To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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U.S. BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR SASCO MORTGAGE LOAN TRUST 2007-WF2

Plaintiff,

-against-

Index No.: 53397/2014
Motion Sequence No. 2
DECISION & ORDER

LORI EHRLICH, JEROME NEUBURGER, JOHN DOE being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming an interest in or lien upon the property described in the complaint or their heirs at law, distributees, executors, administrators, trustees guardians, assignees, creditors or successors),

Defendants.

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The following papers were considered on Plaintiff's motion seeking an Order granting it summary judgment.

PAPERS	NUMBERED
Notice of Motion/Affirmation/Affidavit/Exhibits A-U	1-24
Memorandum of Law in Support	25
Affirmations in Opposition/Exhibit A-G	26-34
Reply Affirmation	35

Plaintiff moves for an Order pursuant to CPLR 3212 seeking summary judgment against the defendants; for an Order dismissing defenses asserted in the Answer pursuant to CPLR 3211(b); and for permission to treat the Answer as a limited notice of

appearance entitling the defendants, Lori Ehrlich and Jerome Neuburger, *pro se*, to receive notice of the proceedings; to appoint a Referee to determine the amount due and to ascertain whether the premises may be sold in parcels; that JOHN DOE be dropped as a party Defendant and that the caption be amended to reflect the deletion: and that all non-appearing and non-answering Defendants be deemed in default.

On or about May 9, 2007, the defendants, Lori Ehrlich and Jerome Neuburger executed a Note with Wells Fargo Bank, N.A. ("Wells Fargo") in the original amount of $620,000.00. The Note was secured by a Mortgage on premises known as 6 Apple Hill Lane, Chappaqua, New York. The Note endorsed in blank was allegedly physically transferred to the plaintiff prior to the commencement of this action and remains in the plaintiff's possession, and the Mortgage was also assigned to the plaintiff prior to the commencement of this action.

Defendants breached their obligation under the terms of the Note and Mortgage by failing to make timely installment payments which became due and payable on November 1, 2012 and by failing to tender subsequent installments. By reason of this default, the plaintiff elected to accelerate the mortgage debt and declare all sums secured thereby to be due and payable in full. As of June 17, 2015, the total amount due to the plaintiff was $749,297.85.

Plaintiff alleges that the required notice of default was mailed to the Mortgagors at the last known address provided by the Mortgagors. Also, a 90-day pre-foreclosure notice pursuant to RPAPL § 1304 was mailed to the defendants by first-class and certified mail on or about May 2, 2013.

The Summons and Complaint were filed in the Westchester County Clerk's Office on March 10, 2014. All of the defendants were duly served and the plaintiff alleges compliance with RPAPL § 1303 and 1320. Defendants, served an Amended Answer, dated May 28, 2014, alleging several affirmative defenses, such as lack of standing, improper service of process, failure to comply with the 90-day notice requirement, HAMP eligibility, failure to file RJI, and that the Complaint was undated and unverified. Defendants also filed a counter claim seeking damages for willfully and intentionally misleading, misrepresenting and misinforming the defendants and acting in a manner to harass the defendants.

The matter was referred to the Foreclosure Settlement Conference Part pursuant to CPLR 3408. A Settlement Conference was held on March 30, 2015. The parties were unable to negotiate a mutually agreeable solution and the matter was released for continuation of the foreclosure on March 30, 2015. Plaintiff moved for summary judgment and other relief and the Court by Decision and Order dated February 29, 2016, denied the plaintiff's motion based upon the plaintiff's non-compliance with the statutory requirement of RPAPL § 1304. Plaintiff once again moves this Court seeking summary judgment.

The Court in its prior Decision and Order determined that the plaintiff had established standing by establishing that it was both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced, *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *U.S. Bank N.A. v. Cange*, 96 A.D.3d 825, 826, 947 N.Y.S.2d 522; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753–754, 890 N.Y.S.2d 578; *Countrywide Home Loans,*

Inc. v. Gress, 68 A.D.3d 709, 888 N.Y.S.2d 914. The Court also determined that the defendants defaulted and were properly notified of the default in accordance with the terms of the Mortgage. The Court, however, found that the plaintiff failed to make out a prima facie case by not establishing that the 90-day pre-foreclosure notice was properly served upon the defendants pursuant to RPAPL § 1304.

A requirement in making out a prima facie case is proof of service of the RPAPL § 1304 notice. Plaintiff is required to establish that a notice pursuant to RPAPL § 1304 was properly served upon the defendants. RPAPL § 1304 provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type" RPAPL § 1304(1); *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 (2d Dep't 2013). RPAPL § 1304 sets forth the requirements for the content of such notice, RPAPL § 1304(1), and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower, RPAPL § 1304(2); *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 (2d Dep't 2013).

