Wells Fargo Bank, N.A. v Daley
2017 NY Slip Op 32748(U)
December 13, 2017
Supreme Court, Suffolk County
Docket Number: 18259/2013
Judge: Howard H. Heckman, Jr.
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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.: 18259/2013
MOTION DATE: 10/10/2017
MOTION SEQ. NO.: 002 MG

COPY

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WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

ARTHUR E. DALEY, JR., ALICE DALEY,

Defendants.

---X

PLAINTIFF'S ATTORNEY:
FEIN, SUCH & CRANE, LLP
1400 OLD COUNTRY RD., STE. C103
WESTBURY, NY 11590

DEFENDANT'S ATTORNEY:
CHRISTOPHER THOMPSON, ESQ.
33 DAVISION LANE EAST
WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 25 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 16-=23 ; Replying Affidavits and supporting papers 24-25 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank, N.A. seeking an order: 1) granting summary judgment striking the answer asserted by defendants Arthur E. Daley, Jr. and Alice Daley ; 2) discontinuing the action against defendant Arthur E. Daley, Jr.; 3) substituting Daniel Daley and Chelsea Daley as named party defendants in place and stead of defendants designated as "John Doe #1" and "Jane Doe #1", and discontinuing the action against defendants designated as "John Doe #2" through "John Doe #5" and "Jane Doe #2" through "Jane Doe #5"; 4) deeming all appearing and non-appearing defendants in default; 5) amending the caption; and 6) 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 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 $315,000.00 executed by defendants Arthur E. Daley, Jr. and Alice Daley on November 29, 2006 in favor of Fremont Investment and Loan. On the same date both Daley defendants also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated February 9, 2009 Mortgage Electronic Registration Systems, Inc. as nominee for Fremont

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Investment and Loan assigned the mortgage to plaintiff Wells Fargo Bank, N.A. Plaintiff claims that the defendants defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning March 1, 2010 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 July 12, 2013. Defendants Arthur E. Daley Jr. and Alice Daley served an answer on August 5, 2013. Defendant Arthur E. Daley, Jr. died on January 8, 2014. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer, discontinuing the action against the deceased party defendant, and for the appointment of a referee.

In opposition to plaintiff's motion, defendant Alice Daley claims that: 1) the action must be stayed pending substitution for the decedent or plaintiff's withdrawal of a claim seeking a deficiency judgment against the decedent's estate; 2) plaintiff has failed to prove that it complied with the service requirements set forth in the mortgage and pursuant to RPAPL 1304; and 3) plaintiff lacks standing to maintain this action.

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 RPAPL 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 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.

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 timely payments due under the terms of the promissory note and mortgage agreement for the past seven years and nine months. Rather, the issues raised by the defendant concern whether the action must be stayed as a result of the defendant/mortgagor Arthur E. Daley, Jr.s death and whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon the mortgagors' 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

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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)).

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. 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.

Initially, with respect to issues surrounding the mortgagor's (Arthur E. Daley's) death, as a general rule if a cause of action survives the death of a party, the death divests the court of

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jurisdiction until a duly appointed personal representative is substituted for the decedent (CPLR 1015; *Giroux v. Dunlop Tire Corp.*, 16 AD3d 1068, 791 NYS2d 769 (4th Dept., 2005); *Gonzalez v. Ford Motor Company*, 295 AD2d 474, 744 NYS2d 468 (2nd Dept., 2002); *Matter of Einstoss*, 26 NY2d 181, 309 NYS2d 184 (1970)). However, where a party's death does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution (*Bova v. Vinciguerra*, 139 AD3d 797, 526 NYS2d 671 (3rd Dept., 1988); *Alaska Seaboard Partners Ltd. Partnership v. Grant*, 20 AD3d 436, 79 NYS2d 117 (2nd Dept., 2002)).

In this case the foreclosed premises were owned by the Daley defendants as tenants by the entirety. By operation of law, upon the demise of one tenant by the entirety, the surviving tenant became seized of the entire ownership interest in the subject property (*see Paterno v. CYC, LLC*, 46 AD3d 788, 850 NYS2d 131 (2nd Dept., 2007); *Matter of Violi*, 65 NY2d 392, 492 NYS2d 550 (1985); *Squiciarino v. Squiciarino*, 35 AD3d 844, 830 NYS2d 163 (2nd Dept., 2006)). The rule is that a mortgagor who has made an absolute conveyance of all his/her interest in the mortgaged premises, including his equity of redemption, is not a necessary part to foreclosure, unless a deficiency judgment is sought (*FNMA v. Connelly*, 84 AD2d 805, 444 NYS2d 147 (2nd Dept., 1981); *Heidegard v. Reis*, 135 AD 414, 119 NYS 921 (1st Dept., 1909); *Mutual Life Insurance Co. Of New York v. Ninety-Fifty Street & Lexington Avenue Corp.*, 60 NYS2d 450 (NY Cty. Sup. Ct. 1946)). Since, upon his death, defendant/mortgagor Arthur E. Daley, Jr. retains no ownership interest in the premises, and in view of the fact that as part of the mortgage lender's motion the Trust seeks to discontinue this action against the defendant/decedent and has elected to waive its right to seek a deficiency, there is no reason to stay this action since the defendant's death does not affect the merits of this action (*HSBC Bank USA v. Ungar Family Realty Corp.* 111 AD3d 673, 974 NYS2d 583 (2nd Dept., 2013); *DLJ Mortgage Capital, Inc. v. 44 Brushy Neck Ltd.* 51 AD3d 857, 859 NYS2d 221 (2nd Dept., 2008); *FNMA v. Connelly, supra.*; *Paterno v. CYC, LLC, supra.*; *Countrywide Home Loans v. Keys*, 27 AD3d 247, 811 NYS2d 362 (1st Dept., 2006); *Residential Credit Solutions, Inc. v. Lalji et al.*, 39 Misc 3rd 1218(A), 975 NYs2d 369 (Queens Cty. Sup. Ct., 2013)).

With respect to the issue of standing, paragraph 5 of plaintiff's mortgage servicer's officer's affidavit states the following:

> "5. Plaintiff is in possession of the original Note and was in possession of same at the time this action was commenced. Plaintiff acquired the original Note on August 19, 2011. A copy of said original Note, along with a copy of the particular business records that I reviewed and relied upon, maintained as described above and evidencing and confirming the date Plaintiff's (sic) acquired possession of the original Note, is annexed hereto as Exhibit "A".

This sworn statement together with the documentary proof submitted by the plaintiff provides relevant, admissible evidence to establish plaintiff's standing to maintain this foreclosure action since submission of an affidavit from the mortgage lender's agent attesting to plaintiff's agent's possession of the note at or prior to the commencement of the action is sufficient to establish the bank's standing (*see HSBC Bank USA, N.A. v. Armijos*, 151 AD3d 943, 57 NYS3d 205 (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 assignment are irrelevant in this case concerning the issue of standing since the plaintiff

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has established possession of a duly indorsed 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 Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)). Plaintiff has also established standing by attaching a copy of the promissory note to its complaint, which taken together with the attorney certification and servicer's affidavit provides sufficient proof to establish standing (*see JPMorgan Chase Bank v. Weinberger, supra.; Nationstar Mortgage LLC. v. Catizone, supra.*)).

With respect to the issue of the defendants' default in making payments, paragraph 6 of plaintiff's mortgage servicer's officer's affidavit states the following:

> "6. Borrower failed to make the payment that was due for March 1, 2010 under the Loan Documents and has failed to make subsequent payments to bring the loan current. Consequently, the entire loan balance is now due and owing to Plaintiff."

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 since March 1, 2010 (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 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 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 (*see HSBC Bank USA, N.A. v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2nd Dept., 2017); *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)).

In this case, there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office. Plaintiff has submitted proof in the form of an affidavit from the mortgage servicing representative confirming that the mailings were done more than 90 days prior to commencing this action on February 28, 2013; together with copies of the four individual 90 day notices containing the tracking numbers for the certified mailings; the mortgage lender's letter log

records identified as a "certified regulatory mail register" identifying the certified mailings by article number; the servicer's "first class proof of mailing report" showing first class mailing to both mortgagors at the mortgaged premises on February 28,2013; USPS postal "Track & Confirm"records indicating the certified mailing notices (with label numbers matching the certified mailing tracking numbers) were delivered to the premises on March 4, 2013 at 11:06 a.m.; and a copy of the proof of filing statement filed with the New York State Banking Department pursuant to RPAPL 1306 confirming the 90-day notices were timely served and filed. Such proof establishes the plaintiff's compliance with statutory requirements (*see HSBC Bank USA v. Ozcan, supra.*). Defendant's claim that a RPAPL 1304 notice was "never received at our home" together with defense counsel's conclusory denial of service, are not supported by any relevant, admissible evidence sufficient to raise a genuine issue of fact which would defeat plaintiff's summary judgment motion (*see PHH Mortgage Corp., v. Muricy*, 135 AD3d 725, 24 NYS3d 137 (2nd Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to the mortgage default notices, a review of the affirmative defenses asserted in defendants' answer reveals that the defendants never asserted plaintiff's failure to serve a mortgage default notice as required under the terms of the mortgage, as an affirmative defense. Based upon their failure to assert such claim as an affirmative defense, the defendants have waived their right to assert it in opposition to plaintiff's motion (CPLR 3015 & 3018(b); *see Emigrant Bank v. Marando*, 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016)). Moreover, even were the court to consider defendant's fourth affirmative defense as asserting such defense, the plaintiff has submitted sufficient proof to show that default notices were mailed to both mortgagor defendants in compliance with mortgage requirements. The plaintiff's proof consists of an affidavit submitted by the mortgage servicer's representative confirming that the mailings were done by first class mailing of notices dated December 8, 2010, together with copies of the two notices of default dated December 8, 2010 and addressed to the Daley defendants at the mortgaged premises, and the mortgage lender's letter log records reflecting the demand letters were sent on December 8, 2010. Such proof provides sufficient evidence of compliance with the mortgage default notice requirements and the defendant's affidavit, together with defense counsel's conclusory denial of service, fails to raise a genuine issue of fact concerning service of the default notice (*see PHH Mortgage Corp. v. Muricy, supra.*; *HSBC Bank v. Espinal, supra.*). In addition, even were the court to deem the proof submitted by the plaintiff with respect to service of the mortgage default notice insufficient, plaintiff's proof submitted in support of service of the RPAPL 1304 90-day notices, satisfies the mortgage lender's obligations under the terms of the mortgage concerning the notice of default requirements (*see Wachovia Bank, N.A. v. Carcano*, 106 AD3d 724, 965 NYS2d 516 (2nd Dept., 2013)).

Finally, defense counsel's contention that the motion must be denied based upon plaintiff's failure to timely seek a default judgment against defendants who defaulted in appearing in this action is not valid as clearly defense counsel does not have standing to assert this defense on behalf of defendants that he does not represent, and no legal basis exists to deny plaintiff's motion on these grounds. In addition, the defendant has failed to raise any admissible evidence to support the remaining affirmative defenses asserted in her answer in opposition to plaintiff's motion. Accordingly those 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 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

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Accordingly plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: December 13, 2017

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