To be Argued By:
Charles Wallshein
Time Requested 30 Minutes

APL-2022-00061
Westchester County Clerk's Index No. 54780/2014
Appellate Division, Second Department Docket No. 2018-00886

COURT OF APPEALS
of the
STATE OF NEW YORK

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

-against-

ANDREW KESSLER,

Defendant-Respondent,

-and-

REIKO KESSLER and "JOHN DOE" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants,

BRIEF FOR DEFENDANT-RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the language contained in RPAPL §1304 is clear and unambiguous.

2. Whether including additional notices in the RPAPL §1304 Notice sent to the Respondent in the same mailing envelope violated the "separate envelope" provision in RPAPL § 1304(2).

3. If so, whether the courts below committed error on the law by dismissing the complaint for failing to meet a condition precedent to the commencement of the action.

DEFENDANT-RESPONDENT COUNTERSTATEMENT OF FACTS

This appeal concerns the content of a RPAPL § 1304 Notice mailed to the Defendant-Respondent, Andrew Kessler, specifically the additional page of notices apparent on the face of the record at [R, 137]. The Plaintiff-Appellant included an additional page of "Important Disclosures" in the same envelope as the RPAPL §1304 Notice. [R,131-138]. The Plaintiff-Appellant does not dispute that the page containing "disclosures" are notices. Nor does the Plaintiff-Respondent dispute that the additional page of notices was mailed together with the RPAPL §1304 Notice.

Specifically, the record reflects that there are two additional notices on page 7 of 7 of the mailing.[R,137]. First, there is a bankruptcy notice and a servicemembers notice that contains language consistent with the Servicemembers Civil Relief Act ("SCRA"). At the bottom of the body of the RPAPL §1304 Notice itself in small italic print is written "Bank of America N.A., the servicer of your home loan, is required by law to inform you that this communication is from a debt collector." This language is consistent with the provisions of the Fair Debt Collection Practices Act, 15 U.S.C.1692e(11), which requires debt collection notices to be accompanied by a statement that the debt collection notice is mailed/communicated from a debt collector.

The trial court and the appellate court found that Plaintiff-Appellant's Notice is defective on its face and does not require the Defendant-Respondent to demonstrate any prejudice or damage caused by the improper notice mailed by Plaintiff-Appellant. The procedural history of the case is as follows: the Lower Court dismissed the foreclosure action. [R,3-15]. The Appellate Division, Second Department affirmed the Lower Court's decision. (Bank of America v. Kessler, 202 A.D.3d 10, (2nd Dep't 2021). [R,375-391]. The Second Department granted leave to appeal to this Court. [R,374].

RESPONDENT'S PRELIMINARY STATEMENT

Section 1304 of the New York Real Property Actions and Proceedings Law (the "RPAPL") is a consumer protection statute that requires all lenders – prior to commencement of any mortgage foreclosure action – to mail by regular and certified mail to each consumer-borrower with a "Home Loan" a notice stating specific statutory language (the "RPAPL §1304 Notice").[1] The notice language that must

[1] RPAPL §1304(6)(a)(1) states:
Notwithstanding any other provision of law, with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower. . .
6.(a)(1) "Home loan" means a loan, including an open-end credit plan, in which:
(i) The borrower is a natural person;
(ii) The debt is incurred by the borrower primarily for personal, family, or household purposes;
(iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended

be stated in every RPAPL §1304 Notice is mandatory according to the plain meaning of the statutory language set forth in RPAPL §1304.[2] The Plaintiff-Appellant seeks review and reversal of the bright line rule and for this Court to adopt a flexible standard. Defendant-Respondent included the Black's Law dictionary definition of "Notice" and the Plaintiff-Appellant does not dispute the fact that the page containing "disclosures" are notices.[3] The Defendant-

to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and (iv) The property is located in this state.

[2] The Plaintiff-Appellant asks this Court to apply a flexible standard of review concerning departures or additions to the RPAPL §1304 Notice. However, the Plaintiff does not offer a workable alternative to what would be or could be an acceptable additional notice such as a subjective review for cultural bias, or perhaps a literacy test or an I.Q. test for borrowers receiving the Notice.

[3] The following appears at page "4" of the Respondent's Brief submitted to the Appellate Division and is part of the record.

> Blacks' Law Dictionary defines "Notice" as follows:
>
> *n.* (16th c)** legal notification required by law or agreement, or imparted by operation of law as a result of (such as the recording of an instrument); definite legal cognizance, actual or constructive, of an existing right of title<under the lease , the tenant must give the landlord written notice 30 days before vacating the premises>. * A person has notice of a fact or condition it that person (a) has actual knowledge of it; (2) has received information about it;(3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording. 2. The condition of being so notified, whether or not actual awareness exists <all prospective buyers were on notice of the judgment lien>. Cf, [*knowledge*]. 3. A written or printed announcement <the notice of sale was posted on the courthouse bulletin board>. or warning that is delivered in a written format or through a formal announcement. An individual or party is considered liable if the party (1) has knowledge of the notice, (2) received the notice, (3) knows it through experience, (4) has knowledge with regards to an associate fact and (5) could have gained knowledge had an enquiry been undertaken.

Notwithstanding the Plaintiff-Respondent's labeling of the language on the third page of the RPAPL §1304 Notice as "Important Disclosures", the fact remains that the information contained in the "Important Disclosures" satisfy the definition of notice as said word is defined in Black's as a noun. The word "disclosure" is defined by Black's as follows:

> *n.* (16c) 1. The act or process of making known something that was previously

Respondent submits that RPAPL §1304 is a strict compliance statute that is a condition precedent to the commencement of any foreclosure action. Its salutary purpose is to give all homeowners a full and fair opportunity of preventing a foreclosure action from commencing in the first instance. The foreclosing party – not the homeowner – has the burden of proving compliance with RPAPL §1304 before commencement of a foreclosure action. By the statute's clear language, the Legislature intended RPAPL §1304 to apply to all borrowers equally without any measure of the subjective impact that an unlawful notice might have against one borrower as compared to another.

Both the trial court and the appellate court determined that Plaintiff-Appellant's notices did not comply with RPAPL §1304. The Plaintiff-Appellant seeks reversal on three principal grounds, none of which has any merit.

First, the Plaintiff-Appellant claims that RPAPL §1304's statutory language gives sufficient latitude for a broad reading permitting a RPAPL §1304 Notice to include not only the language specified in the statute but also additional language – found nowhere in the statute – that *might* be beneficial to the borrower, at least according to the foreclosing party. As demonstrated more fully below (*see* POINT I, *infra*), the Plaintiff-Appellant's reasoning must be rejected because the well-established rules of statutory construction coupled with the legislative history of

unknown: a revelation of facts < a lawyer's disclosure of a conflict of interest>.
See [*discovery*].

RPAPL § 1304 do not warrant the expansive statutory interpretation urged by Plaintiff-Appellant. Both the plain language of the statute and its legislative history clearly require a RPAPL §1304 Notice to include specific language, leaving no room for improvised variations and miscellaneous additions inserted by the foreclosing party.

Plaintiff-Appellant's second claim is that RPAPL §1304 is unenforceable because its notice requirements have been preempted by the Supremacy Clause of the Constitution of the United States and various provisions of federal law, such as the Fair Debt Collection Practices Act ("FDCPA"). Contrary to Plaintiff-Appellant's argument, the FDCPA expressly requires construction of the FDCPA with parallel state law to give effect to – not preemption of – state law so long as state law does not diminish the protections offered by the FDCPA. Under that standard of construction, RPAPL §1304's notice requirement – which protects consumers – clearly does not conflict with the FDCPA's separate requirements.