While service of mail is complete upon deposit of a properly stamped and addressed envelope, and presumed to be received, there still must be evidence that a properly stamped and addressed envelope was mailed, *HSBC Bank USA, N.A. v. Thomas*, 46 Misc.3d 429, 999 N.Y.S.2d 671 (Sup. Ct. Kings Cty. 2014). If the plaintiff is attempting to rely upon the long standing rule that a letter or notice that is properly stamped, addressed, and mailed is presumed to be received by the addressee, *News*

Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 176 N.E. 169 (1931); *New York New Jersey Products Dealers Coop. v. Mocker*, 59 A.D.2d 970, 399 N.Y.S.2d 280 (3d Dep't 1977), a simple denial of receipt has been held insufficient to rebut this presumption, *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 478, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004); *Countrywide Home Loans, Inc. v. Brown*, 305 A.D.2d 626, 760 N.Y.S.2d 200 (2d Dep't 2003). New York courts have stated that in order to raise the presumption, more than a general mailing affidavit is required. The presumption of receipt 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 A.D.2d 679, 729 N.Y.S.2d 776 (2d Dep't 2001); *Phoenix Ins. Co. v. Tasch*, 306 A.D.2d 288, 762 N.Y.S.2d 99 (2d Dep't 2003). In contrast, affidavits that merely state that the statutorily required documents were mailed within the statutory time period have been held insufficient to establish proof of actual mailing. *Comprehensive Medical v. Lumbermens Mutual Ins. Co.*, 4 Misc.3d 133(A), 2004 WL 1574698 (App. Term 9 & 10th Jud. Dists., 2004).

Here, as in its prior motion, the plaintiff simply provided an Affidavit from James Green, Vice President Loan Documentation of Wells Fargo, servicing agent for the plaintiff, who avers that based upon his review of the records he certifies and affirms that the RPAPL § 1304 notice was mailed. Plaintiff still provided no proof of actual mailing either by certified or first class mail, or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed. Defendant, however, in opposition to the plaintiff's motion conceded that the RPAPL § 1304 notice was served upon the defendants. Defendants stated that "the plaintiff

provided ample documentary evidence which proves that it sent RPAPL § 1304 notice to defendant..." Furthermore, the defendants failed to challenge service of the RPAPL § 1304 notice, in their opposition to the instant motion, even though they did in their prior motion. Therefore, by failing to raise this issue, in opposition to the plaintiff's motion for summary judgment, the defendants are unable to benefit from any failure to provide proof of properly serving the RPAPL § 1304 notice. A broad reading of *Nationstar Mortgage, LLC v. Silveri*, 126 A.D.3d 864, 7 N.Y.S.2d 158 (2d Dep't 2015) suggests that since no opposition was filed, no triable issue of fact was raised in response to the plaintiff's prima facie showing or as to the merits of any of [the] ... affirmative defenses, *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 1045, 943 N.Y.S.2d 551.

Therefore, the plaintiff has met its initial burden of establishing its entitlement to judgment as a matter of law by producing the mortgage, the unpaid Note, and an Affidavit from Ashley Dooley evidencing the default in the payment obligations of the defendants, *Baron Assoc., LLC v. Garcia Group Enters., Inc.*, 96 A.D.3d 793, 793, 946 N.Y.S.2d 611; *GRP Loan, LLC v. Taylor*, 95 A.D.3d 1172, 1173, 945 N.Y.S.2d 336; *Citibank, N.A. v. Van Brunt Props., LLC*, 95 A.D.3d 1158, 1159, 945 N.Y.S.2d 330. Plaintiff has also established compliance with the default notice provision of the Mortgage as well as RPAPL § 1304. The burden now shifts to the defendants to establish triable issues of fact.

In opposing the motion, the defendants are required to produce evidentiary proof, in admissible form, sufficient to raise a triable issue of fact as to its defenses, *Washington Mut. Bank, F.A. v. O'Connor*, 63 A.D.3d at 833, 880 N.Y.S.2d 696; *US Bank Trust N.A. Trustee*, 16 A.D.3d at 408. Defendants, Ehrlich and Neuburger did

oppose the plaintiff's motion for summary judgment by filing an Answer to the plaintiff's Complaint as well as written opposition to the plaintiff motion for summary judgment. In answering the plaintiff's Complaint for foreclosure, the defendants simply entered general denials or asserted denials based upon information and belief as well as seven affirmative defenses. An Answer containing general denials is insufficient to defeat summary judgment, *Bankers Trust of Rockland County v. Keesler*, 49 A.D.2d. 918, 373 N.Y.S.2d 637 (2'd Dep't 1975). Furthermore, General denials in an answer are insufficient to raise an issue of fact, *Anderson v. City of New York*, 58 A.D.2d 588, 17 N.Y.S.2d 326, 329 (2d Dep't 1940). To succeed in defeating the plaintiff's motion for summary judgment, the defendant's are required to produce evidentiary proof in admissible form establishing a triable issue of material fact, not mere conclusions, hope, unsubstantiated allegations or assertions, *Zuckerman v. City of New York*, 49 N.Y.2d 577.

Defendants' opposition is based upon the RPAPL § 1304 notice containing inaccurate reinstatement figures as well as the plaintiff's Affidavit in support of the plaintiff's motion being inadmissible hearsay. Defendants argue that based upon the RPAPL § 1304 notice served upon them, the payment amount needed to cure the default as of May 2, 2013 - $38,756.76 - was incorrect and should have been $44,244.16 as referenced in the mortgage statement dated May 20, 2013. The Second Department has ruled in *Hudson City Savings Bank v.. DePasquale*, 113 AD3d 595 (2d Dep't 2014), that the factual inaccuracy contained in the 90–day notice requires dismissal of the action because the law requires strict compliance with RPAPL § 1304.

However, the Court finds the defendants' argument to be specious. The RPAPL § 1304 notice states that the defendants can cure the default by making the payment of $38,756.36 dollars "by June 1, 2013", and not "through June 1, 2013" as represented by the defendants. Therefore, if the defendants paid the $38,756.36 by June 1, 2013, that payment would make the mortgage current. However, an additional payment would become due for the month of June covering the period June 1, 2013 to June 30, 2013. The notice for June 2013 payment simply included the payment due for the period June 1, 2013 to June 30, 2013 which added an additional payment of $5,502.40 bringing the total due to $44,244.16. As of May 2, 2013, the date of the RPAPL § 1304 notice, the correct amount due was $38,756.76. The amount required to be paid by the defendants to cure the default in the RPAPL § 1304 notice is correct and not factually inaccurate.

To establish its standing as holder of the note, the plaintiff proffered, among other things, the affidavit of Ashley Dooley, Vice President Loan Documentation of Wells Fargo Bank, N.A. the servicing agent to the plaintiff, who averred that he is familiar with the business records maintained by Wells Fargo for the purpose of servicing mortgage loans, and that he reviewed records kept and maintained by Wells Fargo in its ordinary course of business and that the plaintiff had possession of the Promissory Note on January 11, 2013. He further averred that the plaintiff had possession of the Promissory Note on or before March 10, 2014, the date this action was commenced, *Wells Fargo Bank N.A. v. Arias,* 121 A.D.3d 973, 995 N.Y.S.2d 118, 2014 N.Y. Slip Op. 07148 (2d Dep't 2014); *Bank of New York Melon v. McClintock*, 138 A.D.3d 1372, 31 N.Y.S.3d 252, 2016 N.Y. Slip Op. 03234 (3d Dep't 2016). It is also undisputed that the plaintiff submitted a power of attorney to demonstrate that Wells

Fargo Bank, N.A. as servicer, was acting as attorney in fact for the plaintiff and could execute the affidavit.

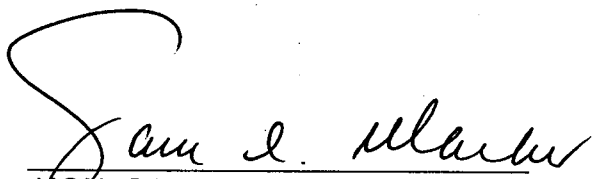
With respect to the defendants' claim of improper service of process, pursuant to CPLR 3211(e), the defendants were required to move to dismiss the complaint for lack of proper service within 60 days following the service of the answer, unless an extension of time was warranted on the ground of undue hardship. Defendants failed to move to dismiss within 60-days and there is no support in the record to establish undue hardship which would have prevented the defendants from making the motion within the requisite statutory period, *Reyes v. Albertson*, 62 A.D.3d 855, 878 N.Y.S.2d 623; *Woleben v. Sutaria*, 34 A.D.3d 1295, 1296, 825 N.Y.S.2d 860; *Worldcom, Inc. v. Dialing Loving Care*, 269 A.D.2d 159, 702 N.Y.S.2d 76; *Vandemark v. Jaeger*, 267 A.D.2d 672, 699 N.Y.S.2d 522. Defendant's affirmative defense of lack of personal jurisdiction is without merit.

By failing to raise the remaining affirmative defenses in opposition to the plaintiff's motion for summary judgment, such defenses are waived. A broad reading of *Nationstar Mortgage, LLC v. Silveri*, 126 A.D.3d 864, 7 N.Y.S.2d 158 (2d Dep't 2015) suggests that since no opposition was filed, no triable issue of fact was raised in response to the plaintiff's prima facie showing or as to the merits of any of [the] ... affirmative defenses, *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 1045, 943 N.Y.S.2d 551. By limiting their opposition to the accuracy of the RPAPL § 1304 notice, and inadmissibility of the Affidavit of Ashley Dooley, the defendants waived their right to challenge the plaintiff's establishment of its prima facie case.

Plaintiff's application for an Order pursuant to CPLR 3212 seeking summary judgment against the defendants and to appoint a Referee to determine the amount due and to ascertain whether the premises may be sold in parcels is GRANTED. Plaintiff's application seeking an Order dismissing defenses asserted in the Answer pursuant to CPLR 3211(b); for permission to treat the Answer as a limited notice of appearance entitling the defendants, Lori Ehrlich and Jerome Neuburger, *pro se*, to receive notice of the proceedings; that JOHN DOE be dropped as a party defendant and that the caption be amended to reflect the deletion: and that all non-appearing and non-answering defendants be deemed in default was GRANTED in the Court's Decision and Order of February 29, 2016.

To the extent any relief requested in motion sequence 2 was not addressed by the court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
January 24, 2017



HON. SAM D. WALKER, J.S.C.