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| <b>Nationstar Mtge. LLC v Brown</b>                                                                                                                                                                                                                              |
| 2016 NY Slip Op 30725(U)                                                                                                                                                                                                                                         |
| April 18, 2016                                                                                                                                                                                                                                                   |
| Supreme Court, Kings County                                                                                                                                                                                                                                      |
| Docket Number: 505518/2014                                                                                                                                                                                                                                       |
| Judge: Larry D. Martin                                                                                                                                                                                                                                           |
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 5<sup>th</sup> day of April 2016

**P R E S E N T:**

**HON. LARRY D. MARTIN, J.S.C.**

NATIONSTAR MORTGAGE LLC,

MOTION SEQ. #

1

Plaintiff,

-against-

INDEX No.:

KENNETH BROWN, et al

505518/2014

Defendants.

The following papers numbered 1 to 2 read on this motion

Papers  
Numbered

Notice of Motion,  
Affirmation, Affidavits

1-2

Answering Affidavits

Reply Affirmations and  
Affidavits

Upon the foregoing papers, plaintiff moves this Court for an Order of Reference appointing a Referee, default judgment and amending the caption. Upon review, the motion is denied.

Proper service of a RPAPL 1303 notice is a condition precedent to commencing a foreclosure action and the “foreclosing party has the burden of showing compliance” (*First Natl. Bank of Chicago v. Silver*, 73 AD3d 162, 166 [2d Dept 2010]). The notice “must be ‘delivered’ with the summons and complaint” and the affidavits of service should demonstrate such compliance (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102–03 [2d Dept 2011]). The notice pursuant to RPAPL 1303(a) specifically pertains to the mortgagor of an owner occupied property whereas RPAPL 1303(b) pertains

to any tenant of a dwelling unit as defined by the provisions of the section. Here, attached to the affidavits of service, plaintiff submits a copy of a RPAPL 1303(b) notice sent to Defendant Kenneth Brown (“Kenneth”) as a tenant and not as a mortgagor. However, although the affidavit of service submitted by plaintiff appears to demonstrate compliance with other requirements of the section, it is insufficient to show that the content of the notice was compliant with the statute (see *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 168-169 [2d Dept 2010] [holding compliance with HETPA’s notice requirements, including RPAPL 1303, is a condition precedent]). As such, Plaintiff is directed to submit proof of compliance with RPAPL 1303(a).

Additionally, “[p]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). The notice must be sent by certified or registered mail, as well as first-class mail (RPAPL 1304 [2]). Here, plaintiff submits a copy of the two (2) notices sent to Kenneth, dated February 4, 2014 (attached as Exhibit E to the moving papers) at 1455 East 94<sup>th</sup> Street, Brooklyn, New York 11236 (the “mortgaged premises”). One of the notices lists a “Certified Mail” number of “7196 9006 9297 2190 4676” on the front upper right corner of the page while the other notice has no number listed. Plaintiff also submits a copy of an affidavit from an Assistant Secretary, Jerrell Menyweather (“Menyweather”). Menyweather states that, based upon a review and analysis of plaintiff’s relevant business records and other relevant documents of plaintiff, “the servicing records show that the 90-day notices required by statute were mailed to defendant by regular and certified mail to both the last known mailing address

and to the property address on February 4, 2014” (Menyweather Affidavit, ¶ 7). Although, Menyweather references the service records, there is no indication that Menyweather has personal knowledge of service of the RPAPL 1304 notice. Moreover, the papers do not demonstrate proof of such service — e.g., a certified mailing receipt and an affidavit from someone with personal knowledge of the mailing (*TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1257–58 [3d Dept 2014] [plaintiff did not submit proper certified mailing receipts, nor “an affidavit from anyone with personal knowledge of the mailing”]; see *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 910 [2d Dept 2013] [plaintiff’s burden not met without an affidavit of service]; *JPMorgan Chase Bank, N.A. v Plaskett*, 45 Misc 3d 531, 534–35 [Sup Ct Kings County 2014]; see also *Weisblum*, 85 AD3d at 103). In this regard, plaintiff is directed to submit proof of compliance with RPAPL 1304.

Claims that a party in an action is exempt from the settlement conference requirements of CPLR 3408 because the property is not owner occupied must be substantiated by an Affidavit for an Exemption and an Affidavit of Investigation.

“Every affidavit for an exemption from a conference made pursuant to CPLR §3408 and RPAPL §1304 must specify the grounds for same and provide supporting documentation and affidavits from persons with direct knowledge. Where the claim is that the borrower is not living in the subject house, then an affidavit of investigation substantiating this allegation must be appended which states inter alia that the borrower is not living in the house and that no action by the mortgagee or its agents procured same. This affidavit shall be included in the motion for a Judgment of Foreclosure and Sale.” [Kings County Supreme Court Uniform Civil Term Rules, Part (F)(7)].

In his Affirmation in Support, Thomas Zegarelli, Esq. avers that:

“Defendant is ineligible for a settlement conference because he does not satisfy the eligibility criteria set forth in the statutes. Specifically, to be eligible for a settlement conference, defendant must occupy or intend to occupy the mortgaged property as their principal dwelling. As evidenced

by the Affidavits of Service annexed hereto as Exhibit 'I,' Kenneth Brown, does not occupy the subject property as their principal place of dwelling. Accordingly, since defendants failed to meet the foregoing criteria, they are not eligible for a settlement conference under the law" (plaintiff's Affirmation in Support of Order of Reference, ¶ 13).

Kerry Allaire avers in the affidavit of information pertaining to nail and mail service (attached as Exhibit I of the moving papers), that the agent made four (4) attempts on July 9, July 10, July 11 and July 12, 2014, respectively, to serve Kenneth at the mortgaged premises. Kerry Allaire further avers that on one of those dates, his agent "was able to speak with a neighbor 'Jane Doe' (refused name; F/BLK/BLK/5'4"/150/45), tenant 4<sup>th</sup> floor, who confirmed that said defendant is currently residing at the mortgaged premises. Additionally, the Affidavit of Information states that a Skip "search revealed that said defendant's most current address is that of 1455 East 94<sup>th</sup> Street, Brooklyn, New York 11236 and this is confirmed through 6/2014." On the contrary, plaintiff submits an Affidavit of Neighbor Confirmation by David P. Feldman ("Feldman"), in which he states that "'Jane Doe' confirms that Kenneth lives at the 10 East 43<sup>rd</sup> Street, Apt. 4J, Brooklyn, New York 11203." In light of conflicting statements regarding Kenneth's occupancy of the mortgaged premises, plaintiff is directed to submit an Affidavit of Investigation detailing the efforts that it undertook to confirm that Kenneth does not actually reside at the mortgaged premises, so as to render a CPLR 3408 settlement conference unnecessary or RPAPL 1304 inapplicable to the case at bar (*see MetLife Home Loans v. Pappu*, 46 Misc.3d 1204[A] [Sup Ct, Kings County 2014]; *First United Mortgage Banking Corp. v. Valdivieso*, 45 Misc.3d 1216[A] [Sup Ct, Kings County 2014]).

That branch of the plaintiff's motion to amend the caption to substitute Joe Ferguson, Maria Ferguson, Naomi Ferguson and Marla Ferguson be substituted in place and instead of John Doe #1, John

Doe #2, John Doe #3 and John Doe #4 and that John Doe #s 5-12 are stricken is hereby granted and the caption is hereby amended to reflect same. The remaining branches of plaintiff's motion are denied without prejudice with leave to renew upon submission of (1) proof of proper service of the RPAPL 1303 and 1304 pre-commencement notices upon Kenneth; and (2) an Affidavit of Investigation pursuant to the Kings County Supreme Court Uniform Civil Term Rules, Part (F) Rule (7). Upon renewal, plaintiff is directed to annex a copy of this decision and order to its motion papers.

The foregoing constitutes the decision and order of the Court.

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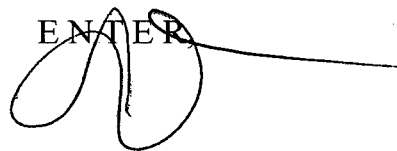
MG EX

MD    

Motion Seq. # 1

APR 05 2016

ENTER



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HON. LARRY D. MARTIN  
J.S.C.