

<b>Citibank, N.A. v Idakwoji</b>
2026 NY Slip Op 30601(U)
February 5, 2026
Supreme Court, Kings County
Docket Number: Index No. 527683/2024
Judge: Menachem M. Mirocznik
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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 5<sup>th</sup> of February 2026

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

CITIBANK, N.A., AS TRUSTEE FOR CMLTI ASSET TRUST,

Plaintiff,

-against-

AGNES IDAKWOJI; "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. **527683/2024**

**Decision and Order  
(Motion Seq. 1 and 2)**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion Papers	NYSCEF Doc. 54-77
Notice of Cross-Motion/Opposition Papers	NYSCEF Doc. 83-94
Opposition to Cross-Motion/Reply Papers	NYSCEF Doc. 97-98

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

**Procedural History**

This action was commenced on October 11, 2024, seeking to foreclose a mortgage (the "mortgage") executed by defendant Agnes Idakwoji (the "defendant") encumbering the real property known as 1352 East 92nd Street, Brooklyn, NY 11236 (the "property").

With the filing of the summons and complaint, plaintiff filed a certificate of merit in compliance with CPLR 3012-B, which expressly provided that the subject mortgage is a home loan within the meaning of RPAPL 1304 and that defendant is a resident of the subject property.

Defendant did not timely appear or answer the complaint.

Plaintiff now moves for a default judgment, an order of reference, and to amend the caption. Plaintiff argues that it is entitled to a default judgment and appointment of a referee with the production of the note, mortgage, and evidence of default. Plaintiff relies on the affidavit of Scott Mackintosh ("Mr. Mackintosh" or "Mackintosh Affidavit"), a purported Assistant Secretary of Fay Servicing, LLC ("Fay"), the alleged attorney-in-fact for plaintiff.

Defendant opposes the motion and cross-moves to vacate her default and for leave to serve a late answer. Defendant argues that her failure to respond was excusable due to severe medical hardship affecting both herself and her caregiver daughter and that public policy favors resolving cases on the merits. Defendant further argues she has potentially meritorious defenses, including Plaintiff's alleged failure to strictly comply with RPAPL 1304 and RPAPL 1306 and failure to properly prove mailing of the contractual default notice. Specifically, defendant contends that Mr. Mackintosh failed to demonstrate compliance with the notice provisions of the mortgage and RPAPL 1304 inasmuch as he makes only conclusory and insufficient assertions and that the RPAPL 1306 filing allegedly contained an incorrect telephone number.

In opposition to the cross-motion and further support of its motion, plaintiff argues that defendant failed to demonstrate both a reasonable excuse and a potentially meritorious defense, asserting that Defendant received the statutory foreclosure summons warnings yet allegedly ignored them, that the illness allegations do not justify the lengthy default, and that Defendant's asserted defenses lack merit since the loan is not a "home loan" requiring RPAPL §1304 compliance, the servicer affidavit and incorporated business records adequately establish default and mailing, and the CEMA agreement contains enforceable waivers of defenses; accordingly, Plaintiff contends it has established a prima facie foreclosure case and is entitled to a default judgment and order of reference.

### Discussion

#### **I. Plaintiff's Motion for a Default Judgment Is Denied**

Plaintiff failed to submit sufficient evidence constituting the claim. In support of the motion, plaintiff relies on the testimony of Mr. Mackintosh, an employee of Fay, the alleged attorney-in-fact for plaintiff. To demonstrate the authority of Fay, plaintiff proffers a "limited power of attorney" dated November 1, 2024. However, the limited power of attorney is expressly limited by agreements, including a servicing agreement, which have not been produced.

Accordingly, for the reasons stated in *PNC Bank, National Association, et al v. Garfield Brown; Et Al*, Index No. 501394/2023 at NYSCEF Doc. 66 [Sup Ct, Kings Cty 2026][Hon. Menachem M. Mirocchnik, JSC], plaintiff failed to demonstrate the facts constituting the claim as required by CPLR 3215[f]. Therefore, plaintiff's motion for a default judgment must be denied. See also, e.g., *HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735 [2d Dept 2009]; see also, e.g., *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066, 1068 [2d Dept 2022][“the limited power of attorney submitted...restricted and conditioned its authority based on the terms of other agreements which were not provided by the plaintiff. Thus, the limited power of attorney was insufficient to demonstrate that Nationstar possessed the authority to act on behalf of the plaintiff”]

#### **II. Defendant's Motion to Vacate Her Default and Submit an Answer Is Granted**

“Under CPLR 3012(d), [u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default...A defendant who admits to having defaulted in the action must show that it has a reasonable excuse for its default and a potentially meritorious defense to the action...The determination of what constitutes a reasonable

excuse lies within the Supreme Court's discretion." *Stewart Tit. Ins. Co. v Bank of New York Mellon*, 154 AD3d 656 [2d Dept 2017][internal citations and quotations omitted].

"Whether a proffered excuse is reasonable is a sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" *Wells Fargo Bank, N.A. v Krauss*, 128 AD3d 813 [2d Dept 2015]. Additionally, "[i]t has long been held that courts have inherent power beyond that which is contained in the CPLR or its predecessor statutes to open defaults." *Cervino v Konsker*, 91 AD2d 249 [2d Dept 1983], citing *Ladd v Stevenson*, 112 NY 325 [1889]

"A defendant is not required to establish its defense as a matter of law; it need only set forth sufficient facts to make out a prima facie showing of a meritorious defense." *Quis v Bolden*, 298 AD2d 375 [2d Dept 2002]; See also *Tat Sang Kwong v Budge-Wood Laundry Serv., Inc.*, 97 AD2d 691 [1st Dept 1983][“it was not necessary for defendant to establish its defense as a matter of law but merely to set forth facts sufficient to make out a prima facie showing of a meritorious defense.”]; *Loris v S & W Realty Corp.*, 16 AD3d 729 [3d Dept 2005][“it is not necessary that summary judgment standards be met before a court can exercise its discretionary power to vacate a default judgment.”]

Here, the Court, in its discretion, finds that defendant has proffered a reasonable excuse due to undisputed medical issues which inhibited her ability to appear and timely defend the action. Notably, plaintiff does not allege the default was willful, defendant states the default was not willful, and the delay does not appear significant given that a default judgment has not yet been entered.

Moreover, defendant has also demonstrated *potentially* meritorious defenses predicated on non-compliance with RPAPL 1304 and RPAPL 1306.

First, defendant is correct that plaintiff failed to establish compliance with RPAPL 1304.

"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]

"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.” *U.S. 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.”]

Here, Mr. Mackintosh does not claim he personally sent the RPAPL 1304 notices, does not allege the existence of a standard office procedure designed to ensure that items are properly addressed and mailed, and defendant denies receipt of the alleged RPAPL 1304 notices. Therefore, defendant proffered a *potentially* meritorious defense predicated on RPAPL 1304.

Second, defendant proffered a potentially meritorious defense predicated on non-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]

“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]

Here, defendant contends that the RPAPL 1306 filing proffered by plaintiff does not accurately reflect her last known telephone number. Therefore, defendant demonstrated a potentially meritorious defense predicated on non-compliance with RPAPL 1306.

Contrary to plaintiff’s contention, it failed to establish that the subject mortgage is not a “home loan” within the meaning of RPAPL 1304. The fact that the subject mortgage contains a 1-4 family rider is not dispositive of whether the mortgage is a home loan and reliance on *MLB Sub I, LLC v. Mathew*, 202 AD3d 1078 [2d Dept 2022] is misplaced. Unlike in *Mathew*, defendant submits an affidavit attesting that she resides at the subject property. Plaintiff offers no other evidence that the subject property is not the defendant’s principal dwelling. This Court is not persuaded that *Mathew* establishes a sweeping bright-line rule that the subject rider removes the subject loan from the ambit of RPAPL 1304.

Nor has that argument persuaded other Justices of the Supreme Court. See *Deutsche Bank Nat. Tr. Co. v Pinkney*, 2024 NY Slip Op. 30852[U], 3 [Sup Ct, Kings Cty 2024][Hon. Cenceria P. Edwards, JSC][The Court also finds that Plaintiff misreads the *Mathew* decision by relying on only a portion of the Second Department's reasoning. Although the *Mathew* Court found that Plaintiff made a *prima facie* showing that the subject property was not the borrower's principal

dwelling by submitting the “1 to 4 Family Rider,” it then stated that “[i]n opposition, the defendant failed to raise a triable issue of fact” (see *Mathew*, 202 AD3d at 1080). Hence, rather than stand for the rigid, bright-line rule seemingly urged by Plaintiff on this motion, *Mathew* appears to merely hold that, in certain circumstances, a plaintiff’s submission of such riders can establish, *prima facie*, that the subject premises is not a borrower’s principal dwelling”]; *Wells Fargo v Weisz*, 2022 NY Slip Op 34526[U], 4 [Sup Ct, Kings County 2022][Hon. Larry D. Martin, JSC][“Upon a review of the record in that case, however, it is clear that there were additional factors leading to the conclusion that it was not a home loan (the defendant did not claim to have resided there, she had a multitude of other properties, etc.). As such, this Court is not prepared to conclude that the (somewhat common) rider removing the residency requirement is alone sufficient to place a loan outside the ambit of RPAPL 1304 especially where, as here, Defendant claims to have resided in the property subsequent to the mortgage.”]; *BNY v Small* [Sup Ct, Kings Cty 2024][same]; See also *Bank of Am. v Sands*, 2022 NY Slip Op. 32875[U], 3-4 [Sup Ct, New York Cty 2022][Hon. Francis A. Kahn III][“Based solely on this document, Plaintiff asserts it establishes, as a matter of law, that Unit 7-B was not “borrower’s principal dwelling” and, therefore, not within the definition of a “home loan” in RPAPL § 1304. An identical rider has been determined to be *prima facie* proof that a mortgaged premises does not qualify as a home loan pursuant to RPAPL 1304 (see *U.S. Bank N.A. v Shereshevsky*, 198 AD3d 1000, 1001 [2d Dept 2021]; see also *MLB Sub I, LLC v Mathew*, 202 AD3d 1078, 1081 [2d Dept 2022]). However, in *Shereshevsky* and *Mathew* the mortgagors failed to proffer any evidence that upon executing the rider they “thereafter used the property as their principal dwelling... In this case, there is unchallenged proof that Sands used Unit 7-B as his primary residence before this action was commenced. The modification agreement itself stated the “Borrower’s address is 50 East 76th Street, #7B”]; See also New York State Senate Sponsors Memorandum, Senate Bill S5829B, 2023-2024 Legislative Session.

Plaintiff’s contention that defendant conceded the loan is not a home loan because she was allegedly served at an address that is other than the property is specious. Defendant expressly attests to the subject property being her principal residence and not seeking jurisdictional relief is not a concession of any kind. The Court further notes that in support of its motion for default judgment, plaintiff alleges that the property is vacant, while at the same time claiming to have served tenants. Plaintiff further attested in the certificate of merit that the subject mortgage is a “home loan” within the meaning of RPAPL 1304 and that the defendant resides at the subject property. At the very least, factual issues would exist as to whether defendant resides at the subject property which is sufficient to state a potentially meritorious defense.

Finally, it is not clear that defendant is in default given that settlement conferences have not yet been held as required by CPLR 3408. CPLR 3408 applies “...in any residential foreclosure action involving a home loan as such term is defined in [RPAPL 1304], in which the defendant is a resident of the property subject to foreclosure...”

As noted above, the burden of establishing the inapplicability of RPAPL 1304 (i.e. that the mortgage is not a home loan) is on plaintiff. See e.g. *Bank of Am., N.A. v Reed*, 239 AD3d 800 [2d Dept 2025]; *Wells Fargo Bank, N.A. v Rodriguez*, 210 AD3d 728, 730 [2d Dept 2022]

CPLR 3408 imposes an affirmative obligation on the Court to conduct settlement conferences, at the first of which, defendant is presumed to have a reasonable excuse and may submit an answer. See, CPLR 3408[m]; see e.g. *Carrington Mortg. Servs., LLC v. Fiore*, 198

AD3d 1106 [3rd Dept 2021][“CPLR 3408(l) imposes an affirmative obligation on Supreme Court that if, “[a]t the first [foreclosure] settlement conference[,] . . . the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall: 1. advise the defendant of the requirement to answer the complaint; 2. explain what is required to answer a complaint in court; 3. advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and 4. provide information about available resources for foreclosure prevention assistance.” Relatedly, pursuant to CPLR 3408 (m), “[a] defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to [CPLR 320], shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived[,] within [30] days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.”]

Therefore, as a matter of equity and in light of the strong public policy in favor of resolving cases on the merits, the Court finds, in its discretion, that defendant has proffered a sufficient reasonable excuse for the default, several potentially meritorious defenses, that, in any event, relief is warranted in the interest of justice, and that in accordance with this Court’s duties under CPLR 3408, this matter should be transferred to the foreclosure settlement part for conferences in accordance with CPLR 3408.

Accordingly, it is hereby

**ORDERED**, that plaintiff’s motion for a default judgment and an order of reference is DENIED; and it is further

**ORDERED**, that defendant’s cross-motion to vacate her default and for leave to submit a late answer is GRANTED; and it is further

**ORDERED**, that defendant shall file her answer to the complaint within thirty (30) days of entry of this order; and it is further

**ORDERED**, that on its own motion, the matter is referred by the Court to the residential foreclosure settlement conference part pursuant to CPLR 3408.

This constitutes the Decision and Order of the Court.

ENTER:

  
\_\_\_\_\_  
Hon. Menachem M. Mirocznik, JSC

2026 FEB 13 A 9:59  
FILED  
KINGS COUNTY CLERK