Bank of N.Y. Mellon v Herod
2016 NY Slip Op 31964(U)
June 29, 2016
Supreme Court, Suffolk County
Docket Number: 38134-2011
Judge: C. Randall Hinrichs

SHORT FORM ORDER

INDEX NO.: 38134-2011

SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

MOTION DATE: 8-19-2015 (001) / 12-22-2015 (002)
ADJ. DATE: 10-18-2015 (001) / 1-7-2016 (002)
Mot. Seq. # 001-MotD / # 002-MD

The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate holders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-17,

Plaintiff,

-against-

Priscilla Herod; Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Countrywide Home Loans, Inc., and "JOHN DOE 1 to JOHN DOE 25", said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, New York 14624

ANDREA S. GROSS, ESQ.
Attorney for Defendant, Priscilla Herod
205-47 Linden Boulevard, 2nd Floor
St. Al bans, NY 11412

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated July 24, 2015, and supporting papers; (2) Notice of Motion by the defendant, dated October 22, 2015, and supporting papers; (3) Affirmation in Opposition by the Plaintiff, dated December 30, 2015, and supporting papers; (4) Affirmation in Reply by the Defendant, dated January 4, 2016, and supporting papers; and now

ORDERED that this motion (001) by the plaintiff, and the motion (002) by the defendant Priscilla Herod, are consolidated for the purposes of this determination and decided herewith; and it is

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Priscilla Herod, appointing a referee to compute and amending the caption is granted solely to the extent indicated below; and it is

ORDERED that this motion by the defendant Priscilla Herod for, inter alia, an order dismissing the complaint insofar as asserted against her on the grounds that the plaintiff lacks standing and failed to demonstrate strict compliance with the notice requirements of RPAPL §1304; or, in the alternative, extending her time to file opposition papers and for discovery is denied; and it is

ORDERED that pursuant to CPLR 3211 (b) the counterclaim asserted in the answer filed by the defendant Priscilla Herod is dismissed as without merit; and it is

ORDERED that the plaintiff shall serve a copy of this order dismissing the counterclaim upon the Calendar Clerk of this Court; and it is

ORDERED that pursuant to CPLR 3212 (g), the court hereby finds that the sole remaining issues of fact are whether the subject loan is a "home loan" within the meaning of RPAPL §1304, and whether the plaintiff complied with the notice requirements of RPAPL §1304, if required, and that the trial of this action shall be limited to these issues; and it is

ORDERED that a pre-trial conference shall be held in this action on **August 24, 2016** at 9:30 a.m. at IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York 11901, at which counsel are directed to appear; and it is

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon Andrea S. Gross, Esq. counsel for the defendant Priscilla Herod pursuant to CPLR 2103 (b) (1), (2) or (3), and all other parties, if any, who have appeared herein and not waived further notice by regular mail within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the defendant Priscilla Herod shall serve a copy of this order with notice of entry upon Shapiro, DiCaro & Barak, LLC, counsel for the plaintiff pursuant to CPLR 2103 (b) (1), (2) or (3) and all other parties, if any, who have appeared herein and not waived further notice by regular mail, within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 22 Lincoln Avenue, Farmingdale, New York 11735 ("the property"). On August 1, 2006, the defendant Priscilla Herod ("the defendant mortgagor") executed an interest-only, adjustable-rate note in favor of America's Wholesale Lender ("the lender") in the principal sum of $472,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated August 1, 2006 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was subsequently recorded on August 31, 2006.

By way of an undated blank endorsement, the note was allegedly transferred to the plaintiff, The Bank of New York Mellon formerly known as The Bank of New York, as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-17, prior to commencement. The transfer of the note to the plaintiff was also memorialized by an assignment of the mortgage by MERS to the plaintiff executed on November 8, 2011.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about May 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing

of a summons and complaint on December 14, 2011. Issue was joined by the interposition of the defendant mortgagor's answer dated January 12, 2012. The remaining defendants have not answered herein, and thus are in default.

