

Deutsche Bank Natl. Trust Co. v Akintewe

2026 NY Slip Op 30594(U)

February 5, 2026

Supreme Court, Kings County

Docket Number: Index No. 500644/2019

Judge: Menachem M. Mirocznik

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At IAS Part FRPS 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 5th of February 2026

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

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS CERTIFICATE TRUSTEE ON BEHALF OF
BOSCO CREDIT II TRUST SERIES 2010-1

Plaintiff,

-against-

ELFREDA AKINTEWE; NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION &
DEVELOPMENT; "JOHN DOE #1" and "JOHN DOE
#12", the last twelve names being fictitious and
unknown to the Plaintiff, the persons or parties intended
being the tenants, occupants, person or corporations, if
any, having or claiming an interest in or lien upon the
premises, described in the complaint,

Defendants.

Index No. 500644/2019

**Decision and Order
(Motion Seq. 2)**

Papers	Numbered
Notice of Motion Papers	NYSCEF Doc. 48-71
Opposition Papers	NYSCEF Doc. 73
Reply Papers	NYSCEF Doc. 76

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

Procedural History

This more than six-year-old action was commenced on January 10, 2019, seeking to foreclose a mortgage (the "mortgage") executed by defendant Elfreda Akintewe (the "defendant") encumbering the real property known as 1138 East 103rd Street, Brooklyn, NY 11236 (the "property").

On July 29, 2022, the defendant filed an answer that denied that plaintiff had standing, but raised no affirmative defenses.

Settlement conferences were held on March 12, 2019, May 22, 2019, July 11, 2019, September 5, 2019, November 21, 2019, March 5, 2020, April 26, 2022, June 29, 2022, September

14, 2022, and November 16, 2022, after which the matter was released from the settlement conference part.

Non-party Wilmington Savings Fund Society, FSB, Not In Its Individual Capacity But Solely as Certificate Trustee of Bosco Credit II Trust Series 2010-1 ("Wilmington"), now moves for summary judgment, default judgment, order of reference and to amend the caption. Wilmington argues that it is entitled to the relief sought with the production of the note, mortgage, and evidence of the defendant's default. Wilmington relies on the affidavit of Christopher Onove ("Mr. Onove" or "Onove Affidavit"), a purported Foreclosure Analyst of Franklin Credit Management Corporation ("Franklin"), the alleged attorney-in-fact and servicer for Wilmington. Wilmington contends that it demonstrated plaintiff's and Wilmington's standing through the Onove Affidavit and supporting documents and that the defendant's answer is insufficient to raise an issue of fact precluding judgment as a matter of law.

In opposition to the motion, the defendant argues that Wilmington failed to demonstrate prima facie entitlement to judgment as a matter of law. Specifically, the defendant contends that Wilmington failed to submit admissible evidence of the defendant's alleged default, inasmuch as the testimony is hearsay and based on incomplete records without adequate foundation. The defendant argues that Wilmington failed to establish compliance with RPAPL 1304 and RPAPL 1306 because the RPAPL 1304 notice proffered by Wilmington contains inaccurate information about the amounts needed to cure the default by demanding the full payoff of the loan as opposed to the amount needed to reinstate and that the RPAPL 1306 filing is defective because it omits the defendant's telephone number and incorrectly characterizes the type of loan as a first lien while the subject mortgage is allegedly a second lien. Lastly, the defendant argues that Wilmington's evidence failed to establish the notices required by the notice provisions of the mortgage and RPAPL 1304 were actually mailed.

In reply (although incorrectly denominated as a "sur-reply"), Wilmington contends that the defendant failed to raise an issue of fact precluding judgment as a matter of law. Wilmington argues that compliance with necessary conditions precedent, including the notice provisions of the mortgage, RPAPL 1304, and RPAPL 1306, were waived because the same were not pled as affirmative defenses in the defendant's answer, and because such defenses are not jurisdictional, they cannot be raised absent vacatur of the defendant's default. Wilmington further argues that a challenge to the amounts due in the RPAPL 1304 notice does not preclude summary judgment, that the notice merely requires useful information and is not "adjudicative" in nature, since there is no litigation between the parties during the 90-day period, essentially arguing the discrepancy is a minor defect and that it established compliance with RPAPL 1306 with the submission of proof of filing.

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." *US Bank NA. v DLJ Mtge. Capital, Inc.*, 38 NY3d 169 [2022][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., PC.*, 126 AD3d 936 [2d Dept 2015]

"[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, NA. v Vasishtha*, 241 AD3d 1299 [2d Dept 2025][internal citations and quotation marks omitted]

"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]

Moreover, a, defenses predicated on RPAPL 1304 and RPAPL 1306 may be raised at any time prior to entry of judgment. See e.g. *Bank of New York Mellon v Weber*, 169 AD3d 981 [2d Dept 2019][*"Contrary to the plaintiffs contention, noncompliance with RPAPL 1304 may be raised at any time during the action"*]; *Wells Fargo Bank, NA. v Morales*, 178 AD3d 881 [2d Dept 2019][*"A defense based on noncompliance with RPAPL 1304 may be raised at any time during the action."*]

However, "[w]here an RPAPL 1304 notice fails to reflect information mandated by the statute... the statute will not have been strictly complied with and the notice will not be valid." *Emigrant Bank v Cohen*, 205 AD3d 103 [2d Dept 2022]; *Fed. Natl. Mtge. Assn. v Williams-Jones*, 235 AD3d 953 [2d Dept 2025]

Here, the defendant contends that RPAPL 1304 notice incorrectly lists the amount due as the payoff amount as opposed to the amount needed to cure the default (i.e. to reinstate). Wilmington does not dispute that notice listed the payoff amount as opposed to the amount to cure and does not dispute that RPAPL 1304 required the notice to reflect the amount to cure. Rather, Wilmington argues that an inaccuracy as to the amount due does not render the notice defective, relying on *Emigrant Bank v Cohen*, 205 AD3d 103 [2d Dept 2022].

