Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DEUTSCHE BANK NATIONAL TRUST COMPANY, etc.,
Plaintiff,
- against -
THERESA MARTINEZ, et al.,
Defendants.

Index No. 24814 2011

Motion Date July 7, 2016

Motion Cal. No. 54

Motion Seq. No. 4

The following papers read on this motion by plaintiff for an order granting it summary judgment against defendant Theresa Martinez and striking her answer, for leave to enter a default judgment against non-answering and non-appearing defendants, for leave to appoint a referee to compute the sum due and owing to plaintiff, and for leave to amend the caption substituting Ravindra Madramythu, Kovan Desai, Sonal Singh and Vimmi Panchal for the "John Doe" defendants and deleting reference to the "John Doe" defendants; and on this cross motion by defendants Theresa Martinez and Luis Martinez s/h/a Luis Martinez a/k/a Luis F. Martinez for an order dismissing the complaint insofar as asserted against them, for summary judgment in their favor, to toll the accrual of interest pursuant to the promissory note and mortgage nunc pro tunc to October 26, 2011, the date of commencement through and "until such date as the true owner of the collateral documents is established," to cancel the notice of pendency and direct the County Clerk to cancel the assignment of mortgage, and to find plaintiff to have violated its duty to negotiate in good faith pursuant to CPLR 3408 and 22 NYCRR 202.12.

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Notice of Motion - Affirmation - Exhibits.....	1-11
Notice of Cross Motion - Affirmation - Exhibits.....	12-18
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action on October 31, 2011, seeking foreclosure of a consolidated mortgage given by defendants Theresa Martinez and Luis Martinez on the real property known as 133-44 121st Street, South Ozone Park, New York, to secure payment of a consolidated note dated September 26, 2005, evidencing a consolidated mortgage loan from American Home Mortgage Acceptance, Inc. (American Home) in the principal sum of $490,000.00, plus interest. In the complaint, plaintiff alleges that defendants Theresa Martinez and Luis Martinez entered into a consolidation, extension and modification agreement (CEMA) recorded on December 22, 2005, whereby a mortgage recorded on July 19, 2003, securing the sum of $240,000.00 and a mortgage recorded on December 22, 2005, securing the sum of $269,085.02 with a negative amortization not to exceed the amount of $295,993.52, were consolidated into a single mortgage lien in the principal amount of $490,000.00 not to exceed the negative amortization amount up to 110% of the original principal amount. Plaintiff alleges that it is the holder of the note and mortgage, defendants Theresa Martinez and Luis Martinez defaulted in payment of the monthly mortgage installment due on April 1, 2010, and as a consequence, plaintiff elected to declare the mortgage debt to be due and owing.

Defendants Theresa Martinez and Luis Martinez failed to timely appear or answer the complaint.

A settlement conference was scheduled for February 1, 2012; however defendants Theresa Martinez and Luis Martinez failed to appear. After their failure to answer or otherwise appear, plaintiff made two *ex parte* applications for an order of reference, the second one of which was granted by order dated April 3, 2013 and filed on April 5, 2013.

Defendant Theresa Martinez, then appearing in her self-represented capacity, moved to vacate the order of reference and for leave to file a late answer, as proposed. By order dated October 7, 2013, the motion was granted, the order of reference was vacated, and the proposed verified answer dated August 8, 2013 was deemed served. The court noted that defendant Theresa Martinez had not moved to dismiss the complaint due to improper service of process.

Defendant Theresa Martinez and Luis Martinez, now appearing by the same counsel, oppose the motion by plaintiff and cross-move to dismiss the complaint insofar as asserted against them, for summary judgment in their favor, to toll the accrual of interest, to cancel the notice of pendency and direct the County Clerk to cancel the assignment of mortgage, and to find plaintiff to have violated its duty to negotiate in good faith pursuant to CPLR 3408 and

22 NYCRR 202.12. Plaintiff opposes the cross motion. The remaining defendants have not appeared in relation to the motion or cross motion.