By her answer, the defendant mortgagor admits some of the allegations set forth in the complaint, denies other allegations and asserts sixty-three affirmative defenses, alleging, among other things, the plaintiff's alleged lack of standing. By her answer, the defendant mortgagor also asserts a counterclaim whereby she demands monetary damages in the sum of $954,000.00 as well as a rescission of the mortgage transaction on the grounds of "misrepresentation, fraud, and deceit." Parenthetically, even though the answer purports to be verified, a sworn statement from the defendant mortgagor is not annexed to the answer submitted herein.

In response to the counterclaim, the plaintiff filed an untimely reply dated June 1, 2015. On or about June 8, 2015, the defendant mortgagor served the plaintiff with a "Letter of Rejection" dated June 8, 2015 regarding the reply to the counterclaim. In said document, the defendant mortgagor states that she "[r]eject[s] any reply, [a]nswer or [c]ounterclaim from the [p]laintiff of this action due to the untimely [f]iling and service."

By way of background, a settlement conference was held before the foreclosure conference part on June 9, 2014, and the same was continued on June 13, 2014. A representative of the plaintiff attended and participated in the settlement conference. On the last date, this case was dismissed from the conference program by the assigned referee because the parties were unable to achieve a settlement. Accordingly, there has been compliance with CPLR 3408; no further conference is required.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagor, striking her answer and the affirmative defenses asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

In response, the defendant mortgagor now moves for an order: (1) pursuant to CPLR 3211 (a)(2) and (3) dismissing the complaint insofar as asserted against her on the grounds, inter alia, that the plaintiff: (a) lacks standing and/or legal capacity to commence this action; and (b) failed to demonstrate strict compliance with the notice requirements of RPAPL 1304; or, in the alternative, (2) extending her time to file opposition papers in response to the plaintiff's motion and for discovery. Opposition and reply papers have been submitted.

By stipulation dated August 17, 2015 (attached to the defendant's motion), the parties agreed to adjourn the plaintiff's motion to October 18, 2015, or to a date convenient to the court. According to counsel for the defendant mortgagor, the stipulation was erroneously filed by facsimile transmission with the Supreme Court, Nassau County, instead of Suffolk County. Thus, due to this mishap, the court was not aware of the aforementioned stipulation adjourning the plaintiff's motion. In any event, counsel has proffered no explanation for the untimely filing of the defendant mortgagor's motion or for the untimely reply papers submitted approximately two months past the agreed upon adjourned date (*see*, CPLR 2214 [b]; ***Foitl v G.A.F. Corp.***, 64 NY2d 911, 488 NYS2d 377 [1985]; ***Moore v Is. Coll. Hosp.***, 273 AD2d 365, 714 NYS2d 683 [2d Dept 2000]).

The court turns first to the motion made by the defendant mortgagor. To the extent that the defendant mortgagor's motion is predicated upon dismissal pursuant to CPLR 3211 subdivision (a) (3), it was not timely

interposed because it was made after joinder of issue and service of the answer cut off the defendants mortgagor's right to make a CPLR 3211 motion to dismiss on this ground (*see generally*, CPLR 3211 [e]; *see also*, CPLR 3018 [b]). It is well-settled that motions under CPLR 3211 (a) are to be made at any time before service of the responsive pleading (*see*, CPLR 3211 [e]; ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 384

[2d Dept 2012]; ***Cremosa Food Co., LLC v Elwood Catering, LLC***, 2013 NY Misc. LEXIS 4746, 2013 WL 5761461, 2013 NY Slip Op 32556 [U] [Sup Ct, Suffolk County 2013]; ***U.S. Bank, N.A. v Arias***, 2012 NY Misc LEXIS 3621, 2012 WL 3135064, 2012 NY Slip Op 31999 [U] [Sup Ct, Queens County 2012]; *see also*, ***EMC Mtge. Corp. v Gass***, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; ***Hertz Corp. v Luken***, 126 AD2d 446, 510 NYS2d 590 [1st Dept 1987]). Therefore, the defendant mortgagor's post-answer demand for dismissal of the complaint, to the extent it is premised upon the ground embraced by CPLR 3211 subdivision (a) (3), is untimely by nearly four years and will not be considered as an independent basis for dismissal.

