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Warshaw Burstein Partner Wins Hard Fought Appeal in Foreclosure Defense Case

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Warshaw Burstein, LLP partner, [Pankaj Malik](#), successfully appealed from an order in a foreclosure action that denied her clients' motion to dismiss the complaint against them on the basis that they had not been served with proper notice of the foreclosure proceedings.

Ms. Malik said, "this case demonstrates that courts will not allow mortgage lenders to rush to foreclosure at the expense of providing proper notice to defendants and thereby prevent them from being heard and defending themselves."

In this case, [Deutsche Bank National Trust Company, etc., Walter Heitner, Jr. et.al, Index No. 26768/09](#), defendants Walter Heitner, Jr. and his wife, Gail Heitner, executed and delivered to New Century Mortgage Corporation a mortgage and note in the sum of \$450,000, secured by their home in Wantagh, New York. New Century's successor-in-interest commenced an action in the Supreme Court, Nassau County, to foreclose on the mortgage and the Heitners moved for summary judgment dismissing the complaint, on the basis, among other things, that the court lacked personal jurisdiction over them because they had not been properly served with notice of the foreclosure proceeding. The lower court denied the Heitners' motion and they appealed.

On appeal, the Second Department found that "defendant established his *prima facie* entitlement to judgment as a matter of law by submitting his own affidavit attesting that he had not received any notice pursuant to RPAPL 1304." In opposition, plaintiff submitted only a copy of a notice that included a label stating "Certified Article Number" and "Senders Record" and a listing of a 20 digit number on the top of the so called notice, but failed to submit any evidence that it had been properly sent as required by statute. The Second Department found that New Century did not submit an affidavit of service nor did it produce other proof of mailing by the post office "evincing that it properly served the defendant pursuant to RPAPL 1304." According to Ms. Malik, "this decision makes it clear that shoddy compliance with RPAPL 1304 will not be tolerated in mortgage foreclosure actions." She emphasized that "the statute requires strict compliance and evidence of that compliance."

The Appellate court held that since the plaintiff "did not raise a triable issue of fact in opposition to the defendant's prima facie showing that the plaintiff had failed to satisfy the condition precedent of proper service of RPAPL 1304 notice upon him, the lower court should have granted that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against him on that ground." The Appellate Division reversed the lower court, Nassau County Supreme Court, and dismissed the action against the Heitners.

Ms. Malik stated she was "pleased" that her "clients were vindicated" and now is moving to remove an \$850,000 mortgage lien from the clients' Wantagh residence.

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