To Be Argued By:
SAMUEL KATZ
Time Requested: 15 Minutes

CTQ—2020-00001
U.S. Court of Appeals, Second Circuit Docket No. 18-3287

Court of Appeals

STATE OF NEW YORK

CIT BANK, N.A.,

Plaintiff-Respondent,

—against—

PAMELA SCHIFFMAN, JERRY SCHIFFMAN,

Defendants-Appellants,

JP MORGAN CHASE BANK, N.A.,
NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.

BRIEF FOR DEFENDANTS-APPELLANTS

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STATEMENT OF RELATED LITIGATION

There are no related cases, to the knowledge of Defendants-Appellants Pamela Schiffman and Jerry Schiffman, other than the appeal pending in the United States Court of Appeals for the Second Circuit.

CERTIFIED QUESTIONS ACCEPTED FOR REVIEW

1. Where a foreclosure plaintiff seeks to establish compliance with RPAPL § 1304 through proof of a standard office mailing procedure, and the defendant both denies receipt and seeks to rebut the presumption of receipt by showing that the mailing procedure was not followed, what showing must the defendant make to render inadequate the plaintiff's proof of compliance with § 1304?

Under New York Law, a plaintiff's attempt to prove compliance with RPAPL § 1304 by averring to a detailed office mailing practice and procedure, even if satisfactory to meet the prima facie burden, merely creates a rebuttable presumption of receipt, but not that of mailing. Where, as here, a foreclosure defendant both denies receipt of the notice required by the statute and demonstrates that the plaintiff's own office mailing procedure was not followed, that is sufficient to show the plaintiff's proof of statutory compliance was inadequate.

2. Where there are multiple borrowers on a single loan, does RPAPL § 1306 require that a lender's filing include information about all borrowers, or does § 1306 require only that a lender's filing include information about one borrower?

Under New York Law, the text, purpose, and requirements of RPAPL § 1306 clearly demonstrate that a lender's filing required by the statute must include information about all borrowers.

JURISDICTION STATEMENT

This Court has jurisdiction over the certified questions in this proceeding pursuant to 22 N.Y.C.R.R. § 500.27(a).

PRELIMINARY STATEMENT

The United States Court of Appeals for the Second Circuit ("Second Circuit") certified two questions to this Court. Both questions pertain to New York State Real Property Actions and Proceedings Law ("RPAPL") sections which enacted certain requirements for mortgage lenders to satisfy before being allowed to commence a foreclosure action against a borrower. New York courts have established that strict compliance with these requirements needs to be demonstrated by a foreclosure plaintiff in order to be entitled to judgment as a matter of law.

RPAPL § 1304 requires a mortgage lender, assignee or loan servicer to give notice by mail to a borrower at least ninety days before commencing a foreclosure action. *See 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." *Deutsche Bank Nat. Tr. Co. v. Spanos*, 102 A.D.3d 909, 910 (2d Dep't, 2013). One manner in which they can do so, failing submission of "proof of the actual mailings, such as affidavits of mailing or domestic returns receipts with attendant signatures," is by submitting "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." *Citibank, N.A. v. Conti-Scheurer*, 172 A.D.3d 17, 21 (2d Dep't, 2019).

However, where, as here, the facts of the case illustrate that these mailing procedures were not actually followed, has the plaintiff satisfactorily demonstrated they complied with the statutory requirement? Specifically, the Second Circuit certified the question as follows: given the defendant's denial that they received this notice, is the defendant's showing that the plaintiff failed to follow their mailing procedures enough to rebut the presumption of receipt of the mailing, thereby rendering plaintiff's proof of statutory compliance inadequate, or does such a deviation from the asserted routine need to concern the actual mailing process?

While no New York court has ruled on this specific issue, a reading of RPAPL § 1304 cases demonstrates that the method of proving mailing of this notice by swearing to an office's mailing practice and procedures is less desirable than presenting an affidavit of service, and differs significantly in nature. Whereas an affidavit of service creates a presumption of mailing, only rebuttable by clear evidence that the averred mailing was defective, an affidavit of an office mailing procedure merely creates a presumption of defendant's receipt, rebuttable by a denial and a showing that this procedure was not followed.

