

Federal Natl. Mtge. Assn. ("Fannie Mae") v Mayer

2026 NY Slip Op 31608(U)

April 13, 2026

Supreme Court, Kings County

Docket Number: Index No. 515603/2016

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 13th of April 2026

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

FEDERAL NATIONAL MORTGAGE
ASSOCIATION (“FANNIE MAE”), A
CORPORATION ORGANIZED AND EXISTING
UNDER THE LAWS OF THE UNITED STATES OF
AMERICA,

Plaintiff,

-against-

MORDECHAI MAYER; CHANNIE ARON, AS
TRUSTEE OF THE J & W TRUST; NEW YORK
CITY PARKING VIOLATIONS BUREAU; NEW
YORK CITY TRANSIT ADJUDICATION BUREAU;
CACH LLC; UNISTATES CREDIT AGENCY LLC
ASG CITIBANK,

Defendant.

Index No. 515603/2016

**Decision, Order and Judgment
(Motion Seq. 16 and 17)**

Papers	Numbered
Order to Show Cause (Seq. 16)	NYSCEF Doc. 373-376, 378
Opposition Papers (Seq. 16)	NYSCEF Doc. 379-380
Notice of Motion (Seq. 17)	NYSCEF Doc. 381-383
Opposition Papers (Seq. 17)	NYSCEF Doc. 385
Reply Papers (Seq. 17)	NYSCEF Doc. 386
Reply Papers (Seq. 16)	NYSCEF Doc. 387

Upon the foregoing papers, the motion and cross-motion are determined in accordance with this Decision and Order as follows:

Relevant Procedural and Factual History

This action was commenced on September 6, 2016, seeking to foreclose a mortgage (the “mortgage”) executed by defendant Mordechai Mayer (“Mayer”), which encumbers the property known as 213 Hewes Street, Brooklyn, NY 11211 (the “property”). Title to the property was initially jointly held by defendant Mayer and defendant Channie Aron, as Trustee of the J & W Trust (“Aron”).

On December 19, 2007, a prior foreclosure action was commenced seeking to foreclose the

mortgage entitled Citimortgage Inc v. Mayer, Mordechai, et al under Index No. 46183/2007 (the “first foreclosure action”). On May 19, 2008, the first foreclosure action was discontinued by notice.

On November 9, 2011, a second foreclosure action was commenced seeking foreclose the mortgage entitled Citimortgage Inc v. Mayer, Mordechai, et al under Index No. 25312/2011 (the “second foreclosure action”). On November 21, 2012, the second foreclosure action was discontinued by notice.

On October 23, 2014, a third foreclosure action was commenced seeking foreclose the mortgage entitled Federal National Mortgage Association (“Fannie Mae”), et al v. Channie Aron, as Trustee, et al under Index No. 15107/2014 (the “third foreclosure action”). The third foreclosure action was discontinued by order dated September 13, 2016, and entered on September 22, 2016.

On December 2, 2016, defendant Mayer joined issue in this action with the filing of an answer which asserted various affirmative defenses.

Defendant Aron did not initially answer or appear.

On January 24, 2018, the Court granted plaintiff’s motion, *inter alia*, for summary judgment, default judgment and appointed a referee to compute the amounts due to the plaintiff.

On October 26, 2018, Attorney Samuel Katz filed a notice of appearance on behalf of defendant Mayer and defendant Aron.

On January 22, 2019, the Court granted Attorney Samuel Katz leave to withdraw as counsel for the defendants.

On July 1, 2019, the Court granted defendant Aron’s motion, in effect pursuant to CPLR 5015[a][4] to vacate the January 24, 2018 order granting a default judgment and order of reference to the extent of directing a hearing to be conducted as whether Attorney Sam Katz was authorized to appear on behalf of defendant Aron and if not whether defendant Aron was properly served.

On March 5, 2020, the special referee issued a report finding that Attorney Samuel Katz was not authorized to appear for defendant Aron and that defendant Aron was not properly served with the summons and complaint.

On September 13, 2022, the Court granted defendant Aron’s motion to confirm the referee’s report and her motion to vacate the January 24, 2018 order and for leave to submit a late answer. The Court also denied plaintiff’s motion to reject the referee’s report, its motion for an extension of time to serve Aron and its motion for a judgment of foreclosure and sale.

On November 11, 2022, defendant Aron joined issued with the filing of an answer which asserted various affirmative defenses including that the Court lacks jurisdiction over her.

On November 22, 2022, defendant Mayer moved for summary judgment dismissing this action for non-compliance with RPAPL 1304. Defendant Mayer argued that the subject RPAPL 1304 notice included additional language rendering same defective under the Appellate Division’s

holding in *Bank of America v. Kessler*, 202 AD3d 10 [2d Dept 2021]

On January 9, 2023, defendant Aron moved in effect for summary judgment and dismissal of the action for lack of personal jurisdiction and the absence of an indispensable party requires dismissal of the entire action. Defendant Aron argued that the Court already found that service was improper and the same is law of the case.

On March 10, 2023, plaintiff file opposition to Aron's motion and cross-moved, *inter alia*, for summary judgment. Plaintiff argued that defendant Aron waived her objection to personal jurisdiction by seeking vacatur of the default judgment and the submission of an answer and that it demonstrated prima facie entitlement to judgment as a matter of law.

Defendant Aron opposed the cross-motion arguing that the Court did not have jurisdiction over her, that the action was barred by RPAPL 1301[3], as amended by the Foreclosure Abuse and Prevention Act ("FAPA") because this action was commenced prior to the discontinuance of the third foreclosure action, that the discontinuance of the second and third foreclosure actions were with prejudice pursuant to CPLR 3217[c] and that plaintiff failed to demonstrate prima facie entitlement to relief in as much as plaintiff failed to substantiate the authority granted by the proffered limited power of attorney with the subject pooling and servicing agreement upon which was based and that the motion is based upon hearsay assertions without proper foundation.

In reply and in further support of the cross-motion, plaintiff argued that defendant Aron waived her affirmative defenses to the extent not opposed, that her opposition is not supported by admissible evidence, reiterated its belief that defendant Aron waived her personal jurisdiction defense by seeking to vacate the default and leave to submit an answer, that it need not submit the related servicing agreements upon which the power of attorney is based and she lacks standing to challenge same. Plaintiff further argued that FAPA and CPLR 3217 are inapplicable because the third foreclosure action was discontinued as a result of the execution of a loan modification by defendant Mayer and that FAPA is not to be applied retroactively.

On February 27, 2023, the Court denied defendant Mayer's motion for summary judgment because *Kessler* was reversed by the Court of Appeals in *Bank of Am., N.A. v. Kessler*, 39 NY3d 317 [2023]

On September 13, 2022, and May 15, 2023, the Court denied defendant Aron's motion and granted plaintiff's motion for summary judgment. The Court held that defendant Aron elected her remedy and essentially found she waived the defense. The Court further held that the power of attorney was sufficient and the testimony and records were admissible.

On April 11, 2024, plaintiff moved to confirm the referee's report and for a judgment of foreclosure and sale.

On June 6, 2024, defendant Mayer opposed the motion and cross-moved to dismiss the action pursuant to RPAPL 1301[3] as amended by FAPA and that upon dismissal the entire action should be dismissed due to the absence of an indispensable party and in the alternative to reject the report and for entry of a judgment for nominal damages. Defendant Mayer argued that the referee's report should be rejected because it is unsupported by admissible evidence inasmuch as plaintiff failed to demonstrate the authority of its affiant under a limited power of attorney, failed

to lay a proper CPLR 4518 foundation for electronic business records and predecessor servicer records, and therefore failed to meet its prima facie burden to confirm the referee's computation of the amount due. In support of his cross-motion, defendant Mayer argued that the action should be dismissed pursuant to RPAPL 1301[3] because the action was commenced without leave of court while the third foreclosure action was still pending and that under FAPA the leave-of-court requirement is a strict condition precedent. Alternatively, he contended that because plaintiff failed to prove damages in admissible form, the Court should enter only nominal damages of \$1, and further asserts that dismissal as to him requires dismissal of the entire action.

