Hudson City Sav. Bank, FSB v D'Ancona
2017 NY Slip Op 31917(U)
September 4, 2017
Supreme Court, Suffolk County
Docket Number: 33035/2013
Judge: Howard H. Heckman, Jr.

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.: 33035/2013
MOTION DATE: 07/18/2017
MOTION SEQ. NO.: 001 MG
002 MD

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HUDSON CITY SAVINGS BANK, FSB,

Plaintiffs,

-against-

THOMAS D'ANCONA A/K/A THOMAS P. D'ANCONA A/K/A THOMAS DANCONA, KERI D'ANCONA A/K/A KERI A. D'ANCONA A/K/A KERI DANCONA,

Defendants.

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PLAINTIFF'S ATTORNEY'S:
BRYAN CAVE, LLP
1290 AVENUE OF AMERICAS
NEW YORK, NY 10104

DAVIDSON FINK, LLP
28 EAST MAIN ST., STE. 1700
ROCHESTER, NY 14614

DEFENDANTS' ATTORNEYS:
MACCO & STERN, LLP
2950 EXPRESS DR. S., STE. 109
ISLANDIA, NY 11749

Upon the following papers numbered 1 to 36 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-25 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26-31 ; Replying Affidavits and supporting papers 32-36 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Hudson City Savings Bank, FSB, seeking an order: 1) granting summary judgment striking the answer of defendants Thomas D'Ancona and Keri D'Ancona; 2) substituting Michael D'Ancona, Thomas D'Ancona and Nicholas D'Ancona as named party defendants in place and stead of defendants designated as "John Doe #1" through "John Doe #3" and discontinuing the action against defendants designated as "John Doe #4" through "John Doe #25"; 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; and it is further

ORDERED that the cross motion by defendants Thomas D'Ancona and Keri D'Ancona for an order pursuant to CPLR 3211(a)(3), 3212 & RPAPL 1303 & 1304 denying plaintiff's motion and dismissing plaintiff's complaint for lack of standing and for failure to serve pre-foreclosure statutorily required notices is denied; 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 serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk

of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $362,000.00 executed by defendants Thomas D'Ancona and Keri D'Ancona on May 14, 2004 in favor of Flagstar Bank, FSB. On the same date both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated March 22, 2012 Mortgage Electronic Registration Systems, Inc. as nominee for Flagstar Bank assigned the mortgage to Bank of America, N.A. By assignment dated November 15, 2013 Bank of America, N.A. assigned the mortgage to the plaintiff Hudson City Savings Bank, FSB. Plaintiff claims that the D'Ancona defendants defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning December 1, 2011 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on December 16, 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 Keri D'Ancona and an attorney affirmation and claim that: 1) plaintiff failed to serve pre-foreclosure notices of default in compliance with RPAPL 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's representative does 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 issues of fact exist concerning the chain of possession and delivery of the promissory note to the plaintiff since the mortgage lender is required to prove that the plaintiff owned and had possession of the note when this action was commenced. Defendants also raise issues concerning MERS' authority to assign the mortgage and the validity of the Purchase and Servicing Agreement.

In opposition to the cross motion and in further support of its motion, plaintiff submits an attorney's affirmation 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 employee, 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 representative's affidavit detailing the bank records pertaining to the defendants' note and mortgage satisfies the business records exception to the hearsay rule and reveals that the defendants have defaulted under the terms of the mortgage by failing to make mortgage payments for nearly six years. Plaintiff claims the evidence shows that Hudson City Savings Bank has standing to maintain this action as the holder and continuous physical possessor of the promissory note since October 26, 2004. 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 Section 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 an RPAPL 1304 notice on borrower(s) is a condition 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 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 dated May 14, 2004 signed by defendants Thomas D'Ancona and Keri D'Ancona containing two indorsements: the first signed by a vice president and an assistant vice president of the original mortgage lender, Flagstar Bank, FSB and indorsed to the order of Countrywide Home Loans, Inc.; and the second indorsed in blank and signed by a managing director of Countrywide Home Loans, Inc.; 2) a copy of the May 14, 2004 mortgage signed by defendants Thomas D'Ancona and Keri D'Ancona; 3) a copy of the Countrywide/Hudson City Savings Bank Mortgage Loan Purchase and