Even though CPLR 3211 (c) empowers the court to treat a motion to dismiss a motion for summary judgment, in this case, conversion is inappropriate because, inter alia, this action does not exclusively involve issues of law which were fully appreciated and argued by the parties, and since notice has not been provided to the parties (*see*, ***Bennett v Hucke***, 64 AD3d 529, 881 NYS2d 335 [2d Dept 2009]; ***Bowes v Healy***, 40 AD3d 566, 833 NYS2d 400 [2d Dept 2007]; ***Moutafis v Osborne***, 18 AD3d 723, 795 NYS2d 716 [2d Dept 2005]; ***Matter of Weiss v N. Shore Towers Apts., Inc.***, 300 AD2d 596, 751 NYS2d 868 [2d Dept 2002]; *cf.*, ***Bank of N.Y. Mellon v Green***, 132 AD3d 706, 17 NYS3d 651 [2d Dept 2015]). While a defense asserting the lack of standing is preserved in the answer, adjudication of such defense must be made at trial or its procedural equivalent, namely a motion for summary judgment (*see*, ***Diaz v DiGiulio***, 29 AD3d 623, 816 NYS2d 125 [2d Dept 2006]; ***US Bank, NA v Reed***, 38 Misc3d 1206 [A], 967 NYS2d 870 [Sup Ct, Suffolk County 2013]).

To the extent that the defendant mortgagor's motion is predicated upon dismissal pursuant to CPLR 3211 subdivision (a) (2) on the ground that the plaintiff lacks standing, it is entirely without merit (*see*, ***Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]). The general, original jurisdiction of the Supreme Court of the State of New York encompasses all actions at law and equity, except those expressly proscribed by the State and Federal Constitutions or other acts entitled to supremacy (*see*, N.Y. Const. Art. VI § 7 [a]; ***Thrasher v United States Liab. Ins. Co.***, 19 NY2d 159, 278 NYS2d 793 [1967]). Further, the instant action foreclosure action, which was commenced as a result of the alleged breach of the various mortgage loan documents, is clearly a justiciable controversy (*see*, RPAPL § 1301, *et seq.*). That an action to foreclose a mortgage is within the subject matter jurisdiction of this court is clear. Appellate authorities have repeatedly held that "[a] plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through production of the mortgage, the unpaid note and evidence of a default" (***Wells Fargo Bank, N.A. v Cohen***, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]). Thus, this court has exclusive jurisdiction to determine, according to governing statutes, the issues raised by the pleadings or by motion, including those for accelerated judgments, which are viewed as trial equivalents, and those raised at the trial of the action, including adjudication of the sufficiency of proof and the reception of evidence (*see*, ***Balogh v H.R.B. Caterers***, 88 AD2d 136, 452 NYS2d 220 [2d Dept 1982]).

Even if the plaintiff lacked standing, "[w]hether [a foreclosure] action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it" (*see*, ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 243, 837 NYS2d 247 [2d Dept 2007]; *see also*, ***HSBC Bank USA, NA v. Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept

2011]). A standing defense is not jurisdictional in nature (*see*, ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2007]), but instead merely an affirmative defense that is waived if not raised in a timely pre-answer motion to dismiss or in an answer (*see*, CPLR 3211 [a] [3]; [e]; ***US Bank, N.A. v Flowers***, 128 AD3d 951, 11 NYS3d 186 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 810, 954 NYS2d 181 [2d Dept 2007]; ***Deutsche Bank Natl. Trust Co. v Espinoza***, 39 Misc3d 1238 [A], 977 NYS2d 666 [Sup Ct, Suffolk County 2013] [dismissal pursuant to CPLR 3211 [a][2] on standing grounds deemed nearly frivolous]).

