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APPELLATE MORTGAGE NEWSLETTER

ISSUE 2

PIB Appellate Mortgage Newsletter

We are pleased to share with you the latest issue of the PIB Appellate Mortgage Newsletter. This newsletter summarizes recent relevant appellate decisions from the following jurisdictions in which our lawyers practice: New York, New Jersey, Pennsylvania, Massachusetts, Connecticut and California.

For ease of reference, each case summary begins with a brief synopsis of the topics that are generally covered in that case.

Below are a few highlighted cases that are covered in this edition of the newsletter:

- **New York**: Compliance with RPAPL 1304 can establish compliance with pre-foreclosure notice requirement in mortgage (*Ambrosio*)
- **New York**: Second Circuit reverses $300,000.00 sanction for violation of a Bankruptcy Court order and Rule 3002.1(c) by improperly listing fees of $716.00 in mortgage statements (*Sensenich*)
- **Connecticut**: A foreclosing plaintiff may not rely upon an EMAP notice that was sent in connection with a prior foreclosure action (*Yazar*)
- **California**: Scope of title issues that can be adjudicated in post-foreclosure eviction actions continues to be narrow (*Struiksma*)

If there are any particular decisions that you would like to review or discuss, please do not hesitate to let us know.

- Scott, Jay and Jim

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NEW YORK

Compliance with RPAPL 1304 established compliance with pre-foreclosure notice requirement in mortgage: *Fed. Nat'l Mtge. Ass'n v. Ambrosio*, 2021 N.Y. App. Div. LEXIS 4784, 2021 NY Slip Op 04661, 2021 WL 3521002 (2nd Dept. Aug. 11, 2021): Defendants appeal from an order of the Supreme Court, Suffolk County (C. Randall Hinrichs, J.), granting foreclosing plaintiff's motion for summary judgment upon renewal and a second order appointing a referee to ascertain and compute the amount due and owing to the plaintiff. Appeal denied.

The Second Department found that there was no merit to defendants' argument that plaintiff failed to comply with RPAPL 1304 and the pre-foreclosure notice requirements in the mortgage. The Second Department concluded that Plaintiff's affidavits established compliance with RPAPL 1304, and that sending the RPAPL 1304 notice satisfied the pre-foreclosure notice requirement in the mortgage.

In reaching this conclusion, the Second Department found that "the plaintiff established, prima facie, that it strictly complied with RPAPL 1304 by submitting [the servicer's document management specialist's] affidavit, in which she 'described the procedure by which the RPAPL 1304 notice was mailed to the defendant[s] by both certified and first-class mail'. The plaintiff further established compliance with RPAPL 1304 by submitting [the servicer's] records showing that the RPAPL 1304 notice was sent, which were admissible pursuant to the business records exception to the hearsay rule. Moreover, pursuant to the terms of the mortgage at issue, the satisfaction of RPAPL 1304 also satisfied the notice-of-default requirement in the mortgage itself."

Second Circuit reverses $300,000.00 sanction of mortgagee for violation of Bankruptcy Court order and Rule 3002.1(c) where mortgagee improperly listed fees of $716.00 in mortgage statements: *PHH Mortg. Corp. v, Sensenich (In re Gravel)*, 2021 U.S. App. LEXIS 22752, __ F. 4th __, 2021 WL 3277211 (2nd Cir. Aug. 2, 2021): Mortgagee appeals: (i) sanctions of $225,000.00 (D. Vermont, Brown, J.) for violating bankruptcy court orders in two cases that declared debtors current on their mortgages; and (ii) sanctions of $75,000.00 for failing to give notice in three bankruptcy cases of new post-petition fees and charges as required under Bankr R. 3002.1(c).

By way of background, PHH listed a total of $716.00 in late fees, NSF fees, and property inspection fees in monthly mortgage statements after debtors filed bankruptcy. In two of the bankruptcy cases, the statement post-dated entry of an order declaring debtors current in their mortgages, whereas the statements included fees pre-dating entry of the order. In at least one of the bankruptcies, the mortgage statement noted that "the recorded fee and other account information was provided to comply with local bankruptcy rules and was 'not an attempt to collect a debt.'" In addition, the fee was not included in the "total payment due", and the only payment actually due was the principal/interest and escrow. After the Trustee filed the motion for sanctions, PHH removed the fees from the mortgage statements.

The bankruptcy court granted the Trustee's motion for sanctions, finding that: (1) PHH was in contempt of the orders declaring debtors current on their mortgages (the "Orders"); and (2) PHH violated Bankr R. 3002.1.

The Second Circuit vacated the $225,000.00 sanctions for violating the Orders. The Orders stated:

> [T]he debtors, by their payments through the Office of the Chapter 13 Trustee, have made all payments due during the pendency of this case ... including all monthly payments and any other charges or amounts due under their mortgage with PHH Mortgage Corporation…. [T]he mortgagee shall be precluded from disputing that the debtors are current (as set forth herein) in any other proceeding.

The Second Circuit noted that the "purpose of the civil contempt power is to induce compliance with a court's injunction", and concluded that "aside from enjoining acts in other proceedings, there is no injunction here (or similar command or equitable remedy) to enforce--i.e., the orders fail to describe an act or acts restrained or required … The Current Orders imposed a single injunction: PHH may not dispute the current status of the debtors 'in any other proceeding.' However broad 'other proceeding' may be in this context, there is fair ground of doubt as to whether it would reach PHH's out-of-court conduct in these proceedings."

As to the punitive sanctions for violating Bankr. R. 3002.1, the Second Circuit noted that this was a question of first impression among the Circuit courts. Bankr. R. 3002.1 governs installment payments on a home mortgage in a plan under chapter 13, and requires a mortgagee to "file and serve on ... the trustee a notice itemizing all fees, expenses, or charges" that the creditor "asserts are recoverable against the debtor." If a creditor fails to comply, a bankruptcy court may preclude the creditor from presenting the claim as evidence in the case, or award the debtor other relief including expenses and attorney's fees.

In finding that punitive damages are not available under Bankr. R. 3002.1, the Second Circuit noted that other sections of the Bankruptcy Code explicitly authorize punitive damages, whereas Bankr. R. 3002.1 is silent. Also, reading "other appropriate relief" in conjunction with "reasonable expenses and attorney's fees", which are compensatory forms of relief, suggests that relief under Bankr. R. 3002.1 is limited to non-punitive sanctions. In addition, the Second Circuit found that the other sanction available under the Rule – which "prevents a creditor from collecting an un-noticed claim so that a surprise deficiency does not frustrate the debtor's fresh start" – includes an exception for harmless non-compliance. This demonstrates that the sanction is tied to prejudice, and "the remedial goal of shielding the debtor from unforeseen charges, and thus is also not a punishment."

The Bankruptcy Court did not make a finding of bad faith to support a conclusion that the Bankruptcy Court acted within its inherent sanctioning powers. Rather, the Bankruptcy Court "said that PHH's actions 'cannot realistically be attributed to an innocent mistake' and raised 'serious concerns about whether PHH is making a good faith effort to comply with Rule 3002.1'." Moreover, if "inherent power is alone sufficient to affirm the $75,000 sanction, there would be no reason to consider Rule 3002.1."