Therefore, where, as here, the foreclosure plaintiff attempts to prove compliance with RPAPL § 1304 by forgoing the submission of an affidavit of service, instead opting to prove same by averring to the office's mailing practices and procedures, it is incumbent that they followed these procedures in the absolute. Failing that, any foreclosure plaintiff could simply possess mailing practices and procedures, file a form affidavit reciting these procedures in every foreclosure action, whether they were followed or not, thereby rendering the strict compliance the statute requires a hollow formality, and effectively never mandating that the plaintiff show any proof that the actual mailing took place.

Respectfully, this Court should rule that if a foreclosure plaintiff attempts to prove RPAPL § 1304 compliance by averring to their office mailing practices but did not strictly follow their stated procedures, they have failed to meet their burden of proving statutory compliance if the defendant denies receipt of the required notices and illustrates this deviation in the mailing as alleged. Thus, the first certified question should be answered as follows: Where a foreclosure plaintiff seeks to establish compliance with RPAPL § 1304 through proof of a standard office mailing procedure, and the defendant denies receipt, a showing that the mailing procedure was not followed is sufficient to rebut the presumption of receipt and renders the plaintiff's proof of compliance with § 1304 inadequate.

Accordingly, the plaintiff's motion for summary judgment should have been denied on this basis.

RPAPL § 1306 requires a mortgage lender, assignee or loan servicer to file the RPAPL § 1304 notice, within three days of its mailing, with the superintendent of financial services. *See RPAPL § 1306*.

It is well settled that compliance with RPAPL §1306 is a condition precedent to the commencement of a foreclosure action, and failure to prove same is failure to establish *prima facie* entitlement to judgment as a matter of law, requiring the Court to deny a motion for summary judgment. *See Hudson City Sav. Bank v. Seminario*, 149 A.D.3d 706, 707 (2d Dep't, 2017). As a condition precedent to a foreclosure action, established failure of a plaintiff to comply with RPAPL §1306 requires the Court to dismiss the action in its entirety. *See TD Bank NA. v. Leroy*, 121 A.D.3d 1256, 1259-60 (3d Dep't, 2014); *Deutsche Bank Natl. Trust Co. v. Spanos*, 2020 NY Slip Op 01324 (2d Dep't, 2020).

Here, the only RPAPL §1306 filing statement submitted by the plaintiff lists only Pamela Schiffman, but not Jerry Schiffman. The Second Circuit found that this deficiency warrants further consideration. Accordingly, their second certified question was whether RPAPL § 1306 requires that a lender's filing for a loan with multiple borrowers need include information about all borrowers, or is listing only one borrower sufficient?

The Second Circuit found no decisions from this Court or the Appellate Divisions which ruled directly on this issue. However, they reasoned that since RPAPL §§ 1304 and 1306 operate in tandem, given that the former triggers the latter, and both share the same purpose of protecting homeowners and preventing foreclosures, it would be logical to assume that an RPAPL § 1306 filing would be required for each borrower.

Indeed, the text of RPAPL § 1306 explicitly states the filing requirement it is enacting corresponds directly with whatever notice RPAPL § 1304 requires be served. Moreover, a review of the cases which discuss RPAPL § 1306 detail the same requirement of strict compliance with a mandatory condition precedent as RPAPL § 1304, and the identical legislative purpose of home retention and foreclosure prevention. Additionally, by requiring proof of the RPAPL § 1306 filing be part of a plaintiff's *prima facie* case to foreclose, the legislature signified their wish that any defect in compliance with the statute runs contra to its purpose and must not be overlooked.

Accordingly, the second certified question should be answered as follows: RPAPL § 1306 requires that a lender's filing include information about all borrowers upon whom service of an RPAPL § 1304 notice was required.

Thus, the plaintiff's motion for summary judgment should also have been denied on this basis.

STATEMENT OF THE CASE

I. THE SUBJECT MORTGAGE

On March 26, 2008, Pamela Schiffman took out a home loan and executed and delivered a consolidated note (the "Note") in the principal amount of $326,000.00, plus 6.25 percent interest, to IndyMac Bank, FSB ("IndyMac"). (A-15; A-41) On the same date, March 26, 2008, the Note was secured by a consolidated mortgage (the "Mortgage") signed by Pamela Schiffman and Jerry Schiffman ("Schiffmans") in the amount of $326,000 in favor of IndyMac Bank, FSB. This Mortgage secured the Schiffmans' primary residence, a property located at 2122 New York Avenue in Brooklyn, New York (the "Property") as security for repayment of the loan. (A-15; A-46) The Mortgage was subsequently assigned to Mortgage Electronic Registration Systems Inc. ("MERS"), as nominee for IndyMac, and later assigned to OneWest Bank, FSB, now known as CIT Bank, N.A. ("CIT") (A-81)

The Mortgage was modified by a Loan Modification Agreement, executed by the Schiffmans on October 30, 2014 which increased the balance owed to $406,481.10. (A-84)

The Schiffmans allegedly defaulted on the Mortgage payment which became due on December 1, 2014. (A-16; A-107)

Subsequently, on October 17, 2016, CIT commenced this residential mortgage foreclosure action. (A-21)

II. PROCEDURAL HISTORY

Plaintiff-Appellee CIT Bank, N.A. ("CIT") commenced a residential mortgage foreclosure action against Defendants-Counter-Claimants-Appellants Pamela and Jerry Schiffman (the "Schiffmans") in United States District Court for the Eastern District, pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") § 1301, et seq. on October 17, 2016, seeking to foreclose on the subject Mortgage. CIT alleged in their Complaint as stated in section I above. *See supra* at 7.

On May 24, 2017, the Schiffmans filed their Answer to the Complaint with Counterclaims. (A-158) As part of their Answer, the Schiffmans asserted several affirmative defenses including that CIT failed to comply with the requisite pre-foreclosure provisions of RPAPL §§ 1304 and 1306. (A-159; A-160)

Subsequently, CIT filed a motion for summary judgment. (A-9) In support of its motion for summary judgment, CIT submitted an Affidavit of Mailing of 90 Day Notice and Notice of Default of Rachel Hook ("Hook Affidavit") (A-18) attempting to establish compliance with RPAPL §§ 1304 and 1306. The Hook Affidavit stated that CIT had a standard office mailing procedure and averred to her familiarity with such procedure. (A-18) In that regard, Hook stated "I am familiar with CIT's

standard practices and procedures used to create, mail and store data regarding the 90 day pre-foreclosure notice ("90 Day Notice") required by New York law…that are designed to ensure that these letters are properly addressed and mailed and that data reflecting those events are stored in CIT's business records." (A-18) Hook then explains that an electronic file is maintained by CIT for each loan with the name, address and relevant loan information. (A-19) Hook then explains that upon a default, envelopes for certified and regular mail are created, addressed, with 90 Day Notices and a list of housing counseling agencies enclosed. They are then sealed and provided to the United States Post Office for mailing. (A-19) Hook then certified and affirmed that the 90 Day Notices were sent to the Schiffmans in accordance with these mailing practices and procedures. (A-19)

With respect to the RPAPL § 1306 filing requirements, Hook averred that the statutory requirements were complied with by the filing of the notice with the Superintendent of Financial Services and attached a copy of the proof of filing statement issued by the New York State Department of Financial Services. (A-19) CIT also submitted an Affidavit by Michelle Nicole Ray, Assistant Secretary of CIT ("Ray Affidavit") (A-15) and a copy of a Proof of Filing Statement. (A-122) The Ray Affidavit alleged CIT's compliance with RPAPL § 1306. (A-16) The Filing Statement, however, references only Pamela Schiffman. (A-122)

The Schiffmans opposed the motion for summary judgment. (A-217) As part of the Schiffmans' opposition, the Schiffmans submitted a declaration denying that they received the RPAPL § 1304 notices by either regular or certified mail. (A-236; A-237) The Schiffmans further pointed out that since the 90 Day Notices submitted were dated and allegedly sent more than a year after the alleged default in payments on the Mortgage, and the mailing practice and procedure attested that the 90 Day Notices are sent upon default, these procedures were evidently not followed, and Plaintiff's proof of their mailing was insufficient as a matter of law. (A-228) Further, the Schiffmans argued that the RPAPL § 1306 pre-foreclosure filing was insufficient because no such filing was made for Jerry Schiffman, only for Pamela Schiffman. (A-233) In reply, CIT completely ignored that the RPAPL § 1306 filing was not made for Jerry Schiffman. (A-239)

The Honorable Robert M. Levy, United States Magistrate Judge, then issued a Report and Recommendation, dated and entered on August 24, 2018 recommending that CIT's motion for summary judgment be granted. (A-249) The Schiffmans subsequently filed objections to the Report and Recommendation on September 6, 2018. (A-265) In their objections, the Schiffmans pointed out the aforementioned deficiencies with respect to the RPAPL §1304 notices and filing requirements of RPAPL §1306. (A-265)

Over the objections to the Report and Recommendation, the Honorable Dora L. Irizarry, Chief Judge of the District Court, issued a Memorandum and Order dated September 30, 2018, entered October 3, 2018, adopting the Report and Recommendation of the Honorable Robert M. Levy in its entirety, and granted CIT's motion for summary judgment. (A-272) The Schiffmans then appealed from the Memorandum and Order by Notice of Appeal filed October 31, 2018. (A-279).

The United States Court of Appeals, Second Circuit, issued their decision, entered January 28, 2020, finding that this case raised several issues of unsettled New York law and set forth two (2) certified questions for the New York State Court of Appeals to determine, retaining jurisdiction of the appeal pending this Court's resolution of the certified questions. (A-282) By Order dated February 13, 2020, this Court accepted the certified questions. (A-281)

ARGUMENT

I. A FORECLOSURE PLAINTIFF'S SHOWING OF RPAPL § 1304 COMPLIANCE THROUGH PROOF OF A STANDARD OFFICE MAILING PROCEDURE IS INADEQUATE WHERE A DEFENDANT DENIES RECEIPT AND DEMONSTRATES THAT THE MAILING PROCEDURE WAS NOT FOLLOWED

A. NEW YORK LAW REQUIRES STRICT COMPLIANCE WITH RPAPL § 1304 WHICH CAN BE PROVEN BY DIFFERENT METHODS OF EVIDENTIARY SUBMISSION CARRYING DIFFERENT STANDARDS OF REBUTTABLE PRESUMPTION

RPAPL § 1304 provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type." RPAPL § 1304(2) further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower. *RPAPL § 1304*.

"Strict compliance with RPAPL §1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action." *Conti-Scheurer*, 172 A.D.3d at 20 "[T]he plaintiff has the burden of establishing satisfaction of this condition." *Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d 95, 106 (2d Dep't, 2011). "[I]n support of a motion for summary judgment the Plaintiff must prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304." *Bank of N.Y. Mellon v. Aquino*, 131 A.D.3d 1186, 1186 (2d Dep't, 2015). "[F]ailure to make this showing

requires denial of the motion, regardless of the opposing papers." *Weisblum,* 85 A.D.3d at 106.

The early cases dealing with RPAPL § 1304 required a Plaintiff to present an affidavit of service of the 90 day notices to prove compliance. *See Id*. ("Nor did Aurora submit an affidavit of service to establish proper service on both borrowers by registered or certified mail and also by first-class mail to their last known address"). Where the Plaintiff failed to submit an affidavit of service evincing that it properly served the 90 day notices on the borrower(s), they failed to tender sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304 and failed to meet its *prima facie* burden of establishing entitlement to judgment as a matter of law. *See Spanos*, 102 A.D.3d at 910; *Wells Fargo Bank, N.A. v. Burke*, 125 A.D.3d 765, 767 (2d Dep't, 2015); *Aquino*, 131 A.D.3d at 1186 (2d Dep't, 2015); *See also Cenlar, FSB v. Censor*, 139 A.D.3d 781, 783 (2d Dep't, 2016) (Plaintiff failed to establish their RPAPL §1304 compliance where "[n]o affidavit of service was provided.").

Subsequent cases found the court considering other forms of evidence submitted by plaintiffs as a method for them to prove the required mailing took place. "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 submission of the proof of mailing by the post office." *See CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 901 (2d Dep't, 2017). Absent either method, the Plaintiff failed to establish the required mailing of the 90 day notices and their compliance with RPAPL § 1304. *See Id.*; *Citibank, N.A. v. Wood*, 150 A.D.3d 813, 814 (2d Dep't, 2017) ("The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served the appellant pursuant to the terms of the statute."); *Investors Sav. Bank v. Salas,* 152 A.D.3d 752 (2d Dep't, 2017).

Naturally, a bare affidavit by an employee "who averred that he had reviewed the business records, maintained in the regular course of business by the plaintiff, relating to [defendant's] loan" and "[b]ased upon his review, he averred that the RPAPL 1304 notice was sent in accordance with New York RPAPL 1304" was an "unsubstantiated and conclusory statement … insufficient to establish that the required RPAPL 1304 notice was mailed." *Cent. Mtge. Co. v. Abraham*, 150 A.D.3d 961, 962 (2d Dep't, 2017); *see also M&T Bank v. Joseph*, 152 A.D.3d 579, 580 (2d Dep't, 2017); *Cenlar, FSB v. Weisz*, 136 A.D.3d 855, 856 (2d Dep't, 2016); *JPMorgan Chase Bank v. Kutch*, 142 A.D.3d 536 (2d Dep't, 2016).

Even where the Plaintiff submitted an affidavit from an employee and a copy of the 90 day notice, "along with a copy of a Certified Mail Receipt containing the Defendant's address and a Certified Mail Number" (*Wells Fargo Bank, N.A. v.*

Trupia, 150 A.D.3d 1049, 1050-1051 (2d Dep't, 2017); "which referenced purported tracking numbers stamped on the notice" (*Wood*, 150 A.D.3d at 814); or "contained a bar code with a 20-digit number below it" (*Bank of NY Mellon v. Zavolunov*, 157 A.D.3d 754, 756 (2d Dep't, 2018)); the court deemed this insufficient proof of compliance with RPAPL § 1304. The result was the same even where the Plaintiff additionally submitted "Proof of Filing Statements from the New York State Department of Financial Services, demonstrating that the plaintiff filed the information required by RPAPL 1306." *Wells Fargo Bank, N.A. v. Lewczuk*, 153 A.D.3d 890, 892 (2d Dep't, 2017).

Eventually, the Second Department settled on a precise directive as to how a foreclosure plaintiff may demonstrate RPAPL § 1304 compliance. "[R]equisite mailing is 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." *Wells Fargo Bank, N.A. v. Mandrin*, 160 A.D.3d 1014, 1016 (2d Dep't, 2018); *Bank of Am., N.A. v. Bittle*, 168 A.D.3d 656, 658 (2d Dep't, 2019); *Conti-Scheurer*, 172 A.D.3d at 21.

However, there is a clear distinction between proving a mailing with an affidavit of service and by doing so through production of evidence of mailing or by averring to an office mailing procedure. As discussed in *Conti-Scheurer*, in

evaluating the defendant's motion to dismiss the action on RPAPL § 1304 grounds, "it is well established that a mere denial of service is insufficient to rebut a presumption of proper service established by an affidavit of service." *Id*. at 23. Defendant's "contention that she did not receive the RPAPL 1304 notice is likewise without merit. Persad's simple denial of receipt was insufficient to rebut the presumption of proper mailing created by the affidavit of service." *Emigrant Mtge. Co., Inc. v. Persad*, 117 A.D.3d 676, 677 (2d Dep't, 2014). Thus, with an affidavit of service, it is the service that needs to be rebutted, and failing clear evidence to the contrary the documents are presumed to have been sent.

With documentary evidence, it is less clear. "Similarly, a mere denial of receipt is insufficient to rebut a presumption of mailing where there is documentary proof of the mailing." *Conti-Scheurer*, 172 A.D.3d at 23. However, in *Flagstar Bank, FSB v. Mendoza*, 139 A.D.3d 898, 900 (2d Dep't, 2016), the plaintiff "submitted copies of the RPAPL 1304 notices sent to the appellants and copies of the domestic return receipts, with date of delivery and signature of one of the appellants…. The evidence establishing the appropriate mailing of the required notices created a rebuttable presumption that the intended recipients actually received them."

Whether documentary evidence creates a presumption of mailing or receipt, an affidavit is not documentary evidence. *See Phillips v. Taco Bell Corp*. 152 A.D.3d

806, 807 (2d Dep't, 2017). Accordingly, an affirmation of familiarity with mailing practices and procedures certainly does not align with the *Conti-Scheurer* interpretation of the rebuttable presumption created. As the Second Circuit opinion noted (A-288) "the New York Court of Appeals has explained in an analogous context, proof of a standard office mailing procedure gives rise to a presumption that a notice was received." *See Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829 (1978) ("the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed, a presumption arises that those notices have been received by the insureds."). It is clear that where a plaintiff submits an affirmation of familiarity with office mailing records and procedures the rebuttable presumption is not that it was mailed, but that it was received.

