To Be Argued By:
SAMUEL KATZ, ESQ.
(*Time Requested: 30 Minutes*)

CTQ—2020-00001
U.S. District Court for the Eastern District of New York Index No. 16-CV-5772
U.S. Court of Appeals, Second Circuit Docket No. 18-3287

Court of Appeals
State of New York

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CIT BANK, N.A.,

Plaintiff-Respondent,

-against-

PAMELA SCHIFFMAN, JERRY SCHIFFMAN

Defendants-Appellants,

J.P. MORGAN CHASE BANK, N.A.,
NEW YORK CITY PARKING VIOLATIONS BUREAU
,
Defendants.

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Date Completed: November 20, 2020

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PRELIMINARY STATEMENT

The brief filed by Plaintiff-Counter-Defendant-Appellee CIT Bank, N.A. ("plaintiff" or "CIT") asserts that to rebut a plaintiff's attempt to establish compliance with RPAPL § 1304 through proof of a standard office mailing procedure, a defendant must deny receipt of the mailing and demonstrate that the plaintiff failed to follow their office mailing procedure in a material way, not simply any deviance from the process their affiant avers. However, plaintiff failed to adequately address the arguments set forth in the brief of the Defendants-Counter-Claimants-Appellants Pamela and Jerry Schiffman ("defendants" or "Schiffmans") as to why a showing by a defendant of simple failure to adhere with the stated mailing procedure, along with denial of receipt, is sufficient to rebut the plaintiff's *prima facie* showing of compliance.

Defendants have demonstrated that where a plaintiff attempts to show compliance with the RPAPL § 1304 without employing the preferred methods of direct evidence, such as submitting an affidavit of mailing or proof of actual mailing, but resorts to the less probative method of averring to an established office of mailing procedure, a defendant's denial of receipt and demonstration that plaintiff deviated from their stated mailing procedure sufficiently rebuts the required presumption of receipt. It is incumbent there be no doubt the mailing procedure was followed faithfully as it was designed because otherwise all plaintiff has demonstrated is that

they usually comply with the mailing requirement, but failed to prove *prima facie* strict compliance with the statutory prerequisite in the action at bar, a necessary condition precedent to the commencement of the action.

That this method of proving mailing relies on a presumption of mailing, as CIT argues, does not refute the Schiffmans' argument that the rebuttable presumption is that of receipt. By failing to prove mailing with direct evidence, a plaintiff may indeed create a presumption of mailing by attesting that an office mailing procedure was followed, from which a presumption of receipt is inferred. Without doing so, their *prima facie* burden of statutory compliance has not been met. However, when the burden shifts to the defendant, they are constrained from impeaching the presumption of mailing since no direct evidence of the mailing was submitted. Accordingly, since the plaintiff was permitted to offer a *prima facie* showing without any direct evidence, only a procedure designed to ensure mailings are sent and received, a rebuttable presumption available to the defendant is that of receipt, a lower standard which can be established by simply denying receipt and demonstrating that the stated office mailing procedures were not followed. To hold otherwise would mean a foreclosure plaintiff never needs to prove a required mailing occurred in their case as long as an office mailing procedure exists, whether or not it was followed, which would run contrary to the text and purpose of RPAPL § 1304. Thus, where a plaintiff attempts to prove compliance with RPAPL § 1304 via proof

of a standard office mailing procedure, a defendant's denial of receipt and demonstration that the plaintiff failed to follow their office mailing procedure rebuts the presumption of receipt and means that the plaintiff failed to comply with the statute.

Plaintiff's counterarguments as to RPAPL § 1306 compliance are similarly unavailing. The New York Department of Financial Services ("DFS") filing system provides for an RPAPL § 1306 filing for two borrowers where an RPAPL § 1304 notice was served upon each. This is consistent with the Schiffmans' position that the two statutes are linked, and what was required to be filed to comply with the former corresponds with what was required to be served pursuant to the latter. DFS's concern is solely voluminous or duplicative filings which will unnecessarily overload their system, not a single filing which is made as to both borrowers on a single loan, where compliance is to be made with a single filing.

The state Supreme Court case law CIT cites to support their argument that CPLR § 2001 excuses the plaintiff from complying with RPAPL § 1306 stands in direct contrast with the Appellate Division's holding that this section would not apply to non-compliance with a mandatory condition precedent. Plaintiff's insistence that RPAPL § 1306 is simply a means for the State to collect foreclosure data disregards the fact that this statute, like RPAPL § 1304, was specifically enacted to protect homeowners from foreclosure, and compliance with both statutes are

mandatory condition precedents to the commencement of a foreclosure action, to be demonstrated as part of plaintiff's *prima facie* case, a defense which a foreclosure defendant, but not the State, can assert to oppose summary judgment or move for dismissal. Just as RPAPL § 1304 compliance is not proven by sending the required 90 day notice to only one borrower even if the notice was reviewed by a different borrower to whom no notice was sent, RPAPL § 1306 is not proven by filing as to only one of two borrowers allegedly served with the notice. That the only enforcement mechanism for compliance with RPAPL § 1306 is a defense to a foreclosure action, and not through the State's regulatory arm, illustrates that gathering statistics is only part of the statute's purpose, and the strict compliance required applies to every borrower whose home may be affected. Thus, a plaintiff's failure to make the required RPAPL § 1306 filing for both borrowers means that the plaintiff failed to comply with the statute.

For the reasons set forth herein and in the Schiffmans' initial brief, the Schiffmans 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.

REPLY ARGUMENT

I. TO REBUT THE PRESUMPTION OF RECEIPT AND THEREBY A FORECLOSURE PLAINTIFF'S ATTEMPTED SHOWING OF RPAPL § 1304 COMPLIANCE THROUGH PROOF OF A STANDARD OFFICE MAILING PROCEDURE A DEFENDANT MUST MERELY DENY RECEIPT AND DEMONSTRATE THAT THE MAILING PROCEDURE WAS NOT FOLLOWED

A. THE DEVIATION FROM STATED MAILING PROCEDURE NEED NOT BE RELATED TO A MATERIAL DEFECT IN THE ACTUAL MAILING PROCESS

CIT's brief asserts that where a plaintiff attempts to prove RPAPL § 1304 compliance by submitting proof of a standard office mailing procedure, for a defendant to rebut this showing it is necessary their denial of receipt be accompanied by identifying a material defect directly related to the office mailing process and not simply an immaterial deviation, issue or defect in the mailing procedure. CIT Br. 12-13. In doing so, plaintiff misapprehends the arguments in defendants' brief and the prevailing law.

Plaintiff is correct in stating that just like with other methods of proving mailing, the affirmation of a standard office mailing procedure followed creates a presumption of mailing, which in turn raises the presumption of receipt. However, what plaintiff overlooks is that once the burden shifts to the defendant, the resulting presumption they need to rebut is only that of receipt, not mailing. As detailed in defendants' brief this is a lower standard than for more probative evidence of actual

mailing such as an affidavit of mailing, which requires defendant to prove a defect in the mailing process itself. This is something which may prove difficult if not impossible since the defendant would have no knowledge with which to impeach the sworn statement of one who claims they sent the mailing. Therefore, producing an affidavit simply denying receipt does nothing to rebut the affidavit of the mailer which carries more weight. "[I]t is well established that a mere denial of service is insufficient to rebut a presumption of proper service established by an affidavit of service." *Citibank, N.A. v. Conti-Scheurer*, 172 A.D.3d 17, 23 (2d Dep't 2019). "[S]imple 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). To rebut the mailing, defendant needs to point to a defect in the mailing itself.

However, when a plaintiff attempts to prove mailing through an affirmation of an office mailing procedure, a defendant's mere denial of receipt, while still not sufficient to rebut on its own, is explicitly the first prong they need to satisfy. "*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." *Nassau Ins. Co. v Murray*, 46 NY2d 828, 829-830 (1978) (emphasis added). Thus, it is clear that the standard to rebut is lower than by other mailing methods. This is also why, as plaintiff notes (CIT Br. 13), the Court in

Murray refers to proof of mailing via an office practice and procedure as a presumption of receipt. *See Murray*, 46 NY2d at 829. By this method, the presumption of receipt is all that is necessary for the defendant to rebut, not the more difficult presumption of mailing.

This is also consistent with the second prong required, which can be satisfied in one of two ways - "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." *Id*. at 830 (emphasis added). Thus, plainly, even if care was exercised but the defendant can demonstrate routine office practice was not followed, that is a sufficient showing towards rebuttal. This is consistent with allowing the plaintiff to attempt to prove a specific mailing was performed without presenting any actual evidence substantiating its occurrence, only that a standard proper office procedure was in place and was followed. Accordingly, if the defendant can demonstrate that adherence to office procedure was not present in their case, then paired with their denial of receipt the presumption of receipt is rebutted. That the standard office mailing procedure creates a presumption of mailing does not mean a defendant must rebut this showing, it simply allows the plaintiff to satisfy their prima facie burden, for without it they cannot show any evidence of compliance. The presumption of mailing then triggers the presumption of receipt, but only the presumption of receipt

needs to be rebutted, by satisfying the two prong test, not by asserting any material deficiency in the mailing process performed, contrary to CIT's position.

Furthermore, in describing the "forceful denial of receipt method" plaintiff unwittingly supports defendants' position. In the cases cited, there was a material defect in the mailing itself, whether the method of mailing was an affidavit or office mailing procedure. While a defendant need only attempt to rebut presumption of receipt by an office mailing procedure, they are permitted to rebut the mailing where a material defect exists, just as they would be required to do so to rebut an affidavit of mailing. *See Engel v. Lichterman*, 95 A.D.2d 536, 544 (2d Dep't 1983). Accordingly, in these cases, where the flaws in the actual mailing process or affidavit of mailing were apparent, even only an affidavit stating more than a mere denial of receipt was sufficient to rebut a presumption of mailing via proof of a mailing procedure, without even demonstrating the flaw in the actual mailing process. It is unsurprising that this heightened affidavit is alone sufficient to rebut a method of mailing proof by office procedure, since this rebuttal even sufficiently outweighs an affidavit of mailing.

Thus, where there is a material defect in the mailing process, all which is necessary to rebut is a detailed affidavit which exceeds mere denial of receipt. However, as plaintiff concedes, this is only one way in which an office mailing procedure can be rebutted. Where no material defect is apparent, but the defendant

did not receive any mailing and can demonstrate that the mailing procedure was not followed or performed carelessly, it follows that a mere denial of receipt along with illustrating the failure to adhere to the procedure would be the proper and suitable method of rebutting receipt.

For the proposition that a defendant needs to demonstrate a material defect in the actual mailing process to rebut an office mailing procedure, plaintiff cites *Matter of T.J. Gulf, Inc. v. New York State Tax Comm'n*, 124 A.D.2d 314, 316 (3d Dep't 1986) finding that the intended recipient "failed to rebut the presumption of receipt" since even though they "did demonstrate some deviation from set procedure, we cannot say that the responsible employees practiced the mailing procedure so carelessly that it would be unreasonable to assume that the notice was mailed." It is unclear why the Court seemingly held, contrary to *Murray*, that carelessness was the only standard, and ignored the alternative showing that routine office practice was not followed. The Court did not recite what this deviation was only stating "that the employees responsible for the mailing substantially complied with the set procedure. While it appears that the employees may have deviated slightly from the set procedure, such deviation would not prevent the creation of the presumption of receipt." *T.J. Gulf* 124 A.D.2d at 315-316.

To be sure, the Schiffmans' position, contrary to CIT's characterization, (CIT Br. 16, 20-21, 22) is not that a showing of literally any minuscule deviation

whatsoever is sufficient to rebut the presumption of receipt. But even according to the *T.J. Gulf* view the analysis is whether set procedure was complied with, and illustrates that demonstrating a deviation could rebut presumption of receipt without even evaluating the performance of the actual mailing process. Only upon finding that "[t]he slight deviations appear to have been of little consequence" did the Court then need to also find "the actual process to which the employees testified nevertheless evinces a method of ensuring that notices are properly addressed and mailed." *Id*. at 316. Had there been evidence of more than a negligible deviation with the mailing procedure, presumption of receipt may have been rebutted even without showing a material defect in the actual mailing process.

Indeed, a recent Second Department decision encountered these circumstances in connection with RPAPL § 1304. In *Wells Fargo Bank, N.A. v Bedell*, 2020 NY Slip Op 04891 (2d Dep't 2020) plaintiff submitted the affidavit of their Vice President of Loan Documentation in which she "attested that she had personal knowledge of the plaintiff's mailing practices." However, "the substance of her affidavit was contradicted by the documents attached to it that purportedly evidenced the plaintiff's compliance with RPAPL 1304, and her averments were contradicted by those made in another affidavit submitted by the plaintiff in support of its motion." *Id*. The Court therefore held "plaintiff failed to establish its strict compliance with RPAPL 1304" for failure "to provide evidence of the actual

mailing, or reliable evidence of a standard office mailing procedure designed to ensure that the items were properly addressed and mailed, sworn to by someone with personal knowledge of the procedure." *Id*. Even without any showing of a material defect in the actual mailing process, the fact that the plaintiff could not establish that they followed their office mailing procedure was sufficient grounds to deny summary judgment for failure establish compliance with RPAPL § 1304.

CIT cites several other cases, none of which are relevant to the issue at bar. *Barile v. Kavanaugh*, 67 N.Y.2d 392, 399 (1986) does not discuss mailing at all – rather, the issue was the substance of the insurance cancellation notice. In *Savino v. Merchants Mut. Ins. Co.*, 44 N.Y.2d 625, 629 (1978) the insurance company did not attempt to prove mailing of a policy cancelation notice by an office procedure. There was no dispute that the letter was mailed, or even received, the issue was whether the policy was canceled at the time of mailing or receipt and by statute the answer was receipt. *See Id*. In *Law v. Benedict*, 197 A.D.2d 808, 810 (3d Dep't 1993) there was "*undisputed* evidence in the record concerning the office practice and procedure *followed* …." (emphases added). The intended recipient merely denied receipt and failed to attempt to rebut the resumption of receipt in any way. *See Id*.

The Schiffmans do not claim that harmless typos in an intended recipient's name or address would rebut the presumption of receipt. Indeed, this is not even a failure to follow the office mailing procedure. Mailing to the wrong address, not

properly stamping the mailing, recurring delivery problems or doubts as to whether the mailing was even performed are also irrelevant. There, the sender has not even established *prima facie* presumption of mailing to trigger the presumption of receipt the intended recipient would need to rebut.

While these cases are not helpful, the general upshot is indeed, as plaintiff states, the circumstances of the particular case regarding whether the mailing was performed and thereby presumed received. Where a plaintiff resorts to proving the mailing by only a standard office procedure, they have provided no direct evidence that the mailing occurred. Accordingly, paired with a sworn denial of receipt, demonstrating that the office procedure was not followed would rebut the presumption of receipt.

Contrary to CITs mischaracterization, the Schiffmans did not "acknowledge that a defendant can only rebut a presumption of mailing to the extent they can highlight a *clear deficiency* in the mailing process itself." CIT Br. 18 (internal quotations marks omitted, emphasis in original). Rather, defendants stated this only by an affidavit of mailing (or possibly documentary evidence) because they carry a higher standard which needs to be rebutted, that of mailing. However, where the plaintiff attempts to prove mailing by an office procedure, the rebuttable presumption is that of receipt, which only requires denial of receipt and demonstrating the mailing procedure was not followed, not any deficiency in the

mailing process itself. Plaintiff then parses defendants' use of the words '*mailing* practices' where the context clearly showed that the word 'practices' was simply used interchangeably with the word 'procedures' since there the test is whether they were followed. This is consistent with the Schiffmans' position throughout their brief that the rebuttable presumption is that of receipt, which can be accomplished by denying receipt and demonstrating that procedures were not followed, based on an analytical reading of the limited authority addressing this issue.

The cases CIT cite showing that proving a standard office mailing procedure creates a presumption of mailing, but failing to do so does not, have no bearing on the issue at bar. Satisfactorily making this showing is what is necessary for a plaintiff to prove their *prima facie* case. Nor is it germane that if this *prima facie* mailing is established, so is *prima facie* receipt. The salient issue is the rebuttable presumption - that of receipt - and what an intended recipient needs to demonstrate to meet the standard. Obviously, a mere denial alone would be insufficient. However, joined with a showing that the stated office procedure was not followed, defendant has rebutted the presumption of receipt.

CIT fails to explain why the Courts, e.g. *Murray*, specifically label the rebuttable presumption as one of receipt only. That the *prima facie* presumption of mailing was established simply means the burden has shifted to the intended recipient. Without that, defendant has nothing to rebut. Only once *prima facie*

mailing has been proffered, and receipt thereby presumed, does an intended recipient need to rebut the tandem, by a rebuttable presumption standard. To do this, a defendant need only demonstrate that the mailing procedure was not followed, and not the clear defect which would be necessary to rebut an affidavit of mailing, which carries the less vulnerable rebuttable presumption of mailing.

Again, the Schiffmans' position is not that a harmless defect in a mailing, such as a typo in a name or address, would be sufficient to rebut the presumption of receipt because this is not even part of the office mailing procedure. The issue is regarding the office mailing procedure because it only imparts a "likelihood" of proper addressing and mailing. *See Preferred Mut. Ins. Co. v. Donnelly*, 111 A.D.3d 1242, 1244-45 (4th Dep't 2013), *aff'd*, 22 N.Y.3d 1169 (2014). This makes sense because the possession of an office mailing procedure is not direct evidence of mailing in any specific case. It is the following of the mailing procedure which creates a presumption, receipt then being rebuttable by denial and demonstration that procedures were not in fact followed.

That the business records exception to the hearsay rule makes it easier for a large business mailing operation to prove mailing without proving the particular document was actually mailed is exactly why demonstrating a deviation rebuts the presumption of receipt. CIT is arguing that not only should they receive the extra dispensation of proving mailing without producing direct evidence it occurred, but

that when the burden shifts to the intended recipient, the standard to rebut receipt is not commensurately lowered accordingly. The business records hearsay exception allows the less probative office mailing procedure to prove a mailing in lieu of more direct evidence which would show that specific mailing actually occurred only because of the chain of custody provided by a procedure which was followed. It follows that if an intended recipient can break that chain, they have rebutted the presumption of receipt.

Furthermore, punctuation, typographical or formatting errors, as noted above, are not part of the mailing procedure, and have no bearing on whether the procedure was followed. Days of mailing, color of printer paper, or amount of housing agencies listed are simply hypotheticals that also do not pertain to a standard office mailing procedure. Nor is it helpful to CIT to argue that interpreting the law as the Schiffmans argue would extend beyond foreclosures and into other areas. If a mailing procedure was not followed, an intended recipient should be able to rebut receipt regardless of the nature of the action.

Finally, contrary to CIT's claim, businesses would not be forced to produce direct proof of mailing in any more cases, they would still be permitted to attempt to prove mailing by an office mailing procedure if they can demonstrate they followed their own office mailing procedures which should be designed to ensure that items are properly addressed and mailed. That this is considered a potential challenge is

telling. Even if this were so, requiring businesses to produce direct proof of mailing would be neither prohibitive nor prejudicial. Indeed, foreclosure plaintiffs have more commonly produced direct evidence in recent years. If for some reason a plaintiff has difficulty demonstrating that they followed their own mailing procedures, producing direct evidence would simply better reflect whether a mailing in question actually took place. This would also likely increase the likelihood a defendant actually received the notice required pursuant to the statute, and preserve judicial resources.

In light of the above, this Court should respectfully hold that where a party attempts to prove mailing through proof of a standard office mailing procedure, and the intended recipient both denies receipt and demonstrates that the standard office procedure was not followed, the presumption of receipt is rebutted.

B. IF THE COURT REACHES THE QUESTION OF WHETHER PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT IN THIS MATTER THE DEFENDANTS HAVE DEMONSTRATED THAT A MATERIAL ISSUE OF FACT EXISTS AS TO RPAPL § 1304 COMPLIANCE

In their opening brief, defendants concluded their RPAPL § 1304 arguments with a short section merely applying their legal analysis to the stipulated facts at bar in the District Court action, to illustrate that plaintiff failed to demonstrate *prima facie* entitlement to judgment as a matter of law and the District Court erred in granting summary judgment in favor of CIT. (Schiffman Br. - Argument 1. C., 22-

23) Plaintiff's opposition brief contends that this submission was outside the scope of the certified questions to be decided by this Court, but also argued with some detail as to why summary judgment was a proper ruling. While CIT may be correct in their initial limiting of the scope of the inquiry, the Schiffmans will briefly address these substantive opposition arguments in the event this Court does reach this issue.

Plaintiff's argument as to the findings of the magistrate judge and the District Court regarding RPAPL § 1304 compliance are of no moment in light of the Second Circuit decision (A-282) identifying several issues of unsettled New York law requiring clarification which would be determinative of summary judgment on appeal based on the facts at bar. Moreover, the magistrate judge and District Court finding of CIT's presumption of mailing and receipt do not speak to the issue identified by the Second Circuit, that of the rebuttable presumption of receipt which can be satisfied by the defendants "showing that [CIT's] routine office practice was not followed." A-291. This is consistent with the Schiffmans' analysis detailed extensively herein which, as plaintiff concedes, is "[t]he only question." CIT Br. 25.

CIT further contend that the deviation from office mailing procedure set forth by the Schiffmans, creating the 90 day notices nearly a year after the alleged payment default, was not preserved for review because it was not raised in opposition to plaintiff's motion for summary judgment. *Id.* However, this argument fails by the very reasoning previously employed by CIT. Namely, it is improper for

plaintiff to now raise this argument on this appeal which is solely limited to the certified questions at issue. Moreover, plaintiff failed to raise this objection in their opposition brief to defendants' Second Circuit appeal and it is therefore waived. In light of the Second Circuit decision explicitly highlighting this inconsistency as the significant factual finding for which the law requires clarification in order to determine whether entitlement to summary judgment was established, it is clear that it was proper for the Schiffmans to consider this an operable fact they were permitted to raise in their brief and not one which CIT can claim to the contrary.

Plaintiff's remaining arguments - that Pamela Schiffman did not deny receipt of a mailing, and that neither Pamela nor Jerry Schiffman demonstrated a deviation in the office mailing procedure (CIT Br. 26-28) - are similarly unavailing, as they too are outside the scope of the certified questions and were not previously raised. CIT is attempting to improperly re-litigate a finding of the Second Circuit based on the submissions already made before that tribunal - that a deviation in routine mailing procedure occurred - instead of arguing the legal ramifications of this inconsistency, as instructed. Accordingly, plaintiff's argument that the Schiffmans did not demonstrate a defect, based on a parsed distinction between envelope mailing and creation procedure, must be ignored.

However, the contention that Pamela Schiffman's failure to provide a sworn denial of receipt having now been raised by plaintiff for the first time, the defendants

now see that a page of her declaration is seemingly unintentionally but erroneously omitted from the Record. The Declaration of Pamela Schiffman (A-236) contains five paragraphs on the page, but the entire page two of her declaration containing the remaining paragraphs and the signature line are not present. This can be seen by contrasting the Declaration of Jerry Schiffman which follows (A-238), also containing five paragraphs on the first page, but includes a second page with the remaining paragraphs and his notarized signature. The true and entire Declaration of Pamela Schiffman, including a second page containing further averments and a notarized signature, was filed in the District Court, but erroneously omitted from the Record. Accordingly, the defendants wish to bring this to the Court's attention, and request the Record be supplemented to accurately reflect the District Court filings.

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

Plaintiff's brief argues that where there are two borrowers on a mortgage loan and a foreclosure plaintiff files the required RPAPL § 1306 notice as to only one, this is still sufficient compliance with the statute. One of their arguments is that the New York Department of Financial Services ("DFS") RPAPL § 1306 filing system website claims the statute "does not specifically anticipate multiple borrowers." Pre-

foreclosure Information Form FAQs, DFS, https://on.ny.gov/3753YPA (last visited November 4, 2020). However, this response is listed under the question "The Superintendent's system for bulk filings under RPAPL § 1306 only allows for listing two borrowers. How should a lender or servicer effect a RPAPL § 1306 filing when there are more than two borrowers?" *Id*. DFS responds "[w]hen we developed the electronic reporting form for bulk filings, we did not provide for reporting more than two Borrowers" concluding "we do not believe RPAPL § 1306 should be interpreted as requiring the reporting of more than two Borrowers on the bulk reporting form." *Id*. Accordingly, if we are going to pay "respectful attention" (CIT Br. 31) to DFS to determine the amount of borrowers for which a plaintiff is required perform a filing, the answer is up to two, not only one. This is also contrary to CIT's slippery slope argument that the Schiffmans' position will open up the filing requirement to any more borrowers. *Id*.

The concern of DFS seems to be managing their filing database so it is not overloaded with voluminous filings unnecessarily. This is why they also state "if there are multiple borrowers on a single loan, the lender or servicer should not report them on multiple forms." DFS FAQs. Additionally:

> If more than one borrower is listed on the 90-day pre-foreclosure filing, the system will provide one line for each borrower. This enables the online system to accept an unlimited number of borrowers on each loan

> and it prevents the listing of loans from over-running the width of your computer screen. Pressing the "Edit" button next to one of the borrowers begins the process of submitting a Step Two filing for all of the borrowers listed under that unique tracking number.

Accordingly, DFS plainly understands that the filings they are handling flow directly from the required RPAPL § 1304 filings, and therefore designed their system for the user to submit RPAPL § 1306 information forms which correspond. Where there are two borrowers and therefore two RPAPL § 1304 notices there are fields available for each of these borrowers. DFS simply wishes to prevent duplicative filings per loan for their own efficiency, which also serves to improve the user experience. Contrary to CIT's assertion (CIT Br. 32), simply inputting both borrowers in the RPAPL § 1306 filing would not strain any State resources more than one would, nor deprive other borrowers of assistance. The only concern of this nature was that it may be "difficult for New York to allocate resources to more than one borrower in a household" but only where multiple borrowers in a residence have differing interests. DFS FAQs. This was merely DFS's "assumption in preparing the disclosure form" *Id*. Foreclosure plaintiffs routinely submit RPAPL § 1306 filings for both co-borrowers who were mandatorily served RPAPL § 1304 notices. As per DFS guidance this is not only welcome but the system was designed with this in mind. Filing for one borrower and not the other does not seem altogether common,

but the DFS instructions do not illustrate this to be proper compliance with the statute.

This all assumes that analyzing the DFS filing system instructions for statutory interpretation is proper and determinative. If the Court clarifies that RPAPL § 1306 filing is required for all borrowers served with a required RPAPL § 1304 notice, even more than two borrowers, there would simply be an argument for the DFS system to be updated to allow plaintiffs to be able to properly comply with the statute. Regardless, CIT also argues that case law supports their position, largely relying on two New York State Supreme Court, Queens County decisions dated approximately seven weeks apart presided over by the same Justice - *HSBC Bank USA, N.A. as Tr. for Certificateholders of Ace Sec. Corp. Home Equity Loan Tr. v. Ahmad*, 62 Misc. 3d 1225(A), 113 N.Y.S.3d 832 (N.Y. Sup. Ct. 2019) and *Bank of New York Mellon as Tr. for Certificateholders of the CWABS, Inc. Asset-Backed Certificates v. Vasquez*, 63 Misc. 3d 1220(A), 114 N.Y.S.3d 822 (N.Y. Sup. Ct. 2019). In both, the court ignored plaintiff's failure to file the RPAPL § 1306 notice as to both defendants pursuant to CPLR § 2001. CIT sets forth the same argument in their brief. This seems to clash directly with the Appellate Division's holding in *TD Bank NA. v. Leroy*, 121 A.D.3d 1256 (3d Dep't 2014) which rejected plaintiff's argument to disregard non-compliance with RPAPL § 1306 pursuant to CPLR § 2001 stating "failing to comply with the mandatory condition precedent—'cannot

be deemed a minor irregularity which can be overlooked.'" *Id.* at 1259-60, *citing Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95, 108 (2d Dep't 2011).

CIT also fails to adequately address, much less rebut, the arguments laid out in the Schiffmans' brief linking RPAPL § 1306 with RPAPL § 1304 in clear legislative creation and purpose, notwithstanding the use of the word "borrower" in RPAPL § 1306, which is not mitigated by the fact that the State uses the filing to collect foreclosure statistics; or why failure to file an RPAPL § 1306 notice for one borrower and not the other is forgivable but failure to send an RPAPL § 1304 notice to only one borrower is considered non-compliance even if the other borrower also reviewed the notice. Plaintiff completely fails to address why the legislature would require compliance with a purported strictly data mining statute to be a mandatory condition precedent, yet provide no mechanism for the State to enforce it, but permit a defendant to assert plaintiff's non-compliance to oppose summary judgment or move for dismissal. If the State did not wish for this statute to perform any utility other than facilitating statistical compilation, the penalty for non-compliance would have been levied in the administrative setting, not in the context of a foreclosure action between a lender and the borrowers.

In light of the above, this Court should rule that in a foreclosure action where there are two borrowers and plaintiff files an RPAPL § 1306 notice for one but not the other plaintiff has failed to comply with the statute.

CONCLUSION

For the foregoing reasons, Defendants-Counter-Claimants-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.

Dated: Brooklyn, New York
November 20, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. The Reply Brief for Defendants-Counter-Claimants-Appellants Pamela Schiffman and Jerry Schiffman complies with the type-volume limitation of Rule 500.13(c) because this brief contains 5,847 words, excluding the parts of the brief exempted by Rule 500.13(c)(3).

2. The Reply Brief for Defendants-Counter-Claimants-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, Time New Roman.