Plaintiff caused Ravindra Madramythu, Kovan Desai, Sonal Singh and Vimmi Panchal, sued herein as "John Doe" defendants, to be served with process at the subject premises. That branch of the motion to substitute Ravindra Madramythu, Kovan Desai, Sonal Singh and Vimmi Panchal for the "John Doe" defendants and for leave to amend the caption reflecting the substitution and deleting reference to the "John Doe" defendants is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY
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DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee for American Home Mortgage Investment Trust 2006-1,
Plaintiff,

Index No. 24814/2011

-against-

THERESA MARTINEZ; LUIS MARTINEZ A/K/A LUIS F. MARTINEZ; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK PARKING VIOLATIONS BUREAU; CRIMINAL COURT OF THE CITY OF NEW YORK, RAVINDRA MADRAMYTHU; KOVAN DESAI; SONAL SINGH; and VIMMI PANCHAL,
Defendants.
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To the extent defendant Luis Martinez cross-moves to dismiss the complaint insofar as asserted against him based upon improper service of process, plaintiff offers an affidavit of service dated November 23, 2011, and filed on November 23, 2011, of a licensed process server indicating that defendant Luis Martinez was served with process on November 18, 2011 at 11:30 A.M. by delivery of a copy of the summons and complaint, and an RPAPL 1303 notice printed on colored paper, to Ravindra Madramythu, "CO-OCCUPANT/RELATIONSHIP REFUSED," a person of suitable age and discretion, at 133-44 121st Street a/k/a 13344 121st Street, "2nd FLOOR," South Ozone Park, New York,

the actual place of residence of defendant Luis Martinez, and a subsequent mailing on November 23, 2011 of a copy of those documents to defendant Luis Martinez at the same address. This affidavit constitutes prima facie proof of proper service of process upon defendant Luis Martinez pursuant to CPLR 308 (2) (*see Bank of New York v Samuels*, 107 AD3d 653 [2d Dept 2013]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]).

Defendant Luis Martinez makes no sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit to defeat the presumption of proper service of process. In fact, he offers his affidavit only in reply to plaintiff's opposition to his cross motion. To the extent defendant Theresa Martinez states in her verified answer offered in support of the cross motion, that defendant Luis Martinez, her husband, was not properly served with process insofar as he "moved out of the home" in 2011, prior to their reuniting, she lacks standing to contest the validity of service upon Luis inasmuch as that claim is personal to him (*see Wells Fargo Bank v Bowie*, 89 AD3d 931 [2d Dept 2011]).[1] Under these circumstances, no hearing is warranted on the issue of the propriety of the service upon defendant Luis Martinez herein. That branch of the motion by defendant Luis Martinez to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211 (a) (8) is denied.

To the extent defendant Theresa Martinez cross moves to dismiss the complaint insofar as asserted against her based upon lack of standing (CPLR 3211 [a] [3]), it is untimely made. Issue has been joined with respect to her, and therefore, this branch of the cross motion should have been framed by her as one for summary judgment (*see* CPLR 3212) premised upon a CPLR 3211 (a) ground that was asserted in her answer (*see Rich v Lefkovits*, 56 NY2d 276 [1982]; *Piro v Macura*, 92 AD3d 658 [2d Dept 2012]; *see also Murray Bresky Consultants, Ltd. v New York Compensation Manager's Inc.*, 106 AD3d 1255, n 1 [3d Dept 2013]). In any event, defendant Theresa Martinez has failed to establish that plaintiff was not the holder or assignee of the subject mortgage and underlying note at the time this action was commenced (*see U.S. Bank N.A. v Weinman*, 123 AD3d 1108 [2d Dept 2014]). That branch of the cross motion by defendant Theresa Martinez to dismiss the complaint insofar as asserted against her based upon lack of standing (CPLR 3211 [a] [3]) is denied.

That branch of the cross motion by defendant Luis Martinez to dismiss the complaint insofar as asserted against him based upon lack of standing (CPLR 3211 [a] [3]) is untimely since it was made after his time to serve an answer had expired (*see* CPLR 3211 [e]; *Portilla v Law Offices of Arcia & Flanagan*, 125 AD3d 956 [2d Dept 2015]; *Archer v Motor Vehicle*

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1. In any event, defendant Theresa Martinez does not specifically state when defendant Luis Martinez moved out of the home or reunited with her.

Acc. Indemnification Corp., 118 AD3d 5, 11 [2d Dept 2014]; *Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 891 [2d Dept 2013]), and he makes no request to extend his time to serve an answer (*see Archer v Motor Vehicle Acc. Indemnification Corp.*, 118 AD3d 5, 11; *Clinkscale v Sampson*, 74 AD3d 721, 722 [2d Dept 2010]). Defendant Luis Martinez also has not moved for leave to serve a late answer, or to vacate his default in answering, and offers no reasonable excuse for his default since his only excuse is that he was not properly served with process (*see Nationstar Mortg., LLC v McLean*, 140 AD3d 1131 [2d Dept 2016]; *U.S. Bank Nat. Assn. v Hasan*, 126 AD3d 683 [2d Dept 2015]; *Bank of New York v Samuels*, 107 AD3d 653 [2d Dept 2013]). Hence, it is not necessary to determine whether he has demonstrated a potentially meritorious defense to this action, including one based upon lack of standing (*see US Bank, N.A. v Samuel*, 138 AD3d 1105 [2d Dept 2016]). That branch of the cross motion by defendant Luis Martinez to dismiss the complaint insofar as asserted against him based upon lack of standing (CPLR 3211 [a] [3]) is denied.

With respect to that branch of the cross motion by defendant Luis Martinez to dismiss the complaint insofar as asserted against him based upon plaintiff's alleged failure to strictly comply with the notice provisions of RPAPL 1303 and 1304, and the filing provisions of RPAPL 1306, the failure to comply with RPAPL 1303, 1304 and 1306 is not jurisdictional (*see U.S. Bank Nat. Assn. v Carey*, 137 AD3d 894 [2d Dept 2016]; *Pritchard v Curtis*, 101 AD3d 1502, 1505 [3d Dept 2012]). Defendant Luis Martinez has failed to demonstrate that he is not in default in answering, or that he has a reasonable excuse for his default (*see* CPLR 5015 [a] [1]), and does not cross-move for leave to serve a late answer. Thus, he is precluded from raising plaintiff's alleged failure to comply with the notice provisions of RPAPL 1303 and 1304, and the filing provisions of RPAPL 1306, as a defense to this action (*see PHH Mortg. Corp. v Celestin*, 130 AD3d 703 [2d Dept 2015]). The affidavit of service dated November 23, 2011, furthermore, constitutes prima facie proof of proper service upon him of the notice required by RPAPL 1303. The unsubstantiated claim by defendant Luis Martinez of improper service of the notice is insufficient to rebut the presumption of proper service (*see PHH Mortg. Corp. v Israel*, 120 AD3d 1329 [2d Dept 2014]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). That branch of the cross motion by defendant Luis Martinez to dismiss the complaint insofar as asserted against him based upon plaintiff's alleged failure to strictly comply with the notice provisions of RPAPL 1303 and 1304, and the filing provisions of RPAPL 1306 is denied.

With respect to the branch of the cross motion by defendant Theresa Martinez to dismiss the complaint insofar as asserted against her based upon plaintiff's alleged failure to comply strictly with the notice provisions of RPAPL 1303, RPAPL 1303 (2) provides that the notice required pursuant to RPAPL 1303 (1) (a) "shall be delivered with the summons and complaint." Defendant Theresa Martinez asserts that, pursuant to the order dated October 7,

2013, the court already has determined that there was improper service of the summons and complaint upon her, and because the RPAPL 1303 notice was purportedly served along with the summons and complaint, *ipso facto*, she was not properly served with the RPAPL 1303 notice. Contrary to her assertion, the court did not make a prior determination of improper service of process upon defendant Theresa Martinez. Rather, the court determined defendant Theresa Martinez "*may have* demonstrated that CPLR 308(2) was not complied with" (emphasis supplied) and that as a consequence, it was appropriate to allow her to vacate her default in answering and serve a late answer (*see* order dated October 7, 2013).

The affidavit of service of the licensed process server dated November 23, 2011 indicates service of the summons, complaint and notice pursuant to RPAPL 1303 upon defendant Theresa Martinez by delivery to Ravindra Madramythu "CO-OCCUPANT/RELATIONSHIP REFUSED," a person of suitable age and discretion at "133-44 121st STREET A/K/A 13344 121st STREET, 2nd FLOOR, South Ozone Park, NY," as her place of residence, on November 18, 2011, followed by a mailing to her at "133-44 121st STREET A/K/A 13344 121st STREET, 2nd FLOOR, South Ozone Park, NY 11420" on November 23, 2011. This affidavit constitutes prima facie proof of proper service of summons and complaint, along with the notice required by RPAPL 1303, upon defendant Theresa Martinez (*see* CPLR 308 [2]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106).

In her verified answer, which may be considered to constitute an affidavit (CPLR 105 [u]), defendant Theresa Martinez states that Ravindra Madramythu was neither authorized to accept service on her behalf nor a co-occupant, but rather that he is her neighbor. She further states that she never received the summons, complaint and RPAPL 1303 notice because she was out of the country at the time of the alleged service.

CPLR 308 (2) does not require that the person to whom the process is delivered be a person authorized to accept service on behalf of the defendant or someone who resides at the same address as the defendant (*see Glezelis v Halkiopoulos*, 28 Misc 3d 1238[A] [Sup Ct, Queens County, McDonald, J.]). Rather, CPLR 308 (2) requires that delivery be made to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served, and mailing the summons to the defendant's last known residence or his or her actual place of business. Defendant Theresa Martinez does not deny that Ravindra Madramythu was present at the premises and accepted delivery on her behalf of the RPAPL 1303 notice at her actual dwelling place or usual place of abode at the date and time of service. Nor has she offered an affidavit by defendant Ravindra Madramythu in support of her cross motion (*see C & H Import & Export, Inc. v MNA Global, Inc.*, 79 AD3d 784 [2d Dept 2010]; *Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007]). In addition, her conclusory denial of receipt of the mailing is insufficient to overcome the

presumption of delivery created by the affidavit of service reflecting such mailing (*see Engel v Lichterman*, 95 AD2d 536 [2d Dept 1983], *affd* 62 NY2d 943 [1994]; *Facey v Heyward*, 244 AD2d 452 [2d Dept 1997]; *Colon v Beekman Downtown Hosp.*, 111 AD2d 841 [2d Dept 1985]). The unsubstantiated denial by defendant Theresa Martinez of service upon her of the notice pursuant to RPAPL 1303 is insufficient to warrant a hearing on the issue of the propriety of the service (*see JPMorgan Chase Bank, Nat. Assn. v Todd*, 125 AD3d 933 [2d Dept 2015]; *Remington Investments, Inc. v Seiden*, 240 AD2d 647 [2d Dept 1997]; *Sando Realty Corp. v Aris*, 209 AD2d 682 [2d Dept 1994]). Therefore, defendant Theresa Martinez has failed to establish that plaintiff did not comply with RPAPL 1303. That branch of defendant Theresa Martinez's cross motion which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against her based upon plaintiff's alleged failure to comply strictly with the notice provisions of RPAPL 1303 is denied.

To the extent defendant Theresa Martinez cross-moves to dismiss the complaint insofar as asserted against her based upon the claim that the complaint fails to comply with RPAPL 1302, RPAPL 1302 requires a plaintiff to allege in a complaint for foreclosure of high-cost home and subprime home mortgages that it is "the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note" (RPAPL 1302 [1] [a]). RPAPL 1302 also requires the plaintiff to allege in its complaint that it has complied with Banking Law § 595-a, and rules and regulations promulated thereunder, Banking Law § 6-l or § 6-m, and RPAPL 1304 (RPAPL 1302 [1] [b]). The complaint herein meets the statutory requirements of RPAPL 1302 insofar as it contains allegations that plaintiff is the holder of the note and mortgage (*see* paragraph "Sixth"), and has complied with all of the provisions of Banking Law § 595-a, and rules and regulations promulgated thereunder, Banking Law § 6-l and § 6-m, and RPAPL 1304 (*see* paragraph "Eighteenth"). That branch of the cross motion by defendant Theresa Martinez to dismiss the complaint insofar as asserted against her based upon the claim that the complaint fails to comply with RPAPL 1302 is denied.

To the extent defendant Theresa Martinez cross-moves to dismiss the complaint insofar as asserted against her based upon plaintiff's alleged failure to strictly comply with the notice provisions of RPAPL 1304 and the filing provisions of RPAPL 1306, she did not raise such defenses in her answer. Nevertheless, they may be raised at any time (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 105; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 163 [2d Dept 2010]). Defendant Theresa Martinez, however, has failed to establish that plaintiff did not strictly comply with the notice provisions of RPAPL 1304 and the filing provisions of RPAPL 1306. She has not submitted admissible proof so as to carry her burden on the cross motion to establish as a matter of law that plaintiff failed to comply strictly with those statutes. That branch of the cross motion by defendant Theresa Martinez to dismiss the complaint insofar

as asserted against her based upon plaintiff's alleged failure to strictly comply with the notice provisions of RPAPL 1304 and the filing provisions of RPAPL 1306 is denied.