Servicing Agreement dated December 8, 2000; 4) copies of the assignments of the mortgage dated May 22, 2012 from MERS as nominee for Flagstar Bank to Bank of America, N.A. and dated November 15, 2013 from Bank of America, N.A. to Hudson City Savings Bank, FSB.; 5) an affidavit from an assistant vice president of Bank of America, N.A, the mortgage loan servicer for plaintiff Hudson City Savings Bank testifying about the contents of the loan (business) records maintained by the mortgage lender; 6) a copy of the mortgage loan default notice dated January 11, 2012, together with copies of the RPAPL 90 day notices dated July 29, 2013 addressed to the D'Ancona defendants and a copy of the Trackright business record confirming first class and certified mailing of the 90-day notices and a copy of the certified mailing receipt signed by defendant Thomas D'Ancona, and a copy of the RPAPL 1306 Proof of Filing Statement from the New York State Department of Financial Services.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendants do not dispute their failure to make payments due under the terms of the promissory note and mortgage agreement. Rather, the issues raised by the defendants concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendants' continuing default, plaintiff's compliance with 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 is predicated on the affidavit of the mortgage servicer's affidavit who states the following:

> "2. In my capacity as an Officer of Bank of America, N.A., I have access to the business records for and relating to the loan at issue herein. The loan records are maintained by BANA in the course of its regularly conducted business activities and are made at or near the time of the event, by or from information transmitted by a person with knowledge. It is the regular practice of BANA to keep such records in the ordinary course of its regularly conducted business activity. BANA maintains and relies on the records created and maintained by BAC Home Loans Servicing, LP prior to its July 1, 2011 *de jure* merger with and into BANA. Except where otherwise stated, I make this Affidavit based upon my review of BANA's books, records and files for and relating to the loan at issue and from my personal knowledge regarding how those records are kept and maintained.

Of primary importance in determining whether the affidavit conforms 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)). 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 7 of plaintiff's mortgage servicer's assistant vice president's affidavit states the following:

> "7. Plaintiff became the owner of the Note and Mortgage on or before October 26, 2004, pursuant to a Purchase and Servicing Agreement ('PSA"), and Plaintiff remained the owner and holder of the Note and Mortgage through and including December 16, 2013, the date this action was commenced. ... The Note was transferred to Plaintiff on or before October 26, 2004 and Plaintiff has remained in physical possession of the Note since October 26, 2004.

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 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)). Any alleged issues surrounding the mortgage assignments are irrelevant in this case concerning the issue of standing since the plaintiff has established possession of a duly indorsed in blank promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Company v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)). 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)). Moreover, and equally on point as to standing, plaintiff has also established its standing by attaching a certified copy of the promissory note to its complaint which, taken together with the servicer's affidavit and attorney certification, provides sufficient proof to establish standing (*JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*)

With respect to the issue of the defendants D'Anconas' default in making payments, paragraphs 13 & 14 of plaintiff's mortgage servicer's assistant vice president's affidavit states the following:

> "13. Defendants defaulted on the Loan by failing to make the payment due for December 1, 2011 for principal and interest of $2,199.55, including amounts due for taxes and insurance as well as subsequent payments. Defendants' failure to remit timely monthly payments is reflected in the Payment History for the Loan, a true and correct coy of which is attached....
>
> 14. The default was not cured."

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 defendants' undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendants have defaulted under the terms of the parties agreement by failing to make timely payments in nearly 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 their continuing default, plaintiff's application for summary judgment against the defendants based upon their breach of the mortgage agreement and promissory note must be granted.

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" which can be proven by admissible evidence provided by the business records exception to the hearsay rule (*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)).

Plaintiff's proof of compliance with RPAPL 1304 consists of the affidavit testimony of the mortgage servicing representative who states:

> "19. BANA, as is its practice for New York loans in default, caused to be mailed a ninety day pre-foreclosure notice (the "90-Day Notice"), pursuant to RPAPL 1304, by certified and first class mail, addressed to each of the following persons at the Property and last known mailing address on the dates set forth after each name:
>
> First Class Mailing
> Date of Mailing: July 30, 2013
> Thomas D'Ancona
> Keri D'Ancona
> 17 Cedar Ave
> Medford, NY 11763-3501
> Tracking #: 2275168734
>
> Certified Mailing
> Date of Mailing: July 30, 2013
> Thomas D'Ancona
> Keri D'Ancona
> 17 Cedar Avenue
> Medford, NY 11763-3501
> Tracking #: 7196 9006 9296 8530 3188
>
> 20. Annexed hereto as Exhibit 11 are copies of the 90-Day Notices sent to Defendants, both by First-Class and Certified Mail.
>
> 21. Annexed hereto as Exhibit 12 are computer print-outs of the TrackRight shipping information for the Breach Letter and the 90-Day Notices.
>
> 22. Annexed hereto as Exhibit 13 is a copy of the Proof of Filing for the 90-Day Notices.
>
> 23. Annexed hereto as Exhibit 14 is a copy of the Certified Mailing Receipt for the 90-Day Notice sent via Certified Mail."

This affidavit, together with the documentary evidence attached as exhibits to the motion papers, provides the evidentiary foundation to prove plaintiff's compliance with the RPAPL 1304 requirements. Defendants have raised issues concerning service of the 90-day notices and the sufficiency of the contents of the notice.

With respect to service of the notice, defendant Keri D'Ancona's affidavit states that she "did not receive notices required by the CPLR or RPAPL". Plaintiff has, however, submitted sufficient proof, in the form of the affidavit from the mortgage servicing representative (which satisfies the business records exception to the hearsay rule) coupled with the documentary evidence submitted, to prove compliance with the statute. Plaintiff's proof shows that the 90-day notices were mailed by first class and certified mailings addressed to both borrowers on July 30, 2013, with confirmation of

the mailings supported by the mortgage servicer's TrackRight tracking system, the RPAPL 1306 filing statement and by a copy of defendant Thomas D'Ancona's signature attached to the certified mailing receipt card. The fact that the notices were addressed to both borrowers does not violate the requirements of the statute and would explain why the certified receipt was signed by Thomas D'Ancona since the post office does not require two signatures to serve such documents. Having established sufficient proof of mailing through admissible testimony, documentary evidence and post office receipts, plaintiff has established "strict compliance" with mailing requirements and defendant Keri D'Ancona's carefully worded denial of "receipt" is unavailing and fails to raise a genuine issue of fact related to service (*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 the sufficiency of the contents of the 90-day notice, the defendants claim that the statute requires that the 90-day notice be sent "in a separate envelope from any other mailing or notice." The requirement of a "separate envelope" does not preclude the inclusion of a federally mandated notice to veterans in the envelope enclosures and clearly does not provide legal grounds for dismissing the complaint. Defining "strict compliance" in this manner would defy common sense and logic, and lead to an absurd result of rewarding mortgagors, who obviously were cognizant of the fact that they were in default for nearly two years at the time of mailing and of the fact that such a default has consequences including the lender's right to foreclose, particularly in this instance where four years since receipt of the notice their breach has continued.

Finally, as the defendants have failed to raise any evidence to address their remaining affirmative defenses (of the 17 asserted in her answer) and 5 counterclaims 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 in its entirety. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: September 4, 2017

Hon. Howard H. Heckman Jr.
J.S.C.