This is a different standard, as a defendant can only rebut a presumption of mailing to the extent they can highlight a clear deficiency in the affidavit of mailing (or documentary evidence, as per the *Conti-Scheurer* interpretation), submitted. However, where the presumption is only that the defendant received the mailing, and they submit their own affidavit averring that they did not, they are now in position to potentially rebut. Although "this Court has held in the RPAPL 1304 context that a mere denial of receipt is insufficient to raise a triable issue of fact to rebut a plaintiff's prima facie evidence of mailing" (*Conti-Scheurer*, 172 A.D.3d at

23) it follows that where the evidence plaintiffs submits only creates a presumption of receipt, something more than a mere denial of receipt, by the very person alleged to have received the mailing, would be sufficient to rebut. Indeed, as this Court stated "[d]enial of receipt by the insureds, standing alone, is insufficient to rebut the presumption. In addition to a claim of no receipt, there must be a showing that routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed." *Murray*, 46 NY2d at 829-830. If such demonstration is made, the plaintiff has not established *prima facie* evidence of statutory compliance, and summary judgment must be denied.

Equitably, "there is little authority for the proposition that a litigant can satisfy her or his prima facie burden on a motion for summary judgment dismissing the complaint by simply stating that a document was not received and, therefore, the other party did not perform an act, despite averments that the act was performed." *Conti-Scheurer*, 172 A.D.3d at 23-24. However, where a plaintiff seeking summary judgment resorts to submitting an affirmation of familiarity with office mailing practices and procedures in support of their *prima facie* burden to prove requisite strict compliance with RPAPL § 1304, even if the affiant properly details, through personal knowledge, a procedure designed to ensure that items are properly addressed and mailed, this only creates a presumption of receipt. Accordingly, defendant's opposition to the motion, including sworn denial of receipt, along with

a showing that these mailing practices were not followed, would be sufficient to create a triable issue of fact as to statutory compliance, requiring the denial of plaintiff's motion.

Here, even if plaintiff's affiant properly detailed an adequate mailing procedure, defendants unequivocally denied receipt of the mailing and also demonstrated that plaintiff's own alleged procedures were not followed.

B. A SHOWING THAT ANY PART OF AN OFFICE MAILING PROCESS AND PROCEDURE WAS NOT FOLLOWED REBUTS PRESUMPTION OF RECEIPT

Respectfully, it is of no moment whether the deficiency in a plaintiff's mailing procedure exposed by a defendant is related to any part of mailing routine or directly related to the actual mailing processes. The court has granted the plaintiff multiple methods by which to prove a mailing occurred. Indeed, plaintiffs in recent years more commonly produce an affidavit of mailing or documentary evidence such as copies of mailing receipts to prove RPAPL § 1304 compliance. If the plaintiff chose to submit an affirmation of familiarity in order to prove statutory compliance, they have only created a rebuttable presumption of receipt.

Courts accept proof of a standard office mailing practice in lieu of actual, direct or firsthand proof of mailing as a dispensation for the benefit and convenience of a large business, wherein the sheer volume of its operations may strain the likelihood of distinct recollection of the mailing of a single letter or locating the

documentary evidence thereof. However, some evidence that the mailing in question did in fact occur is still required.[1] This method is only acceptable proof because it is customary and routine and thus lends support for the presumption that the custom was followed in this instance. Where there is evidence in a particular live controversy that the practice was deviated from, that undermines the whole notion of reliability of this type of proof in the matter and creates a question of fact.

RPAPL § 1304 requires strict compliance, and without an affidavit of mailing or documentary evidence presented there is no actual evidence of the mailing taking place, just that they have a routine which makes it likely. As stated above, the affirmation of familiarity must aver to "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed." *Conti-Scheurer,* 172 A.D.3d at 21. If any part of that routine is not followed, then there is no *prima facie* evidence that the mailing in question took place. Otherwise, a foreclosure

[1] As the Appellate Court of Illinois has stated:

> The courts have taken cognizance of the intricacies and expansion of business enterprises, and the cases reveal a liberalizing tendency with reference to the proof required to establish the posting of a letter. From a review of the cases, however, it is evident that while courts may not require the person mailing the letter for a large concern to have a distinct recollection of the particular letter, there must be some evidence on the part of the person whose general practice it was to post the mail that the custom was complied with on the date in question. In Cook v. Phillips, supra, the court stated: We do not think that the mere dictation or writing of a letter, coupled with evidence of an office custom with reference to the mailing of letters, is sufficient to constitute proof of mailing the same, in the absence of some proof or corroborating circumstance sufficient to establish the fact that the custom in the particular instance had in fact been followed.

State Bank of E. Moline v. Standaert, 335 Ill App 519, 524-25, 82 NE2d 393, 396 (Ill. App. Ct., 1948) (internal citations and quotation marks omitted)

plaintiff who is required to mail scores of 90 day notices a year could simply possess mailing practices and procedures, then file a form affidavit in every action reciting these procedures, whether they were followed or not, rendering the requirement of strict compliance with the statute a mere formality, never mandating the plaintiff show any proof that the actual mailing took place.