Third, this case does not present a justiciable case or controversy concerning the interplay between RPAPL §1304 and the FDCPA. We know of no lawsuit brought in the State of New York claiming a violation of the FDCPA premised upon a RPAPL §1304 Notice. Simply put, a RPAPL §1304 Notice is not an attempt to collect a debt but rather is a consumer protection device directing borrowers to potentially helpful resources – not debt collection avenues – with which they may

consult safely in order to avoid entirely debt collection and the subsequent commencement of a foreclosure action.

If the Legislature had intended to carve out the requirement for additional notices in cases other than the COVID-19 Notice or the notice required in reverse mortgages it would have do so, but it did not. The Legislature has been very specific about what is and what is not permitted in a RPAPL §1304 Notice.

The Defendant-Respondent further submits that the Court need not address whether RPAPL § 1304 has been preempted by federal law because that legal issue was not properly preserved for appellate review. Plaintiff-Appellant merely raised the notion of federal preemption as a tangential point that is, in effect, a hypothetical question seeking an advisory opinion from the Court. Nowhere in the record is there any indication that the Defendants-Respondent has made any counter-claims against Plaintiff-Appellant for violations of the FDCPA in connection with the RPAPL §1304 Notice or any other notices associated with the underlying mortgage foreclosure action. Lacking any legally cognizable injury, the Plaintiff-Appellant lacks legal standing to assert that the RPAPL §1304 conflicts with the FDCPA and, therefore, must be preempted. See, Mental Hygiene Legal Service v. Daniels, 33 N.Y.3d 44 (2019); see also, Society of Plastics Industry, Inc., v. County of Suffolk, 77 N.Y.2d 761 (1991). Any references to preemption in the trial court's decision or the appellate court's decision is mere *obiter dicta*.

This Court may appreciate the Appellate Division's application of a bright line rule because it specifically discourages a case-by-case analysis based upon the subjective impact that additional language could have on borrowers, ergo, the Appellate Division's deference to this Court's policy considerations articulated in the Engel case. See, Freedom Mortgage v. Engel, 37 N.Y.3d 1, 19 (2021).

The appellate court accurately understood that this case turns on the legal question of what is and what is not legally permissible to enclose in the envelope containing the RPAPL §1304 Notice. Defendants-Respondent submits that the appellate court correctly affirmed the trial court's decision because both courts agreed that the Legislature's intent is clear in RPAPL §1304. The legislative intent is that the delinquent borrowers who are about to go into foreclosure be given a list of five independent housing counselors to contact so they may avoid foreclosure. The statutory language is likewise clear so that the courts do not have to conduct a case-by-case inquiry into the subjective impact of additional notices or additional language on a spectrum of borrowers. RPAPL §1304 says what it says, no additional notices are to be mailed in the same envelope.

ARGUMENT

I. DISMISSAL OF FORECLOSURE CASES COMMENCED AFTER THE MAILING OF DEFECTIVE RPAPL § 1304 NOTICES EFFECTUATES THE PLAIN LANGUAGE AND LEGISLATIVE PURPOSE

The long-standing rule is that when the meaning of the statutory language is at issue the Court "adhere[s] to the well-established principle that "where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce, 21 N.Y.3d 55, 60, (2013). See also Manoel v. Board of Assessors, 25 N.Y.3d 46 (2015).

The Court should not consider extrinsic factors where the legislative intent is clear, when the statutory language is unambiguous and where the plain meaning of the statute would not lead to an absurd result. See, Doctors Council v. New York City Employees' Retirement System 71 N.Y.2d 669 (1988).

Even if the language of RPAPL §1304(2) were ambiguous, which it is not, this Court's primary consideration is "to discern and implement the will of the Legislature and attempt—by reasonable construction—to reconcile and give effect to all of the provisions of the subject legislation." See, Carney v. Phillipone 1 N.Y.3d 333 (2004). "The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature." N.Y Statutes §92.

A. The Statute's Language is Unambiguous

The Plaintiff's suggestion that the Legislature intended to allow the Notices to contain additional information is misplaced. The dissent interprets the term "shall include" to mean that the legislature intended for other information to be permitted as long as the mandated language is present. The Respondent submits that neither the dissent nor the Appellant can logically account for the clearly restrictive language in RPAPL §1304(2) that states that "Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice." The Appellant's argument that the Legislature did not intend a bright-line rule is belied by the clear and unambiguous restrictive language prohibiting additional notices.

The majority correctly interprets the statute to mean that the foreclosure defendant-borrower should read a single notice, mailed in a single envelope, with the prescribed statutory language. The message is that (a) the lender is about to commence a foreclosure action, (b) there are options available for home retention, and (c) there are five (or more) names of housing counselors approved by HUD and or by DHCR the borrower(s) should call to get help.

The Majority justifies the bright line rule because the alternative, to wit, a flexible standard is unworkable. The Appellate Division, Second Department stated:

> Construing the "separate envelope" requirement of RPAPL 1304 as exacting also addresses recent concerns articulated by the Court of Appeals when it "[a]dopt[ed] a clear rule that will be easily understood by the parties and can be consistently applied by the courts" in mortgage foreclosure cases involving statute of limitations issues (*Freedom Mtge. Corp. v. Engel,* 37 N.Y.3d at 19, 146 N.Y.S.3d 542, 169 N.E.3d 912). In *Freedom Mtge. Corp. v. Engel,* the Court of Appeals set forth a bright-line rule in mortgage foreclosure cases that a lender's voluntary discontinuance of a prior foreclosure action constitutes a revocation of its election to accelerate the debt, absent a contemporaneous statement by that noteholder to the contrary (*see id.*). In its discussion of the application of the statute of limitations, the Court of Appeals "emphasized the need for reliable and objective rules permitting consistent application"

If "other language" or "other notices" were permissible as the Appellant and the dissent argue, then the inquiry as to legislative intent requires this Court to decide what additional notices and or language would be or should be permitted?

The Appellate Division specifically rejected the Lower Court's argument in Deutsche Bank Natl. Trust Co. v. Delisser, Sup Ct, Suffolk County, Sept. 14, 2017, Heckman, J., Index No. 8685/13 where the trial Court held that there was no violation of RPAPL §1304 because defendant failed to show prejudice from the lender's inclusion of notice to veterans and notice regarding consumer rights.

In Kessler, The Appellate Division also rejected other Lower Court's arguments that deviations in form are *de minimis* or may be beneficial to the borrower. The Appellate Division specifically rejected the workability of a subjective standard or a hyper-fact-sensitive inquiry as to whether the additional

notices appear on a separate page from the Notice itself. (see e.g. Beneficial Homeowner Serv. Corp. v. Jordon–Thompson, 57 Misc.3d 1213[A], 2017 N.Y. Slip Op. 51424[U], 2017 WL 4891683 [Sup Ct, Suffolk County].

B. The Legislature's Created a Bright Line Rule that Precludes Additional Notices

The Legislature's intent is to make mandatory the mailing of the Notice to each borrower individually to encourage delinquent borrowers, who are about to be served in a foreclosure action, to contact HUD approved and DHCR certified housing counselors. The restriction against other notices is specifically intended to prohibit language that may confuse or distract a borrower from contacting a housing counselor. This is the only possible meaning that the Court can infer from the statute's plain language or from the statute's legislative history.