To the extent defendant Luis Martinez cross moves for summary judgment in his favor and against plaintiff, he has failed to demonstrate that he has served an answer with a counterclaim (CPLR 3212 [a]). That branch of the cross motion by defendant Luis Martinez for summary judgment in his favor and against plaintiff is denied.

With respect to that branch of the cross motion by defendant Theresa Martinez for summary judgment in her favor and against plaintiff, her answer contains no counterclaim, whether specifically denominated as such or otherwise (*see* CPLR 3011). Thus, to the extent the "wherefore" clause in her answer includes a demand for an award of attorneys' fees, she cannot recover them. That branch of the cross motion by defendant Theresa Martinez for summary judgment in her favor and against plaintiff is denied.

With respect to that branch of the motion by plaintiff for summary judgment against defendant Theresa Martinez, a foreclosure plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1080 [2d Dept 2010]). Proper service of RPAPL 1303 and 1304 notices, where required, is a condition precedent to the commencement of a foreclosure action (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 169; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 102). The filing of the appropriate form with the superintendent pursuant to RPAPL 1306 within three days of the mailing of the RPAPL 1304 notice to the borrower is also a condition precedent to the commencement of the foreclosure action (*see TD Bank, N.A. v Oz Leroy*, 121 AD3d 1256 [3d Dept 2014]). The plaintiff has the burden of establishing satisfaction of these conditions (*see TD Bank, N.A. v Oz Leroy*, 121 AD3d 1256 [3d Dept 2014]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 169; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102 and 107). Where, as here, standing has been raised by the defendant in her answer, plaintiff bears the additional burden of demonstrating that, at the time the action was commenced, it was the holder or assignee of the mortgage and of the underlying note, which can be established by the physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2d Dept 2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108), or by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2d Dept 2014], *affd* 25 NY3d 355 [2015]).

In support of its motion, plaintiff offers an affirmation of regularity, copy of the pleadings, affidavits of service, the subject mortgage, note and CEMA, the assignment of mortgage dated July 08, 2011, and a limited power of attorney dated January 9, 2014. Plaintiff

also offers the affidavit of Jillian Thrasher, a "Contract Management Coordinator" of Ocwen Loan Servicing, LLC (Ocwen), plaintiff's servicer, to demonstrate prima facie its standing, and the default by defendants Theresa Martinez and Luis Martinez in making payments due under the note and mortgage. Plaintiff contends it did not need to comply with RPAPL 1304 and 1306, insofar as it asserts that defendant Luis Martinez filed for bankruptcy on April 6, 2010. It nevertheless claims that it provided defendants Theresa Martinez and Luis Martinez with the pre-foreclosure notices which met the requirements of RPAPL 1304 as a courtesy, and offers copies of the 90-day notices dated June 24, 2011 and Ms. Thrasher's affidavit to prove such claim. The copies of the 90-day notices presented by plaintiff indicate they were issued by "American Home Mortgage Servicing, Inc." (AHMS).

RPAPL 1304 (3) states that the "*ninety day period* contained in [RPAPL 1304 (1)] shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower's principal dwelling" (emphasis supplied). RPAPL 1304 (3), however, does not excuse a lender or mortgage loan servicer from providing the notice which comports with the requirements of RPAPL 1304 (1). The notice and the 90-day period required by RPAPL 1304 are recognized by the Legislature to be distinct concepts (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 103-104 ["(c)ontent, timing, and service provisions of RPAPL 1304 are very specific and couched in mandatory language"]). RPAPL 1304 (4), for example, provides "(t)he notice and the ninety day period required by [RPAPL 1304 (1)] need only be provided once in a twelve month period to the same borrower in connection with the same loan." RPAPL 1304 (3) does not obviate the need to serve a notice, but rather, permits the shortening of the 90-day period for service under certain described circumstances. The purpose of the notice is to aid in bridging the communication gap between distressed homeowners and their lenders in an attempt to avoid foreclosure (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 107), and the timing of the notice operates, in effect, to establish a cure period. Even assuming for the purposes of this motion only that defendant Luis Martinez filed for bankruptcy,[2] such filing does not render the notice requirements of RPAPL 1304 inapplicable to this foreclosure action.

Plaintiff has not established strict compliance with RPAPL 1304. Ms. Thrasher states "[a]t least 90 days prior to the commencement of this action, borrower was sent, via certified mail and first class mail, the requisite 90 day Notice under RPAPL Section 1304 in 14-point type, containing the statutorily prescribed language and the addresses and phone numbers of at least 5 approved housing counseling agencies in the region where the borrower resides." Ms. Thrasher does not purport to have personal knowledge of the mailings of these notices and no contemporaneous affidavit of service has been presented to the court (*see Tuthill*

2. Defendant Luis Martinez denies that he has ever "declared" bankruptcy.

Finance v Candlin, 129 AD3d 1375 [3d Dept 2015]; *TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1257–1258 [3d Dept 2014]). Rather, Ms. Thrasher states in her affidavit that her knowledge is based upon her review of Ocwen's business records and of the "stated facts and circumstances." It is unclear, however, the basis for Ms. Thrasher's knowledge relative to any mailings by AHMS (*see Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2d Dept 2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]; *Smith v Palmeri*, 103 AD2d 739 [2d Dept 1984]).[3]

Plaintiff has failed to demonstrate that the records relied upon by Ms. Thrasher are admissible under the business records exception to the hearsay rule (*see* CPLR 4518 [a]). The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of business are inherently trustworthy because (1) the records are routine reflections of the day to day operations of a business; and (2) the entrant is obliged to be truthful and accurate for purposes of conducting the enterprise (*see Hochhauser v Electric Insurance Co.*, 46 AD3d 174 [2d Dept 2007]). As a general rule, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (*People v Cratsley*, 86 NY2d 81, 90 [1995]). Such records are nonetheless admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon the recipient in its business" (*State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1296 [3d Dept 2012], *lv denied* 20 NY3d 858 [2013]; *see* CPLR 4518[a]; *Deutsche Bank Nat. Trust Co. v Monica*, 131 AD3d 737 [3d Dept 2015]). Ms. Thrasher fails to state that the Ocwen records incorporate records of AHMS or are routinely relied upon in Ocwen's business. Furthermore, she fails to state specifically when the 90-day notices pursuant to RPAPL 1304 were mailed. The affirmation of plaintiff's counsel is not based upon personal knowledge and therefore has no probative value on the issue of whether plaintiff strictly complied with the notice requirements of RPAPL 1304 and 1306. Because plaintiff has failed to demonstrate prima facie compliance with RPAPL 1304, it has also failed to establish prima facie compliance with RPAPL 1306 (*see TD Bank, N.A. v Leroy*, 121 AD3d 1256).

Plaintiff also has failed to demonstrate prima facie standing to bring this action. Annexed to the complaint was a certified copy of the note, which contains undated endorsement in blank by American Home. " '[A] promissory note [is] a negotiable instrument within the meaning of the Uniform Commercial Code' (*Mortgage Elec. Registration Sys., Inc.*

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3. According to the limited power of attorney, Ocwen is the successor servicer to Homeward Residential, Inc., which was formerly known as AMHS.

v Coakley, 41 AD3d 674, 674; *see* UCC 3–104[2][d]). A 'holder' is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession' (UCC 1–201[b][21]; *see* UCC 3–301)" (*see Deutsche Bank Nat. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]). When the instrument is endorsed in blank, it may be negotiated by delivery (*see* UCC 3–202[1], 3–204[2]). Accordingly, to establish standing as holder of the note, plaintiff is required to demonstrate that it was in physical possession of the note endorsed in blank prior to commencement of the action.

Ms. Thrasher states that plaintiff "directly or through its agent/custodian, received physical delivery of the original Notes as consolidated, on March 3, 2011." Again, plaintiff has failed to demonstrate that the records relied upon by Ms. Thrasher in making this statement are admissible under the business records exception to the hearsay rule (*see* CPLR 4518[a]). Ms. Thrasher, an employee of Ocwen, does not identify the "agent/custodian" as Ocwen or some other entity, or state that she is personally familiar with the record-keeping practices and procedures of plaintiff or the undisclosed "agent/custodian" (*see Deutsche Bank Nat. Trust Co. v Brewton*, 142 AD3d 683; *U.S. Bank N.A. v Handler*, 140 AD3d 948 [2d Dept 2016]; *Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650 [2d Dept 2016]; *Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015] ["A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures"]).

To the extent plaintiff relies upon the assignment of mortgage to establish standing, it purports to assign the note and mortgage to plaintiff by "[American Home] by American Home Mortgage Servicing, Inc. as attorney in fact." However, plaintiff has failed to produce any evidence of the authority of American Home Mortgage Servicing, Inc. to assign the note and mortgage on behalf of American Home (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *see Bank of N.Y. v Silverberg*, 86 AD3d 274, 281–283 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 109).

The affirmation of plaintiff's counsel is not based upon personal knowledge and, consequently has no probative value on the issue of whether plaintiff had standing to bring this action.

Plaintiff has failed to establish, prima facie, that it was a holder or assignee of the note prior to commencement of the action (*see Deutsche Bank Nat. Trust Co. v Brewton*, 142 AD3d 683; *cf. JPMorgan Chase Bank, Nat. Assn v Weinberger*, 142 AD3d 643 [2d Dept 2016]). That branch of the motion by plaintiff for summary judgment against defendant Theresa Martinez is denied.

With respect to that branch of the motion by plaintiff to dismiss the affirmative defenses asserted by defendant Theresa Martinez, plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2d Dept 2006]; *see Ramanathan v Aharon*, 109 AD3d 529, 531 [2d Dept 2013]).

That branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendant Theresa Martinez based upon lack of standing is denied (*see supra* at 10-11).

That branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendant Theresa Martinez based upon failure to comply with RPAPL 1302 is granted (*see supra* at 7).

That branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendant Theresa Martinez based upon improper service of process is granted. Defendant Theresa Martinez did not move to dismiss the complaint upon such ground or to extend the period of time in which to move on the ground of undue hardship (CPLR 3211 [e]). As a consequence, such defense is deemed waived (CPLR 3211 [e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

That branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendant Theresa Martinez based upon plaintiff's alleged failure to file a request for judicial intervention (RJI) pursuant to 22 NYCRR 202.12-a (b) and an attorney's affirmation as required by Administrative Order of the Chief Administrative Judge of the Courts promulgated in 2010, as amended in 2011 (*see* A/O 431/11), is denied as moot. Defendant Theresa Martinez has withdrawn this affirmative defense (*see* Memorandum of Law of defendants Theresa Martinez and Luis Martinez at 20).

To the extent defendant Theresa Martinez asserts that she did not receive notice of the settlement conference scheduled for February 1, 2012 in time to attend it, such assertion does not constitute an affirmative defense to the action. In any event, a settlement conference was held on November 4, 2015, and continued on January 20, 2016 and March 23, 2016. By order dated March 23, 2016 of the Hon. Marguerite A. Grays, the court noted that the case had not settled, permitted plaintiff to proceed with the action and directed the parties to appear for a preliminary conference on May 12, 2016. By preliminary conference order dated May 12, 2016, plaintiff was directed to file a note of issue on or before November 18, 2016. The order also provided that any motion for summary judgment be made no later than 120 days after the filing of the note of issue.

With respect to that branch of the cross motion by defendants Theresa Martinez and Luis Martinez to find plaintiff in violation of CPLR 3408, they have failed to demonstrate that plaintiff did not negotiate in good faith during the foreclosure settlement conference (*see* CPLR 3408). Defendants Theresa Martinez and Luis Martinez have made no showing that plaintiff engaged in conduct that improperly hindered the settlement process or needlessly prevented the parties from reaching a mutually agreeable resolution (*see Flagstar Bank, FSB v Titus*, 120 AD3d 469, 470 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 638 [1st Dept 2012]; *cf. U.S. Bank N.A. v Smith*, 123 AD3d 914, 916 [2d Dept 2014]; *US Bank N.A. v Sarmiento*, 121 AD3d 187, 204–205 [2d Dept 2014]).

