapkowitz and against the [***2] plaintiff dismissing the complaint insofar as asserted against them.

WOOTEN, J.

OPINION & ORDER

This appeal presents an issue of first impression before this Court as to whether a plaintiff in a foreclosure action may satisfy the requirements of *RPAPL 1304* by mailing a 90-day notice jointly addressed to two or more borrowers. We hold that this practice is insufficient to satisfy the requirements of *RPAPL 1304*, and that the plaintiff is required to mail a 90-day notice addressed to each borrower in separate envelopes as a condition precedent to commencing the foreclosure action.

I. *Background*

On May 6, 2005, the married defendants Fred J. Yapkowitz and Elaine M. Yapkowitz (hereinafter together the defendants) borrowed the sum of $532,000 from Argent Mortgage Company, LLC (hereinafter Argent), which was secured by a mortgage encumbering their real property in Pomona. The loan was memorialized by a note which was signed by each of the defendants as "Borrower."

On or about January 1, 2009, the defendants defaulted on their payment obligations. [****2] On January 22, 2009, Wilshire Credit Corporation (hereinafter Wilshire), the loan servicer at that time, mailed separate 30-day notices of default to each of the defendants. [***3] The 30-day notices advised each of the defendants that they were obligated to pay the sum of $6,189.30 by February 26, 2009, and that the failure to make payment by that date could result in acceleration of the entire indebtedness of the loan and the commencement of a foreclosure action.

In a letter dated February 26, 2010, jointly addressed to thecompliance with *RPAPL 1304*, a condition precedent to the defendants, Bank of America Home Loans notified thecommencement of the foreclosure action, since the 90-day defendants that servicing of the loan was transferred fromnotice submitted by the plaintiff was addressed to both Wilshire to BAC Home Loans Servicing, LP (hereinafterdefendants jointly, and the plaintiff only presented a certified BAC). The defendants were subsequently notified thatmail receipt signed by "F. Yapkowitz." Thus, the defendants' servicing of the loan was transferred from BAC to Bank ofattorney asserted that apparently "only one 90-day notice was America, N.A. (hereinafter BANA). Thereafter, the defendantsmailed, rather than single notices addressed to each of the were notified that servicing of the **[**166]** loan wasdefendants individually and in separate envelopes, as required transferred from BANA to Nationstar Mortgage, LLCby *RPAPL 1304*."
(hereinafter Nationstar).

In an order dated September 26, 2017, the Supreme Court
In April 2013, Argent assigned the mortgage to the plaintiff.denied the plaintiff's motion. The court determined that the Thereafter, the plaintiff commenced this foreclosure actionplaintiff failed to establish its prima facie entitlement to against, among others, the defendants. In their answer, thejudgment as a matter of law by relying on the affidavit of Hyne, defendants asserted affirmative defenses, including that thewho had no personal knowledge of the mailing of the 90-day plaintiff failed to comply with the requirements of *RPAPL*notice, and relied on inadmissible hearsay.
1304.

At a pretrial conference on February 7, 2018, the parties
In June 2017, the plaintiff moved, inter alia, for summarystipulated **[***6]** to the submission of papers in lieu of judgment on the complaint. In support **[***4]** of the motion,testimony on the issue of, inter alia, whether the plaintiff the plaintiff submitted, among other things, a copy of a 90-daycomplied with *RPAPL 1304*. Thereafter, the plaintiff submitted, notice **[*129]** pursuant to *RPAPL 1304* sent by BANA viaamong other **[*130]** things, an affidavit from Jamie Turner, certified and first-class mail to the defendants' address, and aassistant vice president of BANA, the former loan servicer. certified mail receipt for the 90-day notice signed for by "F.Turner averred, inter alia, that BANA's business records Yapkowitz." The 90-day notice was jointly addressed to both ofreflected that "BANA sent 90-day pre-foreclosure notices . . . the defendants.
via certified and first class mail to Defendants . . . in accordance with BANA's established and routinely followed business
The plaintiff also submitted an affidavit from Edward Hyne, apractices and procedures designed to ensure that documents are litigation resolution analyst for Nationstar. Hyne averred, interproperly addressed and mailed," and that the 90-day notice was alia, that Nationstar's business records, which incorporated thesigned for by "F. Yapkowitz." Turner added that "each 90-Day records of the prior loan servicer, BANA, reflected that "90-dayNotice listed in the upper left-hand corner the names of the pre-foreclosure notices . . . were sent, via certified and firstrecipients (Defendants), the recipients' mailing address . . . and class mail, to Defendants," that "each 90-Day Notice was sentthe specific Mortgage Loan number."
in a separate envelope from any other mailing," and that "F.
Yapkowitz" "signed for and accepted the delivery of the . . . 90-In a decision dated May 21, 2018, made after the submission of Day Notice." Hyne also indicated that "each 90-Daypapers, the Supreme Court determined, inter alia, that "Turner **[**167]** Notice listed in the upper left-hand corner the name ofpossesse[d] the requisite knowledge of BANA's standard office the recipients (the Borrowers), the recipient's address . . . andpractices and procedures to attest that BANA properly sent the the specific Mortgage Loan number."
1304 Notice and . . . substantiate[d] the mailing with documentary proof" (*Wells Fargo Bank, N.A. v Yapkowitz, 59*
In opposition to the plaintiff's motion, the defendants*Misc [****3] 3d 1227[A], 2018 NY Slip Op 50726[U], *7* submitted, inter alia, an affidavit from both of them, wherein*[Sup Ct, Rockland County]*). Nevertheless, **[***7]** the court they averred, in pertinent part, that "[n]either **[***5]** of usdetermined that the plaintiff failed to establish its strict remembers receiving and reading any 90-day notice of default,"compliance with *RPAPL 1304*, which "requires a separate or "whether the 90-day notice . . . addressed to both of us, . . .notice to each borrower in a separate envelope" (*Wells Fargo* and signed for by Fred [Yapkowitz,] . . . was ever shown to*Bank, N.A. v Yapkowitz, 59 Misc 3d 1227[A], 2018 NY Slip Op* Elaine [Yapkowitz]." The defendants' attorney argued, among*50726[U], *8*), and thus, the foreclosure action must be other things, that the plaintiff failed to establish its strictdismissed. The court rejected the plaintiff's contention that it

could be presumed that Fred J. Yapkowitz informed his wife, Elaine M. Yapkowitz, of his receipt of the RPAPL 1304 notice since the lender cannot "shift[ ] its responsibility to provide the 1304 Notice to both borrowers from itself . . . [to] the borrower who signed for the certified mailing or opened the first-class mailing" (Wells Fargo Bank, N.A. v Yapkowitz, 59 Misc 3d 1227[A], 2018 NY Slip Op 50726[U], *8).

Thereafter, the plaintiff moved pursuant to CPLR 4404(b) to set aside the decision. In an order dated July 23, 2018, the Supreme Court denied the plaintiff's motion.

In a judgment dated July 23, 2018, upon the decision, the Supreme Court dismissed the complaint insofar as asserted against the defendants based upon the plaintiff's failure to establish its strict compliance with RPAPL 1304.

The plaintiff appeals from (1) the order dated September 26, 2017; (2) the decision dated May 21, 2018; (3) the order dated July 23, 2018; and (4) the judgment dated July 23, 2018.

[*131] The appeal from the decision must be dismissed, as no appeal **[***8]** lies from a decision (*see Schicchi v J.A. Green Const. Corp., 100 AD2d 509*). The appeals from the orders dated September 26, 2017, and July 23, 2018, also must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho, 39 NY2d 241, 248, 347 N.E.2d 647, 383 N.Y.S.2d 285*). The issues raised on the appeals from those orders are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

II. *Discussion*

A. *Overview of RPAPL 1304*

HN1[↑] An RPAPL 1304 notice is a notice pursuant to the Home Equity Theft Prevention Act (Real Property Law § 265-a), "the underlying purpose of which is 'to afford greater protections to homeowners confronted with foreclosure'" (Bank of N.Y. Mellon v Forman, 176 AD3d 663, 665, 110 N.Y.S.3d 136, quoting Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 103, 923 N.Y.S.2d 609). "RPAPL 1304 was added to the Real Property Actions and Proceedings Law in 2008 as part of the legislative response to the subprime lending crisis and the epidemic of foreclosures" (Sparta GP Holding Reo Corp. v Lynch, 186 AD3d 894, 895, 131 N.Y.S.3d 17; *see* L 2008, ch 472, § 2). "RPAPL 1304 requires 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 **[**168]** loan servicer must give notice to the borrower" (*Bank of N.Y. Mellon v Porfert, 187 AD3d 1110, 1111-1112, 134 N.Y.S.3d 57*). "Since RPAPL 1304 notice must be sent at least 90 days prior to the commencement of an anticipated foreclosure action, its manifest purpose is to aid the homeowner in an attempt to avoid **[***9]** litigation" (Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 107). Further, "[t]he legislative history noted a typical lack of communication between distressed homeowners and their lenders prior to the commencement of litigation" (*id.*), and "[t]he bill sponsor sought 'to bridge that communication gap in order to facilitate a resolution that avoids foreclosure' by providing [the] preforeclosure notice . . . and an 'additional period of time . . . to work on a resolution'" (*id.*, quoting Senate Introducer's Mem in Support, Bill Jacket, L 2008, ch 472 at 10).

"*HN2*[↑] Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of **[*132]** a foreclosure action'" (*Bank of N.Y. Mellon v Porfert, 187 AD3d at 1112*, quoting Citibank, N.A. v Conti-Scheurer, 172 AD3d 17, 20, 98 N.Y.S.3d 273), "'and the plaintiff has the burden of establishing satisfaction of this condition'" (*Bank of N.Y. Mellon v Porfert, 187 AD3d at 1112*, quoting Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106). The statute requires, inter alia, that (1) the 90-day notice be sent by registered or certified mail, and also by first-class mail, to both (a) "the last known address of the borrower" and (b) "the residence that is the subject of the mortgage"; and that (2) "[t]he notices required by this section" be sent "in a separate envelope from any other mailing or notice" (RPAPL 1304[2]). "By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered **[***10]** 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 submission of proof of mailing by the post office" (Wells Fargo Bank, N.A. v Trupia, 150 AD3d 1049, 1050, 55 N.Y.S.3d 134).

B. *Case Law Analyzing Whether RPAPL 1304 Requires Separate Mailings to Each Borrower*

In Aurora Loan Servs., LLC v Weisblum (85 AD3d 95, 923 N.Y.S.2d 609), this Court addressed the issue of whether each of the married borrowers was entitled to a 90-day notice pursuant to RPAPL 1304. In that case, the plaintiff addressed the 90-day notice to only one of the two individuals who agreed to pay the

amounts due under a consolidated note. This Court determined RPAPL 1304(1) was amended to add a plural reference to that since each of those individuals was a "borrower" (Aurora "borrowers" with respect to the commencement of a foreclosure Loan Servs., LLC v Weisblum, 85 AD3d at 105 [internal action, whereas RPAPL 1304(2) continued to refer to a quotation marks omitted]), each was "entitled to receive notice "borrower" in the singular with respect to mailing 90 days prior to commencement of the action" (id. at 105). requirements, reflecting a recognition that "there is often more While the plaintiff in *Weisblum* argued that the failure to serve than one borrower/defendant" (Deutsche Bank Natl. Trust Co. v a 90-day notice on one of the borrowers was "inconsequential Jimenez, 62 Misc 3d at 828), but that "each borrower" (id.) because she likely became aware of the notice allegedly sent to must individually receive the RPAPL 1304 notice.
her husband and, in any event, both [of the borrowers] . . .
appeared at [a] mandatory settlement conference after the Further, in *HSBC Bank, USA N.A. v Patricola (62 Misc 3d* commencement of the action" (id. at 106-107), this Court *1209[A], 2019 NY Slip Op 50076[U] [Sup Ct, Suffolk* rejected that contention, holding that HN3[↑] the purpose of *County])*, the Supreme Court again determined that each RPAPL 1304 was to provide notice [***11] to the borrowers borrower is entitled to a separate RPAPL 1304 notice, since it prior to the commencement of the foreclosure action "in an would be improper for the court to essentially rewrite the attempt to avoid litigation" (Aurora Loan Servs., LLC v statute to substitute "borrowers" in the plural for "borrower" in Weisblum, 85 AD3d at 107). Moreover, this Court determined the singular under RPAPL 1304(2).
that the failure to send a RPAPL 1304 [*133] notice to each of
the borrowers was not a "minor irregularity [**169] " (Aurora [*134] HN4[↑] Likewise, in HSBC Bank USA v Hoffman Loan Servs., LLC v Weisblum, 85 AD3d at 108) that could be (2019 WL 7559637, *5, 2019 NY Misc LEXIS 6193, *13 [Sup disregarded in the absence of prejudice, but rather "the Ct, Westchester County]), the Supreme Court reiterated the condition sought to be disregarded [by the plaintiff] is a principle that "not mailing notices to individual borrowers mandatory condition precedent" (id.). violates the mailing requirements of RPAPL § 1304."

