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MEMO DECISION & ORDER

INDEX No. 2548/14

COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/5/17
SUBMIT DATE 11/30/17
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD
CDISP Y____ N X

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DEUTSCHE BANK NATIONAL TRUST CO. in its capacity as Indenture Trustee for the note holders of Aames Mortgage Investment Trust, 2005-2,

Plaintiff,

-against-

EDMUND McCOLLIN, NERISSA McCOLLIN, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, SLOMIN'S, INC., TAX REDUCTION SERVICES, INC., LVNV FUNDING, LLC, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE CCP LIEN UNIT, CITIFINANCIAL COMPANY (DE), "JOHN DOE #1 - 10" and "JANE DOE #1 - 10", the names John Doe and Jane Doe being fictitious, their identities being unknown to the plaintiff, it being the intention of plaintiff to designate any and all unknown person, including but not limited to, the tenants, occupants, corporations, and judgment creditors, if any, holding or claiming some right, title, interest or lien in or to the mortgaged premises herein,

Defendants.

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Upon the following papers numbered 1 to 11 read on this motion to appoint a referee to compute, among other things, and cross motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers: 4-7 ; Opposing papers: ; Reply papers ; Other 8-9 (memorandum); 10-11 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted in its entirety; and it is further

ORDERED that the cross motion (#002) by defendants, Edmund McCollin and Nerissa McCollin, for dismissal is denied in its entirety; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; 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 § 202.5-b(h)(3).

This foreclosure action was commenced by filing on February 6, 2014. The matter was reassigned to this Part pursuant to Administrative Order No. 110-17, dated September 28, 2017 and submitted for decision on November 30, 2017. In essence, on March 7, 2005, defendants, Edmund McCollin and Nerissa McCollin, borrowed $351,000.00 from the plaintiff's predecessor-in-interest and executed a promissory note and mortgage. The defendants defaulted and on February 26, 2008, the borrowers executed a Loan Modification Agreement in the new principal sum of $348,705.22. The defendants defaulted, once again, on September 1, 2010 by failing to pay the monthly installments due and owing. The defendants submitted an answer to the complaint, alleging twelve affirmative defenses and three counterclaims.

In the moving papers, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses of the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see* ***HSBC Bank USA, Natl. Assn. v Espinal***, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Cox***, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

The burden then shifts to defendants (*see* ***Bank of America, N.A. v DeNardo***, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer or otherwise available to them (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d

832,880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., 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]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

The defendants' opposition challenges plaintiff's mailing of the contractual 30-day notice, as well as the alleged non compliance with RPAPL § 1304. The cross motion (#002) seeks dismissal on these issues. The Court addresses each of these allegations herein, however, in accordance with the above, all other affirmative defenses and counterclaims raised in the answer and not addressed in the opposition and cross motion are dismissed as abandoned.

Any claim that the RPAPL §1304 notice was not properly mailed is rejected. As noted by the Court of Appeals, "[i]t is a general rule that the law presumes that a letter properly addressed, stamped and mailed is duly delivered to the addressee" (***Trust & Guar. Co. v Barnhardt***, 270 NY 350, 1 NE2d 459 [1936]; *see also* ***Engel v Lichterman***, 95 AD2d 536, 538,467 NYS2d 642 [2d Dept 1983] ["[i]t has long been recognized in the law of evidence that a letter properly mailed is presumed to have been received"]). Here, Christy Metcalfe's affidavit states that, upon her personal review, Residential Credit Solutions, Inc.'s (RCS) business records confirm that the 90-day notice was sent to the borrowers via first class and certified mail at the property address. RCS is the prior servicer which sent the 30-day contractual notice and the 90-day pre-action notice. Ms. Metcalfe notes that she is personally familiar with RCS's regular business practices, and describes the procedure by which the records are created and maintained. She swears that the business records were relied upon on a regular basis in the course of plaintiff's business activities with respect to this loan in default, and provides in detail the records relied upon.

Attached to her affidavit are copies of the electronic PDF copies and the Collection Notes, the 30-day default notice, the 90-day notice and the Proof of Filing Statement to the New York State Banking Department, pursuant to RPAPL § 1306, which is offered as proof to the state agency that the mailing occurred on March 11, 2013, pursuant to the Step One Filing requirement. The

documents contain the 10-digit and 20-digit US Postal Service numbers and demonstrates RCS's standard mailing practice and procedure. The affidavit adequately sets forth the basis of the affiant's knowledge and established the admissibility of the documents appended to the affidavit as business records and comports with the dictates of ***HSBC Bank USA v Ozcan***, 154 AD3d 822, 2017 WL 4657992 (2d Dept 2017) (*see* ***Bank of America, Natl. Assn v Brannon***, __ AD3d __, 63 NYS3d 352 [1st Dept 2017]; *see also* ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, 761 NYS2d 54 [2d Dept 2003]).

That there is no requirement that the affiant have personal knowledge of every entry is clear, particularly where there is a business relationship between the entities entering and maintaining the records and those incorporating and relying upon them in the regular course of their business (*see* ***Citibank, NA v Abrams***, 144 AD3d 1212, 1216, 40 NYS3d 653 [3d Dept 2016] ["Polk was entitled to rely on the loan records in addressing the issue of possession, as CPLR 4518[a] does not require a person to have personal knowledge, ..."]; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 739, 15 NYS3d 863 [3d Dept 2015]; ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 1127, *supra*; ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012] ["Plaintiff established its entitlement to judgment as a matter of law by relying in part on the original loan file prepared by its assignor. Plaintiff relied on these records in its regular course of its business"]).

