

U.S. Bank v Waithe-Lee
2026 NY Slip Op 30255(U)
January 14, 2026
Supreme Court, Kings County
Docket Number: Index No. 524980/2021
Judge: Carolyn Walker-Diallo
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At an IAS Term, Part FRP4, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 14th day of January 2026.

PRESENT:

HON. CAROLYN WALKER-DIALLO, J.S.C.

Index No.: 524980/2021

_____ x

U.S. BANK,

Plaintiff,

DECISION AND ORDER

-against-

CAROL WAITHE-LEE, et al.,

Defendants.

_____ x

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this

Motion:

Papers

Motion, Affirmation in Support, and Exhibits
Affirmation in Opposition
Affirmation in Reply

Numbered

NYSCEF Doc. Nos. 40-50
NYSCEF Doc. Nos. 51-58
NYSCEF Doc. Nos. 61-63

Motion Sequence #1

Plaintiff moves for an Order: (1) granting summary judgment; (2) striking Carol Waithe-Lee’s (“Defendant”) answer; (3) appointing a referee; (4) granting default judgment against all non-appearing defendants; (5) amending the caption; and (6) awarding costs. Defendant opposes, arguing that Plaintiff failed to meet its prima facie burden, as its affiant, Juliana Thurab of PHH

Mortgage Corporation (“PHH”), lacks personal knowledge of the loan’s origination, servicing, and recordkeeping by the original lender, JPMorgan Chase Bank. Defendant further argues that: (1) the affidavit fails to establish the records were incorporated and relied upon by Plaintiff; (2) Plaintiff failed to comply with RPAPL 1303, 1304, and 1306, as no proofs were provided evidencing the proper formatting, mailing, and filing of the pre-foreclosure notices; and (3) the 1306 filing omitted critical information. In reply, Plaintiff asserts that Defendant’s opposition fails to raise a triable issues of fact and that summary judgment should be granted, as its servicer, PHH, properly laid its business-record foundation through its affiant and established incorporation, and that it fully established its RPAPL obligations. Finally, Plaintiff argues that Defendant did not raise these defenses in the answer filed. For the foregoing reasons, Plaintiff’s motion is DENIED.

DISCUSSION

I. PLAINTIFF HAS DEMONSTRATED ITS PRIMA FACIE BURDEN IN THIS ACTION.

“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 N.Y.2d 320, 324 (1986) (Internal citations omitted). Further, it is well established that “[i]n a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default.”

Onewest Bank v. Wellington Roy Mahoney, 154 A.D.3d 770, 771 (2d Dep’t 2017); *Loancare v. Firshing*, 130 A.D.3d 787 (2d Dep’t 2015).

Moreover, “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. Vasishtha*, 241 A.D.3d 1299, 1300 (2d Dep’t 2025) (Internal quotations and citations omitted).

As such, “to establish a foundation for the admission of a business record, the proponent of the record must satisfy the requirements identified in the statute (*see* CPLR 4518[a]). First, the proponent must establish that the record be made in the regular course of business—essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business. Second, the proponent must also demonstrate that it be the regular course of such business to make the record . . . essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record. Third, the proponent must establish that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured.” *Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 205 (2d Dep’t 2019) (Internal quotations and citations omitted).

Here, Defendant’s contentions as to the admissibility of the affidavit of Juliana Thurab of PHH are without merit. Defendant offers no authority for the notion that Plaintiff must incorporate

the records of its own servicer to be admissible pursuant to CPLR 4518. Defendant does not contest PHH's authority to act as Plaintiff's servicer. The affiant need only attest to PHH's record-keeping practices and personal familiarity with PHH's business records to the extent that compliance with CPLR 4518 and case law. Accordingly, Defendant's contentions are without merit.

II. PLAINTIFF HAS DEMONSTRATED COMPLIANCE WITH RPAPL 1304.

Plaintiff has established compliance with RPAPL 1304. "RPAPL 1304 (1) provides that, 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage foreclosure, such lender, assignee[,] or mortgage loan servicer shall give notice to the borrower.' The statute further sets forth the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower (*see id.* § 1304 [2]). Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action. Proof of the requisite mailings of the RPAPL 1304 notices may 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." *Deutsche Bank Nat'l Trust Co. v. Pirozzi*, 230 A.D.3d 736, 738-39 (2d Dep't 2024) (Internal quotations and citations omitted).

Here, Plaintiff established prima facie that it complied with RPAPL 1304. Ms. Thurab attests to personal knowledge of PHH's "standard office practice and procedures for generating and mailing documents such as pre-commencement notices . . . [t]hese standard office practices and procedures are employed as part of PHH's regular business practice . . . and are designed to ensure timely mailing" and attaches the copies of the RPAPL 1304 notices mailed. Thus,

Defendant fails to raise an issue of fact. *See* Affirmation in Support of Motion for Summary Judgment of Juliana Thurab, dated June 4, 2024, NYSCEF Doc. No. 53.

III. PLAINTIFF HAS NOT DEMONSTRATED COMPLIANCE WITH RPAPL 1306.

Plaintiff has failed to establish that it complied with its RPAPL 1306 obligation. RPAPL 1306 provides that, as a “condition precedent” to commencing a foreclosure action, “[e]ach lender, assignee or mortgage loan servicer” file with the Superintendent of Financial Services “within three business days of the mailing of the [1304] notice . . . the information required by subdivision two.” RPAPL 1306 (1). Subdivision (2) directs, in relevant part, that “[e]ach filing . . . shall be on such form as the superintendent shall prescribe, and 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.”

The copy of the RPAPL 1306 notice that Plaintiff annexes in support of its motion is redacted, in pertinent part, where the borrower’s phone number is meant to be listed. *See* Plaintiff’s RPAPL 1306 Notice, NYSCEF Doc. No. 49 at 207. While Defendant annexes what purports to be the RPAPL 1306 notice without redactions, this notice does not exactly match Plaintiff’s notice, in that the “Loan Number Step 1” section redacted in Plaintiff’s notice is blank in the versions proffered by Defendant. Further, Defendant attaches two versions of the unredacted notice, one with a phone number and one without (only containing a “3”). *See* Defendant’s Versions of RPAPL Notice, NYSCEF Doc. No. 58 at 2-3. Plaintiff’s failure to establish that it included the borrower’s last known telephone number is fatal to its motion. The parties do not cite, and this Court is not aware of, any decision of the Appellate Division, Second Department, that addresses a lender’s failure to include the borrower’s last known telephone number in its RPAPL 1306 filing. 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. *See Bank of N.Y. Mellon v. Gargiulo*, 87 Misc. 3d 1243(A) (Sup. Ct. Nassau Co. 2025); *Deutsche Bank Nat'l Trust Co. v. Velasquez*, 86 Misc. 3d 288, 291, 226 N.Y.S.3d 522, 525 (Sup. Ct. Suffolk Co. 2025). This Court agrees.

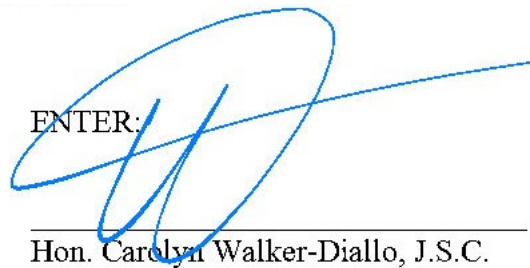
The “clearest indicator of legislative intent is the statutory text”. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). RPAPL 1306 (2) specifically requires a lender to file information that “will enable the superintendent to . . . direct appropriate services to borrowers in need.” *U.S. Bank N.A. v. Adams*, 202 A.D.3d 867, 871 (2d Dep’t 2022). Here, Plaintiff’s failure to include the telephone number could impact the State’s ability to assist the borrower to prevent foreclosure or to provide counseling services, which is the purported purpose of RPAPL 1306. Therefore, the inclusion of the borrower’s last known phone number is critical to the statutory purpose of RPAPL 1306. As Plaintiff failed to strictly comply with RPAPL 1306, its motion must be denied without regard to the sufficiency of the opposition papers. *See Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (“Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers”).

CONCLUSION

Accordingly, Plaintiff’s motion is DENIED. To the extent that any relief requested was not addressed by the Court, it is hereby DENIED. This Court extends the time to file a note of issue until April 15, 2026, to provide the parties with an opportunity to exchange discovery. The parties are to complete discovery and proceed to trial. Plaintiff shall serve notice of entry within fifteen (15) days of the upload of the order to NYSCEF upon Defendants and all parties who have appeared in this action.

This constitutes the Decision and Order of the Court.

ENTER:



Hon. Carolyn Walker-Diallo, J.S.C.