OneWest Bank, FSB v Rao
2016 NY Slip Op 32521(U)
September 19, 2016
Supreme Court, Suffolk County
Docket Number: 12-20881
Judge: William G. Ford

[* 1]

SHORT FORM ORDER

INDEX No. 12-20881

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 1-29-16
ADJ. DATE
Mot. Seq. # 002 - MotD

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OneWest Bank, FSB

Plaintiff,

- against -

Tara Rao, Nassau County Federal Credit Union f/k/a Nassau Financial Federal Credit Union and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the Mortgaged premises described in the Complaint,

Defendants.

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Upon the following papers on this motion for summary judgment and an order of reference: proposed order of reference, affirmation of plaintiff's counsel Nabeela Basheer, Esq., with supporting exhibits A-J; affirmation in opposition of defendant Tara Rao, and upon due consideration and deliberation, it is

ORDERED that this motion (002) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Tara Rao, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent indicated below, otherwise denied; and it is

ORDERED that the plaintiff shall serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice 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 real property known as 390 37th Street, Lindenhurst, New York 11757. On January 25, 2008, the defendant Tara Rao ("the defendant mortgagor") executed a fixed-rate note in favor of IndyMac Bank, F.S.B. ("the lender") in the principal sum of $368,350.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated January 25, 2008 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") acted 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 in the Suffolk County Clerk's Office on December 1, 2008. By way of, inter alia, physical delivery, the note was allegedly transferred to OneWest Bank, FSB ("the plaintiff") prior to commencement, and memorialized by an assignment of the mortgage executed by MERS on July 13, 2011.

The defendant mortgagor allegedly defaulted on the mortgage by failing to make the monthly payment of principal and interest due on or about September 1, 2010, 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 lis pendens, summons and complaint on July 12, 2012.

Issue was joined by the interposition of the defendant mortgagor's answer dated August 3, 2012. By her answer, the defendant mortgagor denies all of the allegations in the complaint, and asserts ten affirmative defenses, alleging, among other things, the lack of standing and the failure to comply with the notice provision of RPAPL § 1304. The remaining defendants have not answered the complaint and, thus, all are in default.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor, and striking her answer; (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 opposition to the motion, the defendant mortgagor has submitted her own affidavit. After the submission of the instant motion, this action was transferred from the inventory of the Honorable Emily Pines, who has since retired, to this IAS Part 38.

The court turns first to the issue of the plaintiff's compliance with the notice requirements of RPAPL § 1304. When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the

defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

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]).

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, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on or after January 14, 2010, the 90-day notice requirement set forth in the statute is applicable (*see*, RPAPL §1304; Laws 2008, ch 472, § 2, eff Sept 1, 2008, as amended by Laws 2009, ch 507, § 1-a, eff Jan 14, 2010). 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]).

The plaintiff's submissions are insufficient to demonstrate 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 an affidavit of service of the 90-day notice upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailing, along with a copy of the certified mailing receipt 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*).

Under the facts presented, the statements set forth in the affidavits of Jillian Thrasher regarding the 90-day pre-foreclosure notice, 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]). Although Ms. Thrasher alleges that the subject notice was mailed to the defendant mortgagor, she did not set forth sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notices; nor did she identify the individuals who allegedly did so. Further, it is noted that Ms. Thrasher's affidavit does not constitute sufficient 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*).

The court next turns to the standing defense asserted in the answer. Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra* at 911 [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the

foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v Sullivan***, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], quoting ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911]).

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201 (5) (*see*, UCC 3-104; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see*, UCC § 3-202; § 3-204; § 9-203 [g]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, *supra*). Furthermore, UCC § 9-203 (g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

The plaintiff demonstrated that, as holder of the endorsed note, it has standing to commence this action (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In her affidavit, Ms. Thrasher alleges that the plaintiff, directly or through its custodian Deutsche Bank, received physical delivery of the original note on February 6, 2008. The documentary evidence submitted by the plaintiff also includes, among other things, the note transferred via a blank endorsement (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Additionally, the plaintiff submitted, among other things, the assignment of the mortgage executed prior to commencement, which memorialized the transfer of the same to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage, which followed as an incident to the note (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Therefore, the plaintiff demonstrated its prima facie burden as to its standing. The opposition in response to this branch of the motion is insufficient to raise a triable issue of fact (*see*, ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]).

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***CFSC Capital Corp.***

XXVII v Bachman Mech. Sheet Metal Co., 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; ***Banque Arabe Et Internationale D'Investissement v One Times Square Assoc. Ltd. Partnership***, 193 AD2d 387, 597 NYS2d 48 [1st Dept 1993] [Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in New York and to commence actions to enforce obligations under those mortgages]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991] [where a foreclosure action is commenced within the applicable limitations period, the doctrine of laches is no defense]). Furthermore, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see*, ***Matter of Stralem***, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses in the answer, except those relating to the plaintiff's alleged lack of standing and the plaintiff's failure to demonstrate compliance with the 90-day pre-foreclosure notice requirements of RPAPL § 1304. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses in the answer in opposition to the motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the unsupported affirmative defenses set forth in the answer are thus dismissed.

The plaintiff demonstrated its standing, as indicated above, by producing the affidavit of in support of Ms. Thrasher and documentation in the form of a written assignment, which established that it was the owner and holder of the subject mortgage and note prior to commencement (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Furthermore, the assignment of the note after commencement is irrelevant to the issue of standing (*see*, ***Emigrant Mtge. Co., Inc. v. Persad***, 117 AD3d 676, 677, 985 NYS2d 608 [2d Dept 2014]; *see also*, ***Brighton BK, LLC v Kurbatsky***, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]). The court finds that none of the defendant mortgagor's allegations give rise to a question of fact as to the plaintiff's standing (*see,* ***Peak Fin. Partners, Inc. v Brook***, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; *cf.*, ***Countrywide Home Loans, Inc. v Gress***, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). The defendant mortgagor, therefore, failed to establish the merit of the standing defenses in the answer. Accordingly, the seventh and eighth affirmative

defenses asserted in the answer are stricken. The court has considered the defendant mortgagor's remaining contentions and finds that they lack merit.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendants, "John Doe #1" through "John Doe #10" is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). The branch of the motion an order pursuant to CPLR 1021 amending the caption by substituting Ocwen Loan Servicing, LLC for the plaintiff is also granted (*see,* CPLR 1018; 3025[b]; ***Citibank, N.A. v Van Brunt Props., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the remaining defendants, Nassau County Federal Credit Union formerly known as Nassau Financial Federal Credit Union (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***U.S. Bank, N.A. v Razon***,115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of the above-noted remaining defendants is fixed and determined; and it is further

ORDERED that plaintiff is directed to place this matter on the Court's calendar (Part 38) for a status conference within 30 days of the service of notice of entry of this decision.

In light of the above-determination, the remaining branches of the motion are denied at this juncture. Therefore, the trial of this action shall be limited to the issue of the plaintiff's compliance with the service requirements of the 90-day pre-foreclosure notice pursuant to RPAPL § 1304 (*see*, CPLR 3212 [g]).

Accordingly, the motion by the plaintiff for summary judgment is determined as indicated above. The combined fourth affirmative defense, except for defense asserted therein relating to the issue of the 90-day pre-foreclosure notice (*see*, Ans. ¶ "9"), is stricken. All of the remaining affirmative defenses asserted in the answer are also stricken.

In view of the foregoing the proposed order submitted by the plaintiff has been marked "not signed."

Dated: September 19, 2016
Riverhead, New York

Hon. WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION