Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 03213/2013
MOTION DATE: 03/14/2017
MOTION SEQ. NO.: 002 MD
003 MD

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HSBC BANK USA, N.A.,

Plaintiffs,

-against-

MELISA SABO, JOSEPH G. KUBACKI,

Defendants.

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PLAINTIFFS' ATTORNEY:
McCABE, WEISBERG AND CONWAY, P.C.
145 HUGUENOT ST., STE. 210
NEW ROCHELLE, NY 10801

DEFENDANTS' ATTORNEYS:
HAROLD A. STEUERWALD, LLC
112 SOUTH COUNTRY RD., STE. 116
BELLPORT, NY 11713

Upon the following papers numbered 1 to 37 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-11 (#002), 12-27 (#003) : Notice of Cross Motion and supporting papers 28-30 : Answering Affidavits and supporting papers : Replying Affidavits and supporting papers 31-37 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff HSBC Bank USA, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Joseph Kubacki and Melisa Sabo; 2) discontinuing the action against defendants designated as "John Doe#1" to "John Doe #10"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted to the following extent:

ORDERED that plaintiff is awarded partial summary judgment dismissing all affirmative defenses set forth in defendants' answer except the tenth, eleventh (only with respect to issues related to compliance with RPAPL 1304 & 1306) and twelfth affirmative defenses; and it is further

ORDERED that plaintiff's application to discontinue the action against defendants designated as "John Doe #1" through "John Doe #10" is granted and the caption is hereby amended by deleting from the caption the defendants designated as "John Doe #1" through "John Doe #10"; and it is further

ORDERED that plaintiff's application for an order appointing a referee to compute amounts due is denied without prejudice, as such request is premature. The proposed order submitted by the plaintiff shall be marked "not signed"; and it is further

ORDERED that the cross motion by defendants Melisa Sabo and Joseph G. Kubacki for an order pursuant to CPLR 3211(a)(3), 3212 & RPAPL 1303 & 1304 dismissing plaintiff's complaint

for lack of standing and for failure to timely serve pre-foreclosure statutorily required notices of default or, in the alternative, denying plaintiff's summary judgment motion is denied; and it is further

ORDERED that pursuant to CPLR 3212(g) in aid for disposition of the action, the sole remaining issues to be determined in this foreclosure action shall concern whether the plaintiff complied with pre-foreclosure mortgage and RPAPL 1304 & 1306 default notice requirements and the trial of this action shall be limited to those issues; and it is further

ORDERED that all parties shall appear for a court conference to ready this matter for trial or to provide a briefing schedule for an additional summary judgment motion (*see Kolel Damsek Eliezer, Inc. v. Schlesinger*, 139 AD3d 810, 33 NYS3d 284 (2nd Dept., 2016)) at 9:30 a.m. on September 26, 2017 in Part 18 at the Courthouse located at 1 Court Street, Riverhead, NY; and it is further

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

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR Section 202.5-b(h)(3).

Plaintiff's action seeks to foreclose a mortgage in the original sum of $278,800.00 executed by defendant Melisa Sabo on June 22, 2006 in favor of HSBC Mortgage Corporation (USA). On the same date defendant Melisa Sabo also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated January 17, 2012 Mortgage Electronic Registration Systems, Inc. as nominee for HSBC Mortgage Corp. (USA) assigned the mortgage to plaintiff HSBC Bank USA, N.A. Plaintiff claims that defendant Sabo defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning April 1, 2011. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on January 29, 2013. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In support of their cross motion and in opposition to plaintiff's motion, defendants submit an affidavit from defendant Melisa Sabo and two attorney affirmations and claim that: 1) plaintiff failed to serve pre-foreclosure notices of default in compliance with mortgage and RPAPL 1303 & 1304 requirements; and 2) plaintiff lacks standing to maintain this action requiring dismissal of the complaint. Defendants claim that the evidence submitted by plaintiff in support of its summary judgment motion from the mortgage servicer is inadmissible hearsay since the mortgage servicer representatives do not possess personal knowledge of the business records record-keeping methods and such testimony does not therefore qualify as an exception to the hearsay rule. Defendants also claim that the copy of the promissory note attached as an exhibit to plaintiff's original summary judgment motion, (which was denied by Order (Iliou, J.) dated December 12, 2014) was unindorsed and questions of fact therefore exist concerning the plaintiff's submission of an indorsed in blank promissory note in support of this (second) summary judgment motion. Defendants also claim that plaintiff has failed to submit documentary evidence to prove that plaintiff's mortgage servicer ("Residential Mortgage Loan Administrative Services") had authority to act on behalf of HSBC Bank USA, N.A.