RPAPL § 1304 compliance is a fact specific question for each case, and to rely on a general office mailing procedure, without proving that the general practice was precisely followed, would show that these mailings usually take place, but not without exception. In the event a defendant denies receipt, and can demonstrate the mailing procedure was not followed, this should be sufficient to create a triable issue of fact as to the requisite strict compliance with the statute, grounds for denial of summary judgment.

C. CIT DID NOT FOLLOW THEIR OFFICE MAILING PRACTICES AND PROCEDURES AND THEREFORE FAILED TO PROVE RPAPL § 1304 COMPLIANCE FOR ENTITLEMENT TO SUMMARY JUDGMENT AS A MATTER OF LAW

In the matter at bar, CIT did not provide either an affidavit of service of the 90 Day Notices made by the person who actually performed the mailings nor independent proof of mailing such as USPS stamped certified mailing receipts. Thus, CIT created no presumption of mailing. Rather, CIT relied exclusively on the Hook Affidavit which averred to familiarity with mailing practices and procedures. (A-18) Accordingly, CIT created only a rebuttable presumption of receipt by the

Schiffmans. The Schiffmans averred that that they never received these notices. (A-236; A-237)

The Hook Affidavit attested that envelopes for mailing are purportedly created upon a defendant's default in payment. (A-19) However, the notices purportedly sent to the Schiffmans were dated and sent a year *after* the alleged default. (A-124; A-140) In opposition to the motion for summary judgment the Schiffmans demonstrated that this deviance from routine office practices showed CIT failed to follow their own stated mailing procedure. Thus, in conjunction with their denial of receipt, the Schiffmans successfully rebutted the presumption of receipt and rendered CIT's showing of proper mailing inadequate.

Since CIT did not tender the requisite evidence demonstrating the absence of material issues of fact as to strict compliance with RPAPL § 1304, they failed to meet their *prima facie* burden of proving satisfaction of a condition precedent to commencement of this action, and the District Court should have denied CIT's motion. Therefore, the District Court erred in granting summary judgment in favor of CIT.

II. COMPLIANCE WITH RPAPL § 1306 MANDATES A FORECLOSURE PLAINTIFF TO FILE INFORMATION WITH THE SUPERINTENDENT REGARDING ALL BORROWERS UPON WHOM SERVICE OF AN RPAPL § 1304 NOTICE WAS REQUIRED

RPAPL § 1306 states: "Each lender, assignee or mortgage loan servicer shall file with the superintendent of financial services (superintendent) within three

business days of the mailing of the notice required by subdivision one of section thirteen hundred four of this article … the information required by subdivision two of this section." *RPAPL § 1306*.

It is well settled that compliance with RPAPL §1306 is a condition precedent to the commencement of a foreclosure action, and failure to prove same is failure to establish *prima facie* entitlement to judgment as a matter of law, requiring the Court to deny a motion for summary judgment. *See Seminario*, 149 A.D.3d at 707. Indeed, as a condition precedent to a foreclosure action, not only does the failure to comply require denial of a motion for summary judgment, it also requires the Court to dismiss the action in its entirety. *See Leroy*, 121 A.D.3d at 1259-60; *Spanos*, 2020 NY Slip Op 01324.

With respect to the RPAPL § 1306 filing requirements in the matter at bar, the Hook Affidavit averred that the notice was electronically filed with the Superintendent of Financial Services and that a copy of the proof of filing statement issued by the New York State Department of Financial Services was attached to CIT's motion. (A-19) In support of its motion for summary judgment CIT also submitted an Affidavit by Michelle Nicole Ray, Assistant Secretary of CIT ("Ray Affidavit") (A-15) in which she too alleged CIT's compliance with RPAPL § 1306 and stated that a copy of a Proof of Filing Statement was attached. (A-16) However, the Filing Statement attached references only Pamela Schiffman. (A-122)

CIT did not submit any copy of any attempted proof of compliance with this RPAPL §1306 filing requirement of the 90 day notices allegedly served on Jerry Schiffman. Moreover, after pointing out this defect in opposition to CIT's motion for summary judgment, CIT failed to even address this argument in its reply memorandum of law (A-239) thereby conceding that it had not complied. The Second Circuit, with no binding precedent regarding the ramification of this conceded omission, thus certified the question of whether an RPAPL § 1306 filing must be made for each borrower or only one. While this Court and the New York State Appellate Divisions have not directly ruled on this question, a review of the text, purpose, and requirements of RPAPL § 1306 demonstrates that compliance as to all borrowers is strictly required.