Judge Bianco dissented as to vacating the $75,000.00 sanctions award for violating Bankr. R. 3002.1. He concluded that "the 'other appropriate relief' language in the sanctions authority conferred upon bankruptcy courts under Rule 3002.1(i) provided a proper basis to impose the $75,000 punitive sanction against PHH based upon its flagrant and repeated violations of the Rule."

Law office failure unsupported by a detailed and credible explanation of default will not suffice as a reasonable excuse to vacate default in opposing a motion: *Wells Fargo Bank, N.A. v. Singh*, 2021 N.Y. App. Div. LEXIS 4663, 2021 NY Slip Op 04575, 2021 WL 3177667 (2nd Dept. July 28, 2021): Defendants appeal from an order and judgment of foreclosure and sale of the Supreme Court, Queens County (Denis J. Butler, J.), entered upon earlier orders granting the plaintiff's unopposed motion for summary judgment and denying defendants' motion to vacate the orders granting plaintiff summary judgment and to dismiss the complaint. Appeal denied.

A defendant seeking to vacate default in opposing summary judgment is required to demonstrate: (i) a reasonable excuse for the default, and (ii) a potentially meritorious opposition to the motion. While "[t]he court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where the claim is supported by a detailed and credible explanation of the default", the Second Department opined that "mere neglect will not be accepted as a reasonable excuse." Here, the defendants gave nothing more than a "vague explanation as to why their prior counsel failed to appear at the calendar call of the motion and, more significantly, they did not offer any explanation as to why their prior counsel never served papers in opposition to the plaintiff's motion."

Unsubstantiated law office failure is not a reasonable excuse for failing to appear on the return date of a motion: *Bank of Am., N.A. v. Russell*, 2021 N.Y. App. Div. LEXIS 4740, 2021 NY Slip Op 04592, 2021 WL 3378329 (2nd Dept. Aug. 4, 2021): Defendant appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), denying her motion to vacate her default in appearing on the return date of the foreclosing plaintiff's motion for summary judgment, and to restore to the calendar her cross motion to dismiss the complaint. Appeal denied.

Defendant sought to demonstrate both a reasonable excuse and potentially meritorious defense to justify vacating default in appearing on the return date of the motion. Although law office failure may be a reasonable excuse, here defendant's counsel stated that he was unable to appear at the calendar call "because he was out of the country, and that he asked a colleague to cover the appearance, but the unidentified colleague was unable to do so." The Second Department found that "this claim of law office failure was unsubstantiated and, under the circumstances, did not constitute a reasonable excuse."

Motion to intervene untimely, where movant had knowledge of the mortgage for five years prior to filing the motion, even though the notice of pendency was expired when the movant acquired title: *1077 Madison St. v. Dickerson*, 2021 N.Y. App. Div. LEXIS 4707, 2021 NY Slip Op 04591, 2021 WL 3378315 (2nd Dept. Aug. 4, 2021): The proposed intervenor Quincy St. III Corp. ("Quincy") appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), denying its motion pursuant to CPLR 1012(a)(3) for leave to intervene in the action and, thereupon, to dismiss the complaint or, alternatively, to vacate the foreclosure judgment. Appeal denied.

By way of background, this action was commenced in 2006 and the original notice of pendency expired in 2009. In November 2013, Quincy acquired title to the mortgaged property. A closing statement listing the subject mortgage, and signed by Quincy, was attached to the deed. Plaintiff filed a new notice of pendency in August, 2015 and a foreclosure judgment was entered in October 2017. In June 2018, Quincy moved to intervene, which was denied as untimely.

In agreeing with the Supreme Court that Quincy's motion to intervene was untimely, the Second Department held that it must consider not just the passage of time, but whether it would result in a delay in resolving the action or otherwise cause prejudice:

> In considering whether a motion to intervene is timely, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a part. Here, Quincy moved for leave to intervene approximately five years after the November 2013 conveyance and approximately seven months after the order and judgment of foreclosure and sale was issued. While it is undisputed that the notice of pendency had lapsed and a new one had not been filed by November 2013 when Quincy purchased the property, it is also undisputed that Quincy had actual notice of the open and unsatisfied mortgage at that time and it does not contend that it lacked actual notice of the plaintiff's claim.

Complaint not subject to dismissal under CPLR 3215(c) where plaintiff filed RJI and proposed ex parte order of reference within one year of defendant's default: *1077 Madison St. v. Dickerson*, 2021 N.Y. App. Div. LEXIS 4718, 2021 NY Slip Op 04590, 2021 WL 3400581 (2nd Dept. Aug. 4, 2021): Defendant appeals from a judgment of foreclosure and sale of the Supreme Court, Kings County (Lawrence Knipel, J.) entered upon earlier orders (Peter P. Sweeney, J.), denying defendant's cross-motion to dismiss the Complaint as abandoned and granting plaintiff's motion for default judgment. Appeal denied.

The Second Department found that the foreclosure complaint should not be dismissed under CPLR 3215(c), because plaintiff's predecessor in interest timely filed an RJI and ex parte order of reference:

> Less than two months after the defendant's default in appearing or answering the complaint, the plaintiff's predecessor in interest took the preliminary step toward obtaining a default judgment of foreclosure and sale by filing an RJI and a proposed ex parte order of reference and paying a motion fee. Since proceedings for entry of the order and judgment of foreclosure and sale were initiated within one year of the defendant's default (see CPLR 3215[c]), there was no basis for dismissal of the complaint pursuant to CPLR 3215(c).

Plaintiff precluded from arguing that Banking Law §§ 6-l and 6-m do not apply, when it failed to make this argument in the lower court: *VFS Lending Jv II v. Krasinski*, 2021 N.Y. App. Div. LEXIS 4653, 2021 NY Slip Op 04572, 2021 WL 3177773 (2nd Dept. July 28, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Orange County (Elaine Slobod, J.), granting defendant's motion for summary judgment on counterclaims alleging violations of Banking Law §§ 6-l and 6-m. Appeal denied.

The Second Department found that Plaintiff's contention that Banking Law 6-l and 6-m do not apply was "improperly raised for the first time on appeal", and opined that "under the circumstances of this case, the issue does not involve a pure question of law that appears on the face of the record and could not have been avoided if brought to the Supreme Court's attention."

The Second Department also found to be meritless plaintiff's argument that the "Supreme Court lacked authority under Banking Law §§ 6-l and 6-m to void the subject loan":

> Banking Law § 6-l (10) provides, in pertinent part, that "[a] home loan agreement shall be rendered void" where the court finds "an intentional violation by the lender of this section". Here, the defendants established, prima facie, that certain violations of Banking Law § 6-l, which appear on the face of the loan documents, were intentional, and the plaintiff failed to raise a triable issue of fact in opposition. The court also properly determined that the defendants were entitled to damages pursuant to Banking Law § 6-l(7)(a)-(b).

Likewise, "Banking Law § 6-m(11) authorizes 'injunctive, declaratory and such other equitable relief' as the court deems appropriate."

Plaintiff established compliance with RPAPL 1304; defendants waived any right to a referee's hearing by declining to appear at the hearing, and were not prejudiced by lack of a hearing where the court considered their opposition to plaintiff's motion to confirm the referee report: *United States Bank N.A. v. Morton*, 2021 N.Y. App. Div. LEXIS 4681, 2021 NY Slip Op 04570, 2021 WL 3177786 (2nd Dept. July 28, 2021): Defendants appeal from an order and judgment of foreclosure and sale of the Supreme Court, Westchester County (William J. Giacomo, J.), granting plaintiff's motion to confirm a referee's report and directing the sale of the subject property. Appeal denied.

Defendants failed to raise any evidence of fraud to support their contention that plaintiff did not comply with RPAPL 1304, and plaintiff's affidavit established its strict compliance with RPAPL 1304. The Second Department opined that RPAPL 1304 "implicitly provided the means" to demonstrate compliance with that statute:

> By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure.

The Second Department also found that defendants failed to prove that they were prejudiced by the lack of a referee hearing:

> The referee did not violate CPLR 4313 by scheduling a hearing more than 20 days after the order of reference was issued because the matter was stayed when it was transferred to the settlement part. Furthermore, the defendants specifically declined to appear at a hearing, thereby waiving their right to appear. In any event, the defendants were not prejudiced by the lack of a hearing because the Supreme Court, as the ultimate arbiter of the dispute, was able to consider the defendants' evidence submitted in their opposition to the plaintiff's motion to confirm the referee's report.

Court has discretion to grant a motion to renew based on facts known to movant at time original motion was made, where court sua sponte raised lack of a power of attorney in denying plaintiff's motion for summary judgment: *NP162 v. Harding*, 2021 N.Y. App. Div. LEXIS 4719, 2021 NY Slip Op 04612, 2021 WL 3378805 (2nd Dept. Aug. 4, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Queens County (Diccia T. Pineda-Kirwan, J.), denying plaintiff's motion for leave to renew its prior motion for summary judgment and for an order of reference. Appeal granted to the extent of granting the motion to renew and remanding the matter to the Supreme Court for a determination on plaintiff's motion.

The Second Department concluded that the motion should have been granted, "since the plaintiff's initial failure to submit the power of attorney was raised sua sponte by the Court." In reaching this conclusion, the Second Department opined that "the requirement that a motion for leave to renew be based upon new or additional facts unknown to the movant at the time of the original motion is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made."

Failure to exercise due diligence to identify "John Doe" defendants subjects the complaint to dismissal as to that party; failure to timely file an affidavit of service is a procedural irregularity that can be cured by motion: *Wilmington Trust, N.A. v. Shasho*, 2021 N.Y. App. Div. LEXIS 4726, 2021 NY Slip Op 04632, 2021 WL 3378816 (2nd Dept. Aug. 4, 2021): Defendants appeal from a judgment of foreclosure and sale of the Supreme Court, Kings County (Noach Dear, J.), entered upon an earlier order granting plaintiff's motion: (i) for leave to amend the caption to substitute Esther Shasho for the defendant "John Doe", (ii) to deem proof of service to have been timely filed nunc pro tunc, (iii) for leave to enter a default judgment against the defendants, and (iv) for an order of reference, and denying defendants' cross motion pursuant to CPLR 3215(c) to dismiss the complaint, or, alternatively, for leave to serve and file an answer. Appeal granted and defendants granted leave to serve and file an answer.

Esther Shasho was served as a "John Doe" defendant and did not appear, resulting in plaintiff's motion to substitute her for the John Doe defendant. The Second Department concluded that the Supreme Court erred in grant the motion and applying the relation back doctrine to bar application of the statute of limitations. The Second Department opined that "parties are not to resort to the 'Jane Doe' procedure unless they exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, are unable to do so. Any failure to exercise due diligence to ascertain the 'Jane Doe's' name subjects the complaint to dismissal as to that party."

Here, the plaintiff did not meet that standard, because it did not demonstrate that it "made diligent efforts to ascertain the unknown party's identity prior to the expiration of the statute of limitations." Therefore, the Second Department found that the Supreme Court should have denied plaintiff's motion to the extent it sought leave to enter default judgment against Esther Shasho.

While defendant Elliot Shasho was served with the complaint, proof of service was not timely filed. In concluding that it was appropriate to deem proof of service on this defendant as timely filed *nunc pro tunc*, the Second Department opined that this was "a procedural irregularity, not a jurisdictional defect, that may be cured by motion, or sua sponte by the court in its discretion pursuant to CPLR 2004." This, however, did not end the inquiry, as such relief may only be granted "upon such terms as may be just, and only where a substantial right of a party is not prejudiced. The court may not make such relief retroactive, to the prejudice of a defendant, by placing the defendant in default as of a date prior to the order." As such, defendants were entitled to leave to serve an answer, and plaintiff's motion for default judgment against Elliott Shasho should have been denied.

Service by publication is appropriate where it is impracticable to serve by traditional methods: *JPMorgan Chase Bank, N.A. v. Perkin*, 2021 N.Y. App. Div. LEXIS 4713, 2021 NY Slip Op 04600, 2021 WL 3378318 (2nd Dept. Aug. 4, 2021): Defendant appeals from an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), denying his motion pursuant to CPLR 5015(a)(4) to vacate a judgment of foreclosure and sale, and to dismiss the complaint for lack of personal jurisdiction or, in the alternative, to compel the plaintiff to accept a late answer. Appeal denied.

By way of background, plaintiff was unable to serve defendant at the subject property, which was boarded up and vacant. The process server located another possible address for defendant but was informed by a neighbor that defendant did not live at that address. The process service agency unsuccessfully searched for other addresses for defendant, and plaintiff obtained an order authorizing service by publication and for the appointment of a guardian ad litem to accept service on the defendant's behalf. The guardian ad litem answered on the defendant's behalf, and raised no objection to the entry of a judgment of foreclosure and sale.

In denying the appeal, the Second Department concluded that it was impracticable to serve defendant by traditional methods, based upon the applicable standard:

> A court may permit service by publication, upon motion without notice, if traditional service is "impracticable" (CPLR 308[5]). The impracticability standard does not require the applicant to satisfy the more stringent standard of due diligence under CPLR 308(4) nor make an actual showing that service has been attempted pursuant to CPLR 308(1), (2), and (4). Whether service is impracticable depends on the facts and circumstances surrounding each case.

As the defendant failed to rebut the presumption of proper service in his affidavit, and failed to assert a reasonable excuse for his default or a meritorious defense, he was not entitled to vacate the judgment.

Defendant did not waive standing defense by failing to raise it in an answer or motion to dismiss; plaintiff failed to establish standing where it did not attach a copy of the note to the complaint or otherwise produce evidence that it was in possession of the note at the time the complaint was filed: *Wells Fargo Bank, N.A. v. Smith*, 2021 N.Y. App. Div. LEXIS 4709, 2021 NY Slip Op 04631, 2021 WL 3378819 (2nd Dept. Aug. 4, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Rockland County (Victor J. Alfieri, Jr., J.), denying its motion for an order of reference and granting defendant's cross motion pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing. Appeal denied.

Citing RPAPL 1302-a, the Second Department noted that "the defendant did not waive a standing defense pursuant to CPLR 3211(e) by virtue of her failure to raise it in an answer or a pre-answer motion to dismiss."

Further, defendant demonstrated that the plaintiff failed to attach a copy of the note to the complaint, and that the assignment of mortgage, which "post-dated the commencement of this action, did not reference the note." While plaintiff submitted an affidavit stating that plaintiff "was in possession of the Note at the time of commencement of this action," the statement was inadmissible hearsay; the affiant "did not annex a copy of the record from which she obtained that information."

The Second Department further opined that "the plaintiff did not submit any admissible evidence that the note, with its undated endorsement stamped on a purported allonge, was, in fact, in its possession on or before February 9, 2011, when the action was commenced, or that the purported allonge was connected or firmly attached to the note."

Under RPAPL 1302-a, defendants did not waive lack of standing as a defense when they raised it for the first time in opposition to plaintiff's motion for summary judgment: *Wells Fargo Bank, N.A. v. Ghobrial*, 2021 N.Y. App. Div. LEXIS 4710, 2021 NY Slip Op 04630, 2021 WL 3378392 (2nd Dept. Aug. 4, 2021): Defendants appeal from an order of the Supreme Court, Richmond County (Thomas P. Aliotta, J.), which granted foreclosing plaintiff's motion for summary judgment. Appeal granted.

Citing to RPAPL 1302-a, the Second Department held that defendants did not waive the standing defense by failing to raise it in the answer to the Complaint. Further, the Second Department found that defendants raised a triable issue of fact by submitting affidavits from two vice presidents of plaintiff, each of which attested that another entity besides plaintiff was in possession of the note when the foreclosure was commenced.

Defendant's default in appearing precluded her from raising various defenses, including lack of standing, but did not preclude her from contesting the amount due; Plaintiff was required to provide business records to support the inclusion of disbursements in the calculation of amount due: *Wells Fargo Bank, N.A. v. Campbell*, 2021 N.Y. App. Div. LEXIS 4661, 2021 NY Slip Op 04574, 2021 WL 3177663 (2nd Dept. July 28, 2021): Defendant appeals from judgment of foreclosure and sale of the Supreme Court, Kings County (Noach Dear, J.), entered upon an order granting plaintiff default judgment. Appeal granted; matter remitted to the Supreme Court for a new report computing the amount due.

The Second Department held that, because defendant defaulted in appearing, she "was precluded from raising the failure to satisfy a condition precedent, lack of standing, and predatory lending and unconscionability as defenses to this action." In other words, "[i]nasmuch as those defenses were never properly raised by the defendant, the plaintiff was not required to disprove them to obtain the relief it sought in its motion."

The Second Department further found, however, that defendant's default did not preclude her from contesting the amount owed and the referee's report should not have been confirmed. Reason being, plaintiff did not produce business records to support the tax and hazard insurance disbursements.

Plaintiff's affidavit was insufficient to establish defendant's default: *Wilmington Sav. Fund Soc'y v. McLaughlin*, 2021 N.Y. App. Div. LEXIS 4676, 2021 NY Slip Op 04576, 2021 WL 3177774 (2nd Dept. July 28, 2021): Defendants appeal from a judgment of foreclosure of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered upon an order granting plaintiff's motion for summary judgment. Appeal granted.

As the Second Department held, Plaintiff's affidavit did not establish defendant's default in payment. The affiant "did not specifically state that she had personal knowledge of the defendants' default in payment." Nor did she "identify which records she relied on to assert a default in payment, or attach any business records to her affidavit to substantiate the alleged default in payment."

Under *Engel*, voluntary discontinuance of prior action rendered current foreclosure timely: *United States Bank Trust, N.A. v. Collis*, 2021 N.Y. App. Div. LEXIS 4685, 2021 NY Slip Op 04571, 2021 WL 3177784 (2nd Dept. July 28, 2021): Plaintiff moves for leave to renew an appeal from an order of the Supreme Court, Kings County, which denied plaintiff's motion for summary judgment. Motion granted; the court's original decision is recalled and vacated; appeal granted; and plaintiff's motion for summary judgment granted.

Commencement of an action in 2009 accelerated the debt, but that action was subsequently voluntarily discontinued as evidenced by the order granting the plaintiff's motion to discontinue. As such, citing to *Freedom Mortgage v. Engel*, the Second Department opined that the instant action commenced in 2017 was timely.

Loan modification demonstrated that plaintiff revoked prior acceleration: *Emigrant Bank v. McDonald*, 2021 N.Y. App. Div. LEXIS 4734, 2021 NY Slip Op 04594, 2021 WL 3378788 (2nd Dept. August 4, 2021): Defendant, subordinate lienholder, appeals from a judgment of foreclosure and sale of the Supreme Court, Kings County (Noach Dear, J.), entered upon an earlier order granting plaintiff's motion for summary judgment and denying defendant's cross motion for summary judgment dismissing the complaint based on the expiration of the statute of limitations. Appeal denied.

"Plaintiff's submissions, which included a loan modification agreement entered into between the plaintiff and the borrowers, demonstrated, prima facie, that the plaintiff revoked its prior election to accelerate the mortgage debt less than six years after the commencement of the 2007 action."

Under *Engel*, defendant failed to establish, *prima facie*, that foreclosure was time barred where prior foreclosure was voluntarily discontinued: *United States Bank N.A. v. Francis*, 2021 N.Y. App. Div. LEXIS 4728, 2021 NY Slip Op 04628, 2021 WL 3378806 (2nd Dept. Aug. 4, 2021): Plaintiff moves for leave to renew appeals from: (1) an order of the Supreme Court, Queens County granting defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(5), and (2) an order denying plaintiff's motion for leave to renew and reargue defendant's motion. Motion granted, and order dismissing plaintiff's complaint vacated.

> Defendant established that the mortgage debt was accelerated when Deutsche Bank commenced the 2010 action and elected in the complaint to call due the entire amount secured by the mortgage. However, the defendant's motion papers also included a particular affirmation that Deutsche Bank had submitted in support of its request for a voluntary discontinuance and the order rendered thereon. The defendant's evidence that the debt was accelerated by commencement of the 2010 action, which was later discontinued voluntarily, failed to demonstrate, prima facie, that an action to foreclose the subject mortgage was time-barred (see Freedom Mtge. Corp. v Engel, 37 NY3d at 19).

Plaintiff's voluntarily discontinuance of prior foreclosure raised an issue of fact precluding defendant's motion for summary judgment to dismiss; plaintiff's failure to establish compliance with pre-foreclosure notice requirements precluded summary judgment in plaintiff's favor: *United States Bank N.A. v. Tiburcio*, 2021 N.Y. App. Div. LEXIS 4703, 2021 NY Slip Op 04629, 2021 WL 3378801 (2nd Dept. Aug. 4, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Suffolk County (Joseph Farneti, J.), denying its motion for summary judgment and granting defendant's cross motion for summary judgment dismissing the complaint. Appeal granted to the extent of vacating the order dismissing the complaint.

While the defendant demonstrated that the loan had been accelerated by the commencement of a prior foreclosure, the Second Department found that plaintiff raised an issue of fact by producing an order granting its motion to voluntarily discontinue the prior action.

Nor was plaintiff entitled to summary judgment, as it failed to establish compliance with the pre-foreclosure notice requirements: "[T]he plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by an individual with personal knowledge of that procedure. Thus, the plaintiff failed to establish strict compliance with RPAPL 1304 and failed to establish that it sent the 30-day notice of default pursuant to the terms of the mortgage."

Dismissal under CPLR 3215(c) was appropriate due to five-year delay in prosecuting foreclosure action: *United States Bank N.A. v. Moster*, 2021 N.Y. App. Div. LEXIS 4599, 2021 NY Slip Op 04507, 2021 WL 3073569 (2nd Dept. July 21, 2021): Defendant Bayridge Investors Corp. appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), granting foreclosing plaintiff's motion for leave to enter a default judgment against that defendant. Appeal granted.

The Second Department agreed with defendant's argument in opposition to plaintiff's motion for default that the complaint should be dismissed as abandoned pursuant to CPLR 3215(c) as to that defendant:

> Although Bayridge was served in November 2012, and defaulted in December 2012, the plaintiff did not initiate any proceedings to seek judgment against it until April 2018, more than five years later, when it moved for leave to enter a default judgment and for an order of reference. Although the plaintiff contended that foreclosure activity as to the property at issue was suspended during the months between October 2012 and March 2013 due to an order of the Federal Emergency Management Agency declaring the area in which the property is located to be a disaster area, and that the matter was the subject of a voluntary loss mitigation as well as in the foreclosure settlement part between May 2016 and July 2016, the plaintiff failed to provide a reasonable excuse for its failure to undertake proceedings in the three-year period between those events and the approximately two-year period after the matter was released from the foreclosure settlement part. The plaintiff's contention that the delay was due to its continuing litigation against another defendant in the action, who purportedly holds a subordinate mortgage on the property, does not constitute a reasonable excuse. The plaintiff failed to show how its efforts to serve one litigant and subsequent motion practice related to that other litigant hindered it from timely taking any steps to initiate proceedings for the entry of a default judgment against Bayridge.

Defendant waived the automatic stay under CPLR 321(c) where new counsel timely appeared on his behalf: *Wells Fargo Bank, N.A. v. Kurian*, 2021 N.Y. App. Div. LEXIS 4611, 2021 NY Slip Op 04509, 2021 WL 3073571 (2nd Dept. July 21, 2021): Defendant appeals from an order of the Supreme Court, Queens County (Thomas D. Raffaele, J.), denying her motion to stay the foreclosure sale of the subject property and to vacate an order and judgment of foreclosure and sale of the same court. Appeal denied.

This appeal involved the application of CPLR 321(c) – which automatically stays an action when a party's attorney dies, is suspended, or is otherwise unable to represent the party – to a factual posture of first impression in the Second Department. By way of background, in July 2012, the defendant (represented by counsel) interposed an answer. In March 2013, the defendant's attorney was suspended from the practice of law, which automatically stayed the action pursuant to CPLR 321(c). According to the plaintiff, the defendant failed to notify the parties or the Supreme Court of her attorney's suspension from the practice of law, and plaintiff did not serve a notice to appoint a new attorney upon defendant as required by CPLR 321(c). In April 2014, plaintiff served a motion for summary judgment on defendant. Six days later, new counsel appeared on behalf of defendant, and unsuccessfully opposed the motion. Defendant subsequently filed a motion to vacate on the grounds that plaintiff's motion was invalid, because the CPLR 321(c) stay was in effect when the motion was filed its motion, thus rendering any subsequent orders null and void. The Supreme Court denied defendant's motion, and defendant now appeals.

The Second Department acknowledged that plaintiff filed its motion "at a time when no event allowing the lifting of the CPLR 321(c) stay had yet occurred", and that "the plaintiff moved for summary judgment without having served a CPLR 321(c) notice demanding the appointment of new counsel and without abiding by the statutorily mandated 30-day waiting period that follows the notice." Nevertheless, the Second Department noted that defendant's new counsel appeared six days after the motion was filed, and that defendant's opposition was considered on the merits. As a result, the Second Department concluded that "the protection afforded to parties under CPLR 321(c) when attorneys die or are incapacitated, removed, suspended, or otherwise disabled was no longer necessary or relevant …

The appearance and activities of the defendant's new counsel operated, in effect, as a waiver of the protections otherwise afforded to the defendant by CPLR 321(c)."

In conclusion, the Second Department ruled that "even in the absence of service of a notice to appoint new counsel upon the unrepresented party as procedurally required by CPLR 321(c), a continuing stay under the statute may be waived by the unrepresented party's affirmative conduct of retaining new counsel, effective as of the time that new counsel formally appears in an action."

Voluntary discontinuance revoked acceleration under *Engel*; only an "express, contemporaneous" statement by the noteholder can subsequently defeat that revocation: *US Bank N.A. v. Szoffer*, 2021 N.Y. App. Div. LEXIS 4617, 2021 NY Slip Op 04508, 2021 WL 3073562 (2nd Dept. July 21, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Rockland County (Gerald E. Loehr, J.), granting defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them and for summary judgment on their counterclaims to discharge of record the subject mortgage, and denying plaintiff's cross motion for summary judgment partially dismissing the defendants' affirmative defenses and counterclaims. Appeal granted; Plaintiff's motion for partial summary judgment granted.

Although the mortgage debt was initially accelerated by the commencement of an earlier foreclosure action, the plaintiff had demonstrated, prima facie, that it discontinued that action, thus revoking acceleration of the debt.

Defendants failed to raise a triable issue of fact in opposition. Defendants argued that, "after the 2009 foreclosure action was discontinued, they called the lender to request a repayment plan and were told that no payments would be accepted because the loan was still in foreclosure status." Pursuant to the Court of Appeals' decision in *Freedom Mtge. Corp. v Engel*, however, the Second Department found that "only an 'express, contemporaneous' statement of the noteholder will defeat a revocation of acceleration effected by discontinuance of a prior action (37 NY3d at 32). Since the defendants have not asserted that any such express, contemporaneous statement was made at the time of the discontinuance, pursuant to *[Engel*], the discontinuance necessarily effected a revocation of the acceleration of the debt as a matter of law (*see id*.). Thus, this action was not time-barred."

Application for default judgment on non-verified foreclosure complaint was deficient where affidavit in support failed to attach business records: *Deutsche Bank Nat'l Trust Co. v. Hossain*, 2021 N.Y. App. Div. LEXIS 4608, 2021 NY Slip Op 04480, 2021 WL 3073530 (2nd Dept. July 21, 2021): Defendants appeal from an order of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), granting the plaintiff's unopposed motion for a judgment of foreclosure and sale. Judgment reversed, plaintiff's motion for leave to enter default judgment denied.

If a foreclosure complaint is not verified, CPLR 3215(f) requires that an application for default judgment include an affidavit setting forth proof of the facts constituting the claim, the default, and the amount due. Here, the Second Department opined that that the affidavit of the Document Execution Specialist employed by the plaintiff's servicing agent was insufficient to demonstrate "proof of the facts constituting the claim." Although she "asserted that she had personal knowledge of the merits of the plaintiff's cause of action based upon her review of various business records, … [S]ince the plaintiff failed to attach the business records upon which the affiant relied in her affidavit, her factual assertions based upon those records constituted inadmissible hearsay."

NEW JERSEY

Cause of action on note originally secured by mortgage barred by one-year statute of limitations: *Wilmington Sav. Fund Soc'y v. Raposo*, 2021 N.J. Super. Unpub. LEXIS 1335, 2021 WL 2764016 (App. Div. July 1, 2021): Plaintiff appeals the trial court's finding that its cause of action on a note was barred by the one-year statute of limitations found in N.J.S.A. 2A:50-8, and dismissal with prejudice. Affirmed.

By way of background, borrowers gave two mortgages that were assigned by Decision One to MERS the same day as origination. MERS transferred the first mortgage to Deutsche Bank, which filed a foreclosure action in 2009 naming MERS as nominee for Decision One as a defendant because of the second mortgage. Judgment was entered, and the property was sold at sheriff sale on April 8, 2014, extinguishing the second mortgage. At "some unspecified point in time after the foreclosure proceedings," the second note was transferred to Plaintiff, and Plaintiff filed the within action to enforce the note.

The Appellate Division agreed with the Superior Court that the action was barred by N.J.S.A. 2A:50-8, which "requires a lender to collect on a bond or note, originally secured by a mortgage, within one year of a foreclosure judgment or 'be thereafter completely and forever barred for lapse of time.'"

In addition, the Appellate Division rejected Wilmington Savings' argument that the exception in N.J.S.A. 2A:50-2.3(d) applied because it was a different institution than the first mortgagee that foreclosed.. NJSA 2A:50-2.3(d) provides an exception to N.J.S.A. 2A:50-8 where:

> a banking institution ... is the lender, and … where the mortgage so given is subject to the lien … of a prior mortgage … not held by such institution ....

The Appellate Division concluded that the N.J.S.A. 2A:50-2.3(d) exception does not apply because Wilmington Savings "stands in the shoes of Decision One." In reaching this decision, the Appellate Division noted:

> Wilmington Savings provides no information regarding its acquisition of the $50,000 note and the right to collect on that indebtedness, much less documentation that the note was acquired prior to foreclosure on the first mortgage and the subsequent sheriff's sale. We do know, however, that Decision One, Wilmington Savings' predecessor-in-interest, as we have said, was a named party to the foreclosure proceedings. Wilmington Savings does not claim that its predecessor-in-interest failed to receive notice of the foreclosure proceedings.

As the Appellate Division further found, simply because Decision One "assigned the first mortgage and note and the second mortgage and note to different parties does not change the source of the funds or the lender. Wilmington Savings offers no precedent which leads us to a contrary result. It is the fact that Decision One was the original lender for both the first and second mortgage that makes the one-year statute of limitations applicable. Thus, its successor-in-interest is not entitled to the exception that would have been in play had the second mortgage lender been a different banking institution."

Default judgment vacated when title holder not properly served with complaint; knowledge of foreclosure prior to foreclosure judgment does not estop ability to vacate default: *Tower DBW VI REO, LLC v. Sunshine Homes*, 2021 N.J. Super. Unpub. LEXIS 1343, 2021 WL 2692193 (App. Div. July 1, 2021): Plaintiff appeals the Chancery Division's order granting defendant Sunshine Homes and Management, Inc.'s ("SHMI's") motion to intervene and vacate final default judgment of foreclosure on a tax sale certificate. Affirmed, as the record supports the trial court's determination that SHMI was a title holder when the complaint was filed, and was not properly served the foreclosure complaint.

By way of background, when SHMI purchased the property, a scrivener's error deeded the property to "Sunshine Homes, **LLC**" (emphasis added), a non-existent entity, but listed SHMI's correct address of 700 Park Avenue in Elizabeth. The mortgage encumbering the property incorrectly listed another entity "Sunshine Homes**, Inc**." (emphasis added) as the mortgagee, but with SHMI's correct address. Prior to recording the deed and mortgage, Sunshine Homes, Inc.'s business status was revoked for failing to file an annual report for two consecutive years.

Plaintiff, the tax sale certificate holder, sent the pre-action notice addressed to "Sunshine Homes, LLC" to SHMI's correct address in Elizabeth. SHMI's counsel acknowledged receipt. Upon discovering that Sunshine Homes, LLC did not exist, Plaintiff served Sunshine Homes, Inc. – an entity that never had any ties to the property – by delivering the pleadings to its registered agent at an address in Montville. Shortly thereafter, a corrective deed was recorded transferring title from Sunshine Homes, LLC to SHMI. After judgment was entered, SHMI filed a motion to vacate, which was denied because it was not a party to the action, and thus lacked standing to contest the judgment. SHMI then filed a motion to intervene, which was granted, as SHMI's interest was not "an after acquired interest. … [T]he correct[ive] deed corrected only the title or the name of the party."

As an initial matter, the Appellate Division confirmed that SHMI's motion to vacate was timely, as it was filed within a reasonable time as required under R. 4:50-2. SHMI filed its motion to vacate three weeks after final judgment was entered, and its subsequent motion to intervene was filed 64 days after entry of final judgment, within the three-month deadline for seeking to reopen a foreclosure judgment under NJSA 54:5-87.

In addition, SHMI was "deprived of procedural due process because it was not served the summons and complaint. … [K]nowledge of a pending foreclosure before entry of foreclosure judgment does not estop a party from seeking relief where the judgment is void due to the lack of proper service." The Appellate Division also noted that, although the deed and mortgage misidentified the owner, they listed SHMI's correct address, and there was "no showing that SHMI was responsible for the confusion regarding the deed owner of the property or the inability of plaintiff to identify the proper owner on whom to serve the foreclosure complaint."

Likewise, there was "no merit in plaintiff's assertion that SHMI, the property's title holder at the time the complaint was filed, was required to intervene before entry of final judgment [as] there is no dispute that SHMI was the property's owner despite the scrivener's error on the deed. In addition, SHMI's right to redeem was not "cut off" by the final default judgment, because the judgment was void due to lack of jurisdiction caused by lack of service on SHMI.

PENNSYLVANIA

Failure to file Pa. R.A.P. 1925(b) statement of errors subjects appeal to dismissal: *Bank of Am. N.A. v. Papapietro*, 2021 Pa. Super. Unpub. LEXIS 1854, 2021 WL 2933135 (Pa. Super. Ct. July 12, 2021): Defendants in this foreclosure action appeal from an order entered in the Wayne County Court of Common Pleas, denying their motion for leave to file a post-trial motion *nunc pro tunc*. Appeal denied.

Defendants were directed to file a Pa. R.A.P. 1925(b) statement of errors complained of on appeal. As they failed to do so within the deadline, the Superior Court of Pennsylvania held that defendants waived all issues on appeal.

MASSACHUSETTS

To vacate a non-judicial foreclosure and sale, a borrower is required to show that the failure to comply with the Right to Cure notice requirement was "fundamentally unfair": *Carny v. Provident Funding Assocs., L.P.*, 2021 Mass. App. Unpub. LEXIS 558, 100 Mass. App. Ct. 1104, 2021 WL 3277268 (Mass. App. Ct. Aug. 2, 2021): Plaintiff borrower appeals from the dismissal of her complaint after a non-jury trial. Dismissal affirmed.

Plaintiff brought claims for wrongful foreclosure, negligent misrepresentation and breach of good faith and fair dealing against the defendant mortgagee, in connection with defendant's non-judicial foreclosure and sale of the subject property in 2015, based on a default that occurred in 2012. Plaintiff specifically alleged that defendant failed to comply General Laws c. 244, § 35A, requiring the mortgagee to provide a pre-foreclosure notice and opportunity to cure.

The Appeals Court found plaintiff's claims to be baseless. First, because the foreclosure was by way of power of sale, plaintiff was required to "prove more than a mere violation of § 35A, and instead bears the burden of showing that the alleged violation rendered the foreclosure so fundamentally unfair that [the borrower] is entitled to affirmative equitable relief, specifically the setting aside of the foreclosure sale."

Further, the Appeals Court found it irrelevant as to whether the lender improperly relied on a "right to cure" notice that was sent in connection with an earlier default that had been cured. Reason being, plaintiff was aware of the arrearage and provided an opportunity to cure it:

> Even assuming that Provident had been required to provide the plaintiff with a new notice and failed to do so, we are not persuaded that Provident's actions deprived the plaintiff of the ability to cure her deficiency as contemplated by § 35A. In reaching this conclusion, we note that Provident provided the plaintiff with updates on the amounts due; at a minimum, on April 3, 2012, Provident wrote to the plaintiff informing her of the default (providing her with the amount of the then-current arrearage, and specifying the date by which payment had to be made to avoid acceleration of the loan) and in 2015, sent a "reinstatement letter" listing the amount necessary to bring the loan obligations current. Additionally, before the foreclosure sale was completed, Provident provided the plaintiff with multiple modification packages, and yet, despite these ongoing communications, the plaintiff neither contacted Provident for more specific arrearage amounts before the sale nor fully completed any loan modification package.

Likewise, defendant did not breach the covenant of good faith and fair dealing. Plaintiff did not respond to defendant's multiple invitations to apply for a loan modification, until after the foreclosure sale was scheduled and then failed to provide the missing information requested by defendant to complete the application. Nor was defendant under any obligation, under the terms of the mortgage or otherwise, to accept a partial payment of $50,000.00 towards the arrears in exchange for a stay of the auction so that plaintiff could "come up with a plan to cure the arrears or sell the property."

Dismissal of bankruptcy renders debtor's appeal of order directing trustee to disburse insurance funds to mortgagee moot: *Sundaram v. Briry, LLC (In re Sundaram)*, 2021 U.S. App. LEXIS 24184, __ F.4th __, 2021 WL 3578339 (1st Cir. Aug. 13, 2021): Plaintiff appeals the Bankruptcy Appellate Panel's dismissal of her appeal as moot. Appeal denied.

By way of background, plaintiff's home was damaged and the insurer issued a check payable to the plaintiff, plaintiff's lawyer and the mortgagee. Plaintiff filed bankruptcy in the District of Rhode Island, and the funds were paid over to the trustee. The mortgagee obtained an order in the bankruptcy directing payment of the funds to the mortgagee based on a provision in the mortgage, stipulating that any insurance proceeds be paid directly thereto should the note be in default (which it was).

Plaintiff then filed a motion for reconsideration and a separate motion to dismiss the bankruptcy. Prior to the return date of the motions, the trustee disbursed the funds to the mortgagee. On the return date, plaintiff's bankruptcy was voluntarily dismissed, and the court denied the motion for reconsideration, finding that the mortgagee had a valid lien on the funds. The Bankruptcy Appellate Panel denied plaintiff's appeal as moot, because the bankruptcy had been dismissed.

The First Circuit rejected plaintiff's argument that her appeal was not moot because it did not concern the reorganization of the estate. As the First Circuit opined, "once the underlying bankruptcy proceeding is dismissed, the possibility of reorganization evaporates. Thus, the goal of reorganizing the debtor's affairs is no longer attainable, and the parties no longer have a live or continuing interest in the outcome. At that point, any opinion that a reviewing court might provide would be merely advisory, as there is no longer any underlying bankruptcy proceeding to which the case could be remanded."

Further, the First Circuit concluded that plaintiff's claims were not "ancillary to the bankruptcy", which would have provided an exception to the general rule that an appeal is moot following dismissal of the underlying bankruptcy. Here, the "insurance-settlement funds were placed in the hands of the Trustee in the course of the anticipated reorganization of the bankruptcy estate, and there is no principled way in which it can be said that the appellant's claim to those funds is ancillary to the putative reorganization."

Finally, the First Circuit found to be meritless Plaintiff's argument that the distribution of the funds violated 11 USC § 1362(a)(2) and 11 USC § 349(b)(3). Those statutes, when read together, require the trustee to return all funds on hand to the debtor upon dismissal of a chapter 13 bankruptcy where a repayment plan has not been confirmed. Here, however, the bankruptcy court ordered disbursement of the funds four days prior to the filing of plaintiff's motion to dismiss the bankruptcy and the trustee had disbursed the funds to the mortgagee prior to the dismissal of the bankruptcy. As such, those statutes are inapplicable.

CONNECTICUT

Foreclosing plaintiff may not rely upon an EMAP notice sent in connection with a prior foreclosure action: *Keybank, N.A. v. Yazar*, 2021 Conn. App. LEXIS 274, 206 Conn. App. 623, 2021 WL 3478322 (App. Ct. of Conn. Aug. 10, 2021): Defendant appeals from a judgment of strict foreclosure rendered in favor of foreclosing plaintiff. Judgment reversed.

The Appellate Court of Connecticut held that the foreclosing plaintiff's failure to serve a notice in accordance with the Emergency Mortgage Assistance Program ("EMAP") prior to the commencement of the subject action deprived the trial court of subject matter jurisdiction, warranting a dismissal of the action.

Pursuant to Conn. Gen. Stat. § 8-265cc, *et seq.*, in foreclosure actions relating to certain types of loans (including the one at issue), the plaintiff is required to serve the defendant with a notice concerning the availability of EMAP as a condition precedent to commencing proceedings. EMAP is an assistance program available to homeowners who fall behind on their mortgage payments as a result of financial hardship. To qualify, the homeowner must live in the property facing foreclosure.

In this matter, the plaintiff's predecessor in interest had served the defendant/borrower Ozlem Yazar with an EMAP notice on August 22, 2016, prior to commencing an initial foreclosure proceeding on January 16, 2017. After the first action was dismissed, the plaintiff filed a second foreclosure action on August 22, 2017. Plaintiff, however, did not serve a new EMAP notice on defendant prior to commencing this second proceeding.

After the Superior Court in the judicial district of Stamford-Norwalk rendered judgment of strict foreclosure in the plaintiff's favor, the defendant appealed, asserting that the plaintiff failed to comply with Conn. Gen. Stat.§ 8-265ee(a), the notice provision of EMAP. The Appellate Court agreed, finding that the plaintiff could not rely upon the EMAP notice served prior to commencement of the first action to satisfy the statutory requirement. Rather, plaintiff was required to serve a new EMAP notice prior to commencing the second action, and it failed to do so. Accordingly, the court lacked subject matter jurisdiction, and the Appellate Court remanded with direction to dismiss the action.