A business record will be admissible if that record "was made in the regular course of any business and ... 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" (***One Step Up, Ltd. v Webster Bus. Credit Corp.***, 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518[a]). While "the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence 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" (***Deutsche Bank Natl. Trust Co. v Monica,*** 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015] *supra*; *quoting* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012], *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]). Here, Ms. Metcalfe's affidavit demonstrates the required reliance upon the records in the regular course of business and such reliability is key to its admissibility (*see* ***Corsi v Town of Bedford,*** 58 AD3d *at* 231–232, 868 NYS2d 258 [2d Dept 2008], *lv. denied* 12 NY3d 714, 883 NYS2d 797 [2009]; ***Matter of Carothers v GEICO Indem. Co.***, 79 AD3d at 865, 914 NYS2d 199 [2d Dept 2010]). The Court need not address defendants' concerns as to the quality of the affidavit since it satisfied the admissibility requirements of CPLR 4518(a) (*see* ***Stewart Title Ins. Co. v Bank of New York Mellon***, 154 AD3d 656, 61 NYS3d 634 [2d Dept 2017]; ***Citigroup v Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; *see generally* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]).

It is the Court which must determine the threshold requirement for admissibility (*see* ***People v Kennedy,*** 68 NY2d at 576, 510 NYS2d 853 [1986]). The Court of Appeals in ***Bossuk v Steinberg***,

58 NY2d 916, 919, 460 NYS2d 509 (1983) held that there was no need to produce the person who did the actual mailings since "[t]he proof of the Sheriff's regular course of business in this regard sufficed." In ***Hospital for Joint Diseases v Elrac, Inc.***, 11 AD3d 432, 433, 783 NYS2d 612 (2d Dept 2004), the Second Department held that an affidavit based upon records maintained by an insurer in the ordinary course of business did constitute admissible evidence ("Personal knowledge of such documents, their history, or specific content are not necessarily required of a document custodian"). Various cases, particularly in the Second Department, have held that such business records are admissible (*see* ***CitiMortgage, Inc. v Espinal***, 134 AD3d 876, *supra*; ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, *supra*; ***Burrell v Barreiro***, 83 AD3d 984, 922 NYS2d 465 [2d Dept 2011]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, *supra*]; ***We're Assocs. Co. v Rodin Sportswear Ltd.***, 288 AD2d 465, 734 NYS2d 104 [2d Dept 2001]; ***Spangenberg v Chaloupka***, 229 AD2d 482, 645 NYS2d 514 [2d Dept 1996]).

Here, Christy Metcalfe, as the current recipient of the records, can establish personal knowledge of the maker's business practices and procedures, "and the records themselves actually evince the facts for which they are relied upon (citations omitted)" (***Citigroup v Kopelowitz***, 147 AD3d 1014, *supra*). Therefore, this Court holds that the records relied upon, in the affidavit of Christy Metcalfe, are admissible pursuant to the business records rule. Rejected as unmeritorious is defendants' counsel's claim that the plaintiff's affidavit of merit is insufficient due to a lack of personal knowledge on the part of the affiant, who is an employee of the prior servicer and sender of the required notices.

Notably, even under the dictates of ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, 47 NYS3d 415 (2d Dept 2017), plaintiff has met its burden. Due proof of the mailing of the RPAPL § 1304 notice can be established by any one of three alternative methods. First, by the submission of an affidavit of service (*see* ***JPMorgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]); second, by "proof of mailing by the post office" alternative method of proof of proper mailing set forth in ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, *supra*); or the third method, that is, the business record exception alternative of proof of proper mailing set forth in ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, *supra* (*see* CPLR 4518).

Based upon the discussion set forth above, Christy Metcalfe's affidavit satisfies the third alternatives under ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, *supra*; *see generally* ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]). The affidavit adequately sets forth the basis of her knowledge and established the admissibility of the documents appended to the affidavit as business records (*see* ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, *supra*; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, *supra*).

Here, plaintiff satisfied the mailing requirements of RPAPL § 1304 and the default notice with Ms. Metcalfe's affidavit, which adequately set forth the basis of her knowledge and established the admissibility of the documents appended to the affidavit as business records (*see* ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, *supra*; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, *supra*). As such, the Court finds the defendants' denial of receipt to be without merit, since the plaintiff is only required to send the notices.

The Court also rejects the claim concerning the list of five housing counseling agencies (*see* RPAPL §1304[2]). The claim that the notice was non-compliant because three of the six listed housing counseling agencies were located in Nassau County instead of Suffolk County is substantively lacking in merit. The statute, applicable at the time of mailing, did not require that the list of five housing counselors selected by the plaintiff be those with offices in the *county* wherein the borrower resides. Rather, the statute provided that "the department of financial services and/or the division of housing and community renewal shall make available a listing, by *region*, of such agencies which the lender or mortgage loan servicer may use to meet the requirements of this section" [emphasis added] and the lender is free to chose counselors on either list (*id.*). The list provided satisfied the Long Island Region requirement.

The defendants' cross motion is denied.

The Court, therefore, grants plaintiff's motion (#001) in its entirety, denies defendants' cross motion (#002) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 12/20/17

THOMAS F. WHELAN, J.S.C.