To the extent that the defendant mortgagor's motion is predicated upon dismissal pursuant to CPLR 3211 subdivision (a) (2) on the ground that the plaintiff failed to comply with the notice requirements of RPAPL 1304, it is denied (*see*, ***Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980, *supra*). Contrary to the defendant mortgagor's contentions, the plaintiff's alleged failure to satisfy a condition precedent by failing to provide her with a 90-day pre-foreclosure notice, even if true, does not deprive this court of jurisdiction to enter a judgment of foreclosure and sale (*see*, ***Deutsche Bank Trust Co. Ams. v Shields***, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504-1505, 957 NYS2d 440 [3d Dept 2012]; ***Signature Bank v Epstein***, 95 AD3d 1199, 1200, 945 NYS2d 347 [2d Dept 2012]). In any event, the defendant mortgagor's mere allegation that the property is her "home" is insufficient as a matter of law to demonstrate that it is her "principle dwelling," or that the subject loan is a "home loan" within the meaning of RPAPL § 1304 (5). As the moving party, the defendant mortgagor needed to affirmatively demonstrate that the pre-condition mandated by RPAPL §1304, if applicable, was not satisfied. Indeed, "[a] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***Velasquez v Gomez***, 44 AD3d 649, 650-651, 843 NYS2d 368 [2d Dept 2007], quoting ***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). Parenthetically, the defendant mortgagor's address listed in the mortgage is 120-60 164th Street, Jamaica, New York 11434 ("Jamaica, NY") (*see*, Mtge pg.1, § B, word description), as distinguished from the property (*see*, Mtge, pg. 3 § A, property description). The court also notes that the mortgage provides, in relevant part, for occupancy of the property only for a period of one year from the date of execution (*see*, Mtge § 6).

To the extent that the defendant mortgagor moves, ostensibly, pursuant to CPLR 3124 for an order compelling the production of certain documents related to the plaintiff's standing, the same is denied as procedurally and substantively deficient because it is not supported by an affirmation of good-faith effort to resolve the issues raised herein (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]; ***Ponce v Miao Ling Liu***, 123 AD3d 787, 996 NYS2d 548 [2d Dept 2014]; ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]; ***Zorn v Bottino***, 18 AD3d 545, 794 NYS2d 659 [2d Dept 2005]). In any event, this branch of the motion is not supported by a compliance conference order directing the requested discovery (*see*, ***HSBC Bank, USA, N.A. v Arias***, 112 AD3d 785, 977 NYS2d 323 [2d Dept 2013]; ***Oller v Liberty Lines Tr., Inc.***, 111 AD3d 903, 975 NYS2d 768 [2d Dept 2013]). The remaining branch of the defendant mortgagor's motion for leave to interpose untimely opposition papers to the plaintiff's motion-in-chief is denied as without merit, and as academic as for the reasons set forth below.

The court next turns to the motion-in-chief and the issue of the plaintiff's compliance with certain conditions precedent to commencement of this action. In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language, and the

notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Unlike the defense of a failure to satisfy a contractual condition precedent which must be pleaded (*see*, CPLR 3015[a]; 3018), a party who has timely appeared may raise the absence or defective notice defense on motion, even though it was not included in an answer nor made the subject of a pre-answer to dismiss. Since the notice defense remains viable during the pendency of the action, it may be raised by a non-defaulting party any time prior to judgment (***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup Ct, Suffolk County 2013] [finding that the failure to comply with RPAPL § 1304 gives rise to a heightened or "super" defense to the plaintiff's claim that is not subject to waiver]).

Initially, it is noted that, while the defendant mortgagor did not specifically raise non-compliance with RPAPL 1304 as affirmative defense in her answer, she raised this issue in support of her own motion. Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, *supra* at 1504). Since this action was commenced on December 14, 2011, the 90-day notice requirement set forth in the statute is applicable. Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL §1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

Under the facts presented herein, the plaintiff failed to supply adequate evidentiary proof of compliance with RPAPL § 1304 (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). The plaintiff submitted neither affidavits of service of the 90-day notice upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

Further, the conclusory statements set forth in the affidavit of Mr. Mark McCloskey that, inter alia, the plaintiff sent a "ninety (90) day pre-foreclosure notice on January 5, 2011 in accordance with RPAPL § 1304, by certified and first class mail[,]" even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank N.A. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). Mr. McCloskey did not allege sufficient facts as to how or when compliance was accomplished. He also does not state that he served the notice; nor does he identify the individual who allegedly did so. Moreover, it is noted that Mr. McCloskey's affidavit does not constitute proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*).

Additionally, the plaintiff has also proffered no explanation by way of an affidavit or affirmation from one with personal knowledge as to why one notice, printed in English, was allegedly sent to the defendant mortgagor at the property, while another notice, printed in Spanish, was sent to her at Jamaica, NY. In any event, the plaintiff submitted conflicting proof as to whether the subject property is the defendant mortgagor's principle residence and, if so, whether the notice requirements of RPAPL 1304 apply to this action (*see*, ***CitiMortgage, Inc. v Simon***, 137 AD3d 1190, 2016 NY Slip Op 02313 [2d Dept, March 30, 2016]; ***Richlew Real Estate Venture v Grant***, 131AD3d 1223, 17 NYS3d 475 [2d Dept 2015]; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]; *see also*, ***US Bank N.A. v Kostanovic***, 2015 NY Misc LEXIS 685, 2015 NY Slip Op 50307 [U] [Sup Ct, Queens County 2015]). If the defendant mortgagor did not reside or intend to reside at the subject property during the relevant time herein, then, in that event, the mandates of RPAPL §1304 would not apply herein, thus, raising additional triable issues of fact (*see*, RPAPL §1304 [5]).

The court next turns to the issue of the counterclaim asserted in the answer. Even though the plaintiff's reply was served late, the defendant mortgagor's retention of the pleading is deemed a waiver of the late service under the facts presented herein (*see*, ***Dime Savings Bank of N.Y., FSB v Halo***, 210 AD2d 572, 619 NYS2d 804 [3d Dept 1994]; ***Minogue v Monette***, 138 AD2d 851, 525 NYS2d 961 [3d Dept 1988]). In the letter of rejection and the affidavit of service of the letter upon the plaintiff, there are no allegations by the defendant mortgagor that the reply was returned to the plaintiff. Further, the averments by the plaintiff's counsel that the reply was not returned to his office along with the letter of rejection are entirely uncontroverted.

By its submissions, the plaintiff established that the counterclaim, sounding in, inter alia, fraud and misrepresentation lacks merit as a matter of law because the defendant mortgagor failed to allege that plaintiff or its predecessor owed her a fiduciary duty with respect to her future ability to afford the mortgage (*see generally*, ***Schwatka v Super Millwork, Inc.***, 106 AD3d 897, 965 NYS2d 547 [2d Dept 2013]; ***Levin v Kitsis***, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; *see also*, ***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 7 NYS3d 146 [2d Dept 2015]; ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]). In any event, the defendant mortgagor's general factual assertions do not satisfy the pleading requirements of fraud (*see*, ***Abdourahamane v Public Stor. Institutional Fund***, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014]; ***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; ***Jones v OTN Enter., Inc.***, 84 AD3d 1027, 922 NYS2d 810 [2d Dept 2011]; *see also*, ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). Accordingly, the defendant mortgagor's unsupported counterclaim is dismissed.

In view of the foregoing, and pursuant to CPLR 3212 (g), the court hereby finds that the sole remaining issues of fact are whether the subject loan is a "home loan" within the meaning of RPAPL §1304, and whether the plaintiff complied with the notice requirements of RPAPL §1304, if required, and that the trial of this action shall be limited to these issues. In view of these open questions, the proposed order submitted by the plaintiff has been marked "not signed." The defendant mortgagor's motion for dismissal of the complaint insofar as asserted against her is denied for the reasons set forth above.

Counsel are directed to appear ready to confer with the court on the readiness of this matter for the trial on the limited issue framed above at the conference scheduled herein for **August 24, 2016.**

Dated: June 29, 2016

C. Randall Hinrichs

Hon. C. RANDALL HINRICHS, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION