

High Court Answers Open Questions Concerning RPAPL 1304 and 1306

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On the heels of its landmark *Freedom Mortgage Corp. v. Engel* decision, the Court of Appeals, responding to two certified questions from the Second Circuit Court of Appeals, took the opportunity to further clarify New York foreclosure law. On March 30, 2021, the high court answered the open questions of (1) what evidentiary showing a borrower must make to rebut a lender's proof of a standard office procedure to establish compliance with RPAPL 1304's notice requirement and (2) whether lenders must provide information for all borrowers in RPAPL 1306 proof of filing statements. With respect to the first question, the court concluded, as lenders have long argued, that proof of a material deviation from a lender's routine office practice, which calls into question whether an RPAPL 1304 ninety-day notice was properly mailed, must be made. As for the second question, the court concluded, in another win for lenders, that lenders must furnish information for only one borrower in RPAPL 1306 proof of filing statements. The high court's answers to the Second Circuit's questions not only resolve open questions concerning RPAPL 1304 and 1306, but also, perhaps more importantly, indicate that the high court is committed to both clarifying and rationalizing foreclosure law in New York.

The facts in *CIT Bank N.A. v. Schiffman*, 2021 NY Slip Op 01933, are straightforward. The plaintiff bank commenced a foreclosure action against the defendant borrowers, a husband and wife, in the United States District Court for the Eastern District of New York. The borrowers answered the complaint asserting, among other defenses, that the bank failed to comply with RPAPL 1304 and 1306. The bank moved for summary judgment arguing that it complied with RPAPL 1304 and 1306 by both mailing ninety-day notices in accordance with RPAPL 1304 and timely filing a proof of filing statement with the Department of Financial Services ("DFS") pursuant to RPAPL 1306. To demonstrate compliance with RPAPL 1304, the bank submitted an affidavit of an employee that attested to her personal knowledge of the bank's routine office practice relating to the generation, addressing and mailing of ninety-day notices, which she described in her affidavit. Copies of the notices and envelopes were attached. As relevant to the first certified question, the employee stated in her affidavit that as part of the bank's standard practice, envelopes for ninety-day notices are "created upon default." A copy of the RPAPL 1306 proof of filing statement was also attached to the affidavit. However, the statement provided information for only one borrower. The borrowers opposed the motion, denying receipt of the ninety-day notices and arguing that the affidavit was insufficient to create a presumption of receipt. As for RPAPL 1306, the borrowers argued that the proof of filing statement was insufficient because information for only one borrower was provided. The District Court granted the bank's motion concluding that it complied with RPAPL 1304 and 1306. The borrowers appealed.

On appeal, the borrowers argued that the District Court erred in concluding that the bank complied with RPAPL 1304 because it was evident from the ninety-day notices, dated almost a year after they defaulted, that the bank deviated from its routine office practice of generating envelopes for ninety-day notices "upon default." The borrowers also repeated their argument that the bank failed to comply with RPAPL 1306 because information for only one borrower was provided. Rather than decide these issues, the Second Circuit, determining that guidance was necessary, certified both questions to the Court of Appeals for review.

The Court of Appeals began its analysis by examining RPAPL 1304's text and legislative history, finding that neither indicate what proof a lender must proffer to demonstrate compliance with the statute's notice requirements. Nevertheless, the court observed that in analogous circumstances it has recognized that a party may establish that a document was mailed through either evidence of actual mailing or proof of a sender's routine business practice for generating, addressing and mailing similar documents. The court observed that when the second method is utilized, evidence of an established and regularly followed office procedure may give rise to a rebuttable presumption that a document was mailed and received by the intended recipient. In order for the presumption to arise however, the procedure must be geared to ensure the likelihood that documents are always properly addressed and mailed. Such proof need not be offered by the person charged with mailing the document, but can be offered in the form of an affidavit of an employee with personal knowledge of the practices used by the company at the time of the mailing.

After discussing the presumption, the court turned its attention to the issue at hand, holding, for the first time, that in order to rebut the presumption:

there must be proof of a material deviation from an aspect of the office procedure that would call into doubt whether the [RPAPL 1304] notice was properly mailed, impacting the likelihood of delivery to the intended recipient.

The court explained that "the crux of the inquiry is whether the evidence of a defect casts doubt on the reliability of a key aspect of the process such that the inference that the notice was properly prepared and mailed is significantly undermined." Thus, the court concluded, "Minor deviations of little consequence are insufficient."

In applying these principles, the court observed that the evidence necessary to rebut the presumption is dependent upon the nature and practices detailed in the employee's affidavit. The court noted that contextual considerations, such as a bank's deviation from its routine office practice because of mortgage assignments, might also play a role in the analysis. Ultimately, though, the court passed on deciding whether the presumption was rebutted in this case; leaving that determination to the Second Circuit.

Next, the Court of Appeals addressed the question of whether lenders are required to furnish information for all borrowers on a multi-borrower loan in RPAPL 1306 proof of filing statements. As with the first question, the court began its analysis by reviewing the statutory text and legislative history. Although neither resolved the question, the court utilized well-settled principles of statutory interpretation to conclude, based on a plain meaning reading, that information for only one borrower is required. The court noted further that its determination is supported by the statute's primary purpose, to provide DFS with statewide information on properties at risk of foreclosure. Indeed, in certain circumstances, such as when the borrowers are married, including information on a second borrower would be redundant.

The high court's answers to the Second Circuit's certified questions are a welcome relief to the mortgage servicing industry. Lenders no longer need to fear that minor deviations from their routine office practices for generating and mailing ninety-day notices and/or furnishing information for only one borrower on multi-borrower loans will inevitably result in dismissal. Notwithstanding the foregoing, we recommend that lenders try not to deviate from their routine office practices and provide information for all borrowers.