SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Bank of Am. v. Sands

2026 NY Slip Op 02443 · No. Case No. 2025-01291; Appeal No. 6456; Index No. 810068/10 · Decided April 23, 2026

SUMMARY

The Appellate Division, First Department unanimously affirmed a foreclosure judgment in favor of Bank of America. The court held that the Referee's report was properly confirmed based on business records and that the absence of a CPLR 4313 hearing did not prejudice the defendant. The court declined to review the defendant's challenge to service of the RPAPL 1304 notice and held on the merits that the loan was not a statutory home loan because the condominium was not subject to the required primary-residence occupancy.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Manzanet-Daniels, J.P.; Kennedy, J.; González, J.; Pitt-Burke, J.; Rosado, J.
JURISDICTION	New York Supreme Court, Appellate Division, First Department
DECIDED	April 23, 2026
DOCKET	Case No. 2025-01291; Appeal No. 6456; Index No. 810068/10
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from an order granting plaintiff's motion for a judgment of foreclosure and sale and confirming the Referee's report. The appeal was deemed taken from the subsequently entered judgment awarding judgment to plaintiff.
STANDARD OF REVIEW	The Referee's findings were reviewed for whether they were substantially supported by the record. The court also applied preservation and prejudice principles to the unreviewed service challenge.
PRECEDENTIAL VALUE	published
PARTIES	Nicholas J. Sands also known as Nicholas Sands v. Bank of America

TOPICS

foreclosure | mortgages | appellate procedure | evidence | statutory interpretation

PRACTICE AREAS

mortgage foreclosure | real estate litigation | appellate practice | evidence

QUESTIONS PRESENTED

1. Whether Supreme Court properly confirmed the Referee's report concerning the amount due on the mortgage.
2. Whether plaintiff's supporting documents and calculations were properly authenticated and submitted as business records.
3. Whether the failure to provide notice of a hearing under CPLR 4313 required reversal or otherwise prejudiced defendant.
4. Whether defendant's challenge to service of the 90-day notice under RPAPL 1304 was preserved for appellate review.
5. Whether the loan qualified as a statutory home loan under RPAPL 1304(6)(a)(1)(iii).

HOLDINGS

1. Supreme Court properly confirmed the Referee's report because its findings concerning the amount due were substantially supported by the record.
2. The failure to notice a hearing under CPLR 4313 was immaterial because defendant was not prejudiced and had an opportunity to contest the Referee's report.
3. The court declined to review defendant's challenge to proper service of the RPAPL 1304 90-day notice because defendant abandoned his appeal from the prior summary-judgment order and failed to raise the issue in opposition to the motion for a judgment of foreclosure and sale.
4. The loan was not a home loan under RPAPL 1304(6)(a)(1)(iii).

KEY QUOTATIONS

> *"The failure to notice a hearing under CPLR 4313 is immaterial."* ([*1])

> *"The loan documents demonstrate that the loan in question was not a "home loan" under the statutory definition (RPAPL 1304[6][a][1][iii])."* ([*2])

FACTUAL BACKGROUND

The foreclosure concerned a condominium unit securing a mortgage loan. Defendant admitted that he did not live in the unit when he signed the original mortgage, the original 1-4 Family Rider deleted the borrower-occupancy requirement, and the modified mortgage contained a second-home rider precluding occupancy as a primary residence. Plaintiff's affiant supported the amount due with business records, including a payment history after default, and defendant had an opportunity to present evidence challenging the calculations but did not do so.

PROCEDURAL HISTORY

Supreme Court, New York County, granted plaintiff's motion for a judgment of foreclosure and sale and confirmed the Referee's report concerning the amount due on the mortgage. The court later entered judgment for plaintiff. The Appellate Division deemed the appeal to be from that judgment and unanimously affirmed it with costs.

DISPOSITION

affirmed

CASES CITED

- HSBC Bank USA, N.A. v. Wu, 242 AD3d 599, 601 (1st Dept. 2025)
- Matter of Dubuche v. New York City Tr. Auth., 230 AD3d 1026, 1027 (1st Dept. 2024)
- U.S. Bank N.A. v. Tiburcio, 242 AD3d 591, 592 (1st Dept. 2025)
- Aurora Loan Servs., LLC v. Taylor, 114 AD3d 627, 630 (2d Dept. 2014), affd, 25 NY3d 355 (2015)
- Wells Fargo Bank N.A. v. Javier, 153 AD3d 1199, 1200 (1st Dept. 2017)
- Bray v. Cox, 38 NY2d 350, 353 (1976)
- Fellner v. Aeropostale, Inc., 150 AD3d 598, 599 (1st Dept. 2017)
- Mongeau v. SR Taxi Corp., 235 AD3d 500, 500-501 (1st Dept. 2025)
- Wall St. Mtge. Bankers, Ltd. v. Berquin, 213 AD3d 972, 975 (2d Dept. 2023)
- U.S. Bank N.A. v. Simmons, 230 AD3d 621, 622 (2d Dept. 2024)
- JP Morgan Chase Bank, N.A. v. Venture, 148 AD3d 1269, 1271 (3d Dept. 2017)

OPINION

PER CURIAM.

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Judiciary Law § 431.</p> <p>This decision is uncorrected and subject to revision before publication in the Official Reports.</p> </div> <div> <p>Bank of America etc., Plaintiff-Respondent,</p> <p>v</p> <p>Nicholas J. Sands Also Known as Nicholas Sands, Defendant-Appellant, JPMorgan Chase Bank, N.A. as Successor to Washington Mutual Bank, F.A., et al., Defendants.</p> </div> <p>Decided and Entered: April 23, 2026</p> <p>Index No. 810068/10|Appeal No. 6456|Case No. 2025-01291|</p> <p>Before: Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ. </p> <div> <p>The David R. Smith Law Group PLLC, New York (David R. Smith of counsel), for appellant.</p> <p>Hinshaw & Culbertson LLP, New York (Leah R. Lenz of counsel), for respondent.</p> </div> [*1] <p>Appeal from order, Supreme Court, New York County (Francis A. Kahn, III, J.), entered or about January 14, 2025, which granted plaintiff's motion for a judgment of foreclosure and sale and to confirm the Referee's report as to the amount due on the mortgage, deemed appeal from the judgment, same court and Justice, entered April 23, 2025, awarding judgment to plaintiff, and, so considered, the judgment unanimously affirmed, with costs.</p> <p>Supreme Court properly confirmed the Referee's report, as the findings are substantially supported by the record (<i>see HSBC Bank USA, N.A. v Wu</i>, 242 AD3d 599, 601 [1st Dept 2025]; CPLR 4403).

Plaintiff's affiant proffered the business records on which the calculations were based, all the documents annexed to the Referee's report were previously filed electronically with Supreme Court, and plaintiff's attorney affirmation in support of the motion referenced the docket numbers of those documents (CPLR 2214[c]; <i>see</i> <i>Matter of Dubuche v New York City Tr.

Auth.</i>, 230 AD3d 1026, 1027 [1st Dept 2024]). Plaintiff's affiant established these documents as business records on which the calculations were based (CPLR 4518[a]). Defendant "identifies no evidentiary objections to the statements therein" and fails to identify any "unproduced business records," as his payment history after the default is specifically included (<i>U.S.

Bank N.A. v Tiburcio</i>, 242 AD3d 591, 592 [1st Dept 2025]). Indeed, defendant was given the opportunity to submit evidence to the Referee showing any additional payments made or challenging the computations generally, but he failed to do so (<i>see</i> <i>id.</i>).</p> <p>The failure to notice a hearing under CPLR 4313 is immaterial. Defendant was not prejudiced because he "opposed plaintiff's motion to confirm the report and had an opportunity to contest the report" (<i>id.</i>, citing <i>Aurora Loan Servs., LLC v Taylor</i>, 114 AD3d 627, 630 [2d Dept 2014], <i>affd</i> 25 NY3d 355 [2015]; <i>see also Wells Fargo Bank N.A. v Javier</i>, 153 AD3d 1199, 1200 [1st Dept 2017]).</p> <p>We decline to review defendant's challenge to proper service of the 90-day notice under RPAPL 1304, as he abandoned his appeal of the order which granted summary judgment to plaintiff after finding compliance therewith, and he failed to raise the issue in opposition to the motion for a judgment of foreclosure and sale (<i>see</i> <i>Bray v Cox</i>, 38 NY2d 350, 353 [1976]; <i>Fellner v Aeropostale, Inc.</i>, 150 AD3d 598, 599 [1st Dept 2017]; <i>see also</i> Rules of App Div, All Depts [22 NYCRR] § 1250.10[a]; <i>cf.</i>

<i>Mongeau v SR Taxi Corp.</i>, 235 AD3d 500, 500-501 [1st Dept 2025]).</p> [*2] <p>On the merits, defendant's argument is unavailing.

The loan documents demonstrate that the loan in question was not a "home loan" under the statutory definition (RPAPL 1304[6][a][1][iii]). Defendant admittedly did not live in this condominium unit at the time he signed the original mortgage agreement, the 1-4 Family Rider in the original agreement deleted the occupancy-by-borrower requirement (<i>see</i> <i>Wall St. Mtge.

Bankers, Ltd. v Berquin</i>, 213 AD3d 972, 975 [2d Dept 2023]), and the modified mortgage agreement included a second home rider precluding occupancy as a primary residence (<i>see U.S. Bank N.A. v Simmons</i>, 230 AD3d 621, 622 [2d Dept 2024];<i> JP Morgan Chase Bank, N.A. v Venture</i>, 148 AD3d 1269, 1271 [3d Dept 2017]).</p> <p>We have considered defendant's remaining arguments and find them unavailing.</p> <p>THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.</p> <p>ENTERED: April 23, 2026</p> </div> <div> <footer> <div> <p>Court Decisions</p> All Court Decisions Official Reports Service Bound Volumes Decision Search </div> <div> <p>Resources</p> RSS Feeds Style Manual Citation Tools Opinion Formatting & Privacy Guidelines Opinion Selection Criteria Legal Research Portal Site Index </div> <div> <p>About</p> About the Law Reporting Bureau About our Operations Contact Us Twitter </div> <div> <p>Quick Contact Info</p> <p>17 Lodge Street</p> <p>Albany, NY 12207</p> <p>Phone: (518) 453-6900</p> </div> </footer> </div> <div> <p>Links to or from other sites do not signify endorsement or relationship with them.</p> </div> </div>

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