Defendants Theresa Martinez and Luis Martinez applied for a loan modification in October 2015, which was denied on the ground their verified income was insufficient to create a post-modification monthly payment which would be affordable (*see* plaintiff's Exhibit "G," letter dated November 13, 2015, annexed to the affirmation of Amy L. Rohe-Kipp, Esq.). Their appeal from this denial was also denied, because no modification option existed which would result in affordable level payments based upon their verified monthly income amount (*see* plaintiff's Exhibit "H," a letter dated December 10, 2015, annexed to the affirmation of Amy L. Rohe-Kipp, Esq.). To the extent defendants Theresa Martinez and Luis Martinez filed a second loan modification application, their gross monthly income was verified to be $4,340.57, but their application was denied by letter dated February 25, 2016, because their income was insufficient to achieve an affordable modification. Defendants Theresa Martinez and Luis Martinez have made no showing that these determinations were based upon erroneous calculations, or that plaintiff improperly refused to consider monthly life insurance payments actually received by Luis Martinez. They also have made no showing that plaintiff acted in less than good faith by refusing to consider potential future rental income. Nor can defendants Theresa Martinez and Luis Martinez rely upon the Broker Price Opinion (BPO) report dated February 21, 2016 to establish a lack of good faith by plaintiff in negotiating during the settlement conferences. It is offered for the first time in their reply papers in further support of their cross motion (*see L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692 [2d Dept 2013]; *GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535, 535 [2d Dept 2006]; *Voytek Tech. v Rapid Access Consulting*, 279 AD2d 470, 471 [2d Dept 2001]). Furthermore, in the letter dated February 25, 2016, plaintiff conditionally approved their application to be entered into a period of marketing the property for the purpose of a short sale. Plaintiff advised that certain documents were required to be provided within 30 days of the date of the letter, and final approval would be conditioned upon receipt of an independent valuation of the property. Defendants Theresa Martinez and Luis Martinez have not established they provided such documents in time for the March 23, 2016 conference, plaintiff had received the BPO by that time, or any valuation of the property was discussed at the settlement conference before the case's release from the part.

Defendants Theresa Martinez and Luis Martinez also have failed to show that plaintiff violated CPLR 3408 by moving for summary judgment after they failed to surrender the property by means of a deed in lieu of foreclosure in accordance with the April 1, 2016 offer by plaintiff. The case had already been released from the Residential Foreclosure Conference Part by the time of the offer (*see* order dated March 23, 2016), and motions in the action were no longer stayed pursuant to 22 NYCRR 2012.12-a (c) (7). That branch of the cross motion by defendants Theresa Martinez and Luis Martinez to find plaintiff in violation of CPLR 3408 is denied.

In an action of an equitable nature, the recovery of interest is within the court's discretion (*see* CPLR 5001[a]; *Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002]). The exercise of that discretion is governed by the particular facts in each case, including any wrongful conduct by either party (*see Danielowich v PBL Dev.*, 292 AD2d at 415; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995], *lv to appeal dismissed* 87 NY2d 968 [1996]; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]). Defendants Theresa Martinez and Luis Martinez have failed to demonstrate plaintiff engaged in wrongful conduct which has allowed the unnecessary accumulation of default interest. At this juncture, the court declines to exercise its discretion to toll the accrual of interest nunc pro tunc to the commencement date of this action (*see Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002]; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995], *lv to appeal dismissed* 87 NY2d 968 [1996]; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]). That branch of the cross motion by defendants Theresa Martinez and Luis Martinez to toll the accrual of interest nunc pro tunc to the commencement of this action is denied.

Those branches of the motion by plaintiff for leave to enter a default judgment against Luis Martinez, City of New York Environmental Control Board, City of New York Parking Violations Bureau, Criminal Court of the City of New York, Ravindra Madramythu, Kovan Desai, Sonal Singh and Vimmi Panchal and to appoint a referee are denied at this juncture in view of the open questions of whether plaintiff strictly complied with RPAPL 1304 and 1306 and had standing to bring this action.

Those branches of the cross motion by defendants Theresa Martinez and Luis Martinez to cancel the notice of pendency and to direct the County Clerk[4] to cancel the assignment of mortgage are denied.

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4. It is otherwise noted that the correct entity with respect to such relief is the Office of the City Register and not the County Clerk.

Accordingly, the cross motion is denied. That branch of plaintiff's motion for an order amending the caption is granted, as set forth above. That branch of the motion for an order granting it summary judgment against defendant Theresa Martinez is denied. The branch of the motion for an order dismissing her affirmative defenses is granted only to the extent that the defenses alleging a failure to comply with RPAPL 1302 and improper service of process are dismissed, and is otherwise denied.

Dated: October 17, 2016

J.S.C.