In opposition to the cross motion and in further support of its motion, plaintiff submits an attorney's affirmation and an affidavit from an assistant vice president of the mortgage servicer and argues that no basis exists to deny plaintiff's application for an order granting summary judgment. Plaintiff claims that the proof submitted in the form of an affidavit from the mortgage servicer's employees, together with copies of the promissory note and mortgage agreement, provide sufficient evidence entitling the mortgage lender to foreclose the mortgage. Plaintiff contends the mortgage servicer's representatives' affidavits detailing the bank records pertaining to the defendant's note and mortgage satisfies the business records exception to the hearsay rule and reveals that the defendant has defaulted under the terms of the mortgage by failing to make mortgage payments for more than six years. Plaintiff claims the evidence shows that HSBC has standing to maintain this action as the holder and continuous physical possessor of the promissory note since February 6, 2012. Plaintiff also claims that the proof submitted shows that the defendant was properly served with pre-foreclosure default notices in compliance with the terms of the mortgage and RPAPL Sections 1303 & 1304.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35

NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

Proper service of RPAPL1303 & 1304 notices on borrower(s) are conditions precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1303 requires that notice be delivered with the summons and complaint to commence the mortgage foreclosure action. The notice must be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type and the notice shall be on its own page. RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

The plaintiff's proof in support of its motion consists of: 1) a copy of the promissory note signed by defendant Melissa Sabo and indorsed in blank by a vice president of the original mortgage lender HSBC Mortgage Corporation; 2) a copy of the June 22, 2006 mortgage signed by defendant Melisa Sabo; 3) a copy of the assignment of the mortgage dated January 17, 2012 from MERS as nominee for HSBC Mortgage Corporation to HSBC Bank USA, N.A. ; 4) two individual affidavits from a vice president and an assistant vice president of PHH Mortgage Corporation, the mortgage loan servicer for plaintiff HSBC, testifying about the contents of the loan (business) records maintained by the mortgage lender; 5) a copy of the mortgage loan default notice dated June 10, 2011, together with copies of the RPAPL 90 day notices dated February 1, 2012, and a copy of the RPAPL 1306 Proof of Filing Statement from the New York State Department of Financial Services; 5) a copy of the RPAPL 1303 notice, together with an affidavit of service dated February 6, 2013, attesting to service of the summons and complaint and RPAPL 1303 notice by personal service on defendant Sabo on February 2, 2013.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest her failure to make payments due under the terms of the promissory note and mortgage agreement. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's continuing default, plaintiff's compliance with mortgage and statutory pre-foreclosure notice requirements and plaintiff's standing to maintain this action

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business

and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice*, 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise." (quoting *People v. Kennedy*, 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan*, 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records– (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*see People v. Kennedy, supra* @ pp. 579-580)). The "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records." (*People v. Cratsley*, 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be 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 by the recipient in its business." (*State of New York v. 158th Street & Riverside Drive Housing Company, Inc.*, 100AD3d 1293, 1296, 956 NYS2d 196 (2012); *leave denied*, 20 NY3d 858 (2013); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company*, 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica*, 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo*, 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO*, 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). In this regard, with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it incorporated the original records into its own records and relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

In this case, the plaintiff's evidentiary foundation to prove its entitlement to foreclose the mortgage hinges on the admissibility of two affidavits the mortgage lender has submitted from employees of the current mortgage servicer (PHH Mortgage Corporation). The first affidavit dated February 26, 2016, entitled "Affidavit of Amount Due", is from a PHH vice president and sets forth

the proof relevant to defendant's default in making payments due under the terms of the mortgage and promissory note, and to service of the pre-foreclosure default notices required by the mortgage and RPAPL 1304 & 1306. The second affidavit dated January 12, 2017, entitled "Affidavit of Possession", is from a PHH assistant vice president and sets forth the proof relevant to plaintiff's possession of the original promissory note prior to commencement of the foreclosure action.

Both affidavits contain near identical statements addressing the business records exception to the hearsay rule (CPLR 4518). The mortgage servicer's employees' affidavits state:

> "2. In the regular performance of my job functions, I have access to and am familiar with business records maintained by the Servicer for the purpose of servicing mortgage loans. I have personal knowledge of the manner in which these business records are created. These records (which include data compilations, electronically imaged documents, and others) are: (a) made at or near the time of the occurrence of the matters set forth by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records; and (b) kept as a regular practice and in the ordinary course of business conducted by the Servicer. It is the regular practice of the Servicer to make such records. To the extent records related to the Loan come from another entity (including, but, not limited to the prior servicer*), those records were received by Servicer in the ordinary course of business, have been incorporated into and maintained as part of Servicer's business records, and have been relied on by Servicer. In connection with making this Affidavit, I reviewed and relied on those business records concerning the Loan." (* indicates the affidavit dated 1/12/17).

Of primary importance in determining whether these affidavits conform to requirements for admissibility as business records exceptions to the hearsay rule, is the issue of whether the hearsay contained in the business documents is essentially reliable given the rationale for the existence of the exception which is that records systematically made for the conduct of business as a business are inherently highly trustworthy since the records serve in place of the safeguards ordinarily afforded by confrontation and cross examination (*see Williams v. Alexander*, 309 NY 283, 129 NE2nd 417 (1955)). While defense counsel points to a series of decisions which emphasize a need for a current servicer's representative to have "personal knowledge" of a prior servicer's business record-keeping practices and procedures (*see Aurora Loan Services, LLC v. Baritz*, 144 AD3d 618, 41 NYS3d 55 (2nd Dept., 2016); *HSBC v. Royal*, 142 AD3d 952, 37 NYS3d 321 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Brewton*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *U.S. Bank V. Handler*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *Aurora Loan Services, LLC v. Mercius*, 138 AD3d 650, 29 NYS3d 462 (2nd Dept., 2016); *Citibank, N.A. v. Cabrera*, 130 AD3d 861, 14 NYS3d 420 (2nd Dept., 2015)), the statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record, particularly in this case, where there is a business relationship between mortgage servicing entities responsible for entering and maintaining accurate records, and where the current servicer has incorporated and relied upon the business records it maintains in its regular course of business (*see Citibank N.A. v. Abrams*, 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang, supra.*)).

As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a

foreclosure action rely on a particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a) and the records themselves actually evince the facts for which they are relied upon." Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business; 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the time the transaction occurred. – if demonstrated, make the records admissible since such records are considered trustworthy and reliable. And clearly, if each of these criteria are established, the records of a predecessor-in-interest lender or predecessor mortgage servicer, can be introduced as evidence in support of a foreclosing plaintiff's prima facie case since those business entries accurately recorded underlies the intent of the business records exception (*People v. Cratsley, supra.; Citibank v. Abrams, supra.; Deutche Bank National Trust Co. v. Monica, supra.; HSBC Bank USA, N.A. v. Sage, supra.; Landmark Capital Inv. Inc. v. Li-Shan Wang, supra.*)). Moreover, the language contained in the statute specifically authorizes the court discretion to determine admissibility by stating "*if the judge finds*" that the three foundational requirements are satisfied the evidence shall be admissible.