While it is apparent from this Court's decision in *Weisblum* that However, in Hudson City Sav. Bank, FSB v D'Ancona (2017 NY each borrower is entitled to be sent notice at least 90 days prior Slip Op 31917[U], *9 [Sup Ct, Suffolk County]), the Supreme to the commencement of the foreclosure action pursuant to Court determined that the mere fact that 90-day notices "were RPAPL 1304, neither this Court nor any appellate court in New addressed to both borrowers" in a single [***13] mailing "does York has determined whether each borrower is entitled to not violate the requirements of [RPAPL 1304]" (id. at *9), since receive an individually addressed 90-day notice in a separate the mailing was signed for by one of the borrowers and "the envelope from a 90-day notice sent to the other borrower(s). post office does not require two signatures to serve such Further, while this issue has been addressed by the Supreme documents" (id.).
Court in several decisions, there is some disagreement among
those decisions as to whether RPAPL 1304 requires a separate Similarly, in HSBC Bank USA, N.A. v Schneider (2020 NY Slip 90-day notice to be mailed to each borrower. Op 30182[U] [Sup Ct, Suffolk County]), the Supreme Court, while determining that the plaintiff failed to establish, prima

In U.S. Bank Natl. Assn. v Diaz (2018 NY Slip Op 30436[U] facie, its mailing of a RPAPL 1304 notice, stated in dicta that [Sup Ct, Queens County]), the plaintiff's submissions indicated there was no basis to find "the notice is facially defective just that only one 90-day notice, addressed to both of the defendant [**170] because [the borrowers] are listed jointly as borrowers, was mailed to them. The Supreme Court addressees" (HSBC Bank USA, N.A. v Schneider, 2020 NY Slip determined [***12] that such notice was insufficient to Op 30182[U], *3).
establish "proper service of the RPAPL 1304 notice on each of
the borrowers" (id. at *4).

C. *Necessity for Separate Mailings of RPAPL 1304 Notices to Each [****4] Borrower*

Similarly, in Deutsche Bank Natl. Trust Co. v Jimenez (62 Misc HN5[↑] We hold that the mailing of a 90-day notice jointly 3d 811, 812, 93 N.Y.S.3d 532 [Sup Ct, Suffolk County]), the addressed to two or more borrowers in a single envelope is not Supreme Court determined that a single "joint notice" sent to sufficient to satisfy the requirements of RPAPL 1304, and that two borrowers was insufficient to satisfy the requirements of the plaintiff must separately mail a 90-day notice to each RPAPL 1304 . In that case, the Supreme Court noted that borrower as a condition precedent to commencing the

foreclosure action.

HN6[↑] RPAPL 1304(1) provides that giving "notice to the borrower" (emphasis added), in the singular, at least 90 days prior to the commencement of the foreclosure action, is a prerequisite to commencement of the action "against the borrower, *or borrowers*" (*id.* [emphasis added]). By contrast, RPAPL 1304(2), which sets forth the mailing requirements for the 90-day notice, contains no **[***14]** reference to "borrowers" in the plural. HN7[↑] RPAPL 1304(2) requires the 90-day notice to be sent by registered or certified mail, and also by first-class mail, to both (1) "the last known address of the borrower" and (2) "the residence that is the subject of the mortgage" (*id.*). Further, RPAPL 1304(2) provides that "[t]he notices required by this section shall be sent . . . in a separate envelope from any other mailing or notice." While mailing a notice jointly addressed to multiple borrowers at the property which is the subject of the mortgage would clearly be sufficient to satisfy the requirement of sending the 90-day notice to "the residence that is the subject of the mortgage" (*id.*), such mailing would not also satisfy the separate requirement under RPAPL 1304(2) to mail "[t]he notices required by this section . . to the last known address of the borrower" (and to mail each such notice in a separate envelope from any other required notice). Had the Legislature intended the mailing of a notice jointly addressed to two or more borrowers to satisfy the requirements of RPAPL 1304(2), it would have stated, as it did in RPAPL 1304(1) with regard to the commencement of a foreclosure action, that the 90-day notice must be mailed to "the last known address **[***15]** of the borrower *or borrowers*."

The problematic circumstances which might arise if the Legislature had drafted RPAPL 1304(2) to permit a mailing to "the last known address of the borrower or borrowers" are not difficult to envision. Ideally, when one of the borrowers receives a 90-day notice jointly addressed to two or more borrowers, he or she will inform the other borrower(s). However, this ideal scenario clearly will not always occur, and even a matter as urgently pressing as the receipt of a 90-day notice of foreclosure proceedings might not be communicated if, for instance, there is a breakdown of communication between the borrowers. In Aurora Loan Servs., LLC v Weisblum (85 AD3d 95, 923 N.Y.S.2d 609), this Court addressed this issue, rejecting the plaintiff's claim that a failure to serve a RPAPL 1304 notice on one of the borrowers was inconsequential due to the likelihood she became aware of the notice sent to her husband (*see* Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106-107). HN8[↑] Since the purpose of RPAPL 1304 is to take measures aimed at ensuring notice to the borrowers of an impending foreclosure action "in an attempt to avoid litigation" (*see* Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 107), it would subvert the legislative purpose of the statute to shift the burden of providing notice to each borrower from the lender or mortgage **[**171]** loan servicer to one of the borrowers **[***16]** who happens to sign for the envelope.

HN9[↑] Of course, RPAPL 1304(2) does not require actual notice to a borrower, or to each of multiple borrowers, insofar as "[n]otice is considered given as of the date it is mailed." Nevertheless, the mailing requirements of RPAPL 1304(2) were enacted "[t]o assure . . . that the transmitted notice is actually received" (Mark C. Dillon, *Unsettled Times Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law*, 76 Alb L Rev 1085, 1111 [2012-2013] **[*136]** [footnote omitted]) with the **[*135]** added value of "provid[ing] the lender with documentary evidence that the delivery requirements of the statute were met" (*id. at 1111*). Since the Legislature imposed strict mailing requirements aimed at ensuring notice and documenting the delivery of the 90-day notice, it would be difficult to imagine why the Legislature would not also require the simple measure of separately addressing a 90-day notice to each of the borrowers. HN10[↑] Moreover, while "[n]otice is considered given as of the date it is mailed" (RPAPL 1304[2]), that provision cannot be complied with unless and until each notice "required by this section" (*id.*) has been sent "in a separate envelope from any other mailing or notice" (*id.*). Thus, notice **[***17]** cannot be deemed given until the date of mailing, in a separate envelope, of each 90-day "notice to the borrower" (*id.* § 1304[1]), which we read to mean notice to each borrower.

HN11[↑] Furthermore, insofar as strict compliance with RPAPL 1304 is a condition precedent to the commencement of a foreclosure action (*see Bank of N.Y. Mellon v Porfert, 187 AD3d at 1112*), the obligation to send all required notices "in a separate envelope from any other mailing or **[****5]** notice" cannot be satisfied by including the required notice for each borrower in the same envelope (RPAPL 1304[2]). To permit a single notice jointly addressed to two or more borrowers and mailed in a single envelope to serve in lieu of a separately mailed notice to each borrower would transform the requisite standard of compliance from "strict compliance" to "substantial compliance."

D. *The Plaintiff's Failure to Comply with RPAPL 1304*

Here, while 30-day notices of default were separately mailed to each of the defendants, the 90-day notice, which was sent via certified and first-class mail, was jointly addressed to the defendants. While the record reflects that "F. Yapkowitz" signed for and accepted delivery of the 90-day notice sent via certified mail, receipt of the notice is inconsequential. Even assuming, arguendo, that [***18] both of the defendants had signed for and accepted delivery of the 90-day notice, the plaintiff would not have demonstrated strict compliance with the requirements of *RPAPL 1304* by mailing a notice jointly addressed to both of the borrowers in the same envelope. Since it is undisputed that the 90-day notice to each of the borrowers was sent in the same envelope, the plaintiff failed to establish its compliance with *RPAPL 1304*, a condition precedent to the commencement of the action.

Accordingly, the Supreme Court properly denied the plaintiff's motion, inter alia, for summary judgment on the complaint [*137] and properly dismissed the complaint insofar as asserted against the defendants.

The appeals from the decision and the orders are dismissed, and the judgment is affirmed.

HINDS-RADIX and BARROS, JJ., concur.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green [**172] Const. Corp., 100 AD2d 509*); and it is further,

ORDERED that the appeals from the orders dated September 26, 2017, and July 23, 2018, are dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the defendants Fred J. Yapkowitz and Elaine M. Yapkowitz.

Concur by: DILLON (In Part) [***19]

Dissent by: DILLON (In Part)

Dissent

DILLON, J.P., concurs in part and dissents in part, and votes to dismiss the appeals from the decision, and the orders dated September 26, 2017, and July 23, 2018, and to reverse the judgment, on the law, reinstate the complaint insofar as asserted against the defendants Fred J. Yapkowitz and Elaine M. Yapkowitz, grant the plaintiff's motion pursuant to *CPLR 4404(b)* to set aside the decision, modify the order dated July 23, 2018, accordingly, and remit the matter to the Supreme Court, Rockland County, for the entry of an amended judgment, inter alia, in favor of the plaintiff and against the defendants Fred J. Yapkowitz and Elaine M. Yapkowitz on the complaint, with the following memorandum:

I respectfully depart company from my colleagues as to how the language of *RPAPL 1304* should be interpreted where, as here, there are two borrowers living at the residence that is the subject of the mortgage.

The majority accurately sets forth the history of the litigation, the issues presented to the Supreme Court, the judgment appealed from, and the issue of first impression that we address here on appeal. The issue on appeal is merely the latest of many in the field of residential mortgage foreclosure [***20] litigation to arrive at our doorstep deserving of Department-wide attention. Indeed, we have had occasion at our Court to address a variety of novel and evolving issues arising from the spate of residential mortgage foreclosure actions, including many specific to the meaning and mechanics of *RPAPL 1304*.

The current version of *RPAPL 1304(1)* provides that:

"with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, [****6] assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include the following: [notice description omitted]."

In describing the mailing requirements of the statute, *RPAPL 1304(2)* provides:

[*138] "The notices required by this section shall be sent by such lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage. The notices required by this section shall be sent by the [***21] lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice. Notice

is considered given as of the date it is mailed."

RPAPL 1304 provides that upon the default in the payment of a home loan by a natural person using the mortgaged property as a principal dwelling (*see id.* *§ 1304[6]*), the lender must send to that borrower a statutory default notice at least 90 days before commencing a foreclosure litigation. The contents of the notice, **[***23]** and **[**173]** the size of the typeface for certain required content, are defined in *RPAPL 1304(1)* with painstaking statutory specificity. The notices required by the statute must be sent by first-class mail and by either registered or certified mail to the last known address of the borrower, and to the residence that is the subject of the mortgage, and is deemed "given" as of the date of mailing rather than the date of receipt (*see id.* *§ 1302[2]*; *U.S. Bank National Association v Kohanov, 189 A.D. 3d 921, 141 NYS3d 137*; *Deutsche Bank Natl. Trust Co. v Crimi, 184 AD3d 707, 710, 126 N.Y.S.3d 197*). Strict compliance with *RPAPL 1304* is a condition precedent to the commencement of a residential mortgage foreclosure litigation (*see U.S. Bank N.A. v Panzer, 189 AD3d 1109, 138 N.Y.S.3d 58*; *Citibank, N.A. v Conti-Scheurer, 172 AD3d 17, 20, 98 N.Y.S.3d 273*; *JPMorgan Chase Bank, N.A. v Williams, 170 AD3d 1142, 1143, 94 N.Y.S.3d 882*). Our Court has had many occasions to deny summary judgment and trial verdicts to lenders who failed to prove through admissible evidence compliance with each discrete piece of the statute.

[*22]** also relevant here, *RPAPL 1304(2)* provides that "[t]he notices required by this section shall be sent by the lender, assignee, or mortgage loan servicer in a separate envelope from any other mailing or notice." By requiring the lender, assignee, or mortgage loan servicer to send the mortgage default 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 (*see Citibank, N.A. v Conti-Scheurer, 172 AD3d at 20-21*), while doubling the **[*139]** probability that one or both copies of the notice actually will be received by the homeowner.

In *Aurora Loan Servs., LLC v Weisblum (85 AD3d 95, 923 N.Y.S.2d 609)*, a husband and wife were named co-borrowers on a consolidated note, but the lender addressed and sent its *RPAPL 1304* notice only to the husband. The lender's compliance with *RPAPL 1304* also suffered from the failure of the notice to list housing counselors by name and contact information, and from insufficient proof of the mailings (*see Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 106*). In any event, our Court held in *Weisblum* that *RPAPL 1304* was not complied with since the wife, who was as much a co-borrower as the husband, was not sent *any* notice to which she was statutorily entitled (*see Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 105-106*). Left open by the facts and legal analysis of *Weisblum* was whether *RPAPL 1304* is complied with when an otherwise proper statutory default notice is addressed and mailed jointly to co-borrowers, with the name of each borrower appearing on the envelopes and in the salutation of the mailed notices themselves.

After *Weisblum* was decided, the state Legislature amended *RPAPL 1304(1)* in 2016 to pluralize the notice requirement, that such notices be given to the borrower in the singular or to borrowers in the plural (*see* L 2016, ch 73, § 1, part Q, §§ 6, 7). The statutory amendment brought *RPAPL 1304* into better harmony with *Weisblum*. Significantly, however, the Legislature did not similarly amend *RPAPL 1304(2)* to pluralize the statutory provision that describes the required mailings where more than one borrower has signed the note. Instead, *RPAPL 1304(2)* continues to read that insofar as the mailings are concerned, they are to be sent to the "borrower" (singular) at the last known address of the "borrower" (singular), with no language whatsoever that **[**174]** separate and duplicative mailings are statutorily expected where there are co-borrowers.

Trial courts have reached different conclusions on the question left unanswered by *Weisblum*, with some courts finding joint mailings to co-borrowers to be sufficient (*see HSBC Bank USA, N.A. v Schneider, 2020 NY Slip Op. 30182[U] [Sup Ct, Suffolk County]* [Hinrichs, J.] [dicta]; *HSBC Bank USA, N.A. v Ahmad, 62 Misc 3d 1225[A], 2019 NY Slip Op 50252[U], *5 [Sup Ct Suffolk County]* [Quinlan, J.]; *Wells Fargo Bank v Franco* ***[***24]*** , Index No. 26871-2013 [Sup Ct, Suffolk County] [Hinrichs, J.]; *Hudson City Sav. Bank, FSB v D'Ancona, 2017 NY Slip Op 31917[U] [Sup Ct, Suffolk County]* [Heckman, J.]), and other courts finding joint mailings to be insufficient (*see HSBC Bank, USA N.A. v Patricola, 62 Misc 3d 1209[A], 2019 NY Slip Op 50076[U], *3 [Sup Ct, Suffolk County]* [Quinlan, J.]; *Deutsche Bank Natl. Trust Co. v Jiminez, 62 Misc 3d 811, 827-828 [Sup Ct, Suffolk County]* [Quinlan, J.]; *U.S. Bank Natl. Assn. v Diaz, 2018 NY Slip Op 30436[U] [Sup Ct, Queens County]* [Gavrin, J.]). The contrary viewpoints amongst our trial court colleagues underscore that the issue raised here presents no easy or crystal-clear solution. The *Yapkowitz* case, which is our focus here (*Wells Fargo Bank, N.A. v Yapkowitz, 59 Misc 3d 1227[A], 2018 NY Slip Op 50726[U]* [Sup Ct. Rockland County]), is the first trial-level

action where the issue has reached the Appellate Division. It is an issue that may predictably repeat in future actions before the Supreme Court and on appeal.

In my view, the plaintiff in this instance satisfied the requirements of *RPAPL 1304* by mailing the required statutory default notice to both borrowers, the defendants Fred J. Yapkowitz and Elaine M. Yapkowitz (hereinafter together the defendants),with both requisite mailings jointly addressed to each borrower. My opinion is supported by the following collective reasons:

First, the outer envelopes were addressed to Elaine M. Yapkowitz no less so than they were addressed to her husband, Fred J. Yapkowitz. Unlike *Weisblum*, the certified and regular mailings here expressly named Elaine M. Yapkowitz as an addressee to **[***25]** whom the letters were intended for joint delivery.

Second, the *RPAPL 1304* notices contained within the envelopes were likewise expressly addressed to Elaine M. Yapkowitz, no less so than they were addressed to her husband.

Third, the language of *RPAPL 1304(1)* merely requires lenders to "give" a statutory default notice to the borrower or borrowers. According to the business records which the Supreme Court found admissible, the notices were sent to the proper address in the proper mechanistic manner, to the borrowers by both first-class and certified mail. Thus, notice was "given" to not just one of them, but to both of them, upon the mailings addressed to both spouses as co-borrowers.

Fourth, the records in evidence demonstrate that the *RPAPL 1304* notice transmitted by certified mail arrived at its intended address, as it was signed for by "F. Yapkowitz." Thus, while the plaintiff was not required to prove that its mailings actually **[*141]** reached the intended residential address, its proof nevertheless established that in this instance, delivery of the certified mail notice marked to the attention of both co-borrowers was actually accomplished. Any efforts that could have been undertaken by "F. Yapkowitz" in response **[**175]** to the **[***26]** *RPAPL 1304* notice, such as contacting housing counselors, would necessarily inure to the benefit of both borrowers.

Fifth, the records in evidence show that the *RPAPL 1304* notice was transmitted by first-class mail as well. The law provides that material placed in an official depository of the United States Postal Service is presumed to be delivered in the due course of the mail (*see Nassau Ins. Co. v Murray, 46 NY2d 828, 829-830, 386 N.E.2d 1085, 414 N.Y.S.2d 117*; *Assyag v Wells Fargo Bank, N.A., 186 AD3d 1303, 131 N.Y.S.3d 699*). There is therefore an evidentiary presumption that the *RPAPL 1304* notice sent by first-class mail arrived at its intended residential destination, addressed to the attention of both co-borrowers. After the plaintiff established by its business records the presumptive delivery of its first-class mailing, the defendants never denied receiving the 1304 notice in either the first-class or certified mail forms. Instead, they merely argued a lack of any "recollection" of receiving the notices. Evidentially, therefore, the co-borrowers each failed to rebut the legal presumption that the first-class mailing was received by them at their address (*see Flagstar Bank, FSB v Mendoza, 139 AD3d 898, 900, 32 N.Y.S.3d 278*; *Emigrant Mtge. Co., Inc. v Persad, 117 AD3d 676, 677-678, 985 N.Y.S.2d 608* [mere denial of receipt insufficient to rebut presumption of delivery]; *Grogg v South Rd. Assoc., L.P., 74 AD3d 1021, 1022, 907 N.Y.S.2d 22* [same]).

Sixth, and significantly, *RPAPL 1304(1)* and *(2)* do not contain any language requiring "separate" parallel notices addressed **[***27]** to each separate co-borrower. The language enacted by the Legislature, which our Court is obligated to apply, merely requires that the lender, assignee, or mortgage loan servicers "shall give such notice to the borrower," or if applicable, to the "borrowers." That requirement was satisfied here when the plaintiff transmitted a certified and a first-class mail envelope addressed to both borrowers, including Elaine M. Yapkowitz, at her proper **[****7]** address, with an *RPAPL 1304* notice inside the envelopes also addressed to both borrowers. Were we to require that co-borrowers each be entitled to separately addressed and parallel envelopes containing separate *RPAPL 1304* notices, we would be reading into *RPAPL 1304(1)* and *(2)* language that is simply not contained in the statute itself, and which the state Legislature did not place there.

[*142] Seventh, the amendment to *RPAPL 1304(1)* that was enacted in 2016 to require that the statutory default notice be given to the "borrower" or, by amendment, the "borrowers" (*see* L 2016, ch 73, § 1, part Q, §§ 6, 7), does not lead to a contrary result, regardless of how the amendatory language is interpreted. The *RPAPL 1304* notice in this instance was dated December 12, 2012, and the action was commenced by the plaintiff on June 20, 2013, well before the **[***28]** 2016 amendment to the statute became law. Section 11 of the act

amending *RPAPL 1304(1)* specifically provides that the "actlegislative [***30] micro-management. The high level of shall take effect on the one hundred eightieth day after it shalldetail is motivated by the well-intentioned public policy of have become law" (*see* L 2016, ch 73, § 1, part Q, § 11), theadvising homeowners in default of the risks and remedies they purpose of which, at least inferentially, was to allow lenders theface in failing to renegotiate or cure their defaults in payment. time and opportunity to update their statutory defaultPerhaps the most prominent example of the Legislature's procedures to assure that going forward, all borrowers in amicro-management of the subject is the requirement that multi-borrower matter be included by name on the notices.certain language of the notice be in 14-point typeface rather Even this does not require separate mailings to each co-than the more typical 12-point typeface, and the template borrower, so long as all co-borrowers are included in the noticelanguage of the overall notice with seven paragraphs of procedures from that time forward. In any event, it is ainformation that is required to be disclosed. The Legislature has fundamental canon of statutory construction that the retroactiveprovided painstaking detail in describing the requirements of operation of statutes is not favored by courts, and statutes will*RPAPL 1304*—namely, that the notices: advise that the not be given such [**176] construction unless the languagehomeowner is at risk of losing the home; provide a list of expressly or by necessary implication requires it (*see Majewski*housing counselors with specific contact information; invite *v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 584, 696*negotiation with the lender to potentially resolve issues of *N.E.2d 978, 673 N.Y.S.2d 966*; *Jacobus v Colgate, 217 NY 235*,default; advise the homeowner of the right to remain in the *240, 111 N.E. 837* [Cardozo, J.]). Here, the statutoryhome until a court order is received directing otherwise; and amendment was not made retroactive, as it expressly did notadvise the homeowner of the length and amount of the default become effective until 180 days after its enactment. Thethat needs to be cured. *RPAPL 1304* has been amended many amendment, therefore, is irrelevant to this Court'stimes and in several different respects since 2008, further determination of the specific matter before us, as the plaintiffunderscoring the Legislature's attention to the [***31] form could not be expected, in 2012 when the default notices wereand substance of statutory residential mortgage default notices. mailed, or in 2013 [***29] when this action was commenced,Under the long-standing and well-understood maxim of to anticipate what amendments might be added to the statute in*expressio unius est exclusio alterius*, where a statute expressly future years relative to the particulars of this conditiondescribes a particular act, thing, or person to which it applies, precedent. The plaintiff could only rely upon the language ofan irrefutable inference must be drawn that what is omitted or the statute as it existed at those times, and without benefit ofnot included in a statute was intended to be omitted or excluded any future judicial decisional perspective. We err if we apply in(*see* McKinney's Cons Laws of NY, Book 1, Statutes § 240; this particular case the statutory language which, while not*Pajak v Pajak, 56 NY2d 394, 397, 437 N.E.2d 1138, 452 N.Y.S.* requiring separately enveloped mailings to co-borrowers, was*2d 381* [**177] ; *Matter of Brown v New York State Racing &* nevertheless not added to the RPAPL until 2016. *Wagering Bd., 60 AD3d 107, 116-117, 871 N.Y.S.2d 623*).

[****8] Here, despite the details, amendments, and attention Eighth, the related subdivisions of *RPAPL 1304(1)* and *(2)* must*RPAPL 1304* has received for more than a decade from be read together to help determine the scheme of the entireattentive and well-meaning legislators, the Legislature has not section (*see* McKinney's Cons Laws of NY, Book 1, Statutes §placed actual language into the statute, at [*144] any time, 97, Comment at 213-214, 216; *People v [*143] Odum, 31*advising lenders, assignees, and mortgage loan servicers that if *NY3d 344, 351, 78 N.Y.S.3d 252, 102 N.E.3d 1034*; *Archer v*a note and mortgage are executed by co-borrowers, each co-*Beach Car Serv., Inc., 180 AD3d 857, 860, 120 N.Y.S.3d 98*)·borrower is entitled to a duplicative, separately enveloped, While the Legislature directed in the 2016 amendment ofseparately mailed, and separately saluted notice.
subdivision (1) that notice be given to "borrowers," in the

plural, it retained the language in *subdivision (2)* that theFinally, the majority expresses concerns that without parallel mailings be by first-class and certified or registered mail to themailings separately addressed to co-borrowers, there is no "borrower," in the singular. The two statutory subdivisions, asguarantee that mail received by one borrower will be conveyed amended and read together, suggest that a single notice to bothto the other. The majority's concern is not only wholly borrowers collectively satisfies the notice and mailingspeculative but also begs the issue, as the outer envelopes are requirements of *subdivisions (1)* and *(2)*. addressed and delivered to [***32] both addressees. The

lender's obligation only goes so far as sending the required Ninth, *RPAPL 1304* is a statute steeped in minutiae, detail, andmailing to the proper address (*see Citibank v Conti-Scheurer,*

172 AD3d at 24) using two different mailing methods to doubleas here, the statute is satisfied by joint regular and certified the odds that at least one mailing, if not both, will reach themailings to both. A "strict construction" of a statute does not intended destination. Lenders satisfy or fail to satisfy theirmean a "constrained construction" of the statute. Our state obligations under *RPAPL 1304* at the time the required noticesLegislature is free to further amend *RPAPL 1304* to express are placed into the mail, when the proverbial "mailbox rule"such a requirement if it wishes, but so far it has deigned not to triggers, with no control over what happens to the noticesdo so. It is not our place, as jurists, to write such language into beyond the legal presumption of their subsequent delivery inthe law ourselves. Accordingly, I respectfully vote to reverse the regular course of the mail. The statute does not contain anythe judgment appealed from.

requirement that the lender prove actual physical "receipt" of the notices by any intended recipient, including in this instance Elaine M. Yapkowitz's receipt of the certified-mail copy that was apparently signed for at the residence by her co-borrower husband. Receipt is not guaranteed even if separate, parallel mailings were required and used, as it is not known from household to household whether any person collecting the daily mail will pass it along to specific addressees within the same household, regardless of how many envelopes are transmitted or addressed. Moreover, the lender is not a statutory **[***33]** guarantor that any envelope mailed to and received at the proper destination is actually opened by the intended recipient rather than placed in a file, round or otherwise. Here, the fact that "F. Yapkowitz" signed for the certified mailing addressed to both spouses evidences the plaintiff's successful fulfillment of its statutory obligation to give the required default notice to both Elaine M. Yapkowitz and her husband at their proper address. Any circumstances beyond the posting of the letters, regardless of who claimed the mailings at the designated address, are beyond the plaintiff's control, which is true even if separately addressed envelopes were to be used.

End of Document

The plaintiff therefore established, in my view, its compliance with *RPAPL 1304* and its entitlement to judgment in its **[*145]** favor at the conclusion of the trial. In opposition, the defendants did not deny receipt of the *RPAPL 1304* notices, but only claimed that they each had no recollection of their receipt. The defendants failed to refute the delivery of the *RPAPL 1304* notice that was signed for by F. Yapkowitz, and neither defendant rebutted the presumptive delivery of the *RPAPL 1304* notice that had been sent to them by regular mail as well (*see Engel v Lichterman, 62 NY2d 943, 944, 468 N.E.2d 26, 479 N.Y.S.2d 188*; *Nassau Ins. Co. v Murray, 46 NY2d at 829-830*; *Assyag v Wells Fargo Bank, N.A., 186 AD3d at 1303*; *Citibank, N.A. v Conti-Scheurer, 172 AD3d at 22-23*).

[178]** For the foregoing **[***34]** reasons individually and collectively, *RPAPL 1304* should not be construed, in its current or former form, to require separate, duplicative, mailings of notices to co-borrowers residing in the same household where,

U.S. Bank N.A. v. Campbell

Supreme Court of New York, Appellate Division, Second Department

February 23, 2022, Decided

2018-05677, Index No. 708667/16

Reporter

202 A.D.3d 1137 *; 163 N.Y.S.3d 247 **; 2022 N.Y. App. Div. LEXIS 1145 ***; 2022 NY Slip Op 01198 ****

[****1] U.S. Bank National Association, respondent, v Anthony Campbell, etc., appellant, et al., defendants.

Prior History: [***1] In an action to foreclose a mortgage, the defendant Anthony Campbell appeals from an order of the Supreme Court, Queens County (Thomas D. Raffaele, J.), entered December 20, 2017. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were to vacate an order of the same court (Marguerite A. Grays, J.) entered June 6, 2017, sua sponte, directing dismissal of the complaint without prejudice, and to restore the action to the active calendar, and thereupon, for summary judgment on the complaint insofar as asserted against the defendant Anthony Campbell, to strike that defendant's answer, and to appoint a referee to compute the amount due.

Core Terms

summary judgment, amount due, directing, mortgage, appoint, compute, application for an order, status conference, fail to comply, assertions, summary judgment motion, failure to comply, notice of default, business record, inter alia, recommendation, scheduled, complied, modified, default, mailing, notice

Counsel: Biolsi Law Group, P.C., New York, NY (Steven Alexander Biolsi and Aveet Basnyat of counsel), for appellant.

Robertson, Anschutz, Schneid, Crane & Partners, PLLC, Westbury, NY (Joseph F. Battista of counsel), for respondent.

Judges: BETSY BARROS, J.P., CHERYL E. CHAMBERS, SYLVIA O. HINDS-RADIX, LARA J. GENOVESI, JJ. BARROS, J.P., CHAMBERS, HINDS-RADIX and GENOVESI, JJ., concur.

Opinion

[**248] [*1137] DECISION & ORDER

ORDERED that the order entered December 20, 2017, is modified, [*1138] on the law, by deleting the provisions thereof granting those [*1139] branches of [***2] the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Anthony Campbell, to strike that defendant's answer, and to appoint a referee to compute the amount due, and substituting therefor a provision denying those branches of the plaintiff's motion; as so modified, the order entered December 20, 2017, is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff commenced this action to foreclose a mortgage against, among others, the defendant Anthony Campbell (hereinafter the defendant), and the defendant thereafter answered the complaint. At a status conference held on September 21, 2016, a court attorney referee issued an order directing the plaintiff to file an application for an order of reference by the date of the next status conference, scheduled for January 31, 2017. The plaintiff failed to comply, and the court attorney referee again issued an order directing the plaintiff, inter alia, to file an application for an order of

reference by the next status conference date, scheduled forbusiness records which were [***5] not attached to her April 25, 2017. The plaintiff again failed to comply, and theaffidavit (*see Bank of Am., N.A. v Huertas, 195 AD3d 891, 892,* court attorney referee issued a report recommending [***3]*150 N.Y.S.3d 301*). Thus, her assertions regarding the that the action be dismissed without prejudice due to thedefendant's default, without the business records upon which plaintiff's failure to comply with the prior orders directing it toshe relied in making those assertions, constituted inadmissible file an application for an order of reference. Thereafter,hearsay (*see Wells Fargo Bank, N.A. v Yesmin, 186 AD3d 1761,* following the recommendation of the court attorney referee, the*1762, 129 N.Y.S.3d 851*; *Bank of N.Y. Mellon v Gordon, 171* Supreme Court directed dismissal of the complaint without*AD3d 197, 208-209, 97 N.Y.S.3d 286*). prejudice by [****2] order entered June 6, 2017.

By notice of motion dated June 26, 2017, the plaintiff moved, inter alia, to vacate the dismissal order and to restore the action to the active calendar, and thereupon, for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and to appoint a referee to compute the amount due. In an order entered December 20, 2017, the Supreme Court granted the plaintiff's motion. The defendant appeals.

Since issue was joined in this action, the plaintiff could move for summary judgment (*see CPLR 3212*), or proceed to trial. The Supreme Court was without authority to, sua sponte, direct dismissal the complaint based upon the plaintiff's failure to comply with its directive to proceed by motion, which would have required a motion for summary judgment. Thus, this Court need not reach the issue of whether the plaintiff [***4] proffered a reasonable excuse for its delay in moving for summary judgment.

However, the Supreme Court erred in granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and to appoint a referee [**249] to compute the amount due. Contrary to the plaintiff's contention, the defendant properly raised as an affirmative defense that the plaintiff failed to comply with the notice of default provision of the mortgage. In support of its motion for summary judgment, the plaintiff submitted the affidavit of Becky J. Layman, an officer of the plaintiff. Layman's assertions that the plaintiff complied with the notice of default provision of the mortgage and that the plaintiff complied with the notice provision of *RPAPL 1304* were insufficient, since she failed to provide proof of the actual mailings or attest to knowledge of the plaintiff's mailing practices and procedures (*see Citibank, N.A. v Conti-Scheurer, 172 AD3d 17, 24, 98 N.Y.S.3d 273*). Layman's affidavit was also insufficient to establish, prima facie, that the defendant defaulted under the note and mortgage, since her purported knowledge was based upon review of unidentified

Accordingly, 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 the defendant's answer, and to appoint a referee to compute the amount due.

BARROS, J.P., CHAMBERS, HINDS-RADIX and GENOVESI, JJ., concur.

End of Document

Onewest Bank, FSB v. Perwaiz

Supreme Court of New York, Appellate Division, Second Department

April 20, 2022, Decided

2019-01014, 2019-01015, (Index No. 22728/09)

Reporter

164 N.Y.S.3d 857 *; 2022 N.Y. App. Div. LEXIS 2422 **; 2022 NY Slip Op 02558 ***; 2022 WL 1160910

[***1] Onewest Bank, FSB, etc., respondent, v Shagufta Perwaiz, et al., appellants, et al, defendant. Law Office of Paul R. Kenney, LLC, New York, NY, for appellants.

Core Terms

calendar, restore, sua sponte, foreclosure judgment, status conference, motion to vacate, affirmation, mortgage, foreclosure action, vacate an order, foreclosure, directing, orders

Counsel: [**1] Stradley Ronon Stevens & Young, LLP, New York, NY (Lijue T. Philip of counsel), for respondent.

Judges: BETSY BARROS, J.P., JOSEPH J. MALTESE, PAUL WOOTEN, JOSEPH A. ZAYAS, JJ. BARROS, J.P., MALTESE, WOOTEN and ZAYAS, JJ., concur.

Opinion

[*857] DECISION & ORDER

In an action to foreclose a mortgage, the defendants Shagufta Perwaiz and Perwaiz Asghar appeal from two orders of the Supreme Court, Queens County (Salvatore Modica, J.), both entered November 21, 2018. The first order entered November 21, 2018, granted the plaintiff's motion to vacate an order of the same court (Martin J. Schulman, J.) entered January 23, 2015, sua sponte, directing dismissal of the complaint, and to restore the action to the court's calendar. The second order entered November 21, 2018, granted the plaintiff's motion to vacate the order entered January 23, 2015, and to restore the action to the court's calendar, vacated the order entered January 23, 2015, and restored the action to the court's calendar.

ORDERED that the orders entered November 21, 2018, are affirmed, with costs.

In May 2007, the defendants Shagufta Perwaiz and Perwaiz Asghar (hereinafter together the Perwaiz defendants) entered into a consolidation, extension, and modification [**2] agreement and mortgage with the plaintiff's predecessor, combining prior mortgages secured by real property in Queens. In or about August 2009, the plaintiff commenced this foreclosure action against the Perwaiz defendants, among others, alleging that the Perwaiz defendants failed to make payments due on October 1, 2008, and thereafter. The Perwaiz defendants failed to answer or appear in this action. The plaintiff was granted an order of reference in December 2009. By order entered January 23, 2015, the Supreme Court, sua sponte, directed dismissal of the complaint, on the ground that the plaintiff failed to comply with the terms of a status conference order entered December 15, 2014.

The plaintiff moved to vacate the January 23, 2015 [*858] order, and to restore the action to the Supreme Court's calendar. The court granted the plaintiff's motion, vacated the order entered January 23, 2015, and restored the action to the court's calendar. The Perwaiz defendants appeal.

The Supreme Court providently exercised its discretion in

granting the plaintiff's motion to vacate the January 23, 2015 order, and to restore the action to the court's calendar (*see Woodson v Mendon Leasing Corp., 100 NY2d 62, 68, 790 N.E. 2d 1156, 760 N.Y.S.2d 727*). Administrative Order of the Chief Administrative **[**3]** Judge of the Courts AO/548/10 (which has since been replaced by Admin Order of Chief Admin Judge of Cts AO/431/11 and *CPLR 3012-b)*, issued on October 20, 2010, required the **[***2]** plaintiff to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings in a residential foreclosure action (*see US Bank, NA v Boyce, 93 AD3d 782, 940 N.Y.S.2d 656*). Here, the December 15, 2014 status conference order directed the plaintiff to file such an affirmation, and an application seeking a judgment of foreclosure and sale, by January 14, 2015. However, a court may not sua sponte dismiss a complaint for failure to move for a judgment of foreclosure and sale by an arbitrary date set by the court (*see MidFirst Bank v Eddy, 125 AD3d 1458, 3 N.Y.S. 3d 809*). Delay in submitting an application for a judgment of foreclosure and sale is simply not a sufficient ground upon which to direct sua sponte dismissal of the complaint (*see Onewest Bank, FSB v Tarantola, 156 AD3d 711, 64 N.Y.S.3d 903*).

Moreover, as this action was pending on the effective date of the Administrative Order, and no judgment of foreclosure has been entered, the plaintiff was not required to file the affirmation until "the time of filing either the proposed order of reference or the proposed judgment of foreclosure" (*U.S. Bank, N.A. v Ramjit, 125 AD3d 641, 642, 2 N.Y.S.3d 587* [internal quotation marks omitted]; *see also U.S. Bank N.A. v Polanco, 126 AD3d 883, 7 N.Y.S.3d 156*; *Wells Fargo Bank, NA v Ambrosov, 120 AD3d 1225, 993 N.Y.S.2d 322*). Accordingly, the plaintiff's **[**4]** failure to comply with the directives of the status conference order were insufficient grounds upon which to sua sponte direct dismissal of the complaint (*see U.S. Bank N.A. v Salgado, 192 AD3d 1181, 141 N.Y.S.3d 337*; *Countrywide Home Loans, Inc. v Caruso, 171 AD3d 857, 95 N.Y.S.3d 868*).

The Perwaiz defendants' remaining contentions either need not be reached in light of our determination or are without merit.

BARROS, J.P., MALTESE, WOOTEN and ZAYAS, JJ., concur.

End of Document