

Flushing Bank v Orah
2026 NY Slip Op 31524(U)
April 7, 2026
Supreme Court, Kings County
Docket Number: Index No. 503534/16
Judge: Derefim B. Neckles
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 an IAS Term, Part FRP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of April, 2026.

P R E S E N T:

HON. DEREKIM B. NECKLES,
Justice.

-----X
FLUSHING BANK F/K/A FLUSHING
SAVINGS BANK, FSB,

Plaintiff,

-against-

Index No. 503534/16

YESHIVAH KEREN ORAH AKA YESHIVA
KEREN ORAH, MALKAH SUSHOLZ
INDIVIDUALLY AND AS SECRETARY OF
YESHIVAH KEREN ORAH AKA YESHIVA
KEREN ORAH, SHIMON SUSHOLZ, NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD, SHERMAN SCHREIBER,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>160-162, 172, 174</u>
Opposing Affidavits (Affirmations) _____	<u>177</u>

Upon the foregoing papers, defendants Yeshivah Keren Orah a/k/a Yeshiva Keren Orah (Orah) and Malkah Susholz, "Individually" (Malkah) move for an order (1) pursuant to CPLR 205-a (b) and CPLR 2221 (e), vacating the default judgment as against Malkah, and (2) dismissing this action pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1304. Plaintiff Flushing Bank f/k/a Flushing Savings Bank, FSB, moves for an order: (1) discontinuing this action against defendant Shimon Susholz

(Shimon), who is deceased and is no longer a necessary party; (2) amending the caption accordingly; (3) vacating any stays imposed by the court due to Shimon's death; and (4) declaring that plaintiff shall not seek any deficiency against Shimon.

Plaintiff commenced this action to foreclose a mortgage encumbering the property at 810 Ditmas Avenue in Brooklyn. The mortgage was executed by Orah, the property owner, on June 28, 2005, to secure a \$300,000 note in favor of Greenpoint Mortgage Funding, Inc. (Greenpoint). The note was signed by Orah, by its secretary, Malkah, as well as Malkah, individually, Shimon (deceased) and former party defendant Baila Susholz (Baila)(also deceased). Plaintiff thereafter became owner of the mortgage and note and commenced the instant foreclosure action on March 10, 2016. On April 24, 2018, plaintiff moved for an order of reference and a default judgment against nonanswering defendants.¹ In response, Orah moved to vacate its default and to dismiss the action on several grounds. On January 5, 2023, the court (Hon. Mark I. Partnow, J.) issued an order of reference upon the default of Orah and the remaining defendants in answering, effectively denying Orah's motion to vacate its default and dismiss the action.

On June 29, 2023, plaintiff moved for an order confirming the referee's report and for a judgment of foreclosure. Orah moved to renew and vacate the January 5, 2023 order of reference pursuant to CPLR 2221 (e) and to dismiss this action under RPAPL 1304. Orah's renewal motion was based on a purported change in the law relating to service of RPAPL 1304 notices following the Second Department's decision in *Wells*

¹ The motion also sought to discontinue the action as against Baila, the only answering defendant, who was deceased and no longer a necessary party. The action was discontinued against Baila by order dated July 1, 2022.

Fargo Bank, N.A. v Yapkowitz (199 AD3d 126 [2d Dept 2021]).² Orah additionally sought to toll interest on the indebtedness under CPLR 5001 (a). On April 1, 2025, Malkah separately moved to renew and vacate the order of reference pursuant to CPLR 2221 (e) and CPLR 205-a (b), and to dismiss the action under RPAPL 1304.

On June 30, 2025, this court issued an order granting plaintiff's motion and granting Orah's motion only to the extent of tolling interest. In denying the remainder of Orah's motion, the court held, in essence, that any infirmity in the service of the RPAPL 1304 notice(s) is of no moment since the subject loan was not a "home loan" as defined by that statute and therefore plaintiff was not required to comply with the notice requirements. A judgment of foreclosure was issued by this court on June 30, 2025 and entered on August 6, 2025.

In her instant motion (MS # 7), Malkah seeks to renew and vacate the default order of reference based on an alleged change in the law contained in the Foreclosure Abuse and Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]), namely, the addition of CPLR 205-a (b). This subsection provides:

"(b) Where the defendant has served an answer and the action upon a [mortgage] is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the original plaintiff, or a successor in interest or assignee of the original plaintiff, the assertion of any cause of action or defense by the defendant in the new action shall be timely if such cause of action or defense was timely asserted in the prior action."

² The Second Department held that the mailing of a 90-day notice jointly addressed to two or more borrowers in a single envelope, as Orah alleged occurred here, is not sufficient to satisfy the requirements of RPAPL 1304.

Malkah argues that since she interposed a timely answer containing a RPAPL 1304 defense in a prior action brought to foreclosure the subject mortgage by plaintiff in 2010, which prior action had been discontinued, she can assert the same defense in this action and cannot be held in default in the instant action for failure to interpose a timely answer.

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]). Here, Malkah has not demonstrated that CPLR 205-a (b) represents a “change in the law” and therefore that part of her motion for renewal is denied.

CPLR 205-a replaced the savings provision of CPLR 205 with respect to mortgage foreclosure actions. CPLR 205 is a remedial statute, designed to “ameliorate the potentially harsh effect of the Statute of Limitations in certain cases in which at least one of the fundamental purposes of the Statute of Limitations has in fact been served, and the defendant has been given timely notice of the claim being asserted by or on behalf of the injured party” (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 177 [1979]; *see also Krainski v Sullivan*, 208 AD2d 904 [2d Dept 1994]). The statute effectively allows recommencement of a timely action which had been terminated (for reasons apart from those exceptions expressly noted) within six months of the termination, even if the statute of limitations on the cause(s) of action had since expired.

While CPLR 205-a (b) was introduced under FAPA and made effective December 30, 2022, which was after the date plaintiff moved for an order of reference and days before the order of reference was issued, it did not represent a “change in the law,” as this

subsection is a nearly verbatim restatement of CPLR 205 (b), which has always been applicable to foreclosure actions. There is no allegation that Malkah was not properly served with or did not have notice of plaintiff's motion for a default order of reference, and there is no reason her argument that the answer in the prior action must be deemed timely interposed in this action could not have been raised under CPLR 205 (b) in opposition to plaintiff's then pending motion. A party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate a reasonable excuse for the default and a potentially meritorious opposition to the motion (see CPLR 5015 [a] [1]; *Vizelter v Strogov*, 170 AD3d 917, 918 [2d Dept 2019]; *Ki Tae Kim v Bishop*, 156 AD3d 776, 777 [2d Dept 2017]; *Brinson v Pod*, 129 AD3d 1005, 1008 [2d Dept 2015]). Malkah has not offered a reasonable excuse for failing to oppose the motion for a default order of reference.

Moreover, “[t]he doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding” (*Kanes v Kanes*, 230 AD3d 662, 664 [2d Dept 2024] [internal quotation marks omitted], quoting *U.S. Bank N.A. v Moss*, 186 AD3d 1753, 1753 [2d Dept 2020]). The court previously determined in its June 30, 2025 order that failure to comply with RPAPL 1304 is not pertinent to the subject action as it does not involve a home loan. Moreover, the result would not be different upon a separate analysis with regard to Malkah on the instant motion. RPAPL 1304 (6) (a) (1) defines a “home loan” as a loan in which (i) the borrower is a natural person; (ii) the debt is incurred by the borrower primarily for personal, family, or household purposes; (iii) the loan is secured by a mortgage or deed of

trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and (iv) the property is located in this state. Assuming Malkah is a "borrower" as contemplated by the statute, there is no allegation that the loan was used by Malkah for personal, family or household purposes or that the subject property is or would thereafter be occupied as Malkah's principal dwelling. The affidavit of service of the summons and complaint upon Malkah, which is not contested, identifies a different address for Malkah's dwelling place/usual place of abode.

Therefore, even if the order of reference was vacated and Malkah's prior RPAPL 1304 defense is deemed timely interposed in this action, since RPAPL 1304 is inapplicable to this action such relief would not entitle Malkah to dismissal, nor will it otherwise affect plaintiff's ultimate entitlement to a judgment of foreclosure.

As a result, Malkah's motion is denied in its entirety.

There being no opposition to plaintiff's motion (MS # 8), such is granted in its entirety.

Accordingly, it is hereby

ORDERED that defendants' motion (MS # 7) is denied in all respects; and it is further

ORDERED that plaintiff's motion (MS # 8) is granted in all respects; and it is further

ORDERED that this action is discontinued against defendant Shimon Susholz, who is deceased and is no longer a necessary party; and it is further

ORDERED that any stays imposed by the court due to defendant Shimon Susholz's death are vacated; and it is further

ORDERED that plaintiff shall not seek a deficiency judgment against defendant Shimon Susholz; and it is further

ORDERED that the caption is amended to remove Shimon Susholz as a party defendant, and the Clerk is directed to change the caption in its records to read as follows:

-----X
FLUSHING BANK F/K/A FLUSHING SAVINGS BANK, FSB,

Plaintiff,

-against-

Index No. 503534/16

YESHIVAH KEREN ORAH AKA YESHIVA KEREN ORAH, MALKAH SUSHOLZ INDIVIDUALLY AND AS SECRETARY OF YESHIVAH KEREN ORAH AKA YESHIVA KEREN ORAH, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, SHERMAN SCHREIBER,

Defendants.
-----X

The foregoing constitutes the decision and order of the court.

E N T E R,



HON. DEREFIM B. NECKLES
J. S. C.

2026 APR -9 A 11:29
KINGS COUNTY CLERK
FILED