With respect to the issue of standing, paragraph 6 of plaintiff's mortgage servicer's assistant vice president's affidavit states the following:

> "6. After Melisa Sabo executed the Note, the original Note was delivered to HSBC Bank USA, N.A. as custodian. The custodian received the original Note on February 6, 2012. The custodian remains in custody of the original Note, and does so as agent for the current owner of the Loan and Note, HSBC Bank USA, N.A...'

This testimony provides relevant, admissible evidence to establish plaintiff's standing to maintain this foreclosure action since submission of an affidavit from the mortgage servicer (and not necessarily the owner of the mortgage loan) attesting to plaintiff's possession of the note at commencement of the action is sufficient to establish the bank's standing (*see Wells Fargo Bank, N.A. v. Lewczuk*, 2017 NY Slip Op 06318, 2017 WL 3611646 (2nd Dept., 8/23/2017);*HSBC Bank USA, N.A. v. Armijos*, 151 AD3d 943, 2017 WL 2662557 (2nd Dept., 2017); *Central Mortgage Co. v. Davis*, 149 AD3d 898, 53 NYS3d 325 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Ostiguy*, 127 AD3d 1375, 8 NYS3d 669 (3rd Dept., 2015); *U.S. Bank, N.A. v. Cruz*, 147 AD3d 1103, 47 NYS3d 459 (2nd Dept., 2017)). Defendant's contention that the mortgage servicer's vice president's affidavit constituted inadmissible hearsay because she did not have personal knowledge of the plaintiff's record-keeping practices and procedures is without merit (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *Citigroup v. Kopelowitz, supra.*); *Wells Fargo Bank, N.A. v. Gallagher*, 137 AD3d 898, 28 NYS3d 84 (2nd Dept., 2016)). Plaintiff has also established standing by attaching a certified copy of the promissory note to its complaint which, taken together with the servicer's affidavit, provides sufficient proof to establish standing (*U.S. Bank, N.A. v. Sabloff*, 2017 NY Slip Op 06313, 2017 WL 3611653 (2nd Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*)

With respect to the issue of the defendant Sabo's default in making payments, paragraph 9 of plaintiff's mortgage servicer's vice president's affidavit states the following:

> "9. The payments have not been made according to the terms of the Note and

Mortgage. The Loan is currently due for the April 2011 payment and all payments thereafter."

In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see PennyMac Holdings, Inc. V. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk,* 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to the defendant's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments for the past six + years (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning her continuing default, plaintiff's application for partial summary judgment against the defendant based upon her breach of the mortgage agreement and promissory note must be granted.

With respect to service of the RPAPL 1303 notice, plaintiff's proof consists of a copy of the affidavit of service from the process server stating that the "1303 Notice- Help for Homeowners in Foreclosure in bold fourteen-point type and printed on colored paper, and the title of the notice printed in twenty-point type in compliance with RPAPL Sect 1303. Bearing Index Number 13-03213.. " was personally served with the summons and complaint to defendant Sabo on February 2, 2013 at 11:37 a.m. The process server's affidavit constitutes prima facie evidence of proper service of the RPAPL 1303 notice and it is incumbent upon the defendant to submit credible, admissible evidence in the form of an affidavit containing specific and detailed contradictions of the claims set forth in the process server's affidavit (CPLR 306; *U.S. Bank, N.A. v. Tauber,* 140 AD3d 1154, 36 NYS3d 144 (2nd Dept., 2016); *NYCTL v. Tsafinos,* 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). Defendant's conclusory affidavit that she never received the RPAPL 1303 notice, after having received the summons and complaint, is not credible and fails to provide sufficient evidence to raise a genuine issue of fact concerning service of this statutory condition precedent (*see Grogg v. South Road Associates,* 74 AD3d 1021, 907 NYS2d 22 (2nd Dept., 2010); *Emigrant Mortgage Co. v. Gosdin,* 119 AD3d 639, 989 NYS2d 609 (2nd Dept., 2014)).