Entity that obtained title to property via quitclaim deed from the borrower had no standing to challenge the adequacy of the notice of acceleration and default: *Caliber Home Loans, Inc. v. Zeller*, 2021 Conn. App. LEXIS 219, 205 Conn. App. 642, 2021 WL 2754885 (App. Ct. of Conn. July 6, 2021): Defendant appeals from a judgment of strict foreclosure rendered in favor of plaintiff. Judgment reversed and remanded with direction to instead render a judgment of foreclosure by sale.

This foreclosure action was contested by defendant Cambridge Holdings, Inc. ("Cambridge"), an entity that obtained title to the subject property via quitclaim deed from the borrower on the subject loan. The matter proceeded to trial in the Superior Court for the judicial district of Hartford, and the court entered judgment of strict foreclosure in favor of the plaintiff.

Cambridge appealed the trial court's ruling to the Appellate Court of Connecticut on multiple grounds. First, Cambridge challenged the adequacy of the notice of acceleration and default, a pre-foreclosure notice sent to the borrower under the terms of the note. The Appellate Court agreed with the trial court that Cambridge lacked standing to do so. Cambridge was not a foreseeable interested party, and the transfer of interest in the property via quitclaim deed did not transfer any rights in the underlying note and mortgage to Cambridge.

Cambridge also argued that the plaintiff had failed to prove standing to foreclose, failed to prove the amount of outstanding debt, and that it had proven its special defenses of payment, equitable estoppel and unclean hands. As to these arguments, the Appellate Court held that: (1) plaintiff proved standing by demonstrating that it was in possession of the original note, endorsed in blank; (2) the trial court properly rejected Cambridge's claims that it was unaware that payments it had submitted had not been accepted, as they were not credible; and (3) the special defenses were properly rejected, and the trial court's findings in rejecting the evidence Cambridge submitted in support of its payment defense were not clearly erroneous.

Finally, Cambridge asserted that the trial court abused its discretion by ordering a judgment of strict foreclosure rather than a foreclosure by sale, as there was substantial equity in the property. The Appellate Court agreed with the defendant only on this point, and it remanded the case with direction to render a foreclosure by sale.

CALIFORNIA

Scope of title issues that can be adjudicated in post-foreclosure eviction action is narrow: *Struiksma v. Ocwen Loan Servicing*, 2021 Cal. App. LEXIS 574, 66 Cal. App. 5th 546, 2021 WL 2948579 (California Court of Appeal, 4th District, July 14, 2021): Despite long-standing, established case law on the degree to which title issues can be litigated in a post-foreclosure eviction, it appears that some trial courts still take a more expansive view of the preclusive effect of an unlawful detainer judgment.

Here, plaintiffs lost ownership of the property at a foreclosure sale in 2018 at which the property was sold to a third party. The third party buyer filed a post-foreclosure action pursuant to California Code of Civil Procedure § 1161a and obtained a default judgment for possession against plaintiffs in March 2019. In January 2019, plaintiffs filed a wrongful foreclosure lawsuit alleging a number of theories upon which they sought to invalidate the foreclosure sale. The foreclosing lender and the servicer filed a demurrer to the plaintiff's complaint on the theory that plaintiffs' wrongful foreclosure claims were barred by virtue of the judgment entered in the unlawful detainer proceeding. The court sustained the demurrer without leave to amend and plaintiffs appealed.

The Court of Appeal reversed on the issue of the preclusive effect of the unlawful detainer judgment on the plaintiffs' wrongful foreclosure claims. The Court specifically stated that it "publish[es] this case to clarify the preclusive effect of an unlawful detainer action under section 1161a. In such a proceeding, the court must determine whether the purchaser duly perfected title. But this is a limited inquiry focusing on how the trustee's sale is conducted. Issues of title outside this narrow scope need not be raised and are not precluded in subsequent lawsuits."

The Court cited the California Supreme Court in concluding that, "[i]t is true that where the purchaser at a trustee's sale proceeds under section 1161a . . . he must prove his acquisition of title by purchase at the sale; *but it is only to this limited extent, as provided by the statute, that the title may be litigated in such a proceeding.*" (citations omitted) (emphasis in original).*)"* In short, "title issues generally cannot be raised in unlawful detainer actions."

Third party's claim of adverse possession does not prevail over pre-existing lien held by trust deed beneficiary: *Bailey v. Citibank, N.A.*, 2021 Cal. App. LEXIS 560, 68 Cal. App. 5th 335, 2021 WL 2801633 (California Court of Appeal, 5th District, July 6, 2021): Plaintiffs took possession of an unoccupied property in 2013 without the permission of the owners, who apparently vacated the property after defaulting on a 2005 residential home loan. Plaintiffs claimed the property as their own, made improvements, and paid the real estate taxes over the next five years.

In 2017, an assignment was recorded transferring to defendant Citibank the deed of trust that secured repayment of the 2005 loan. Thereafter, Citibank commenced foreclosure proceedings that culminated in a trustee's sale on April 2, 2018, at which title passed to Citibank as evidenced by the trustee's deed recorded on April 12, 2018.

In July 2018, the plaintiffs filed a quiet title action asserting ownership of the property by virtue of their adverse possession of the property for more than five years. Initially, Citibank failed to appear in the action and its default was entered. Following an "evidentiary" hearing on plaintiffs' quiet title claim, the court entered judgment in favor of plaintiffs, finding that title to the property was vested in plaintiffs, not Citibank.

After judgment was entered, Citibank filed a motion to set aside its default and the judgment, which motion included an attorney affidavit of fault pursuant to California Code of Civil Procedure § 473. The court granted Citibank's motion and plaintiffs appealed on the ground that Citibank's attorney was not retained until after Citibank's default was entered. Citibank filed a cross-appeal, arguing that even if relief under Section 473 was not available, judgment in favor of plaintiffs was improper.

On appeal, the Court of Appeal found that the trial court erred in granting relief under Section 473 and, thus, reversed the ruling setting aside Citibank's default. The Court also held, however, that title was vested in Citibank as a matter of law. A claim of adverse possession has the following elements: (1) actual possession of the property by the plaintiff under a claim of right or color of title; (2) open and notorious possession of the property; (3) possession that is adverse and hostile to the actual owner; (4) possession is continuous and uninterrupted for at least five years; and (5) plaintiff has paid all taxes over the five-year period.

In ruling in favor of Citibank, the Court reasoned: "At its most basis level, the doctrine of adverse possession relates to *possessory* estates ... Therefore, under the particular facts of this case, prior to Citibank gaining possessory rights at the time of the foreclosure sale and delivery of the trustee's deed in 2018, plaintiffs' occupation of the property was not hostile to Citibank's rights as a secured lienholder, and therefore the five-year statute was not running against Citibank ...." In short, "a trust deed beneficiary does not have a right to possession, but stands in substance as a lien holder, [and thus] the occupation of the property by a person seeking to acquire title by adverse possession would not be considered hostile to the trust deed beneficiary whose rights under the preexisting trust deed would be unaffected.... Instead, the five-year period of the statute of limitations would not commence to run against a foreclosing mortgagee until the deed was delivered to him at a sheriff's sale."