RPAPL § 1306 does not exist independently of RPAPL § 1304. A foreclosure plaintiff cannot comply with RPAPL § 1306 unless and until the 90 day notice was served. As the statute explicitly states, a plaintiff "shall file with the … (superintendent) within three days of the mailing of the notice required by [RPAPL § 1304]". Thus, for any borrower upon which an RPAPL § 1304 notice is required to be served, the plaintiff needs to correspondingly file their information with the superintendent for compliance with RPAPL § 1306. Since RPAPL § 1304 notices need to be sent to all borrowers (*see Weisblum*, 85 A.D.3d at 106), if follows that the RPAPL § 1306 filing needs to be made as for every borrower.

The purpose of RPAPL § 1306 includes "directing as appropriate available public and private foreclosure prevention and counseling services to borrowers at risk of foreclosure." RPAPL § 1306(4) The statute's legislative history "contains general statements about addressing the mortgage crisis to protect borrowers and prevent a similar foreclosure crisis in the future" and "more particularly … indicates that in order to help reduce the number of preventable foreclosures, it is critical to identify distressed homeowners as soon as possible." *Leroy*, 121 A.D.3d 1259. A proper RPAPL § 1306 filing serves the legislative purpose "to target counseling help effectively and expeditiously." *Bank of Am., N.A. v. Colagrande*, 171 A.D.3d 1124, 1125 (2d Dep't, 2019). This mirrors the purpose of RPAPL § 1304. *See Weisblum*, 85 A.D.3d at 107. Compliance with each statute is a condition precedent to the commencement of a foreclosure action and proof of strict compliance is necessary for a plaintiff to establish entitlement to judgment as a matter of law, while proof of failure to comply is grounds for the action's dismissal. *See Id*. at 106; *Leroy*, 121 A.D.3d at 1259-60. Accordingly, the RPAPL § 1304 requirement of proving compliance as to all borrowers applies to RPAPL § 1306 as well.

Moreover, it is unavailing to reason that because compliance with this statute serves the state's function to compile foreclosure statistics, incomplete compliance may therefore be sufficient. Even where a 90 day notice was sent to one borrower and not another, for the same loan securing the same property, the plaintiff has failed

to comply, despite the possibility that both borrowers received the notice. The same must therefore apply to an RPAPL § 1306 filing as well. If the legislature intended this statute to function solely as a means to compile data, they could have enforced non-compliance with a fine or other penalty. By requiring a plaintiff to prove compliance as part of their *prima facie* case, the legislature manifested their intent that the statute be more than simply a fact gathering exercise.

Finally, both Pamela and Jerry Schiffman executed the subject Consolidation, Extension and Modification Agreement, and are both defined on the CEMA as a borrower agreeing to pay the amounts due under the consolidated note, against whom the note holder can enforce their rights individually. (A48-A50) Accordingly, Jerry Schiffman was considered to be a borrower of the subject loan. *See Weisblum*, 85 A.D.3d at 105.

Given CIT's failure to prove compliance with RPAPL §1306 by failure to file the statement required as to Jerry Schiffman, CIT's motion for summary judgment should have been denied in its entirety.

CONCLUSION

For the foregoing reasons, Defendants-Appellants Pamela Schiffman and Jerry Schiffman respectfully request that this Court answer the certified questions by holding that (i) a plaintiff's proof of RPAPL § 1304 compliance by averring to their office mailing practice and procedure is inadequate where a foreclosure defendant both denies receipt of the required notice and demonstrates that the plaintiff's own office mailing procedure was not followed, and (ii) an RPAPL § 1306 filing must include information about all borrowers.

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 N.Y.C.R.R. Part 500

1. The Brief for Defendants-Appellants Pamela Schiffman and Jerry Schiffman complies with the type-volume limitation of Rule 500.13(c) because this brief contains 6,238 words, excluding the parts of the brief exempted by Rule 500.13(c)(3).

2. The Brief for Defendants-Appellants Pamela Schiffman and Jerry Schiffman complies with the typeface and typestyle requirements of Rule 500.1 because this brief has been prepared in a proportionately spaced typeface using word processing program Microsoft Word 2013, in 14-point font, Times New Roman.