On June 6, 2024, defendant Aron opposed the motion and cross-moved for reargument of the September 13, 2022 and May 15, 2023 orders, and upon same that the action should be dismissed. In opposition, defendant Aron opposed confirmation of the referee's report inasmuch as plaintiff failed to provide admissible evidence establishing the affiant's authority, failed to include the referenced servicing agreements underlying the limited power of attorney, and failed to lay a proper CPLR 4518 business-records foundation for both electronic and predecessor servicer records and incorporated defendant Mayer's opposition papers. In support of her cross-motion, defendant Aron argued that the Court misapprehended RPAPL 1301[3] when it granted summary judgment to plaintiff despite the pendency of the 2014 foreclosure action, arguing that FAPA requires strict enforcement of the leave-of-court condition. Alternatively, she sought rejection of the referee's report with entry of a judgment limited to nominal damages.

In reply to both of the oppositions submitted by defendants, plaintiff argued that it established entitlement to a judgment of foreclosure and sale and confirmation of the referees report which was substantially supported by the record and with the submission of a detailed servicing affidavit itemizing principal, interest, taxes, insurance, and credits, supported by business records and a limited power of attorney. Plaintiff argued that the evidence satisfies CPLR 4518 and that defendants' evidentiary objections lacked merit.

In opposition to the cross-motions, plaintiff argued that cross-motions are improper successive summary judgment motions and cannot be characterized as motions to reargue because they were not identified as such as required by CPLR 2221. Alternatively, it contended that RPAPL 1301[3] does not mandate dismissal because the third foreclosure action was effectively abandoned and de facto discontinued following execution of a modification agreement which is in effect a new mortgage, that no prejudice occurred, and that long-standing equitable interpretations of RPAPL 1301[3] (pre-FAPA) support denial, and that RPAPL 1301[3], as amended by FAPA should not be retroactively applied and that retroactive application would be unconstitutional. Plaintiff similarly characterizes Aron's cross-motion as a successive summary judgment application and made substantially the same arguments as with respect to defendant Mayer.

In reply and in further support of her cross-motion defendant Aron argued that her motion was not a successive summary judgment motion but a proper CPLR 2221 reargument motion which was identified as such, that RPAPL 1301[3], as amended by FAPA unequivocally barred commencement of this action while the third foreclosure action was pending and that FAPA clarifies the law, should be retroactively applied, is constitutional and mandates dismissal. Defendant Aron further argued that plaintiff's "new mortgage" or de facto discontinuance theories were expressly overruled by FAPA and argued alternatively that the referee's report should be rejection and judgment should be entered for nominal damages.

In reply and in further support of his cross-motion, defendant Mayer incorporated defendant Aron's reply arguments, argued that his motion is not barred as a successive summary judgment motion because FAPA's amendments were enacted after his earlier RPAPL §1304 motion and could not have been raised previously, and asserts that plaintiff's failure to respond to his alternative nominal-damages argument constitutes a concession of that relief.

On June 11, 2025, the Court granted plaintiff's motion, denied the cross-motions and issued a judgement of foreclosure and sale. The Court found that referee's report was substantially supported by the record, that the power of attorney, testimony and evidence submitted were admissible and sufficient. The Court further held that defendant Mayer waived any RPAPL 1301 defense by failing to raise it in a pre-answer motion or as an affirmative defense and, having defaulted on summary judgment in 2018 without moving to vacate same, could not relitigate defenses and questioned whether retroactive application of the FAPA would be constitutional under the circumstances. The Court also denied Aron's cross-motion for reargument.

A foreclosure sale was scheduled for December 18, 2025.

Defendant Mayer now moves by order to show cause to renew and reargue the order dated June 11, 2025, and to vacate the judgment of foreclosure and sale and dismissing the action pursuant to RPAPL 1301[3] or alternatively to reject the referee's report and enter a judgment for nominal damages. Defendant Mayer argues that the judgment of foreclosure and sale must be vacated because it rests entirely on inadmissible hearsay and a referee's report that is not substantially supported by the record. Defendant Mayer contends that the servicer's affiant lacked demonstrated authority under a limited power of attorney which was expressly conditioned on unproduced servicing agreements, that the electronic loan history printouts were not authenticated as true and accurate representations under CPLR 4518[a], that alleged predecessor's servicer records were not properly incorporated, and that plaintiff failed to establish the amounts due. Defendant Mayer further argues that the Court misapplied FAPA and RPAPL 1301[3], which should have been applied retroactively and may be raised at any time before enforcement of a foreclosure judgment.

In opposition to the motion, plaintiff argues that relief is barred by waiver, law of the case, and res judicata because the judgment of foreclosure and sale is final as to all defenses that were or could have been litigated, that he failed to raise RPAPL 1301[3] in his answer, previously defaulted on summary judgment, and previously unsuccessfully raised similar arguments. Plaintiff challenges this Court's authority to allegedly sit in appellate review of a prior Justice's determinations and that Mayer is impermissibly attempting to relitigate issues already resolved.

In reply, defendant Mayer argues that RPAPL 1301[3], as amended by FAPA, permits the defense to be raised "at any time prior to final judgment," is comparable to RPAPL 1303 and RPAPL 1304 and that omission of the defense from his answer did not constitute waiver. Defendant Mayer contends that RPAPL 1301[3] controls over CPLR 3211[a][4] and that even an unpleaded defense may support relief absent prejudice. He further argues that the law of the case doctrine does not bar renewal and that intervening Court of Appeals decisions in *Van Dyke* and *Article 13 LLC* confirming FAPA's retroactive constitutionality warrant reconsideration. He

further incorporates the argues raised in defendant Aron's reply (*infra*) as to his alternate grounds for rejection of the referee's report and for entry of a Judgment for only nominal damages.

Defendant Aron separately moves for renewal and reargument of the September 13, 2022 and June 11, 2025 orders, to vacate same and to dismiss the action. Aron seeks relief on three principal grounds. First, that the Court improperly denied her motion to dismiss for lack of personal jurisdiction based on an "election of remedies" rationale raised *sua sponte* and contrary to CPLR 5015[a], 3211[a][8], and 3211[e], arguing that vacating a default and later moving to dismiss for improper service are not inconsistent remedies and do not constitute waiver. Second, that a prior unappealed order finding improper service constitutes law of the case and mandates dismissal as to her and, as an indispensable party, dismissal of the entire action. And third, that the referee's report was confirmed in error because the affidavit of amount due was inadmissible hearsay due to defective proof of servicer authority, failure to authenticate electronic records, and lack of foundation for incorporation of predecessor records.

In opposition defendant Aron's motion, plaintiff argues that Aron waived any objection to personal jurisdiction by formally appearing and participating in the action through a prior CPLR 5015[a] motion, thereby waiving jurisdictional objections, and that a party who participates in litigation without timely asserting jurisdictional objections forfeits the defense. Plaintiff contends that Aron made poor strategic choice that binds her, is seeking relief due the alleged malpractice of prior counsel, that the Court did not misapprehend law or fact, that references to "election of remedies" were *dicta* and not dispositive, and that reargument is improper because Aron seeks to relitigate issues already resolved after years of motion practice and a final judgment. Plaintiff's counsel also avers that an adverse ruling would impugn and sacrifice this Court's credibility, would simply appease the defendant, that this Court would be admonished and that the Appellate Division would reassign matters assigned to this Court to be heard before different Justices of Court.

In reply, defendant Aron argues that her prior CPLR 5015 motion did not constitute a formal or informal appearance under CPLR 320[a] and did not waive her objection to personal jurisdiction and distinguishes the proffered cases involving active participation on the merits. Defendant Aron contends her motion to dismiss under CPLR 3211[a][8] was timely because CPLR 3211[e]'s 60-day rule applies only after a defense is raised in a "pleading," and a motion is not a pleading under CPLR 3011. Defendant Aron further argues that the prior traverse determination finding improper service is law of the case and binding, that the election-of-remedies doctrine does not bar her jurisdictional motion because CPLR 5015 and CPLR 3211 are not inconsistent remedies. Alternatively, she argues that the referee's report should have been rejected because plaintiff failed to establish damages with admissible business records or competent proof of servicer authority (including failure to produce the servicing agreement underlying the limited power of attorney), and that under binding precedent, and recent Kings County foreclosure decisions, the consequence of failing to prove damages is nominal damages. Lastly, defendant Aron contends that plaintiff's counsel is engaging in blatant attempts to intimidate this Court with attacks on the integrity of the Court, threats of institutional consequences and impair the respect due to this Court and to interfere with administration of justice amounting to civil and criminal contempt of Court.

Discussion

I. Standard of Review

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision” *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]; See also *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2012]

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]. “A clarification of the decisional law is a sufficient change in the law to support renewal”. *Dinallo v DAL Elec.*, 60 AD3d 620 [2d Dept 2009]; See also *U.S. Bank N.A. v Mongru*, 241 AD3d 970 [2d Dept 2025]

“Every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made.” *Aridas v Caserta*, 41 NY2d 1059, 1061 [1977]; *Kugel v Reynolds*, 228 AD3d 743, 746 [2d Dept 2024][“The Supreme Court had jurisdiction to reconsider its prior order regardless of statutory time limits concerning motions to reargue”]; *McMahon v City of New York*, 105 AD2d 101, 104 [1st Dept 1984][“Every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made.”]

“Under CPLR 5015(a), a court is empowered to vacate a [] judgment for several reasons, including excusable neglect; newly-discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur of a prior order”...However, CPLR 5015(a) does not provide an exhaustive list as to when a default judgment may be vacated, and a court may vacate its own judgment for sufficient reason and in the interests of substantial justice.” *40 BP, LLC v Katatikarn*, 147 AD3d 710, 710-11 [2d Dept 2017]; See also *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003][“ In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice.”]; *Delagi v Delagi*, 34 AD2d 1005, 1007 [2d Dept 1970][“ The inherent power of the court to relieve a party from the operation of a judgment in the interests of substantial justice has been continually recognized in this State over the past hundred years”]

As will be detailed herein, defendants have demonstrated entitlement to relief.

II. Plaintiff’s Procedural Objections Are Meritless

Plaintiff’s contentions that relief is precluded by entry of the judgment of foreclosure and sale, that relief is barred by law of the case and that this Court is prohibited from reviewing the prior orders are specious.

First, there are no constraints on this Court’s authority to consider the subject motions. CPLR 2221[a] provides that a motion to renew or reargue “shall be made, on notice, to the judge who signed the order, *unless he or she is for any reason unable to hear it*” [emphasis added]

Here, the September 13, 2022 order was issued by the Hon. Larry D. Martin, JSC and the

June 11, 2025 order was issued by the Hon. Carolyn Mazzu Genovesi, JSC. Justice Martin has since retired and Justice Genovesi has been transferred and reassigned to Nassau County.

Therefore, both Justice Martin and Justice Genovesi are “unable to hear” this case. See generally *Sparks v Essex Homes of WNY, Inc.*, 20 AD3d 905, 906 [4th Dept 2005]; *Counsel Fin. Holdings LLC v Sullivan Law, L.L.C.*, 230 AD3d 1588, 1589 [4th Dept 2024], *lv to appeal denied*, 43 NY3d 904 [2025]

In any case, “[a]lthough a motion to vacate an order should generally be made to the justice who signed the order (*see* CPLR 2221[a]), an exception exists where the Rules of the Chief Administrator of the Courts provide otherwise (*see* CPLR 2221 [b]). Here, the Uniform Rules for the New York State Trial Courts (specifically the rule entitled “Individual assignment system [IAS]; structure),” as promulgated by the Chief Administrator of the Courts, provide that, once a judge is assigned to a case, that judge becomes the “ ‘assigned judge’ with respect to that matter and, except as otherwise provided in [22 NYCRR 202.3](c), ... shall conduct all further proceedings therein” (22 NYCRR 202.3[b]). None of the exceptions set forth in subdivision (c) are applicable here. The IAS rules further provide that “[a]ll motions shall be returnable before the assigned judge” (22 NYCRR 202.8[a]). By the adoption of the IAS, “the CPLR 2221 requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the [IAS] that all motions in a case shall be addressed to the assigned Judge” *In re New York State Urban Dev. Corp.*, 85 AD3d 1723, 1724 [4th Dept 2011]; *Matter of Quattrone v Erie-2-Chautauqua Cattaraugus Bd. of Co-op. Educ. Services*, 148 AD3d 1553 [4th Dept 2017][same]; *Billings v Berkshire Mut. Ins. Co.*, 133 AD2d 919, 919-20 [3d Dept 1987][“Here, the motion was before the second Justice because of the implementation of the individual assignment system which contemplates that all motions are to be made returnable before the Justice charged with overseeing the case (*see* 22 NYCRR 202.8[a]). That carrying out the purpose of the individual assignment system satisfies the underscored excepting clause has been confirmed by an amendment to the rule.”]; *Pettus v Bd. of Directors*, 155 AD3d 485, 486 [1st Dept 2017][“That the motion was decided by a Justice other than the Justice who signed the underlying order of dismissal does not compel a different result, given that the CPLR permits sua sponte recusals and reassignments of such motions.”]

Lastly, the law of the case doctrine does not preclude review of the subject orders. It makes little sense to contend that a review of an order that gives rise to the claim of law of the case are not reviewable. Such a contention would render CPLR 2221 meaningless. In any case, the Court always has the discretion reconsider prior rulings of the Court.¹

Therefore, plaintiff’s objections are meritless.

III. Defendant Aron’s Motion For Reargument Is Granted, the Judgment of Foreclosure and September 13, 2022 Order Are Vacated and Her Motion for Dismissal Granted.

In the Court’s September 13, 2022 order, the Court denied defendant Aron’s motion for

¹ The Court notes that Plaintiff’s contention that defendants were represented by several counsel over the course of this heavily contested decade old litigation is utterly irrelevant (and is even less relevant in light of the repetitive foreclosure actions) to the analysis of the subject motions and appears to be nothing more than an attempt to cast defendants in an unfavorable light and is inappropriate.

dismissal of the action for lack of personal jurisdiction. The Court held that defendant Aron “elected her remedy” and in substance found she waived the jurisdictional objection by seeking relief pursuant CPLR 5015 to vacate the default judgment and to submit and answer pursuant to CPLR 3012[d].

Defendant Aron contends the Court misapprehended the law in rendering the September 13, 2022 order. Specifically, defendant Aron contends that she did not waive her objection to personal jurisdiction by seeking to vacate the default judgment pursuant to CPLR 5015 and for leave to serve an answer pursuant to CPLR 3012[d] and the Court should not have sua sponte raised the election of remedy contention.

First, the Court clearly misapprehended the law in concluding that defendant Aron effectively waived any jurisdictional objections by seeking to vacate the default judgment and to submit an answer.

“A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss...A person who participates in the merits of an action appears informally and confers jurisdiction on the court” *P.S. Fin., LLC v Eureka Woodworks, Inc.*, 214 AD3d 1, 15 [2d Dept 2023]

“An “appearance” by a defendant in an action is governed by CPLR 320(a) and is accomplished, inter alia, by service of an answer or notice of appearance, or by making a motion which has the effect of extending the time to answer.” *Manko v Gabay*, 175 AD3d 489, 490 [2d Dept 2019]; *Am. Home Mortg. Servicing, Inc. v Arklis*, 150 AD3d 1180, 1181 [2d Dept 2017][“Pursuant to CPLR 320(a), “[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer.”]

Contrary to plaintiff’s contention, the making of a motion only constitutes an appearance where the motion “**has the effect of extending the time to answer**”.² Moreover, contrary to plaintiff’s mischaracterization of defendant Aron’s initial moving papers, she did not seek to vacate the default judgment pursuant to CPLR 5015[a][1]. Rather, she moved to in effect pursuant to CPLR 5015[a][4] to vacate the default judgment as jurisdictionally void.

Indeed, it is well settled that “[c]ertain types of limited involvement in an action by a defendant do not waive jurisdictional defenses, such as where the defendant’s only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction or...moving to dismiss the complaint pursuant to CPLR 3215(c)” *U.S. Bank N.A. v Cadoo*, 197 AD3d 588, 589 [2d Dept 2021][internal citations and quotations marks omitted]; See also *Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 628 [2d Dept 2014][“where the defendant’s only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived.”]

Similarly, a motion to for leave to serve an answer pursuant to CPLR 3012[d] also does

² The Court notes that plaintiff counsel’s conduct in deliberately omitting relevant language from the statute to suit his mischaracterizations of the law is frivolous and amounts to misconduct.

not constitute a formal or informal appearance inasmuch as such a motion is not itself an appearance but simply a request for leave to appear. See *HSBC Bank USA, Nat. Ass'n v Grella*, 145 AD3d 669, 671 [2d Dept 2016][“a motion pursuant to CPLR 3012(d) for leave to serve an untimely answer does not constitute either a formal (*see* CPLR 320) or informal appearance (*see* CPLR 3012[d])...here, the defendant only sought leave to appear...”]

Much like a motion seeking leave to appear under CPLR 3012[d], the making of a motion seeking to vacate a default judgment pursuant to CPLR 5015[a][4] (or even 5015[a][1]) or is also not a formal or informal appearance because such a motion does not have the “effect of extending the time to answer”, and does not amount to a participation on the merits. See *U.S. Bank N.A. v Smith*, 210 AD3d 725, 726-27 [2d Dept 2022][“Contrary to the plaintiff’s further contention, the defendants’ postjudgment motion to vacate their default on the grounds, among others, that the plaintiff failed to negotiate in good faith during the settlement conferences, did not constitute active litigation of the action or participation in the action on the merits.”]

Here, defendant Aron, initially moved to vacate the default judgment and for leave to serve a late answer (i.e. for leave to appear and was not an appearance itself). In that motion, defendant Aron expressly raised the jurisdictional objection, and her proposed answer also specifically asserted her jurisdictional objection as an affirmative defense. The Court granted the motion after a hearing to determine whether defendant Aron was properly served. Defendant Aron was not granted leave to appear prior the Court granting her motion, defendant Aron was not required to simultaneously seek dismissal and nothing in her motion papers can be considered a waiver of the jurisdictional objections she specifically raised in her motion and proposed answer.

Once a jurisdictional defense is raised in an answer it is deemed timely asserted and “[a]lthough the defendants subsequently cross-moved for summary judgment dismissing the action and challenged the merits of [plaintiff]’s underlying claims, the [] defendants continued to contend that New York courts lacked personal jurisdiction over them. Thus, contrary to [plaintiff]’s contention, the [] defendants did not waive the defense of lack of personal jurisdiction by participating in the defense of this action.” *P.S. Fin., LLC v Eureka Woodworks, Inc.*, 214 AD3d 1, 16 [2d Dept 2023][collecting cases]³

³“*see Dinicu v. Groff Studios Corp.*, 215 A.D.2d 323, 323, 626 N.Y.S.2d 800 [once a jurisdictional defense is raised in an answer to the complaint, it is deemed timely asserted, and defendants do not waive the defense by, among other things, seeking discovery or participating in the defense of the action]; *Bank Hapoalim v. Kotten Mach. Co. of Brooklyn*, 151 A.D.2d 374, 376, 543 N.Y.S.2d 75 [where the defendant interposed the defense of lack of personal jurisdiction in the first papers filed on his behalf, his subsequent participation in the action was not a waiver of his jurisdictional defense because the defendant repeatedly and ardently renewed the jurisdictional objection during the course of the litigation]; *Turkish v. Turkish*, 126 A.D.2d 436, 439, 510 N.Y.S.2d 582 [the defendant did not waive his objection to lack of personal jurisdiction by actively defending on the merits and cross-moving for affirmative relief]; *Calloway v. Natl. Servs. Indus.*, 93 A.D.2d 734, 735, 461 N.Y.S.2d 280, *affd* 60 N.Y.2d 906, 470 N.Y.S.2d 583, 458 N.E.2d 1260 [the defendant, by simply defending on the merits and seeking discovery, did not expressly or impliedly waive its jurisdictional objection]; *Chemical Bank v. Cakepan, Inc.*, 72 A.D.2d 515, 516, 420 N.Y.S.2d 892 [where the answer contained a defense of lack of personal jurisdiction, that objection was *17 preserved notwithstanding participation in the defense of the action]; *Schneikraut v. Gerges Realty Corp.*, 24 A.D.2d 991, 991, 265 N.Y.S.2d 140 [the defendant did not waive the objection of lack of personal jurisdiction by raising such a defense in his answer, by contesting on the merits the plaintiffs’ motion for summary judgment, and by serving his motion for leave to serve an amended answer]; *see also Lischinskaya v. Carnival Corp.*, 56 A.D.3d at 119, 865 N.Y.S.2d 334 [where the defense of lack of personal jurisdiction was raised in the answer, the defendant’s participation in the litigation did not waive

Indeed, this Court sees no meaningful difference with when a defendant submits an answer that does not assert a jurisdictional defense and then seeks leave to amend the answer to assert same. See *Deutsche Bank Natl. Trust Co. v Groder*, 218 AD3d 542, 545 [2d Dept 2023][“Although the defendant did not assert lack of personal jurisdiction in her answer and thereby waived this defense under CPLR 3211(e), such a defense can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b).”]; *Deutsche Bank Trust Co. Ams. v Cox*, 110 AD3d 760, 762 [2d Dept 2013][“Here, the defendant initially did not raise in his answer a defense based upon lack of personal jurisdiction...Hence, those affirmative defenses were waived at that point (see CPLR 3211[e]). However, defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b)...”]

While the Court was not required to schedule a hearing on whether defendant Aron was properly served given she need only have alleged a *potentially* meritorious defense, it nonetheless did so seemingly in the interest of judicial economy. See *Quis v Bolden*, 298 AD2d 375 [2d Dept 2002][“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”]; *Tat Sang Kwong v Budge-Wood Laundry Serv., Inc.*, 97 AD2d 691, 692 [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.”]

Second, defendant is also correct that the Court similarly misapprehend the law in raising the election of remedies contention given that plaintiff concedes it was raised *sua sponte*. See *Rosenblatt v St. George Health and Racquetball Assoc., LLC*, 119 AD3d 45, 54 [2d Dept 2014]; *Misicki v Caradonna*, 12 NY3d 511, 519 [2009][“We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made”].

Moreover, “[f]or purposes of the doctrine of election of remedies, inconsistent remedies are those which proceed on opposite and irreconcilable claims of rights”. *Simon v Boyer*, 51 AD2d 879 [4th Dept 1976], *affd*, 41 NY2d 822 [1977].

Here, the relief sought was plainly not inconsistent with a motion for leave to appear and submit an answer which specifically asserted lack of jurisdiction as an affirmative defense.

Thus, plaintiff’s contention is “is unsupported by any analogous legal authority”.

Lastly, plaintiff does not contend that defendant Aron was properly served, and defendant Aron is correct that the Court already found service was improper. Those findings are law of the case. “The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” *HSBC Bank USA, N.A. v Blair-Walker*, 202 AD3d 1065, 1068 [2d Dept 2022]

the defense afforded by the forum selection clause]; *Williams v. Uptown Collision*, 243 A.D.2d 467, 467, 663 N.Y.S.2d 88 [participation in discovery did not waive defense of lack of personal jurisdiction]; *cf. Textile Tech. Exch. v. Davis*, 81 N.Y.2d 56, 59, 595 N.Y.S.2d 729, 611 N.E.2d 768 [the assertion of an unrelated counterclaim results in a waiver of the defense of lack of personal jurisdiction]”.