To determine the legislative intent behind RPAPL §1304, the Court need not look further than the unambiguous language of the statute. (See POINT I (A), *supra*.) If there is any doubt as to what the plain language of the statute means, the Court may refer to the legislative memorandum that accompanies both the (identical) Assembly and Senate bills that were signed by the Governor on August 5, 2008. (See L 2008, ch 472, § 2 [eff Sept. 1, 2008], as amended by L 2009, ch 507, § 1–a [eff Jan. 14, 2010]; L 2011, ch 62, part A, § 104 [eff Oct. 3, 2011]; L 2012, ch 155, § 84 [eff July 18, 2012]; L 2012, ch 155, § 85; L 2016, ch 73, part Q,§§ 6, 7 [eff Dec. 20, 2016]; L 2017, ch 58, part FF, § 1 [eff Dec. 20, 2016]; L

2018, ch 58, part HH, §§ 1, 5 [eff Apr. 12, 2018, deemed eff Apr. 20, 2017]; L 2018, ch 58, part HH, §§ 3, 4 [eff May 12, 2018]).

A10817A Same As S08143-A

PURPOSE: This bill seeks to address the mortgage foreclosure crisis in the state by: (1) providing additional protections and foreclosure prevention opportunities for homeowners at risk of losing their homes; (2) strengthening the Banking Law to prevent similar crises from occurring in the future; (3) establishing standards for lenders and mortgage brokers to prevent borrowers from being placed into unaffordable home loans; (4) registering and regulating mortgage loan servicers to enhance loan servicing standards in the state; and (5) defining the crime of residential mortgage fraud and establishing strict criminal penalties to deter those who may engage in such activity.

STATEMENT IN SUPPORT: New York State faces a mortgage crisis of immense magnitude Many families have lost their homes and entire neighborhoods have been devastated. In 2007, there were more than 52,000 foreclosure filings in the state - an increase of 10% from 2006 and 55% from 2005. These statistics, especially in light of inaction by the federal government, make clear the need for state action on this issue. This bill attempts to address the mortgage foreclosure crisis in two ways. First, this bill provides assistance to homeowners currently at risk of losing their homes by providing additional protections and foreclosure prevention opportunities for such homeowners Second, this bill establishes further protections in the law to mitigate the possibility of similar crises in the future.

1. Elements of legislation targeted to help homeowners currently at risk of foreclosure
   A. Pre-Foreclosure Notice. According to industry experts, a majority of distressed homeowners do not attempt to contact their lender prior to the commencement of foreclosure proceedings. While there are a myriad of reasons for this, it is undisputed that this lack of communication often leads to needless foreclosure proceedings in cases where a foreclosure alternative might

> otherwise have been possible. This legislation seeks to bridge that communication gap in order to facilitate a resolution that avoids foreclosure. In particular, this bill would require lenders and mortgage loan servicers to provide a pre-foreclosure notice to borrowers with subprime loans at least 90 days before a legal action may be commenced against the borrower. The notice would advise the borrower of HUD-approved and DHCR designated housing counseling services available in the borrower's area. The additional period of time in many cases would allow borrowers to work on a resolution without fear of imminent loss of their homes. This proposal recognizes that avoiding foreclosure is a better outcome than a quick foreclosure. However, if the borrower is unable to reach resolution with the lender in the prescribed time, the lender will have the opportunity to pursue legal action against the borrower.
>
> B. Early Settlement Conference While reaching resolution during the preforeclosure time period is indeed preferred, that will not always occur.
>
> As a result, this bill provides that if an action is commenced, the homeowner will receive a second opportunity to reach resolution with the lender early in the foreclosure process, without delaying the continuation of the action. In particular, this bill would require a court in a residential foreclosure action to schedule a mandatory settlement conference within 60 days of when the plaintiff files a proof of service of the complaint with the county clerk. The plaintiff, or its representative with authority to settle the matter, must appear at that conference. The court may allow an appearance by phone or video-conference for the plaintiff's representative. If the homeowner appears and does not have an attorney, he or she will be deemed to have made a motion to proceed as a "poor person" under CPLR §1101 and the court may, in its discretion, waive certain procedural requirements and even appoint counsel to the homeowner under CPLR §1102(a). Under the bill, the mandatory settlement conference would also be available for certain homeowners who are already in foreclosure.

RPAPL §1304 was amended several times since 2008. None of the amendments changed or altered in any way the restriction against additional notices

in the same envelope. It should be clear that the Legislature's intent was to create a bright line rule that precludes any court from permitting any additional language or notices from the RPAPL §1304 mailing that would confuse or detract from the legislative purpose. The bright line rule is necessary because the Legislature specifically created the statute with an objective standard of strict compliance. It is important to note that there is nothing in the record that alleges that the single envelope rule is unduly burdensome to the lenders.

Consistent with Engel, the Appellate Division follows the policy considerations of this Court to preclude a fact-sensitive standard of review or a subjective standard relative to the prejudice caused to the borrower by particular additional notices or additional language.

It should also be clear that the Legislature did not establish a standard of review for what type of language or what type of additional notice would be permissible with two clear exceptions. The Legislature amended RPL §280-d and the COVID moratorium legislation as permitted notices that could be included in the same envelope. The fact that the Legislature specifically permits two types of notices does not under any circumstances infer that a court or a plaintiff may make up its own rules as it goes along. There is nothing in any legislation that permits the additional notices, disclosures and language contained in the Kessler Notice.

The reason the statute promotes contact with the HUD-approved or DHCR-

certified counselor is that the counselors are independent. Even though lenders, their attorneys and loan servicing agents may under certain circumstances be helpful to a borrower, the law recognizes that even if the lender wanted to help the borrower, the law prohibits and limits the substance of a communication between the borrower and the loan servicer.

Initial contact with a housing counselor is paramount because if the borrower contacted the loan servicing agent or the lender directly, the lender's representative is bound by the FDCPA to start the conversation with the debt collector's "Mini Miranda" warning.[4] The written or verbal FDCPA warning was envisioned by the Legislature to be a powerful psychological deterrent against borrowers sharing information with the lender or lender's agent that may be relevant and vital to a successful restructuring of the debt through the various loan modification programs. Additional language or any information that would deter the borrower from contacting a HUD or DHCR counselor is therefore prohibited. The Legislature intended to strictly prohibit any confusing or conflicting language that would explicitly or implicitly negatively impact the likelihood that a borrower would contact a housing counselor for help. The Legislature intended the mandatory language in a single envelope to not only prohibit confusing messages but also to

[4] The FDCPA "Mini-Miranda" states that anything a debtor says to a debt collector on a telephone call or in writing may be used against the debtor to enforce the debt. Telephone contact with a loan servicer also begin with a mandatory statement that "this call may be recorded for quality assurance . . ."

promote contact with a housing counselor. Any additional message in the mailing is therefore a facial defect that operates against the statutory intent.

The purpose of the bill as is relevant to RPAPL §1304 states: "According to industry experts, a majority of distressed homeowners do not attempt to contact their lender prior to the commencement of foreclosure proceedings. While there are a myriad of reasons for this, it is undisputed that this lack of communication often leads to needless foreclosure proceedings in cases where a foreclosure alternative might otherwise have been possible." The Legislature also recognized that almost without exception, mortgage modifications are negotiated with mortgage loan servicers and not with the note holder-plaintiff.

The Legislative memorandum states as its purpose as follows:

> "This legislation seeks to bridge that communication gap in order to facilitate a resolution that avoids foreclosure. In particular, this bill would require lenders and mortgage loan servicers to provide a pre-foreclosure notice to borrowers with subprime loans at least 90 days before a legal action may be commenced against the borrower. The notice would advise the borrower of HUD-approved and DHCR designated housing counseling services available in the borrower's area. The additional period of time in many cases would allow borrowers to work on a resolution without fear of imminent loss of their homes."

It is important to note that the Legislature used the word "fear" in its memorandum. RPAPL §1304 is meant to encourage borrowers to contact a disinterested, neutral party to assist them in applying for a mortgage modification or other resolution that allows them to keep their homes without the fear that they are

going to be taken advantage of. The Legislature recognized early in the crisis that parties that were not HUD approved or DHCR certified probably were not going to protect homeowners' best interests. This list includes the lenders. While it is counterintuitive to recognize that in many instances loan servicers purposefully obstruct the loan modification process, this is exactly what the Legislature observed and reacted to.

In fact, the Legislative memorandum that accompanies the amendments to CPLR §3408 specifically recognizes that the statute was being amended because mortgage loan servicers' conduct was counterproductive to the mortgage modification process. The "Sponsor's Memo" - Bill Jacket to AO/1298 states as justification for the bill as follows:[5]

> JUSTIFICATION:
> New York State has implemented various laws to help avoid foreclosures and preserve homeownership. CPLR section 3408 is among the laws instituted in New York State that foster the early settlement of foreclosure actions as a means of preserving home ownership. A key provision of this law requires the court to hold mandatory settlement conferences in any residential foreclosure action involving a home loan. The purpose of this conference is to determine whether the parties can reach a mutually agreeable resolution to help the homeowner avoid losing his or her home, and evaluate the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to. (CPLR 3408(a)). In addition, CPLR 3408 requires both sides to negotiate in good faith to reach a mutually agreeable resolution. (CPLR 3408(f)).

[5] AO/1298 passed the Assembly on May 24, 2016 by a vote of 108 Yea to 31 Nay.

> We have learned that banks often flout the express statutory language and the core purpose of the settlement conference law designed to promote negotiation of affordable loan modifications or other home-saving solutions. They do this in a number of ways including by incorrectly arguing that the law permits only certain types of workout options, by providing misinformation, repeatedly losing homeowner paperwork, improperly denying loan modifications, commencing foreclosure actions after promising not to do so in a loan modification offer, and by employing a range of dilatory tactics, including sending counsel to settlement conferences unprepared, without required information and/or without settlement authority, and delaying the appearance at such conferences of a bank representative with full settlement authority. This conduct frustrates the purpose of New York's settlement conference law, prolonging the foreclosure process, often for over a year, that results in costs to the homeowner that makes home-saving solutions difficult, if not impossible.

There should be no question that the Legislature believes that consumer protections afforded pursuant to RPAPL §1304 were, are and will continue to be necessary. Section B to the RPAPL §1304 bill makes specific reference to the foreclosure settlement conferences conducted pursuant to CPLR §3408 after the commencement of the action. The Legislative Memorandum to RPAPL §1304 states:

> As a result, this bill provides that if an action is commenced, the homeowner will receive a second opportunity to reach resolution with the lender early in the foreclosure process, without delaying the continuation of the action. In particular, this bill would require a court in a residential foreclosure action to schedule a mandatory settlement conference within 60 days of when the plaintiff files a proof of service of the complaint with the county clerk.

This court may reasonably infer that RPAPL §1304 and CPLR §3408 are part

of a larger statutory scheme enacted specifically to protect consumers who are about to go into foreclosure as well as those who already may be in the foreclosure process. This Court should affirm the Appellate Division's decision because the statutory scheme depends on the ability of delinquent borrowers to access HUD approved and DHCR certified counselors to assist them in remaining in their homes. For many delinquent borrowers access to HUD approved and DHCR certified counselors prior to the commencement of the action and at the settlement conference phase has been and will continue to be a major factor in ensuring that delinquency on a mortgage does not automatically result in the loss of their home. The strict interpretation of the statutory language is imperative to accomplishing the Legislature's goal because the Legislature drafted the law to be understood in the most objective sense specifically for the least sophisticated borrower. The Legislature created a bright line rule to prevent anything from distracting, diverting or confusing the least sophisticated borrower from contacting a HUD approved and or a DHCR certified counselor.

II. THE COURT MUST APPLY THE LEAST SOPHISTICATED CONSUMER STANDARD TO RPAPL §1304

The legislative memorandum clearly states that the purpose for RPAPL §1304 is to provide free counseling to distressed homeowners by independent counselors approved by the Department of Housing and Urban Development (HUD) and the

Department of Housing and Community Renewal (DHCR). The Respondent Submits that the reason that the Statute has been interpreted to require that the mandatory and exclusive language be sent in a separate envelope from any other notice is because the Legislature and the Governor believed and still believe that the least sophisticated consumer would be or could be confused by additional notices mailed in the same envelope. The Plaintiff-Appellant's argument that the Legislative history does not support a bright line rule is unsupported by the legislative history and by the manner in which consumer protection statutes are interpreted in the courts.

If a consumer sought to challenge the RPAPL §1304 notice as a deceptive notice that requires it to be accompanied by a FDCPA notice it would likely be challenged under federal law. The Second Circuit applies a "least sophisticated consumer" standard. See, Hopkins v. Collecto, Inc. dba EOS CCA, 994 F.3d 117 (2021). The Legislative memorandum explains the reason for the specific language and the restriction against additional notices is to accomplish two straightforward goals. First, to alert the narrow class of consumers-borrowers that have a "Home Loan" of the imminent filing of a foreclosure and second, to alert borrowers that they can receive help from independent and unbiased housing counselors.

Defendant-Respondent submits that this Court should apply the standard in

use in the Circuit in which the consumer resides.[6] If there were a challenge to the law pursuant to State law, the standard of review is articulated, although by analogy, in Clemente Bros. Contracting Corp. v. Hafner-Milazzo, 23 N.Y.3d 277, 288 (2014).[7]

In Hefner-Milazzo the only question before the Court was whether two parties to a contract may contractually alter the one-year notice period in which a banking customer may ". . . agree to shorten from one year to 14 days the statutory period under UCC 4–406(4) within which a customer must notify its bank of an improperly paid item in order to recover the payment thereon." This Court answered the question in the affirmative.

The Majority's opinion appeared to make a distinction, in dicta, between the type of customer that could or could not contract out of the one-year period based

[6] But our court's framework is functionally equivalent to the unsophisticated debtor standard on which claims like Hopkins's have foundered. We have described the "least sophisticated debtor" standard as "almost universally employed by Courts of Appeals in interpreting [the FDCPA]," even though we recognize variance in how the standard is worded. *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 & n.3 (3d Cir. 2015) (noting that it is "sometimes referred to as the or "least sophisticated consumer" 'unsophisticated debtor' standard"). *Id.*

[7] In Milazzo this Court held: "We stress, however, that our holding is limited to the case of a corporate entity that either is financially sophisticated or has the resources to acquire professional guidance. It could well be unreasonable for banks to use contracts of adhesion to impose an exacting 14–day limit on unsophisticated customers, small family businesses, or individual consumers including, for example, the elderly, people suffering from certain disabilities, or others for whom the 14–day rule could be too unforgiving. These customers may lack the time, technology, or other resources to check their account statements within such a limited period every month. They are more susceptible to unforeseen events disrupting their routines or normal business operations. And it may be that banks need less protection on these accounts because the total assets held may be less than those of larger ***290** companies. But whether it would be *manifestly* unreasonable for these customers to be subject to a 14–day notice period, as opposed to a 30– or 60–day period, is a question for a later day."

upon a "*manifestly unreasonable*" standard. However, that question was not before the Court.[8] The majority applied a narrow reading to UCC §4-406(4) and held that its decision was limited to a " . . . corporate entity that either is financially sophisticated or has the resources to acquire professional guidance."

The dissent in Milazzo offers justification for a single standard of review for all borrowers under the statute in issue in that case, Uniform Commercial Code 4-406(4). Judge Piggot's dissent, with Judge Smith in agreement, argued that the statute did not intend for a case-by-case review of the respective parties' financial sophistication and that the application of the one-year-rule should be uniform among all bank customers.

> It would be better to interpret the statute in a way that obviates the need for a court to analyze whether the customer was "financially sophisticated" possessed "the resources to acquire professional guidance," was a "small family ***293** business" or an "elderly" individual (majority op. at 289, 991 N.Y.S.2d at 20, 14 N.E.3d at 373) because the rule would apply to every type of consumer. The rule proposed by the majority provides less certainty and will create more litigation because it doesn't apply to everyone in like fashion. The fact that the majority is concerned that financial institutions will "use contracts of adhesion to impose" what it acknowledges is "an *exacting 14–day limit* on unsophisticated consumers." (majority op. at 289, 991 N.Y.S.2d at 20, 14 N.E.3d at 373 [emphasis supplied]) only underscores why customers and banks should not be permitted to contractually reduce section 4–406(4)'s one-year limitation period.

Defendant-Respondent submits that this Court should apply the same reasoning to RPAPL §1304 as this court applied in Milazzo concerning legislative

[8] Id at 5.

intent and a workable standard as applied across the spectrum of consumers. Unlike the parties in Milazzo, Bank of America and the Kesslers cannot contractually agree to alter the requirement to mail a statutorily compliant RPAPL §1304 Notice. Unlike UCC §4-406(4), the plain language of RPAPL §1304 clearly limits the rule's applicability to "Home Loans" where the borrowers(s) are individuals, on owner occupied, one to four family homes.

There should be no argument that the Legislature intended to narrow the group of mortgagors to which RPAPL §1304 applies. In Milazzzo, this Court applied UCC §4-406(4) to everyone. This Court should apply the same reasoning here as it did in Milazzo, and refrain from further narrowing the group of persons to which RPAPL §1304 applies because the Statute's language is clear an unambiguous and already identifies the specific group of borrowers that must receive a notice containing specific statutory language.

The significance of Milazzo as relevant to this case is that the Majority contemplated that the Legislature at some point could amend the UCC to distinguish between financially sophisticated corporate entities and lay consumers. Here, the Defendant-Respondent does not suggest that this Court draw a distinction that orders the Lower Courts to make evidentiary determinations concerning each borrower's subjective level of sophistication. The reason for considering Milazzo here is so the Court recognize that this Court, in Milazzo, and the Legislature, when

drafting RPAPL §1304, clearly take different levels of borrower sophistication into account. However, the Defendant-Respondent does suggest that because RPAPL §1304 is a consumer protection statute it must be considered under the least sophisticated consumer standard. As a matter of policy, the dissent in Milazzo wrote that the Majority's new rule would ". . . provides less certainty and will create more litigation because it doesn't apply [the UCC's one-year-rule] to everyone in like fashion." This Court has made similar decisions wherein bright line rules are strongly favored because a bright line rule provides more certainty and creates less litigation.

In Freedom Mortgage v. Engel, 37 N.Y.3d 1, 19 (2021) for instance, this Court stated that a bright line rule concerning the application of the statute of limitations to mortgage foreclosures was warranted. This Court stated:

> We have repeatedly recognized the important objectives of certainty and predictability served by our statutes of limitations and endorsed by our principles of contract law, particularly where the bargain struck between the parties involves real property.

Defendant-Respondent respectfully submits that this Court's application of a bright line rule concerning RPAPL §1304 to the least sophisticated borrower would, like Engel did with the statute of limitations, serve the exact same public policy concerns of certainty, predictability and administrative efficiency.

It is irrelevant that the Plaintiff-Appellant believes that additional notices mailed in the same envelope may be beneficial or innocuous to some borrowers.

First, there is nothing in the record that supports the beneficial timbre of additional notices. Second, there is nothing in the Legislative record or memoranda that speaks to the subjective ability of a borrower to understand the content of the RPAPL §1304 Notice.

The only relevant issue is that the Legislature passed a law that requires the mailing of 90-Day Notices, as it is colloquially referred, to the borrowers by regular and certified mail, by itself, with no other notices in the same mailing envelope. Because the statutory language is clear and unambiguous, the reason for the mandatory language and the restrictions against additional notices in the same mailing envelope should not matter. Irrespective, the reason for the restrictions against additional notices is that the Legislature believes that the additional notices would be confusing and could distract and divert the least sophisticated borrower's attention from contacting a HUD approved and DHCR certified housing counselor.

III.. FDCPA and PREEMPTION: RPAPL §1304 DOES NOT CONFLICT WITH FEDERAL LAW

The record reflects that the Plaintiff-Appellant's RPAPL §1304 Notice contains addition notices as well as additional language not mandated by the statute. The record reflects that the Kesslers were not in the military and had never declared bankruptcy. In re Gill, 529 BR 31 [Bankr. WDNY 2015]. (RPAPL §1304 does not violate the permanent injunction provisions of 11 U.S.C. §524(a)).

Therefore, there is no legitimate purpose in providing information that is irrelevant to the borrower especially where additional notices are prohibited in general.

The only authority that the Plaintiff-Appellant offers concerning federal preemption of RPAPL §1304 are a series of state court and one federal lower court case. The Appellate Division rejected the logic and reasoning of these cases outright. However, the Plaintiff-Appellant continues to rely upon a recent case, CIT Bank v. Neris, 2022 WL 1799497, (S.D.N.Y. 2022) as authority to support its claim that federal law requires the FDCPA mini-Miranda warning to be included in the RPAPL §1304 Notice or Bank of America could run afoul of the FDCPA.

Defendant-Respondent submits that the Neris opinion, like its State court counterparts, is without an adequate record that supports the presumed applicability of the FDCPA to the respective [Neris] defendants' foreclosure actions, loans and RPAPL §1304 Notices.

Like any other type of action, an aggrieved debtor-plaintiff must allege specific facts to make a prima facie case for a violation of the FDCPA. The facts in the record in Neris, similar to the facts presented at bar, reflect that an argument concerning the preemption of RPAPL §1304 by the FDCPA does not appear anywhere in the record. Moreover, facts relevant to the applicability of the FDCPA to RPAPL §1304 notices are not in the record of that case.

It appears that the Neris Court simply invented a preemption argument *sua sponte* without a supporting record. Second, the Neris Court at footnote numbered "5" of its decision quotes 15 U.S.C. §1692n, the section of the FDCPA stating the federal statute's "Relation to State Laws." However, it appears that the Federal Court purposefully excised and edited out that portion of 15 U.S.C §1692n that is relevant to the additional protections mandated by RPAPL §1304. The federal court left out the following language:

> . . . For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

A. Preemption was Not Preserved in The Record and Plaintiff Seeks an Advisory Opinion

The Defendant-Respondents did not bring suit seeking relief against the Plaintiff for a violation of the FDCPA. The applicability of 15 U.S.C. §1692 is dependent upon findings of fact that were never litigated before the Lower Court. Without a cognizable case or controversy, Plaintiff-Appellant's argument that the FDCPA, Bankruptcy Permanent Injunction and the SCRA are preemptive bars to the enforceability of RPAPL §1304 is misplaced by seeking an advisory opinion where no controversy exists.

B. The RPAPL §1304 Notice is Not an Attempt to Collect a Debt and the Plaintiff is not a Debt Collector as a Matter of Law.

The Kessler Notice contains a very brief FDCPA warning in addition to two distinct notices. Plaintiff-Appellant relies on the dicta in the Lower Court's decision

as a basis to challenge RPAPL §1304 by arguing that RPAPL §1304(2) is preempted by the Fair Debt Collection Practices Act (FDCPA) claiming that the federal law requires that the State law 1304 Notice must contain the federal notice. Defendant-Respondent Submit that the additional language is neither from a debt collector nor is the RPAPL §1304 Notice an attempt to collect a debt as defined by the FDCPA. The record reflects at allegation numbered "6" in the Complaint that Bank of America states that it is the Holder of the note. [R,20]. This admission is sufficient to disqualify Bank of America as a "Debt Collector." Here, Bank of America is attempting to collect its own debt and is therefore a creditor, rendering the FDCPA inapplicable.

Plaintiff-Appellant's entire foreclosure case is built upon Bank of America being the Holder of the note. The Holder of a note that seeks to enforce its own debt on its own behalf is not a debt collector within the meaning of the statute. Complaint Paragraph "6" is a formal judicial admission that disqualifies the application of the FDCPA. See, Kimso Apartments, LLC v. Gandhi, 24 N.Y.3d 403 (2014). Therefore, the FDCPA does not apply. See 15 U.S.C. §§1692a(4) and (6)(f)(ii) and (f)(iii).

> 15 U.S.C. §1692a(4) defines a "creditor" as follows:
> (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
> 15 U.S.C. §§1692a(6) defines a "debt collector" as follows:

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

The Plaintiff-Appellant asserts that it is required to insert the FDCPA notice in the RPAPL pursuant to §15 U.S.C. 1692e(11) which states:

> (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

Defendant-Respondent submits that there is nothing in the record that relates to the factual circumstances concerning whether the RPAPL mailing was an attempt

to collect a debt or whether the RPAPL Notice is an initial or subsequent communication. Defendant-Respondent submits that the applicability of §15 U.S.C. 1692e(11) cannot be determined because the facts relevant to the application of the statute are not in the record. Even if there were facts concerning a subsequent communication in the record, which there is not, the Court in Davis v Hollins Law, 832 F3d 962, 963 [9th Cir. 2016) stated: "we hold that if a subsequent communication is sufficient to disclose to the least sophisticated debtor that the communication was from a debt collector, this is not a violation of §1692e(11) even if the debt collector did not expressly state, "this communication is from a debt collector."

Even if the §1304 pleading is not a notice, the lack of an additional notice designed to comply with the FDCPA does not violate the FDCPA so long as the least sophisticated consumer would understand the communication to be from a debt collector. The debtor's interpretation of a collection notice cannot be bizarre or unreasonable" (Id, Davis, at 964) To succeed on an argument that a RPAPL §1304 notice without additional disclosures violates FDCPA a litigant would need to argue that the New York Legislature enacted a statute that would leave reasonable, non-bizarre doubt in the financially distressed homeowner's mind about the letter's source.

Defendant-Respondent submits that it seems an unlikely goal of the

Legislature, given the "legislative goal of providing information about additional protections and foreclosure prevention opportunities to homeowners at risk of losing their homes as is clearly stated in the Bill Memorandum. Moreover, nothing in RPAPL §1304 prohibits a lender from mailing, in other envelopes in a separate mailing, other notices to a borrower, whether such notices are federally mandated or consist of any other notice or information that may assist a homeowner to avoid foreclosure.

Last, §15 U.S.C. 1692n requires that the federal law be interpreted to give full effect to state laws as long as the state law affords the consumer greater protection than that afforded by the federal law. §15 U.S.C. 1692n states:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

Defendant-Respondent submits that the RPAPL §1304 adds to the protections afforded by the FDCPA and does not detract from those protections by promoting contact and communication with HUD approved and DHCR certified housing counselors. The legislature did not intend for any borrower, much less the least sophisticated borrower, to believe that the RPAPL §1304 Notice is an attempt to collect a debt. The prohibition against inclusion of any other notices in

the same mailing envelope is the method by which the statute's purpose is accomplished.

IV. DISMISSAL IS THE ONLY REMEDY AVAILABLE

The Plaintiff-Appellant argues that even if the Court finds the Notice noncompliant dismissal would be improper. Plaintiff's first argument that the additional notices constitute a *de minimis* departure from the statute is without merit. The bright line rule against additional notices is a condition precedent to the commencement of the action. There would be no purpose to the rule if dismissal of the action was not the natural and logical consequence to the Plaintiff's failure to satisfy the mailing of notices with compliant content as a condition precedent to the filing of the foreclosure complaint. See, Lubonty v. U.S. Bank National Association, 34 N.Y.3d 250 (2019). Anything but dismissal would nullify the statute's purpose and would lead to absurd result. See, Town of Aurora v. Village of E. Aurora, 32 N.Y.3d 366 (2018).

That just result should not be avoided merely because thousands of defective notices have been mailed in violation of RPAPL §1304's requirements and, consequently, have rendered thousands of foreclosure cases defective and subject to dismissal. It is possible that a dismissed case may be commenced again after there has been proper compliance with RPAPL §1304, and the generous savings

provisions of CPLR §205(a) will apply in appropriate cases. Moreover, there is a distinct possibility that most of these cases, if dismissed, are settled because the borrowers will have straightforward and unambiguous notice of access to housing counselors prior to the refiling of a complaint.

It is unlawful pursuant to State and federal law to commence a foreclosure action while there is pending application for mortgage assistance. See: 12 C.F.R. §1024.41(c)(3)(i)(D)(1), 3 NYCRR §419.10.[9] Therefore, it is likely that strict compliance would increase the number of applications filed before a complaint is filed lest the loan servicer and or the note holder run afoul of State or federal law.

Plaintiff-Appellant also makes the misplaced argument that foreclosure defendants seeking dismissal pursuant to CPLR §1304 are using the statute as a sword for personal gain rather than as a shield under the regulatory scheme that promotes pre-filing contact with HUD approved and DHCR certified housing counselors. See, Charlebois v. Weller Assn., 72 N.Y.2d 587, 595, (1988). The Defendant-Respondents do not seek any financial gain here. The fact that the

[9] See: 12 C.F.R. §1024.41(c)(3)(i)(D)(1): If the servicer has not made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer cannot make the first notice or filing required to commence or initiate the foreclosure process under applicable law before evaluating the borrower's complete application;
3 NYCRR §419.10
(a) A servicer is prohibited from: (4) commencing a residential foreclosure action against a borrower: (i) if a borrower submits a complete loss mitigation application to a servicer before the servicer has commenced a residential foreclosure action against the borrower, . . .

foreclosure action was dismissed is incidental to and the only possible result of the Lower Court's finding that the Plaintiff had not made its prima facie case.

Here, the Defendant's objection to summary judgement was premised upon the Plaintiff's failure to meet a condition precedent to the commencement of the foreclosure action. Kessler's objection certainly caused the case to be dismissed and naturally delayed the foreclosure process by requiring that another foreclosure action must be commenced if the case is not otherwise settled. When Kessler raised noncompliance with RPAPL §1304 as a defense it was not for personal gain but as a defense to summary judgment pursuant to CPLR §3212. One natural consequence of a party's failure to meet a condition precedent to an action, whether statutory or contractual, is dismissal. Yonkers Contracting Co. Inc., v. Port Authority Trans-Hudson Corp. 93 N.Y.2d 375 (1999), U.S. Bank National Assn. v. DLJ Mortgage Capital, Inc., 33 N.Y.3d 72 (2019).

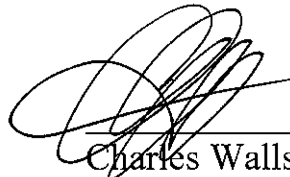
The condition is part of the cause of action and necessary to be alleged and proven, and without this no cause of action exists. To follow the Appellant's suggested "sword-shield" argument would require that every dispositive affirmative defense involving the failure to make a prima facie case, if successful, be characterized as a swordlike windfall to the moving party because it prevents the opposing party from successfully prosecuting its case. That interpretation is absurd and cannot be considered because it effectively denies to litigants

procedural due process.

CONCLUSION

For the reasons stated herein the Defendant-Respondent, Andrew Kessler, respectfully requests that this Court affirm the decision of the Appellate Division leaving its decision undisturbed and to grant such other and further relief as the Court deems just, equitable and proper.

Dated: October 15, 2022
Melville, NY



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NO RELATED LITIGATION

Pursuant to Court of Appeals Rules of Practice, 500.13(a) the Defendant-respondent, Andrew Kessler states that he is unaware of any litigation related to this appeal.

New York State Court of Appeals

Certification Pursuant to 22 NYCRR §500.1

I hereby certify pursuant to 22 NYCRR §500.1(j) that the foregoing Respondent's brief was prepared on a computer using Microsoft Word.

Proportional Type: Times New Roman, 14 Point, Double Spaced.

The total number of words in this brief inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules regulations, etc., is 9197.

Dated: October 12, 2022

Charles Wallshein Esq.
Counsel for Defendant-Respondent

Compendium of Authorities Cited in Respondent's Brief

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PUBLISH

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 8685/2013
MOTION DATE: 05/09/2017
MOTION SEQ. NO.: 001 MG
002 MD

---X
DEUTSCHE BANK NATIONAL TRUST CO.,

Plaintiffs,

-against-

MICHELLE DELISSER,

Defendants.
---X

PLAINTIFF'S ATTORNEY:
PARKER IBRAHIM & BERG, LLC
5 PENN PLAZA, STE. 2371
NEW YORK, NY 10001

DEFENDANT'S ATTORNEY:
CHARLES WALLSHEIN PLLC
115 BROADHOLLOW RD., STE. 350
MELVILLE, NY 11747

Upon the following papers numbered 1 to 54 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-37 (#001) ; Notice of Cross Motion and supporting papers 38-51 (#002) ; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 52-54 ; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Deutsche Bank National Trust Co. seeking an order: 1) granting summary judgment striking the answer and counterclaims of defendant Michelle DeLisser; 2) discontinuing the action against defendants designated as "John Doe"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Michelle DeLisser for an order pursuant to CPLR 3212 denying plaintiff's summary judgment motion based upon plaintiff's alleged failure to comply with RPAPL 1304 requirements is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $584,000.00 executed by defendant Michelle DeLisser on December 31, 2004 in favor of Washington Mutual Bank, FA. On the same date defendant DeLisser executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Under the terms of a Pooling and Servicing

Agreement effective July 1, 2005 the mortgage loan became an asset of Washington Mutual Mortgage Securities Corp. The mortgage loan was subsequently modified by a loan modification agreement dated December 6, 2008 creating a single lien in the sum of $641,532.13. The mortgage was thereafter transferred to plaintiff Deutsche Bank National Trust Co. by assignment dated February 19, 2013. Plaintiff claims that DeLisser has defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning July 1, 2009 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on March 26, 2013. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In support of her cross motion and in opposition to plaintiff's motion, defendant submits an affidavit and an attorney's affirmation and claims that plaintiff failed to strictly comply with RPAPL 1304 requirements since the 90-day notices defendant concedes were served upon her were defective. Defendant claims the notice envelopes contained additional notices which are not permissible under the terms of the statute. Defendant also claims that a decision rendered by Supreme Court Justice Asher in a foreclosure action entitled *U.S. Bank, N.A. v. Arens* (Index # 151-2013) dismissing a foreclosure complaint based upon plaintiff's failure to comply with RPAPL 1304 requirements, mandates and requires that this Court dismiss this foreclosure action based upon the doctrine of res judicata, since the identical issues raised and determined in the *Arens* action have been again raised in this action thereby necessitating the same result.

In opposition to the cross motion and in further support of its motion, plaintiff claims RPAPL 1304 requirements do not apply in this action based upon the defendant's concession in her verified answer that she did not reside in the mortgaged premises. Plaintiff claims that RPAPL 1304 90-day notice requirements only apply to "home loans" and therefore DeLisser's admission that she did not reside in the premises renders any discussion concerning RPAPL 1304 requirements irrelevant and moot. Plaintiff also asserts that even if the defendant resided in the premises, the evidence submitted provides adequate proof of compliance with RPAPL Section 1304 requirements. Plaintiff also claims that the doctrine of res judicata does not apply in this case and there is no binding precedent set by Justice Asher's determination dismissing an unrelated foreclosure proceeding which precludes this court from making its own determination based upon the underlying facts presented by the parties.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)). Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d

1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

Proper service of an RPAPL 1304 notice on borrower(s) is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type. The statute only applies to "home loans" which is defined as premises "which is or will be occupied by the borrower as the borrower's principal dwelling." (RPAPL 1304(5)(b)(iv); *see Wells Fargo Bank, N.A. v. Berkovits*, 143 AD3d 696, 38 NYS3d 579 (2nd Dept., 2016); *Mendel Group, Inc. v. Prince*, 114 AD3d 732, 980 NYS2d 519 (2nd Dept., 2014)).

With respect to plaintiff's summary judgment application, by defendant's failure to oppose the evidence submitted by the mortgage lender, the defendant has conceded that she was loaned the sum of $641,532.13 in December, 2008 on condition that she make timely monthly mortgage payments for a period of thirty six years. She admits that she breached the promise she made after making a total six payments. She has continued to be in default for more than eight years without making any payments.

The issues raised in these motions therefore does not concern defendant's more than eight year continuing failure to make mortgage payments, but rather whether the terms of a New York State statute (RPAPL 1304) enacted to promote efforts for lenders and borrowers to engage in settlement discussions prior to the commencement of a foreclosure action * (FN-1), apply to a mortgagor who has admitted in her verified answer that she does not reside in the mortgaged premises and, if so, whether the mortgage lender's inclusion of an additional one page notice addressed to service members and customers so violates the statute as to require the foreclosure action's dismissal.

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*1- The sponsorship letter memorandum in support of this July 31, 2008 legislation highlighted the three reasons for enacting the bill: 1) to promote efforts to encourage lenders and borrowers to reach a resolution to avoid foreclosure; 2) to combat fraudulent lending practices; and 3) to create new standards and protections for consumers related to sub-prime loans. The bill jacket makes clear that the intent was to provide a *preliminary* mechanism for defaulting homeowners to become more aware that legal action was about to be initiated against them by the mortgage lender should payments not be forthcoming and to introduce a compulsory court settlement conference program whereby the defaulting parties could meet with representatives of the mortgage lender and court personnel to resolve the borrowers' breach and to avoid foreclosure. In January, 2010 the statute was extended to include all "home loans".

With respect to the applicability of the notice requirements set forth in RPAPL 1304, defendant's verified answer contains a sworn denial conceding that she does not reside in the premises located at 7 Bender Court, Dix Hills, New York 11746-- which is the address of the mortgaged premises. Such denial constitutes a judicial admission which removes the mandates imposed by RPAPL 1304, since those mandates apply only to "home loans". As the defendant has admitted in her pleadings that she does not reside in the mortgaged premises there can be no reason to dismiss this action on the basis that the plaintiff violated RPAPL 1304 requirements since such requirements do not apply (*see Wells Fargo Bank, N.A. v. Berkovits, supra.*)). Accordingly defendant's cross motion must be denied in its entirety.

Moreover, even were this Court to determine that defendant's sworn denial has been somehow overcome by her own counsel's claim that she "moved out of the premises for a short time", or by her own belated assertion (contradicting counsel's claim) that: "My home is and always has been occupied by my family and me" (presumably, although not strictly defined in her affidavit, defendant is referring to the Dix Hills mortgaged premises), there remains no legal basis to dismiss the complaint based upon a failure to comply with the statute.

In this respect the defendant does not contest service of the 90-day pre-foreclosure notices and even admits that she received those notices in September, 2012. Rather, her defense is premised upon the fact that included within the 90-day notice envelopes, was a one page notice which defendant contends violated the "strict compliance" requirements imposed by interpretations of the statute by recent case law.

Since 2011, New York appellate courts have interpreted RPAPL 1304 as a defense (albeit not a jurisdictional defense) which requires service of a 90-day pre-foreclosure notice upon a borrower as a "condition precedent" to commencement of the foreclosure action with the mortgage lender having the burden of "strict compliance" of the notice requirements (*see Aurora Loan Services, LLC v. Weisblum, supra.; First National Bank of Chicago v. Silver, supra.; TD Bank, N.A. v. Leroy*, 121 AD3d 1256, 995 NYS2d 625 (3rd Dept., 2014)). Although the great majority of decisions interpreting the statute deal with the quantum of proof required to prove service of the notices, in this instance the issue raised by the defendant concerns "strict compliance" about the contents of the 90-day mailing notices. More specifically defendant claims that plaintiff's inclusion of a one page notice containing information addressed to service members and their dependents (required by the federal Service-members Civil Relief Act) together with two additional paragraphs (on the same page) informing "customers" about the federal "Homeowner Affordability and Stability" plan and about bankruptcy protections afforded pursuant to Title 11 of the United States Code, violates the statute's prohibition requiring a 'separate mailing" and therefore upon such violation this court is required to dismiss the action.

In the seminal case of *Aurora Loan Services, LLC v. Weisblum, supra.*, the appellate court held that the plaintiff was "required to prove ... strict compliance with RPAPL 1304" *(Id @ 106)* and that the lender failed to comply with the statute: 1) by failing to serve one of the borrowers with a 90-day notice; 2) by failing to submit an affidavit of service to establish proper service on both borrowers; and 3) by failing to include the list of counseling agencies in the notices which were sent. More importantly for purposes of this foreclosure action, the *Weisblum* decision recognized that there would be instances where a court may be authorized to exercise its discretion pursuant to CPLR 2001, in cases where "a defect or irregularity in the content of an RPAPL 1304 notice might

be so minimal as the warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of the action." (*Id @ 108).* This is one such case.

The statute does indeed state that the 90-day notice "must be sent in a separate envelope from any other mailing or notice" and requires that the notice "be in 14-point type". But the issue presented is the extent to which "strict compliance" of the statute is to be amplified (*2). The rationale recited by the court in the *Arens* decision states that the "stand alone" notice provision is necessary to avoid "confusion in whom the borrower should contact" and that all defaulting borrowers, both sophisticated and most importantly the unsophisticated, shall be "prejudiced by the plaintiff's conduct" if they are not able to raise this objection. The *Arens* decision goes on to state that "the only way to assure compliance with RPAPL 1304 on a *large scale* is for the courts of this state to continue to hold that RPAPL 1304 is a strict compliance statute as the court set forth in ***Weisblum*** (supra.), and to require plaintiffs to strictly comply with RPAPL 1304 or face dismissal of their cases."

But where is the prejudice? The underlying facts are undisputed. The defendant concedes that she had not made a payment since July 1, 2009 and that she was served with the 90-day notices more than 39 months later on September 13, 2012. The defendant also concedes that the notice itself complied with the statute and provided her with adequate notice of an impending foreclosure action unless she took affirmative steps to address her default. Defendant's affidavit acknowledges receipt of those notices containing all the required information which would enable her to communicate with either the lender or counseling agencies, yet fails to indicate that she took any action and or to indicate that she was in any sense "confused". Indeed the record is clear that the defendant did nothing, resulting in commencement of the action in March, 2013. More importantly, there is no evidence that inclusion of the one page notice resulted in any prejudice to the defendant's ability to take affirmative steps to address her default which is the purpose of the statute.

Under these circumstances, the inclusion of a one page, federally mandated notice to veterans (with two additional brief paragraph statements to lender customers informing them of their consumer rights under federal law) does not violate the "strict compliance" requirements stated in recent case law and clearly does not provide legal grounds for dismissing the complaint based upon any failure to strictly comply with RPAPL 1304. The one page notice constitutes merely a defect in the content of the envelope containing the required 90-day notice and it is this Court's inherent discretionary authority to determine that there is no violation of the statute by its inclusion with the 90-day notice (CPLR 2001). Defining "strict compliance" in the manner advocated by the defendant would defy common sense and logic, and lead to an absurd result of rewarding a mortgagor (be she sophisticated or unsophisticated), who was obviously cognizant of the fact that she was in default for more than three years at the time she concedes she received the mailing, and of the fact that such default would have consequences including the lender's right to foreclose, particularly in this instance where five years after receipt of the notice her breach has continued.

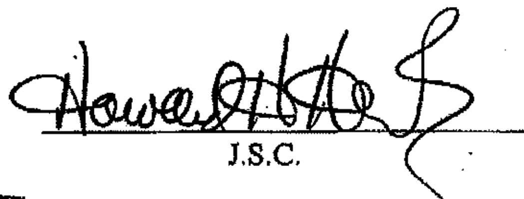
*2- This court assumes that it is not defense counsel's position that "strict compliance" includes a violation of every possible technical detail set forth in the statute such as advocating dismissal based upon a 13.95 or 13.99-point type (not 14-point as set forth in the statute) through counsel's testimonial use of a ruler or micrometer and that only significant statutory deviations are [illegible]

As to defendant's remaining argument that this Court is somehow bound to follow a ruling in an unrelated Supreme Court foreclosure action pursuant to the doctrine of res judicata, such contention is absurd. The doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated and is premised upon the principle that once a person is afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again (*Gramatan Homes v. Lopez*, 46 NY2d 484, 414 NYS2d 308 (1979); *Matter of JPMorgan Chase Bank*, 135 AD3d 762, 24 NYS 667 (2nd Dept., 2016)). This Court is not bound by a decision made by another Supreme Court Justice in a wholly unrelated foreclosure action and to suggest res judicata applies in this case is not worthy of further discussion.

Finally, as the defendant has failed to raise any evidence to address her remaining affirmative defenses (of the remaining 18 asserted in her answer) and 4 counterclaims in opposition to plaintiff's motion, those affirmative defenses and counterclaims must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, the defendant's cross motion is denied in its entirety. Plaintiff's motion seeking summary judgment is granted in its entirety. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: September 14, 2017



J.S.C.

Hon. Howard H. Heckman Jr.

2017 SEP 26 A 10: 01
JUDITH A. PASCALE
SUFFOLK COUNTY CLERK

COURT OF APPEALS
OF THE STATE OF NEW YORK

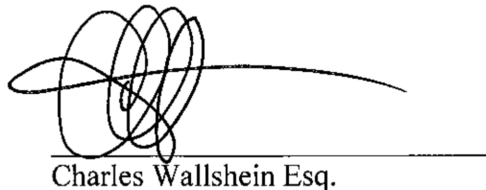
BANK OF AMERICA, N.A., *Plaintiff-Appellant,* -against- ANDREW KESSLER, *Defendant-Respondent,* -and- REIKO KESSLER and "JOHN DOE" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises, *Defendants*

APL-2022-00061

AFFIRMATION OF SERVICE

Charles Wallshein, an attorney admitted to practice in the State of New York makes this affirmation under penalty of perjury:
On Monday October 17, 2022, I served the THREE COPIES OF THE RESPONDENTS'S BRIEF IN THE ABOVE CAPTIONED ACTION
By Overnight Express Delivery via Federal Express upon counsel for the Appellant, Bryan, Cave, Leighton Paisner, LLP at the addresses designated, 1290 Avenue of the Americas, New York, N.Y. 10104, by depositing three true copies of same in a Next-Day Air Federal Express Offical Depository under the exclusive care of Federal Express, within the State of New York:

TO;
Bryan, Cave, Leighton Paisner, LLP
1290 Avenue of the Americas,
New York, N.Y. 10104



Charles Wallshein Esq.

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Dated: October 17, 2022