In *Cohen*, the Appellate Division held that "a dispute between the parties over the exact amount owed by the mortgagor does not affect the adequacy of the RPAPL 1304 notice itself or preclude the grant of summary judgment in favor of the mortgagee, but merely implicates the amount of the mortgaged debt that is to be paid." *Emigrant Bank v Cohen*, *supra*.

The Court further held that "we find that where RPAPL 1304 requires the homeowner to be informed of the duration and dollar amount of a mortgage-related default, and the creditor provides a notice that includes the number of days of the default, **a dollar amount of claimed arrears**, and the cure date, the plaintiff has met its burden of demonstrating strict compliance with the statute... The language of RPAPL 1304 necessarily requires the creditor to unilaterally determine the default amount that it believes due at that snapshot in time, and advise the homeowner of that sum and of other rights and warnings. No provision of the statute, which has otherwise been written with great legislative detail, care, and precision, requires that there be any breakdown about how the default amount is mathematically computed. The statute does not infuse into the notice procedure an adjudicative mechanism or penalty in the event that the homeowner takes issue with the amount of the identified default sum. The sum, once set forth in the notice, will necessarily change with time." *Id.*

Thus, it is clear that in *Cohen*, the issue was a dispute as to the exact amounts owed, not whether the amount due should be a reinstatement figure or payoff figure. Here, the defendant does not merely dispute the amount of the payoff figure but whether the use of a payoff figure is permitted in the first instance. Indeed, it can hardly be said that the failure to include any number or the inclusion of a number that far exceeds the amount that can possibly be claimed as due (e.g. \$1 Billion on a \$500,000 mortgage) would satisfy the requirements of RPAPL 1304. Therefore, in the absence of sufficient briefing on this specific issue, at this juncture, the Court cannot and does not determine that Wilmington established strict compliance with RPAPL 1304 as a matter of law.

In any case, Wilmington failed to demonstrate strict compliance with RPAPL 1306.

"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]

"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, NA. 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]

Here, it is undisputed that the borrower's telephone number is redacted in 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.

"[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 NA. v Sch(ffinan*, 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 Malik*, 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 NA. 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 *US' Bank NA. v Adams*, 202 AD3d 867, 870 [2d Dept 2022]; See also *CIT Bank NA. 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 §[1306] 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 plaintiffs 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, plaintiffs 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 NA. 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 disregarding 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.”]

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, NA. 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 would make little sense for a 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 of RPAPL 1303, RPAPL 1304, and RPAPL 1306. Like Justices Hackeling, 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.

Therefore, Wilmington failed to demonstrate strict compliance with RPAPL 1304 and RPAPL 1306 and the motion must be denied.

Lastly, Wilmington failed to demonstrate entitlement to substitution.

Upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action” (CPLR 1018). “A motion for substitution may be made by the successors or representatives of a party or by any party” (CPLR 1021).” *U.S. Bank, NA. v Duran*, 174 AD3d 768, 769 [2d Dept 2019]

Here, Wilmington claims entitlement to substitution as party plaintiff based on an assignment of mortgage from plaintiff.

However, "[w]hile assignment of a promissory note also effectuates assignment of the mortgage... the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it." *U.S. Bank Nat. Ass'n v Dellarmo*, 94 AD3d 746 [2d Dept 2012][internal citations and quotation marks omitted]; See also *Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2d Dept 2011]"[an assignment of the mortgage without assignment of the underlying note or bond is a nullity"]

Here, the assignment of mortgage does not assign the note, and even if it did, the prior assignments did not all assign the note which was endorsed in blank. Therefore, the assignment is a nullity, and Wilmington proffers no affidavit or other evidence demonstrating that it is in possession of the note endorsed in blank.

Therefore, Wilmington failed to establish entitlement to substitution of US Bank as party plaintiff. See e.g. *Citicorp Mortg. v Adams*, 153 AD3d 779 [2d Dept 2017]"[Here, the plaintiff failed to demonstrate that it transferred its interest in the action to FNMA and, therefore, the Supreme Court improvidently exercised its discretion in granting the plaintiffs motion pursuant to CPLR 1018"]; *US. Bank NA. v Medina*, 230 AD3d 1371 [2d Dept 2024]"[U.S. Bank also failed to establish that the caption should be amended to substitute U.S. Bank as the plaintiff. Leave to amend a caption to substitute an assignee for the plaintiff may properly be granted upon evidence that the mortgage and underlying debt were assigned to the assignee"]; *Citimortgage, Inc. v Bredehorn*, 160 AD3d 803 [2d Dept 2018]"[The Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs motion... to amend the caption by substituting FNMA as the plaintiff. .. Although the plaintiff submitted evidence that the mortgage was assigned to FNMA, there was no evidence in admissible form of an assignment of the note or a transfer of possession of the note to FNMA."]

Accordingly, non-party Wilmington is precluded from participating in these proceedings, until such time as it can demonstrate entitlement to relief pursuant to CPLR 5015[a][2], CPLR 5015[a][5] or CPLR 2221.

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

Accordingly, it is hereby

ORDERED, that Wilmington's motion for summary judgment is DENIED with PREJUDICE; and it is further

ORDERED, that non-party Wilmington is precluded from participating in these proceedings, until such time as it can demonstrate entitlement to relief pursuant to CPLR 5015[a][2], CPLR 5015[a][5] or CPLR 2221; 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.

FILED
KINGS COUNTY CLERK

ENTER:

Hon. Menachem M. Mirocznik J.S.C

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