NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

WELLS FARGO BANK, NA,

Plaintiff,

- against-

MILVIA CALDERON, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

Index No. 708314/16

Motion Date September 18, 2017

Motion Cal. No. 189

Motion Seq. No. 1

The following papers read on this motion by plaintiff for summary judgment against defendant, Milvia Calderon, for leave to enter a default judgment against the remaining defendants, for leave to appoint a referee, and for leave to amend the caption substituting Miguel Reyes, Alejandro Calderon, Johnny Calderon, "John" Calderon and David Reyes in place and stead of defendant, "John Doe"; and this cross motion by defendant, