

HSBC Bank USA, N.A. v Albino
2026 NY Slip Op 31124(U)
March 16, 2026
Supreme Court, Kings County
Docket Number: Index No. 529500/2023
Judge: Menachem M. Mirocznik
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At IAS Part FRP5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 16th of March 2026

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR DEUTSCHE ALT-A SECURITIES, INC., MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-AR2

Plaintiff,

-against-

ARMANDO ALBINO; U.S. BANK NATIONAL ASSOCIATION AS INDENTURE TRUSTEE FOR HOME EQUITY MORTGAGE TRUST 2005-HFI, ITS SUCCESSORS OR ASSIGNS; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; and "JOHN DOE" and "MARY DOE," (Said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein.)

Defendant.

Index No. 529500/2023

**Decision and Order
(Motion Seq. 3)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 80-104
Opposition Papers	NYSCEF Doc. 107-108
Reply Papers	NYSCEF Doc. 109

Upon the foregoing papers, the motion(s) is/are determined in accordance with this Decision and Order as follows:

Relevant Procedural and Factual History

This action was commenced on October 12, 2023, seeking to foreclose a mortgage (the "mortgage") executed by defendant Armando Albino (the "defendant") which encumbers the property known as 337 40th Street, Brooklyn, NY 11232 (the "property").

On January 30, 2024, the defendant filed an answer with asserted various affirmative

defenses including lack of standing, non-compliance with RPAPL 1303, RPAPL 1304 and RPAPL 1306 as well as several counterclaims.

Plaintiff rejected the answer as untimely.

On March 5, 2025, the Court denied plaintiff's motion for a default judgment and order of reference and granted defendant's cross-motion to the extent of accepting defendant's answer.

Plaintiff now moves for summary judgment, to strike defendant's answer, to appoint a referee to compute and to amend the caption. In support of the motion, plaintiff annexes the affidavit of Tricia Glodowski ("Ms. Glodowski" or "Glodowski Affidavit") of NewRez LLC d/b/a Shellpoint Mortgage Servicing fka Specialized Loan Servicing, LLC ("SLS") the alleged attorney in fact for plaintiff. Plaintiff argues it has established prima facie entitlement to summary judgment by producing the note, mortgage, and proof of default, that summary judgment is warranted and defendant's answer fails to raise an issue of fact.

Defendant opposes the motion arguing the motion must be denied as procedurally defective and substantively insufficient to demonstrate prima facie entitlement to judgment as a matter of law. Specifically, defendant argues plaintiff's attorney affirmation is fatally noncompliant with the amended CPLR 2106 because it omits the required statutory language, rendering the motion unsupported by admissible evidence. Defendant further argues Plaintiff failed to establish standing because the affiant's authority is conditioned on a Pooling and Servicing Agreement that was not produced, rendering the affidavit hearsay, that it failed to demonstrate strict compliance with RPAPL 1304 due to conflicting evidence and prior court findings and failed to prove proper service of the RPAPL 1303 notice. Defendant maintains these defects create triable issues of fact precluding summary judgment.

In reply plaintiff argues its attorney affirmation "substantially complies" with CPLR 2106 and that Defendant's own affirmation contains the same language he challenges, undermining the objection. Plaintiff further argues it was not required to produce the Pooling and Servicing Agreement because its Power of Attorney is not conditioned on such agreements, and thus the affiant's authority is properly established. Regarding RPAPL 1304, Plaintiff asserts it laid a proper CPLR 4518 business-record foundation and produced certified USPS tracking and mailing certificates demonstrating compliance, while Defendant's tracking printout is undated and unreliable. Plaintiff also contends the affidavit of service establishes prima facie compliance with RPAPL 1303 and that Defendant's denial is conclusory and insufficient to rebut the presumption of proper service.

Discussion

I. Standard of Review

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact...Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers...Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v*

Prospect Hosp., 68 NY2d 320, 324 [1986][citations omitted]; See also *Zuckerman v. New York*, 49 NY2d 557 [1980]

“Summary judgment is a “drastic remedy” that should be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issue of fact... When ruling on a motion for summary judgment, the deciding court must view the facts “in the light most favorable to the non-moving party.” *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 38 NY3d 169 [2022][internal citations and quotation marks omitted]

“[A] motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence... Records made in the regular course of business are hearsay when offered for the truth of their contents... When a party relies upon the business records exception to the hearsay rule in attempting to establish its prima facie case, “[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker’s business practices and procedures.” *HSBC Bank USA, N.A. v Vasishta*, 241 AD3d 1299 [2d Dept 2025][internal citations and quotation marks omitted]

“Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default” *Hudson City Sav. Bank v Genuth*, 148 AD3d 687 [2d Dept. 2017]. This showing shifts the burden to the non-movant to present evidence in admissible form sufficient to raise a material issue of fact requiring a trial. See *Gesuale v. Campanelli & Assocs., P.C.*, 126 AD3d 936 [2d Dept 2015]

II. Plaintiff Established Its Affiant’s Authority to Act for Plaintiff and Defendant’s Challenge To Plaintiff’s Affirmation Under CPLR 2106 Is Without Merit

Initially, defendant’s contention that plaintiff failed to demonstrate that Ms. Glodowski and Shellpoint have authority to act for plaintiff is without merit.

As correctly observed by plaintiff, this case differs from the *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022] because unlike in *Tesoriero*, the power of attorney submitted herein is not dependent or conditioned on other agreements.

“When an attorney admitted to practice in New York State verifies a petition they need only affirm pursuant to CPLR 2106... Effective January 1, 2024, CPLR 2106 was amended to state that an affirmation pursuant to this section, “shall be in substantially the following form: I affirm this day of _____, _____ under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.” *Grandsard v Hutchison* [N.Y. Sup Ct, New York County 2024], *affd*, 227 AD3d 491 [1st Dept 2024]

Defendant is correct that there is significant recent caselaw authority for rejecting an affirmation that does not substantially comply with CPLR 2106. See *Grandsard v Hutchison* [N.Y. Sup Ct, New York County 2024][rejecting verification of petition that did not comply with CPLR 2106], *affd*, 227 AD3d 491 [1st Dept 2024]; *Great Lakes Ins. SE v Am. S.S. Owners Mut. Protection and Indem. Assn. Inc.*, 228 AD3d 429, 429 [1st Dept 2024][“The court properly found that Gourdomichalis was not entitled to summary judgment dismissing the negligence claim due to lack of personal jurisdiction. Gourdomichalis’ affirmation, which he submitted to support his claim

that the court lacked personal jurisdiction, was inadmissible as it did not contain the language required by CPLR 2106.”]

However, the cases cited by defendant are factually distinguishable from the instant matter inasmuch as the subject affirmation is not necessary to establish plaintiff’s prima facie case. Here, Plaintiff’s evidentiary support for the requested relief was submitted through the testimony of Ms. Glodowski through a properly subscribed affidavit as opposed to an affirmation.

Therefore, defendant’s objections are without merit.

III. Plaintiff Failed To Establish Strict Compliance with RPAPL 1304

“[W]here, as here, a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, the moving party is also required to make a prima facie showing of strict compliance with RPAPL 1304...RPAPL 1304(1) provides that “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower...including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower. RPAPL 1304(2) requires that the notice be sent 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.” *Caliber Home Loans, Inc. v Weinstein*, 197 AD3d 1232 [2d Dept 2021][internal citations and quotation marks omitted]

“By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure.” *US Bank N.A. v Pierre*, 189 AD3d 1309 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Fregosi*, 222 AD3d 811 [2d Dept 2023][“A plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened.”]

“[I]n order for the presumption to arise, [the] office practice must be geared so as to ensure the likelihood that [the] notice...is always properly addressed and mailed.” *Wells Fargo Bank, N.A. v Shields*, 201 AD3d 1007, 1009 [2d Dept 2022]

Here, plaintiff failed to demonstrate prima facie strict compliance with RPAPL 1304.

First, Ms. Glodowski does not allege that she personally mailed the subject notices but rather attempts to demonstrate mailing with standard mailing practices and procedures. However, her testimony is conclusory, provides insufficient detail and fails to explain how the procedure is designed to ensure that items are properly addressed and mailed. See e.g. *Freedom Mtge. Corp. v King*, 215 AD3d 923, 926 [2d Dept 2023][“Further, the plaintiff failed to present sufficient proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, including how the mail was transmitted to the postal service.”]; See also *Wells Fargo Bank, N.A. v Shields*, 201 AD3d 1007, 1009 [2d Dept 2022][“[I]n order for the presumption to arise, [the]

office practice must be geared so as to ensure the likelihood that [the] notice...is always properly addressed and mailed”]

“Because the plaintiff “failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304” and, therefore, failed to establish, prima facie, its entitlement to judgment as a matter of law.” *Bethpage Fed. Credit Union v Hernon*, 216 AD3d 895 [2d Dept 2023]; See also *NS194, LLC v Gregg*, 231 AD3d 1162 [2d Dept 2024]; *US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718 [2d Dept 2023]; *MTGLQ Invs., L.P. v Cacioppo*, 217 AD3d 939 [2d Dept 2023]

Second, while Ms. Glodowski attached what she describes as “the integrated business records and independent United States Postal Service tracking records” evidencing the mailing of the RPAPL 1304 notices, the subject documents are a USPS tracking history for the certified mailing of the RPAPL 1304 notice, and a document entitled “Certificate of Mailing”. However, the Certificate of Mailing is not dated, signed or postmarked by the post office or the alleged sender of the notices. Moreover, the sender is identified as “Computershare Communication Services”, does not identify whether it refers to the certified mailing or first-class mailing and no proof has been offered that Computershare Communication Services was authorized to send the notices on the dates in question.

Therefore, plaintiff failed to establish prima facie compliance with RPAPL 1304. See *Siegel v Kentucky Fried Chicken of Long Is., Inc.*, 108 AD2d 218 [2d Dept 1985][“the mere assertion of authority on the face of the notice by a total stranger...that he is authorized to act on the latter’s behalf cannot be deemed to provide...notice...”], *affd*, 67 NY2d 792 [1986]; See also RPAPL 1304[1][“such lender, assignee or mortgage loan servicer shall give notice”]; *Deutsche Bank Natl. Trust Co. v Pariser*, 207AD3d 518 [2d Sept. 2022][“The plaintiff further failed to establish that the RPAPL 1304 notices were sent by the “lender, assignee, or loan servicer” as required by the statute...Here, the RPAPL notices were allegedly sent on August 7, 2014, by the Law Offices of McCabe, Weisberg, and Conway, P.C., on behalf of Ocwen Financial, the plaintiff’s loan servicer. However, the limited power of attorney authorizing Ocwen Financial to act on behalf of the plaintiff, which was submitted by the plaintiff in support of its motion, states that it was executed on and effective as of September 17, 2014.”][citations omitted]; See also *MTGLQ Invs., L.P. v Cacioppo*, 217 AD3d 939 [2d Dept 2023][“Here, the plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. The plaintiff submitted a detailed affidavit of mailing from an assistant secretary of loan documentation at Rushmore Loan Management Services, LLC (hereinafter Rushmore), which demonstrated that the RPAPL 1304 notices had been mailed in accordance with the statute...However, this affidavit failed to demonstrate that Rushmore had the authority to service the loan at the time that it mailed the RPAPL 1304 notices to the defendant...and this record presents triable issues of fact as to whether Rushmore had this authority.”][citations omitted]

In this Court’s view, a stranger sending the RPAPL 1304 notices, not only contravenes the plain language of the statute and well settled caselaw, it undermines the fundamental legislative intent and spirit of RPAPL 1304 which is to bridge the gap in communication between the borrower and lender to avoid litigation and for the borrower to make arrangements for payment to his or her actual lender. Communications from a stranger does not accomplish these purposes,

is “insufficient and the [defendant] was entitled to ignore them as not in compliance” *See Siegel v Kentucky Fried Chicken of Long Is., Inc.*, 67 NY2d 792, 794 [1986]; See also e.g. *Bank of NY Mellon v Forman*, 176 AD3d 663 [2d Dept 2019][“The manifest purpose [of the RPAPL 1304 notice] is to aid the homeowner in an attempt to avoid litigation.”].

IV. Plaintiff Failed To Establish Strict Compliance with RPAPL 1303

“RPAPL 1303 requires that a notice titled “Help for Homeowners in Foreclosure,” with specified type size and colored paper, be delivered with the summons and complaint in residential foreclosure actions involving owner-occupied, one-to-four family dwellings...Proper service of an RPAPL 1303 notice is a condition precedent to the commencement of a foreclosure action, and noncompliance mandates dismissal of the complaint” *Bank of Am., N.A. v Lauro*, 186 AD3d 659, 660 [2d Dept 2020][citations omitted]

Here, while the affidavit of service makes reference to service of a RPAPL 1303 notice on colored papers, no such notice was attached to the affidavit of service initially filed with the Court and while plaintiff’s moving papers attach a copy of RPAPL 1303 notice, there is no evidence that the notice attached to the moving papers was the same notice referenced in the affidavit of service. Moreover, defendant attests that no such notice was served and none of the papers allegedly served were on colored paper. Rather it appears all the papers were on white paper, which is consistent with the RPAPL 1303 notice on white paper submitted with the moving papers, unlike in other instances where this Court observed the notice on colored paper electronically filed with the complaint or affidavit of service.

Therefore, when the evidence is viewed “in the light most favorable” to defendant, as this Court must (see *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, *supra*), at the very least an issue of fact exists as to plaintiff’s strict compliance with RPAPL 1303. See *Bank of Am., N.A. v Lauro*, 186 AD3d 659, 660 [2d Dept 2020][“Here, contrary to the defendant’s contention, the plaintiff established, prima facie, that it provided notice in compliance with RPAPL 1303 by submitting two affidavits of service, in which the process server attested that he served the defendant with the summons and complaint, together with the notice required by RPAPL 1303 printed on yellow paper; the title of the notice was in bold 20–point type; and the text of the notice was in bold 14–point type...However, in opposition, the defendant raised a triable issue of fact with respect to whether the RPAPL 1303 notice was in the proper form, as he asserted in his affidavit that the notice with which he was served “was on white colored paper, the same color papers as the summons and complaint and the heading entitled ‘Help for Homeowners in Foreclosure’ was smaller than twenty-point type”][citations omitted]; See also *Bank of New York Mellon v Carbone*, 190 AD3d 803 [2d Dept 2021]

V. Plaintiff Failed To Establish Strict Compliance with RPAPL 1306

“RPAPL 1306 provides, in pertinent part, that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1), every lender or assignee “shall file” certain information with the superintendent of financial services, including “**at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage**, and such other information as will enable the superintendent to ascertain the type of loan at issue...Like RPAPL 1304, compliance with RPAPL 1306 is a condition precedent to the commencement of a foreclosure action...” *HSBC Bank USA, N.A. v Bermudez*,

175 AD3d 667 [2d Dept 2019][internal citations omitted and emphasis added] *Deutsche Bank Natl. Tr. Co. v Goetz*, 239 AD3d 934 [2d Dept 2025][“In support of his cross-motion, the defendant established, prima facie, that the plaintiff failed to establish its compliance with RPAPL 1306, which provides, in pertinent part, “that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1)”][emphasis added]

“Compliance with RPAPL 1306 is a condition precedent to the commencement of a foreclosure action...[S]trict compliance” with the statutory requirement of making the appropriate filing within three business days of the mailing of the RPAPL 1304 notice is required.” See e.g. *Bank of New York Mellon v Peralta*, 239 AD3d 932 [2d Dept 2025][internal citations and quotation marks omitted]

Here, plaintiff alleges that it mailed the notices on March 31, 2018 and allegedly made the requisite RPAPL 1306 filing on April 2, 2018. However, a review of the USPS tracking information attached to the Krupp Affidavit reflects that a label may have been created on March 31, 2018, but that the notice was not actually provided to USPS until April 6, 2018, which is more than three days after the alleged RPAPL 1306 filing. Therefore, when viewed “in the light most favorable” to defendant, issues of fact persist as to whether plaintiff complied RPAPL 1306.

Moreover, it is clear that the space on the form for the borrower’s telephone number is redacted from the filing. Therefore, the Court cannot assess whether plaintiff strictly complied with RPAPL 1306 and it’s submission of a redacted form is insufficient to demonstrate prima facie strict compliance with RPAPL 1306. However, since the Appellate Division has not directly addressed the issue, an analysis of the statute and the legislative intent is appropriate.

“[O]ur primary consideration is to ascertain and give effect to the intention of the [l]egislature...Because the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself...with due consideration given to the statutory purpose and history, including the objectives the legislature sought to achieve through its enactment.” *CIT Bank N.A. v Schiffman*, 36 NY3d 550 [2021][internal citations and quotation marks omitted]; See also *S. H. v Diocese of Brooklyn*, 205 AD3d 180, 185 [2d Dept 2022][“it is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature”] *People v Roberts*, 31 NY3d 406, 418 [2018][“[O]ur task—as it is in every case involving statutory interpretation—is to ascertain the legislative intent and construe the pertinent statutes to effectuate that intent”]; *Riley v County of Broome*, 95 NY2d 455 [2000][“The primary consideration of courts in interpreting a statute is to “ascertain and give effect to the intention of the Legislature”.]

“All parts of the constitutional provision or statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof. Indeed, our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid a construction that treats a word or phrase as superfluous.” *Matter of Hoffmann v NY State Ind. Redistricting Commn.*, 41 NY3d 341, 359 [2023][internal citations and quotation marks omitted]; See also *People v Roberts*, 31 NY3d 406, 428 [2018][“meaning and effect should be given to every word of a statute and that an interpretation that renders words or clauses superfluous should be rejected.”]

“The literal language of a statute is generally controlling unless the plain intent and purpose

of a statute would otherwise be defeated...In interpreting statutory language, all parts of a statute are intended to be given effect and a statutory construction which renders one part meaningless should be avoided.” *Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]; See also *Matter of Jun Wang v James*, 40 NY3d 497 [2023][“[A]ll parts of a statute are intended to be given effect and a statutory construction which renders one part meaningless should be avoided”]

Here, the statute on its face expressly provides that the filing shall include “at a minimum, the name, address, *last known telephone number of the borrower*, and the amount claimed as due and owing on the mortgage and such other information as will enable the superintendent to ascertain the type of loan at issue.” RPAPL 1306[2][emphasis added]

Accordingly, the express language should be, and at least for this Court is, the end of the inquiry.

Nevertheless, RPAPL 1306[4] further provides in relevant part that the “information provided to the superintendent pursuant to this section...shall be used by the superintendent exclusively for the purposes of monitoring on a statewide basis the extent of foreclosure filings within this state, to perform an analysis of loan types which were the subject of a pre-foreclosure notice and directing as appropriate available public and private foreclosure prevention and counseling services to borrowers at risk of foreclosure. The superintendent may share information contained in the database with housing counseling agencies designated by the division of housing and community renewal as well as with other state agencies with jurisdiction over housing, for the purpose of coordinating or securing help for borrowers at risk of foreclosure.”

The Appellate Division Second Department held in the context of the information pertaining to the type of loan that “RPAPL 1306(2) specifically requires the filing of information that will enable the superintendent to ascertain the type of loan at issue... and states that the data collected shall be used to perform an analysis of loan types...and to direct appropriate services to borrowers in need.” *U.S. Bank N.A. v Adams*, 202 AD3d 867, 870 [2d Dept 2022][citation omitted and emphasis removed and added]; See also *CIT Bank N.A. v Schiffman*, 36 NY3d 550 [2021][“This provision shows that the principal objective of the filings is to provide statistical data permitting DFS to accurately track and analyze loans at risk of foreclosure and properly allocate foreclosure counseling resources statewide in order to combat the mortgage crisis—an aim also reflected in the legislative history.”]

The Court finds that the failure to include the borrower’s last known phone number is not a mere technical defect or irregularity. It is a failure to comply with an express requirement of RPAPL 1306 and undermines the purpose of the statute to “direct appropriate services to borrowers in need.” See *U.S. Bank N.A. v Adams*, 202 AD3d 867, 870 [2d Dept 2022]; See also *CIT Bank N.A. v Schiffman*, 36 NY3d 550 [2021]

The Court further finds the reasoning in the holding of the Hon. C. Stephen Hackeling, JSC of our sister court in Suffolk County persuasive. “Because the statutory text permits the agency to share information contained on the filing with certain housing counseling agencies that coordinate help for distressed borrowers, and the Department of Financial Services may use the information to facilitate a review of whether the borrower might benefit from counseling or other foreclosure prevention services, including a borrower's last known telephone number is critical to facilitate the statutory purpose of RPAPL 1306.” *Deutsche Bank Natl. Tr. Co. as Tr. for GSAMP Tr. 2005-*

WMC3 v Velasquez, 86 Misc 3d 288, 294 [Sup Ct 2025]; See also *Brown v Amarante*, 23-CV-3514 (JGLC) (RWL), 2024 WL 4716364, at *14 [SDNY Nov. 8, 2024][“the Court sees no difference between leaving the space blank and filling it in with a non-telephone number (i.e., 9999999999). The result is the same: the minimum information required by the statute, particularly the borrower's telephone number, has not been provided. While addressing other aspects of § 1306 in reply, Plaintiff ignores entirely the telephone-number deficiency. Plaintiff has not demonstrated compliance with RPAPL § 3106 and thus has failed to establish having satisfied a condition precedent to suit.”] [United States Magistrate Judge Robert W. Lehrburger] *report and recommendation adopted*, 23-CV-3514 (JGLC), 2025 WL 934318 [SDNY Mar. 27, 2025][United States District Judge Jessica G. L. Clarke]; *U.S. Bank v Waithe-Lee*; Index No. 524980/2021 at NYSCEF Doc. 66 [Sup Ct, Kings Cty, Jan 14, 2026][“However, several other trial courts have found that a plaintiff's failure to list the borrower's last telephone number in its RPAPL 1306 filing is a material defect... This Court agrees.”][Walker-Diallo, J]; *M&T Bank vs. BH Koren LLC et al*; Index No. 030491/2022 at NYSCEF Doc. 11-112 [Sup Ct, Rockland Cty, Sep 8, 2025][“Plaintiff failed to establish[] that it included a telephone number that it had a reasonable basis to believe was Defendant Koren's phone number. Therefore, Plaintiff has failed to prove compliance with 1306 and it is not entitled to summary judgment.”][Cornell, J.]

As aptly noted in reaching the same conclusion, the Hon. Carolyn Mazzu Genovesi, JSC, held that “within the context of the RPAPL 1304, plaintiff's failure to include the telephone number of the Department of Financial Services' toll-free helpline is a facial defect that invalidates the RPAPL 1304 notice.” *The Bank of New York Mellon; et al v Susan Gargiulo et al*, 2025 NY Slip Op 51886[U] [Sup Ct Nov. 25, 2025] citing *Fed. Natl. Mtge. Assn. v Williams-Jones*, 235 AD3d 953 [2d Dept 2025][“Since the notices failed to include the telephone number for the Department of Financial Services' toll-free helpline—a piece of information specifically required by the version of RPAPL 1304 in effect at the time the notices were sent—the notices were facially defective, and the defendant's motion for summary judgment dismissing the complaint insofar as asserted against her should have been granted”]

This Court respectfully disagrees with Judge Genovesi that “[a]rguably, the plaintiff's misstatement of whether the loan was modified, which the Appellate Division, Second Department excuses, is a more egregious defect than the omission of borrower's telephone number.” *Gargiulo, supra. citing U.S. Bank N.A. v Adams*, 202 AD3d 867, 870 [2d Dept 2022].

The Court in *Adams*, specifically reasoned that the requirement to specify the modification status of the mortgage was *not* a statutory requirement as opposed to simply disregarding the will of the people as set forth in the express language of the statute, which would render the language pertaining to the telephone number superfluous and without meaning. See *Adams, supra.* [“RPAPL 1306 (2) specifically requires the filing of information that “will enable the superintendent to ascertain the *type of loan at issue*” (emphasis added) and states that the data collected shall be used to “perform an analysis of loan types” (*id.* § 1306 [4]) and to direct appropriate services to borrowers in need. Here, the Proof of Filing Statement provides that information, indicating that the loan is “Fixed Rate” and “1st Lien.” Plainly stated, a loan modification is not a “type of loan.”]

The Courts have recently experienced the consequences of judicial policy making in the context of foreclosure law and will not engage in the type of meddling the legislature as representatives of the People of the State of New York have expressly denounced. See the Foreclosure Abuse and Prevention Act which abrogated *Freedom Mtge. Corp. v Engel* (3 7 NY3d

1 [2021]) and legislation has been introduced to abrogate *Bank of Am., N.A. v Kessler*, 39 NY3d 317 [2023], was passed unanimously in the Assembly (A05841) and passed the Senate in the following year (S.5829); See also *Diamond v Chakrabarty*, 447 US 303 [1980][“The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.”]

Indeed, the Hon. Francois A. Rivera, JSC recently held that the absence of the correct telephone number in a RPAPL 1303 rendered the notice defective. See *HSBC Bank USA, N.A. v Williams* 2025 NY Slip Op 34650(U) [Sup Ct Dec. 19, 2025][“As the trial record reflects, plaintiff’s witness, Zambrano, expressly admitted that the toll-free telephone number and website were both different than the mandatory language contained in RPAPL 1303 at the time of the commencement of this action.... Accordingly, this Court concludes that a necessary pre-commencement mandate for the lawsuit was not complied with.”]

It makes little sense for this Court to apply RPAPL 1306 to a different standard than RPAPL 1303 and RPAPL 1304. All three require strict compliance. All three require a phone number. Accordingly, this Court will not second guess the policy considerations underpinning passage RPAPL 1303 RPAPL 1304 and RPAPL 1306. Like Justices Hackling, Genovesi, Lehrburger, Clarke, Walker-Diallo, Cornell and Rivera, this Court [Mirocznik, J.] will apply the telephone number requirement as required by the face of the statute.

Accordingly, plaintiff’s motion must be denied without regard to the sufficiency of the opposition papers. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985][“Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers”]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986][“Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers”]; See also *Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927 [2d Dept 2021][affirming denial of unopposed motion for summary judgment on RPAPL 1304 grounds]

The parties’ remaining contentions need not be reached in light of the Court’s determinations.

Accordingly, it is hereby

ORDERED, that plaintiff’s motion is DENIED with PREJUDICE; and it is further

ORDERED, that the parties are directed to complete discovery and proceed to trial.

This constitutes the decision and order of the Court.

ENTER:


Hon. Menachem M. Mirocznik, JSC

2026 MAR 20 A 4:07

FILED
KINGS COUNTY CLERK