In the light of the above, defendant Aron's motion for reargument and to vacate the September 13, 2022 Order and Judgment of Foreclosure and Sale is granted and the action is dismissed for lack of personal jurisdiction.

IV. Defendant Meyer's Motion Is Granted, the Judgment of Foreclosure and June 11, 2025 Order Are Vacated and the Cross-Motion for Dismissal Is Granted.

In the Court's June 11, 2025 order, the Court denied defendant Mayer's cross-motion for dismissal of the action for failure to seek leave of Court to commence this action in violation of RPAPL 1301[3] as amended by FAPA. In denying the cross-motion the Court held that defendant Mayer waived any defense of non-compliance with RPAPL 1301[3] pursuant to CPLR 3211[e] by failing to assert same in his answer and because the Court granted plaintiff's motion for summary judgment on default by defendant failing to oppose same. The Court further noted its belief that application of FAPA's amendments to RPAPL 1301 would be unconstitutional.

Defendant Mayer contends that the Court misapprehended the law in finding that the RPAPL 1301[3] defense was waived because it was not asserted in his answer. Defendant Mayer argues that the amendments to FAPA and its legislative history make clear that just like the defenses predicated on RPAPL 1303 and RPAPL 1304, such defense may be raised at any time prior to judgment and need not be asserted in his answer. Defendant Mayer further argues that the Court was incorrect in believing that retroactive application of FAPA would be unconstitutional inasmuch as the Court of Appeals has since ruled on the constitutionality of retroactive application of FAPA.

In opposition, plaintiff contends that the Court was correct in finding that the defense was waived because the defense was not asserted in defendant Mayer's answer and because the Court granted summary judgment upon defendant Mayer's default in opposing same, which plaintiff contends is law of the case. Plaintiff's contentions are meritless.

A. The Law of the Case Doctrine Is No Barrier To Relief.

Initially, plaintiff's contention that defendant Mayer's default in opposing the motion for summary judgment bars relief based on the law of the case doctrine is without merit.

"The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" *HSBC Bank USA, N.A. v Blair-Walker*, 202 AD3d 1065, 1068 [2d Dept 2022]

However, "[t]he doctrine [of law of the case] applies only to legal determinations that were necessarily resolved on the merits in the prior decision, and to the same questions presented in the same case" *Mosby v Parilla*, 140 AD3d 1129 [2d Dept 2016][quotation marks omitted]; See also *Mamani v Kiesling*, 117 AD3d 804, 805 [2d Dept 2014][law of the case inapplicable to order granting summary judgment regarding codefendant entered upon default]

Here, the issue of whether plaintiff commenced this action without leave of court in violation of RPAPL 1301[3] as amended by FAPA was not adjudicated or ruled upon on the merits in the Court's granting of summary judgment. Indeed, summary judgment against defendant

Mayer was granted on default.

Therefore, the law of the case doctrine is inapplicable.

B. Notwithstanding Plaintiff's Constitutional Objections, The Court Erred In Speculating that Retroactive Application of FAPA Raises Constitutional Concerns

Contrary to Plaintiff's Contentions, the Court's expressed constitutional concerns are clearly erroneous given uniform holdings of all four departments of the Appellate Division as well as the Court of Appeals expressly finding retroactive application of the FAPA amendments constitutional. See *Art. 13 LLC v Ponce De Leon Fed. Bank*, 2025 NY Slip Op 06536 [Ct App Nov. 25, 2025][“Article 13”]; *Van Dyke v U.S. Bank, N.A.*, 2025 NY Slip Op 06537 [Ct App Nov. 25, 2025][“Van Dyke”]; *Bank of New York Mellon v Del Rio*, 233 AD3d 529 [1st Dept 2024]; *Bayview Loan Servicing, LLC v Dalal*, 232 AD3d 487 [1st Dept 2024], lv to appeal dismissed, 44 NY3d 986 [2025]; *Bank of New York Mellon as Tr. (CWALT 2007-24) v Bosboom*, 238 AD3d 504, 504 [1st Dept 2025]; *Wells Fargo Bank, N.A. v Salko*, 241 AD3d 851 [2d Dept 2025]; *Deutsche Bank Natl. Tr. Co. v Dagrín*, 233 AD3d 1065 [2d Dept 2024]; *U.S. Bank N.A. v Mongru*, 241 AD3d 970 [2d Dept 2025]; *U.S. Bank N.A. v Craft*, 240 AD3d 1140 [3d Dept 2025]; *Deutsche Bank Natl. Tr. Co. v Goldwasser*, 237 AD3d 1291 [3d Dept 2025]; *MCLP Asset Co., Inc. v Zaveri*, 243 AD3d 1209 [4th Dept 2025]

C. The Language of RPAPL 1301(3) Is Unambiguous and Non-Compliance May Be Raised At Any Time.

It is well established that “[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature” *S. H. v Diocese of Brooklyn*, 205 AD3d 180, 185 [2d Dept 2022]; *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”.]

“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]

“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”]

“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.”]; *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”].

A statute cannot be interpreted in a manner that renders words superfluous or defeats its own operation. See *Hoffmann v New York State Ind. Redistricting Commn.*, 41 NY3d 341, 359 [2023]; *People v Galindo*, 38 NY3d 199,205 [2022]. Courts are not free to rewrite statutes. The Court of Appeals has repeatedly cautioned that “courts are not to legislate under the guise of interpretation.” *People v Finnegan*, 85 NY2d 53, 58 [1995].

Where, as here, “the statute unequivocally describes in general terms the particular situation in which it is to apply and nothing indicates a contrary legislative intent, the courts should not impose limitations on the clear statutory language.” *Matter of Tucker v Bd. of Educ., Community School Dist. No. 10*, 82 NY2d 274, 278 [1993]; see *Article 13, supra*. Thus, “[i]t is not for this Court to engraft limitations onto the plain language of the statute.” *Kimmel v State*, 29 NY3d 386, 401 [2017]. Nor may courts “correct” perceived legislative omissions. “We cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit.” *Matter of Diegelman v City of Buffalo*, 28 NY3d 231, 237 [2016].

RPAPL 1301[3] provides in relevant part:

“While the action is pending or after final judgment for the plaintiff therein, ***no other action shall be commenced or maintained to recover any part of the mortgage debt***, including an action to foreclose the mortgage, without leave of the court in which the former action was brought. The procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave ***shall be a defense to such other action***. For purposes of this subdivision, in the event such other action is commenced without leave of the court, the former action shall be deemed discontinued upon the commencement of the other action, ***unless prior to the entry of a final judgment in such other action, a defendant raises the failure to comply with this condition precedent therein***, or seeks dismissal thereof based upon a ground set forth in paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules.” [emphasis added]

Here, the statute on its face expressly provides that the failure to seek leave of Court “***shall be a defense to such other action***” and expressly contemplates that such defense be raised “***prior to the entry of a final judgment in such other action.***”

There can be other interpretation of the language of the statute other than it expressly contemplating the defense being raised after the grant of summary judgment and prior to entry of a final judgment of foreclosure and sale.

Accordingly, the express language is, for this Court at least, the end of the inquiry.

D. FAPA Is Remedial Legislation and Must Be Liberally Construed and The Legislative History Confirms the Legislative Intent.

In any case, to the extent one can reasonably argue the language is ambiguous, the legislative history makes clear that the legislature intended that non-compliance with RPAPL 1301[1] be treated the same as other Article 13 defenses such as RPAPL 1303, RPAPL 1304 and RPAPL 1306 which are mandatory conditions precedent to maintenance of a foreclosure action.

It is well established that legislative history is an important tool to accomplish that goal. See e.g. *Riley v County of Broome*, 95 NY2d 455 [2000][“the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear... When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.”][internal quotation marks omitted]; See *Article 13, supra*. [Court of Appeals **relying heavily on FAPA legislative history to ascertain legislative intent**]

More recent decisions confirm the continued relevance of legislative materials. In *People v Roberts*, 31 NY3d 406 [2018], the Court of Appeals relied repeatedly upon the sponsor’s memorandum to interpret the Legislature’s intent in enacting New York’s identity theft statute. See *id.* at Similarly, in *Harkenrider v Hochul*, 38 NY3d 494 [2022], the Court conducted an extensive examination of legislative materials—including sponsor memoranda, floor debates, and approval memoranda—to determine the meaning of constitutional amendments.

The Appellate Division has likewise recognized the importance of legislative history in statutory interpretation. In *S.H. v Diocese of Brooklyn*, 205 AD3d 180 [2d Dept 2022], the court began its analysis by examining the legislative history of the statute, including the Senate Introducer’s Memorandum and legislative floor statements. See *Id.* at 185-187. There, the Appellate Division conducted systematic analysis of legislative history, stating that “we commence our analysis with a review of the legislative history of the bill” even when “both parties argue that the statute unambiguously supports their view” *Id.* at 185. The court examined the Senate Introducer’s Memorandum in support, multiple legislative floor statements, and voting explanations to conclude that “the legislative history supports a finding that the legislature intended” a broad application of the statute. *Id.* at 187.

Here, the legislative history reinforces this conclusion. In discerning the scope of FAPA, the Court of Appeals has looked to legislative materials accompanying the statute. See *Van Dyke, supra; Article 13, supra*; see also *Matter of Duell v Condon*, 84 NY2d 773, 783-784 [1995].

Moreover, FAPA is a quintessentially remedial statute designed to correct judicial misinterpretations and restore the intended operation of the statute of limitations. Each Department of the Appellate Division has recognized that FAPA is “remedial” legislation. See, e.g., *FV-I, Inc. v Palaguachi*, 234 AD3d 818, 822 [2d Dept 2025]; *U.S. Bank NA. v Lynch*, 233 AD3d 113, 116-

17 [3d Dept 2024]; *Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 45 [1st Dept 2023]; *Deutsche Bank Natl. Tr. Co. as Tr. for Ameriquest Mtge. Sec. Inc., Asset-Backed Pass-Through Certificates, Series 2005-R5 v Testa*, 243 AD3d 1255 [4th Dept 2025]. The Legislature’s judgment that such remedial protection should reach *any foreclosure judgment not yet enforced* is binding. The courts may not graft additional timeliness limits onto the statute.

New York courts have long held that remedial statutes - particularly those enacted to correct judicial misinterpretations and curb procedural abuses – “should be liberally construed to spread [their] beneficial effects as widely as possible.” *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 24 [1984]. FAPA falls squarely within this category. Its text, legislative findings, and history reflect a clear determination to restore the intended operation of statutes of limitations governing foreclosure actions and to curb the procedural gamesmanship identified in *Engel* and its progeny. *See Van Dyke, supra*.

The Court of Appeals has now confirmed the breadth of FAPA’s remedial purpose. In *Van Dyke*, the Court explained: “In light of the Legislature’s determination that these ‘abuses’ should be curtailed, it is rational for FAPA to apply retroactively to shield as many borrowers as possible from those practices.” *Van Dyke*, 2025 NY Slip Op 06537, at 7 [emphasis added].

Specifically, FAPA’s Sponsor’s Memorandum provides in relevant part:

“The use of the imperative “shall” with respect to the requirement to obtain prior leave of court connotes a mandatory requirement... Yet, the mandate of the subdivision has been whittled away by judicial interpretation. The clarification of condition precedent language is to ensure RPAPL 1301 (3) is afforded the same strict compliance standard as its kindred RPAPL Article 13 condition precedents (see RPAPL 1303, 1304, 1306 [each section containing the phrase “shall be a condition precedent”])...The failure to comply with the leave of court condition precedent may not be excused by finding that the prior action was “de facto discontin[ued]” or “effectively abandoned”... or that the defendant was not prejudiced thereby... nor by deeming the pre-action failure a mistake, omission, defect, or irregularity that could be overlooked or disregarded...”

In *First Nat. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010] the appellate Division Second Department held as a matter of first impression that the non-compliance with RPAPL 1303 need not be raised as an affirmative defense and may be raised “at any time”. In So holding the Court placed emphasis on the fact that “[a]s in HETPA, all of these statutes contain the word “shall.”...Thus, it is appropriate to place the burden of showing compliance on the foreclosing party. Accordingly, we hold that this is a condition precedent which is the plaintiff’s burden to meet, and which does not have to be raised as an affirmative defense in the answer.”

In *Aurora Loan Services, LLC v Weishlum*, 85 AD3d 95 [2d Dept 2011] the Appellate Division Second Department applied the same reasoning and holding of *Silver* with respect to RPAPL 1304. “We reach this determination for reasons similar to those stated in *Silver*. RPAPL

1304, like RPAPL 1303, contains specific, mandatory language in keeping with the underlying purpose of HETPA to afford greater protections to homeowners confronted with foreclosure...Both statutes have titles containing the word “required”...Content, timing, and service provisions of RPAPL 1304 are very specific and couched in mandatory language...”

With respect to RPAPL 1303 and RPAPL 1304, the Appellate Division, has consistently held that a defense predicated on RPAPL 1303 and RPAPL 1304 need not be raised in a defendant’s answer and may be raised “at any time” including in response to a motion for a judgment of foreclosure and sale. See *U.S. Bank N.A. v Krakoff*, 199 AD3d 859 [2d Dept 2021][“Contrary to the plaintiff’s contention, failure to comply with RPAPL 1304 is a defense that may be raised at any time prior to the entry of judgment of foreclosure and sale...and thus, the Krakoffs properly raised it in opposition to the plaintiff’s motion to confirm the referee’s report and for a judgment of foreclosure and sale.”]; *CitiMortgage, Inc. v Dente*, 200 AD3d 1025 [2d Dept 2021][“Although the defendants failed to oppose the plaintiff’s motion, inter alia, for summary judgment and for an order of reference on the ground that the plaintiff did not comply with RPAPL 1304, “failure to comply with RPAPL 1304 is a defense that may be raised at any time prior to the entry of judgment of foreclosure and sale”]; *Nationstar Mtge., LLC v Gayle*, 191 AD3d 1003 [2d Dept 2021][“[T]he failure to comply [with RPAPL 1303] is a basis for dismissal of a complaint which may be raised at anytime while the action is pending”...Thus, contrary to the plaintiff’s contention, the defendant did not waive a defense based on failure to comply with RPAPL 1303 by failing to assert the defense in his answer.”]; *Tri-State III, LLC v Litkowski*, 239 AD3d 911, 914 [2d Dept 2025][“[T]he failure to comply [with RPAPL 1303] is a basis for dismissal of a complaint which may be raised at anytime while the action is pending”]; See also *Wells Fargo Bank, N.A. v Merino*, 173 AD3d 491 [1st Dept 2019][“While defendant, who was initially pro se, raised the defense of plaintiff’s noncompliance with the strict requirements of RPAPL 1304 90-day pre-foreclosure notices in her answer, she did not raise it in her opposition to plaintiff’s motion for summary judgment, which was subsequently granted. This does not preclude her, however, from raising plaintiff’s noncompliance prior to entry of judgment of foreclosure and sale”]; *U.S. Bank N.A. as Tr. for Citigroup Mtge. Loan Tr. Inc. v Moran*, 191 AD3d 451 [1st Dept 2021][“The court improvidently exercised its discretion in applying the doctrine of law of the case and declining to reconsider defendant’s contention that plaintiff failed to demonstrate its compliance with RPAPL 1304...Although defendant raised the defense of plaintiff’s noncompliance in his answer, he did not raise it in his opposition to plaintiff’s motion for summary judgment, which was granted. However, that does not preclude him from raising the defense prior to entry of judgment of foreclosure and sale”]

Here, given the express language of the of the statute, the clear legislative intent that a defense predicated on non-compliance with RPAPL 1301[3] be treated in like manner as other Article 13 defenses such as RPAPL 1303 and 1304, the Court of Appeals directive that FAPA be applied to “shield as many borrowers as possible” and that it makes little sense to treat RPAPL 1301[3] different than other Article 13 defenses, this Court holds that a defense of “the failure to comply with the leave of court requirement set forth in RPAPL 1301[3] is a basis for dismissal of a complaint which may be raised at any time while the action is pending”⁴

⁴ Plaintiff’s citation to *EMC Mtge. Corp. v Anderson*, 241 AD3d 1279 [2d Dept 2025] to support the contention that a defense predicated on RPAPL 1301[3] must be asserted in an answer is misleading and inapposite. It does not hold

In the light of the above, defendant Mayer's motion to vacate the June 11, 2025 Order and Judgment of Foreclosure and Sale is granted and the action is dismissed for failure to seek leave of Court as required by RPAPL 1301[3] as amended by FAPA.

The Court notes that given defendant Aron and Mayer⁵ are fee owners of the property, the granting either motion would necessitate dismissal of the action as the Court cannot proceed in the absence of an indispensable party. See *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept 2018] ["Chittra, as a fee owner of the property which was subject to the mortgage, was a necessary and indispensable party to the action...Once the complaint was dismissed against Chittra, the plaintiff could not continue the action against the other defendants"]; *Newton v Evers*, 215 NY 198 (1915) ["Julia E. Ferguson was the owner of the equity of redemption under her deed...She was a necessary party to any action brought to foreclose that mortgage, and without her presence the action could not proceed."]; see also *MTGLQ Inv'rs, L.P. v Shay*, 190 AD3d 527 [1st Dept 2021] ["Dismissal of the action as against Eaton requires discontinuation of the action as against Meldal as well"]; *Green Tree Servicing, LLC v Jean*, 244 AD3d 955 [2d Dept 2025] ["As a fee owner of the property and mortgagor, [defendant] was an indispensable party to this foreclosure action...The absence of an indispensable party mandates dismissal of the action, and the plaintiff cannot maintain the action as against the other defendants...Therefore, contrary to the plaintiff's contention, once the complaint was dismissed insofar as asserted against [defendant], the plaintiff could not continue the action against the remaining defendants."][internal citations omitted]

Lastly, given the dismissal of the complaint, the notices of pendency filed herein must also be cancelled. See CPLR 6514; See also generally, *Nationstar Mtge., LLC v Davis*, 240 AD3d 790 [2d Dept 2025]; *Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807 [2d Dept 2021]

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

V. **Attorney Stephen Vargas' Inflammatory Rhetoric and Apparent Attempts to Intimidate this Court Are Unacceptable, Inappropriate and Will Not Be Countenanced**

The Court is deeply troubled by multiple averments in Attorney Vargas's submission. Among other things, Attorney Vargas represented: (1) that "Defendant purports that this Court should impugn and sacrifice its own credibility to enable the Defendant to reap a windfall," notwithstanding that defendants made no such argument, thereby fabricating a position never advanced and suggesting that a lawful ruling in defendants' favor would necessarily require this Court to forfeit its own credibility; (2) that such a ruling would come "at the ultimate expense of this Court's reputation with the Appellate Division, Second Department"; (3) that this Court's prior decisions concerning nominal damages—an approach apparently adopted by at least one other jurist—were "legally asinine"; (4) that those decisions were "similarly dubious"; (5) that the Second Department had issued a "strong rebuke and swift reversal"; and (6) that "if the Court were

that a party who answered waives the defense of non-compliance with RPAPL 1301[3] if it is not asserted in the answer as an affirmative defense. Similarly, plaintiff reliance *US Bank, N.A. v Brown*, 213 AD3d 717 [2d Dept 2023] is also misplaced as *Brown* did not involve application of RPAPL 1301[3].

⁵ Mayer was a fee owner when the action was commenced and his successors in interest stand in his shoes.

to appease the Defendant by limiting the Plaintiff to \$1.00 in damages, then the Second Department would reverse any such judgment” and remit the matter to another judge.

Read together, these statements do far more than advocate a legal position. They falsely attribute bad faith to the Court, portray a ruling according to law as an illegitimate “appeasement,” denigrate judicial reasoning with insulting rhetoric, and imply that adverse consequences to this Court may follow if it does not decide the matter as plaintiff wishes. Most troubling of all, they strongly suggest either purported certainty as to how the Appellate Division would treat this case and this Court, or a claimed basis for such certainty not disclosed in the record. Either possibility is alarming. If baseless, the statements are reckless and improper. If based on some claimed source of information outside the record, that raises even graver concerns. In either event, the unmistakable thrust of the submission is that this Court should fear reputational, institutional, or appellate repercussions if it rules against a powerful litigant.

This Court will not bend or bow to such threats or attempts at intimidation. Such statements have no place in a Court of law, are wholly inappropriate and attempt to interfere with the neutral administration of justice. The judiciary does not dispense justice based on intimidation, status, access, or insinuations of influence. Any submission suggesting otherwise strikes at the heart of public confidence in the fair, impartial, and independent administration of justice.

Mr. Vargas’ statements appear to cross the line from advocacy to misconduct. This Court will not countenance same. Sometimes crossing a line comes with a price.

“A court may sua sponte impose sanctions against an attorney or a party to the litigation, or against both, but the attorney or party to be sanctioned must be afforded a reasonable opportunity to be heard...Conduct during litigation is frivolous and subject to sanction and/or the award of costs under 22 NYCRR 130-1.1 “if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or . . . it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another” *Miller v Cruise Fantasies, Ltd.*, 74 AD3d 919, 920-21 [2d Dept 2010][internal citations and quotation marks omitted]

“Lawyers are expected, among other things, to “be courteous and civil in all professional dealings with other persons” (NY Rules of Prof Conduct, Standards of Civility [22 NYCRR part 1200, Appendix A] § 1 [Lawyers’ Duties to Other Lawyers, Litigants, Witnesses and Certain Others]); to “act in a civil manner regardless of the ill feelings that [they or] their clients may have toward others” (*id.* at [I] [A]); to “disagree without being disagreeable” and without “antagonistic or acrimonious behavior,” and to “avoid vulgar language, disparaging personal remarks[,] or acrimony toward other counsel, parties or witnesses” (*id.* at [I] [B]); not to “engage in conduct intended primarily to harass or humiliate witnesses” (*id.* at [I] [C]); not to “use any aspect of the litigation process . . . as a means of harassment (*id.* at [VI]); and, to “conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect” (*id.* at [VII]). Respondent’s misconduct evinces not only flagrant disregard for these standards of civility, but contempt for and rejection of them.” *Matter of Manchanda*, 233 AD3d 169, 181 [1st Dept 2024]

“By leveling unprofessional and vituperative personal attacks...in court documents, the respondent has violated Code of Professional Responsibility.” *In re Raskin*, 217 AD2d 187 [2d

Dept 1995]; See Rules of Professional Conduct Rule 3.3[f][2] and [4]; Rule 8.4[d] and [g][3]; Rule 8.4[h]

Article 19 of the Judiciary may also be implicated.

Therefore, the Court shall separately issue an Order directing Attorney Stephen J. Vargas, Esq., to show cause why sanction, penalties and other disciplinary action or remedy should not be issued in connection with his conduct.

Accordingly, it is hereby

ORDERED, defendant Aron's motion for renewal, reargument and vacatur is GRANTED; and it is further

ORDERED, that defendant Mayer's motion for renewal, reargument and vacatur is GRANTED; and it is further

ORDERED, that the orders dated September 13, 2022, June 11, 2025 and the Judgment of Foreclosure and Sale dated June 11, 2025 are VACATED; and it is further

ORDERED AND ADJUDGED, that this action is DISMISSED; and it is further

ORDERED, the Clerk is directed to cancel Notices of Pendency filed on September 6, 2016, April 29, 2019, February 10, 2022 and January 14, 2025; and it is further

This constitutes the decision, order and judgment of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

WARNING:

YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT

NOTICE:

A PURPOSE OF THIS HEARING IS TO PUNISH THE ACCUSED FOR CONTEMPT OF COURT, AND THAT SUCH PUNISHMENT MAY CONSIST OF A FINE, IMPRISONMENT, OR BOTH ACCORDING TO LAW

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 13th of April 2026

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

FEDERAL NATIONAL MORTGAGE
ASSOCIATION (“FANNIE MAE”), A
CORPORATION ORGANIZED AND EXISTING
UNDER THE LAWS OF THE UNITED STATES OF
AMERICA,

Plaintiff,

-against-

MORDECHAI MAYER; CHANNIE ARON, AS
TRUSTEE OF THE J & W TRUST; NEW YORK
CITY PARKING VIOLATIONS BUREAU; NEW
YORK CITY TRANSIT ADJUDICATION BUREAU;
CACH LLC; UNISTATES CREDIT AGENCY LLC
ASG CITIBANK,

Defendant.