With respect to service of the pre-foreclosure mortgage RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish "proof of mailing by the post office" (*CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia,* 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza,* 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.,* 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

While the business records exception to the hearsay rule provides a mechanism to establish

the foundation for the proof necessary to prove compliance, recent appellate rulings have required that the affidavit submitted by the mortgage service provider's representative set forth his/her personal familiarity with the mailing practices and procedures of the business entity responsible for doing the actual mailing (*CitiMortgage, Inc. v. Pappas, supra.; Wells Fargo Bank, N.A. v. Trupia, supra.; Wells Fargo Bank, N.A. v. Lewczuk,* 2017 NY Slip 06318, 2017 WL 3611646 (2nd Dept., 2017); *Investors Savings Bank v. Salas,* 152 AD3d 752, 2017 WL 3161068 (2nd Dept., 2017); *JPMorgan Chase Bank v. Kutch,* 142 AD3d 536, 36 NYS3d 235 (2nd Dept., 2016)). In this case, there is insufficient documentary evidence to prove that mailing by certified and first class mail was done by the post office, since plaintiff has only submitted copies of the 1304 notice and a RPAPL 1306 proof of filing statement. Moreover, since a prior servicer performed the actual mailing of the required RPAPL 1304 notices, there is insufficient proof submitted to prove strict compliance with the RPAPL 1304 mandates, since the servicer's affidavits do not affirm that these notices were sent according to standard office mailing practice and procedures of the prior servicer. Based upon these circumstances, plaintiff has failed to demonstrate its entitlement to summary judgment on the issue of compliance with the requirements of RPAPL 1304 (*see Wells Fargo Bank, N.A. v. Lewczuk,* 2017 NY Slip Op 06318, 2017 WL 3611646 (2nd Dept., 2017); *Citibank, N.A. v. Wood,* 150 AD3d 813, 2017 WL 1903218 (2nd Dept., 2017); *M & T Bank v. Joseph,* 152 AD3d 579, 2017 WL 2961421 (2nd Dept., 2017)). For the same reasons, the affidavits submitted by the current mortgage servicer are insufficient to prove that the notice of default required under the terms of the mortgage was served by the plaintiff (*see U.S. Bank, N.A. v. Sabloff,* 2017 NY Slip Op 06313, 2017 WL 3611653 (2nd Dept., 8/23/2017); *Emigrant Bank v. Myers,* 147 AD3d 1027, 47 NYS3d 446 (2nd Dept., 2017);*Deutsche Bank National Trust Co. v. Carlin,* 152 AD3d 491, 2017 WL 2855918 (2nd Dept., 2017); *HSBC Mortgage Corp. v. Gerber,* 100 AD3d 966, 955 NYS2d 131 (2nd Dept., 2012).

With respect to defendant's claims of fraud, there is no credible evidence submitted by the defendant to support her claim that the indorsed in blank promissory note submitted by the plaintiff in support of its summary judgment motion is fraudulent and no basis therefore exists to dismiss the complaint on such an assertion (*HSBC Bank USA, N.A. v. Armijos, supra.*). Plaintiff has also submitted sufficient proof of the mortgage servicer's authority to act on behalf of the plaintiff by submission of a Limited Power of Attorney dated January 21, 2016. Finally as the defendant has failed to raise any evidence to address her remaining affirmative defenses (of the 23 asserted in her answer) in opposition to plaintiff's motion, those affirmative defenses must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore,* 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, the defendant's cross motion seeking dismissal of plaintiff's complaint is denied. Plaintiff's motion seeking summary judgment is granted solely to the extent indicated hereinabove. A conference shall be held for the purpose of either scheduling a limited issue trial pursuant to CPLR 3212(g), or a briefing schedule for submission of another summary judgment motion.

Dated: August 24, 2017

HON. HOWARD H. HECKMAN, JR.
J.S.C.