

**Lehman XS Trust Mtge. Pass-Through
Certificates, Series 2005-7N v Aboutboul**

2025 NY Slip Op 34848(U)

December 8, 2025

New York County, Kings County

Docket Number: Index No. 509640/2015

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 8th day of December 2025

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

LEHMAN XS TRUST MORTGAGE P ASS-
THROUGH CERTIFICATES, SERIES 2005-7N, U.S.
BANK NATIONAL ASSOCIATION, AS TRUSTEE,

Plaintiff,

-against-

JOSEPH ABOUTBOUL; IRIT ABOUTBOUL;
BERKSHIRE FINANCIAL GROUP, INC.; CITY OF
NEW YORK ENVIRONMENTAL CONTROL
BOARD; DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT; HSBC
BANK NEVADA, N.A.; DEPARTMENT STORES
NATIONAL BANK; "JOHN DOE" AND "JANE
DOE" said names being fictitious, it being the
intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein

Defendants.

Index No. 509640/2015

**Decision, Order and Judgment
(Motion Seq. 4 and 5)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 122-144
Notice of Cross-Motion/Opposition	NYSCEF Doc. 146-179
Opposition to Cross-Motion and Reply	NYSCEF Doc 180-190
Reply to Cross-Motion	NYSCEF Doc. 193-196

Upon the foregoing papers, the motion and cross-motion are determined in accordance with this Decision, Order and Judgment as follows:

Procedural History

This action was commenced on August 5, 2015, seeking to foreclose a mortgage executed by defendants Joseph Aboutboul and Irit Aboutboul (the "defendants") encumbering the property known as 2746 East 64th Street, Brooklyn, NY 11210 (the "property"). Defendants did not initially appear.

On July 19, 2017, the Court issued an order advising that the Court may dismiss the action pursuant to CPLR 3215(c) due to plaintiff's delay in proceeding with this matter unless a motion for default judgment and order of reference was filed within 90 days.

On February 2, 2018, the Court granted plaintiff's motion for an extension of time to move for a default judgment and order of reference.

On August 30, 2018, plaintiff moved for a default judgment and order of reference. Defendants appeared through counsel opposed the motion and cross-moved to dismiss the action for lack of personal jurisdiction or for leave to serve a late answer.

By order dated January 2, 2019, the Court granted defendants' motion to extent that it ordered a traverse hearing.

By stipulation May 1, 2019, the parties agreed to withdraw their respective motions with defendants accepting service and plaintiff accepting defendants' answer.

On June 18, 2019, defendants joined issue with the filing of an answer asserting various affirmative defenses including that plaintiff failed to comply with RPAPL 1304.

Plaintiff now moves for summary judgment, to strike defendants' answer, for a default judgment and order of reference and to amend the caption. In support of the motion plaintiff contends that it established prima facie entitlement to judgment as matter of law. As it pertains to RPAPL 1304, plaintiff argues that RPAPL 1304 is not applicable because the subject property is presently not occupied by defendants. Plaintiff further contends that it in any case it complied with RPAPL 1304 by allegedly mailing the notices by certified and first-class mail to "2746 East, Brooklyn, NY 11234 as well as the last known address provided by the Borrowers, which is: 2203 Ave X, 64th Street, Brooklyn, NY 11235."

Defendants oppose the motion and cross-move to dismiss the action due to non-compliance with RPAPL 1304. Defendants allege they resided at the property from the origination of the loan in 2005 until 2009 and plaintiff failed to send the RPAPL 1304 notices to the correct addresses. Specifically, defendants contend that plaintiff admitted it failed to send the RPAPL 1304 notices to the correct addresses as neither "2746 East, Brooklyn, NY 11234" nor "2203 Ave X, 64th Street, Brooklyn, NY 11235" are the correct addresses and do not exist. Defendants also argue that plaintiff failed to establish prima entitlement to judgment as a matter of law because the plaintiff relies on hearsay evidence lacking foundation and plaintiff failed to establish it sent the notice of default as required by the mortgage and compliance with RPAPL 1306.

In opposition to the cross-motion and in reply to its motion plaintiff argues it established prima facie entitlement to judgment as a matter of law and that defendants failed to establish entitlement to dismissal because defendants admit that they presently do not reside at the property, moved out of the property in 2009. Therefore, plaintiff argues RPAPL 1304 is not applicable because the loan is not a "home loan" within the meaning of RPAPL 1304. Plaintiff further contends it established the RPAPL notices were properly sent, that established it properly sent the notice of default required by the mortgage and that complied with RPAPL 1306.

In reply to the cross-motion, defendants argue that RPAPL 1304 is applicable and that defendants attested that the property was utilized as their principal dwelling when the loan was originated until they moved out in 2009. Defendants further argue that RPAPL 1304 does not require the property be used as their principal dwelling at the time of the action. Essentially defendants argue that the fact that the property ceased to be their principal dwelling at some time after origination of the loan does not relieve plaintiff of its obligation to comply with RPAPL 1304. Defendants further point out that plaintiff did not address or dispute the contention that the RPAPL 1304 notices were sent to the incorrect or non-existent addresses.

Discussion

“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” *Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683 [2d Dept 2016]

“[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]

“Proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition...Alternatively, the plaintiff bears the burden of establishing, prima facie, that RPAPL 1304 is inapplicable” and, therefore, that “the loan is not subject to the notice requirements set forth in [the statute]”...“Home loan” is defined as a loan, inter alia, that is secured by a mortgage on real estate “which is or will be occupied by the borrower as the borrower’s principal dwelling” *Bank of Am., N.A. v Reed*, 239 AD3d 800 [2d Dept 2025] [internal citations and quotations omitted]; See also *Wells Fargo Bank, N.A. v Rodriguez*, 210 AD3d 728, 730 [2d Dept 2022]

Here, defendants raised plaintiff’s non-compliance with RPAPL 1304 as an affirmative defense and therefore, plaintiff was required to demonstrate prima facie compliance that it strictly complied with RPAPL 1304 or that the loan was not a home loan within the meaning of RPAPL 1304, to be entitled to relief. Plaintiff has failed to do so. Defendants further established prima facie that loan is a home loan, that RPAPL 1304 was applicable and that plaintiff failed to comply.

Defendants are correct that the property need not be owner occupied at the time of commencement of the action for RPAPL 1304 to be applicable. Even if defendants ceased to reside at the subject property, the same would not relieve plaintiff of its obligation to comply with RPAPL 1304. See *Nationstar Mtge., LLC v Sim*, 197 AD3d 1178 [2d Dept 2021][“pursuant to RPAPL former 1304(3), the fact that the borrower no longer occupies the residence as his or her principal dwelling would similarly only relieve the plaintiff of the 90-day requirement, and not of the

obligation to send the notice prior to commencing the foreclosure action.”]; See also *Bank of Am., N.A. v Reed*, 239 AD3d 800, 804 [2d Dept 2025]; *U.S. Bank N.A. v Reddy*, 220 AD3d 967 [2d Dept 2023]; *U.S. Bank N.A. v Maher*, 219 AD3d 1372 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Rodriguez*, 210 AD3d 728 [2d Dept 2022]

Defendants submitted affidavits attesting to living at the property from origination of the loan until they vacated in 2009 which plaintiff does not dispute. Nor does plaintiff dispute that 2746 East is not the property address. Nor could it. The mortgage expressly encumbers 2746 East 64th Street. Plaintiff also does not dispute that 2203 Ave X, 64th Street is not defendants last known address, nor does plaintiff dispute the contention that the alleged addresses do not exist. Finally, defendants expressly deny receipt of the notices, established prima facie non-compliance and plaintiff offer no proof that it sent the notices to the proper addresses. See e.g. *Bank of New York Mellon v Weber*, 169 AD3d 981 [2d Dept 2019]

Therefore, plaintiff’s motion is denied, defendants’ cross-motion is granted and the action is dismissed.

Lastly, given the dismissal of the complaint, the notices of pendency filed herein must also be cancelled. See CPLR 6514; See also generally, *Nationstar Mtge., LLC v Davis*, 240 AD3d 790 [2d Dept 2025]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]

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

Accordingly, it is hereby

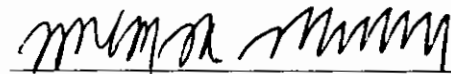
ORDERED AND ADJUDGED, that plaintiff’s motion is DENIED; and it is further

ORDERED AND ADJUDGED, that defendants’ cross-motion is GRANTED and the complaint is DISMISSED; and it further

ORDERED, that the Clerk is directed to cancel Notices of Pendency filed August 5, 2015, July 25, 2018, July 22, 2021, and August 1, 2023.

This constitutes the decision, order and judgment of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

KINGS COUNTY CLERKS OFFICE

DEC 11 2025

FILED