Index No. 515603/2016

ORDER TO SHOW CAUSE

Upon the accompanying Decision and Order dated April 13, 2026, in which this Court, among other things, found serious cause for concern arising from representations, contentions, and rhetoric contained in the affirmation of attorney Stephen J. Vargas, Esq., dated January 28, 2026, including statements that may reasonably be understood as impugning the integrity of this Court and the Appellate Division, attempting to intimidate the Court, suggesting access to improper non-public influence or information concerning appellate disposition, and otherwise undermining public confidence in the fair and impartial administration of justice; and upon the Court’s authority under, inter alia, 22 NYCRR 130-1.1, Judiciary Law Article 19, the Court’s inherent authority to regulate proceedings before it and protect the integrity of the judicial process, and the authorities cited in the accompanying Decision and Order; it is hereby

ORDERED, that attorney Stephen J. Vargas, Esq., shall show cause before this Court, at IAS Part FRP5, Room 357, at the courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 16th day of June, 2026, at 10:00 a.m., or as soon thereafter as counsel may be heard, why an order should not be made:

1. imposing costs, financial sanctions, and/or other penalties and remedies against him for frivolous conduct and/or other sanctionable litigation misconduct pursuant to 22 NYCRR 130-1.1 or other relevant authority; and
2. holding that his conduct warrants referral to the appropriate attorney grievance committee for investigation of possible professional misconduct; and
3. adjudging him in civil contempt and/or criminal contempt, to the extent authorized by law, including but not limited to Judiciary Law Article 19; and
4. directing such other remedial, disciplinary, or supervisory relief as this Court deems just and proper to protect the integrity of these proceedings and public confidence in the judiciary; and

and it is further

ORDERED, that, no later than June 1, 2026, attorney Stephen J. Vargas, Esq., shall serve and file a written affirmation made under penalty of perjury fully responding to the concerns identified in the accompanying Decision and Order and, in separately numbered paragraphs under separate headings, fully and specifically answering the following questions:

1. Whether he has had, directly or indirectly, any conversation, communication, correspondence, meeting, text message, email, or other exchange with any Justice, Judge, court attorney, law clerk, non-judicial court employee, or employee, officer, or representative of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, concerning:
 - a. the issues presented in this action;
 - b. this Court;
 - c. any prospective ruling in this action;
 - d. any appeal or prospective appeal arising from this action;
 - e. the likely reaction of any appellate court or appellate justice to any ruling in this action; or
 - f. any suggestion that adverse administrative, professional, or institutional consequences might follow from a ruling by this Court.
2. If the answer to any part of Paragraph 1 is yes, he shall identify, with specificity:
 - a. the date and time of each such communication;
 - b. the manner of communication;
 - c. the identity and title of every participant;
 - d. who initiated the communication;
 - e. the full substance of the communication; and
 - f. whether any notes, emails, texts, or other records memorialize the same.
3. Whether any third party has communicated to him, directly or indirectly, any purported inside information, non-public information, claimed influence, or prediction concerning:

- a. how the Appellate Division would rule in this case or in a similar matter;
 - b. how any specific justice or panel would view this Court's ruling;
 - c. whether this Court would be "admonished," reassigned cases, stripped of cases, criticized institutionally, or otherwise suffer consequences based on its ruling; or
 - d. any other matter suggesting extra-record influence, institutional pressure, or predetermined appellate treatment.
4. If the answer to Paragraph 3 is yes, he shall identify, with specificity:
 - a. the identity of the person or persons who made each statement;
 - b. the date, time, and manner of each communication;
 - c. the precise substance of each communication;
 - d. whether he believed the information to be true at the time;
 - e. what steps, if any, he took to verify the information; and
 - f. whether any writing, message, note, or recording exists reflecting the communication.
5. The full factual basis for his sworn representation that the Appellate Division "would reverse" a judgment or ruling of this Court, or any substantially similar assertion conveying certainty or claimed foreknowledge of appellate action.
6. The full factual basis for any representation, express or implied, that this Court's credibility, standing, assignment of cases, treatment by administrative authorities, or institutional reputation would be jeopardized by ruling in a particular way.
7. Whether he contends that any such statement was:
 - a. a statement of fact;
 - b. a prediction grounded in admissible evidence;
 - c. a rhetorical argument;
 - d. a representation based upon information obtained from others; or
 - e. something else, and if so, what exactly.
8. Whether, before making any such statement in a sworn filing, he possessed any admissible evidence supporting it, and if so, identify that evidence in detail.
9. Whether he now withdraws, retracts, modifies, or disavows any such representation, and if so, exactly which representation and on what grounds.
10. Whether he intended, in whole or in part, by any statement in his affirmation:
 - a. to influence this Court by invoking apprehension of institutional retaliation, appellate rebuke, reputational harm, or administrative consequence;
 - b. to suggest that persons or institutions outside the record had already prejudged the matter;
 - c. to imply that he had access to information unavailable to the Court or opposing parties; or
 - d. to pressure or intimidate this Court into ruling in his client's favor.
11. If he denies any such intent, he shall state what he intended the Court to understand from the statements at issue.
12. Whether he disputes that statements by counsel in a sworn court filing implying inside access, predetermined appellate action, administrative retaliation, or adverse institutional consequences for a trial judge's ruling are capable of undermining public confidence in the judiciary's independence, impartiality, and integrity, and, if he disputes that proposition, he shall explain fully.
13. Whether he disputes that such statements, particularly when made by counsel representing

- powerful institutional litigants, may reasonably be understood by a judge, a litigant, or the public as an assertion of influence, special access, or extra-record power, and, if so, he shall explain fully.
14. He shall identify and produce, for in camera review if necessary, all non-privileged documents, communications, emails, text messages, notes, memoranda, billing entries, or other materials that support, reflect, or relate to the statements and subjects identified above.
 15. To the extent he withholds any material on the basis of privilege, he shall provide a privilege log identifying the date, author, recipients, general subject matter, and basis for withholding.

and it is further

ORDERED, that in his responsive submission attorney Stephen J. Vargas, Esq., shall also show cause why the Court should not find that the statements at issue were frivolous within the meaning of 22 NYCRR 130-1.1(c), including because they were completely without factual basis, were asserted without evidentiary support, were intended to harass or intimidate, or otherwise interfered with the orderly and impartial administration of justice; and it is further

ORDERED, that attorney Stephen J. Vargas, Esq., shall further show cause why the Court should not determine that his conduct constituted an abuse of the litigation process by making statements that could reasonably be construed as:

- (a) impugning the integrity of the Court,
- (b) threatening institutional or reputational consequences if the Court ruled adversely to his client,
- (c) suggesting special influence over or foreknowledge concerning appellate action, and
- (d) diminishing public confidence in the independence of the judiciary; and it is further

ORDERED, that failure to appear or to submit a full, timely and truthful response may result in the imposition of sanctions, contempt remedies, referral to disciplinary authorities, adverse findings, or such other relief as this Court deems proper; and it is further

ORDERED, that service of a copy of this Order to Show Cause, together with the accompanying Decision and Order, upon attorney Stephen J. Vargas, Esq., by NYSCEF when uploaded by the clerk of the Court shall be deemed good and sufficient service.

ENTER:



Hon. Menachem M. Mirocznik, JSC