

Wells Fargo Bank, N.A. v Fishman
2026 NY Slip Op 30540(U)
January 27, 2026
Supreme Court, Kings County
Docket Number: Index No. 518002/2023
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 21st of January 2026

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

Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Malkie Fishman, Binyomin D. Fishman, TD Bank, N.A., The City of New York Department of Sanitation and John Doe (Those unknown tenants, occupants, persons or corporations or their heirs, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an interest in the mortgaged premises.),

Defendant.

Index No. 518002/2023

**Decision and Order
(Motion Seq. 1)**

Papers	Numbered
Notice of Motion	NYSCEF Doc. 29-63
Opposition Papers	NYSCEF Doc. 68-70
Reply Papers	NYSCEF Doc. 71

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 June 21, 2023, seeking to foreclose a mortgage (the “mortgage”) executed by defendants Malkie Fishman and Binyomin D. Fishman (the “defendant”) which encumbers the property known as 1811 Avenue K, Brooklyn, NY 11230 (the “property”).

On January 22, 2024, defendants joined issue with the filing of an answer which asserted various affirmative defenses and a counterclaim.

Settlement conferences were held on September 12, 2023, October 17, 2023 and November 9, 2023 after which the matter was released from the settlement part.

Plaintiff now moves for summary, to strike defendant’s answer and affirmative defenses, for a default judgment against the non-appearing defendants, appointing a Referee to compute and to amend the case caption. In support of the motion, plaintiff annexes the affidavit of Rick Penno, (“Mr. Penno” or “Penno Affidavit”), a purported Vice President Loan Documentation of plaintiff.

Plaintiff contends that it established entitlement to relief with the production of the note, mortgage and evidence of defendant's default. Plaintiff further argues that defendants' answer fails to raise an issue of fact.

Defendant opposes the motion contending that plaintiff failed to demonstrate compliance with RPAPL 1306 and that the complaint failed to properly accelerate the sums due under the note and mortgage.

In reply, plaintiff argues that its submission of the proof of filing statement demonstrates compliance with RPAPL 1306 and that it accelerated the loan by filing the complaint in this action.

Discussion

“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...Even then, summary judgment should be granted only if, upon the moving party's meeting this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action...Issue finding, not issue deciding, is the court's purpose at the summary judgment stage...Thus, [w]here the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied...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]

“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...is required.” See e.g. *Bank of New York Mellon v Peralta*, 239 AD3d 932 [2d Dept 2025][internal citations and quotation marks omitted]

Initially, Mr. Penno contends, based upon a review of business records, that the RPAPL 1304 notices were generated, dated, printed and mailed by Covious, it’s third party vendor on or about January 10, 2023. In support of this contention, Mr. Penno attaches copies of the subject notices and what he contends is a “Trackright” report and plaintiff’s internal letter log. However, the letter log does not provide a date that notices were allegedly mailed and “Trackright” report is mostly cut off with the dates not visible. While Mr. Penno contends the notices were sent on or about January 10, 2023, this contention is hearsay and lacks probative value in absence of the business records substantiating his contentions.

“There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon.” *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]

Indeed, “[w]ithout business records proving the matter asserted, [plaintiff]’s “unsubstantiated and conclusory” statement, by itself, [is] insufficient...” *Wilmington Sav. Fund Socy., FSB v Kutch*, 202 AD3d 1030, 1033 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Bonilla*, 227 AD3d 788, 790 [2d Dept 2024][“Without business records proving the matter asserted, Ranaldi’s “unsubstantiated and conclusory” statement, by itself, was insufficient...”]

“Although, [t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business...it is the business record itself, not the foundational affidavit, that serves as proof of the matter...Accordingly, [e]vidence of the contents of business records is admissible only where the records themselves are introduced...Without their introduction, a witness’s testimony as to the contents of the records is inadmissible hearsay” *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019][internal citations and quotation marks omitted]; See also *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757 [2d Dept 2021][“However, while the Lee affidavit was sufficient to lay a proper foundation for the admission of a business record pursuant to CPLR 4518 (a)...Lee failed to identify the records upon which she relied in making the statements, and the plaintiff failed to submit copies of the records themselves.”]; *Deutsche Bank Trust Co. Ams. v Miller*, 198 AD3d 867 [2d Dept 2021][“Moreover, even if Lee’s affidavit set forth a proper foundation for the admissibility of the unspecified records he relied on...Lee failed to identify the records upon which []he relied in making the statements, and the plaintiff failed to submit copies of the records themselves...It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted”][internal citations and quotation marks omitted]

Here, the plaintiff allegedly made the requisite RPAPL 1306 filing on January 10, 2023,

and in the absence of admissible proof as to when the RPAPL 1304 notices were mailed, the Court cannot ascertain whether the filing was timely made within three days of the mailing as required by 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 its 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][“[i]t 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]

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 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* (37 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 and Rivera, this Court [Mirocznik, J.] will apply the telephone number requirement as required by the face of the statute.

Accordingly, plaintiff failed to demonstrate strict compliance with RPAPL 1306 and the must be denied with 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”]

The parties remaining contentions not 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

FILED

FEB 11 2026

KINGS COUNTY CLERK'S OFFICE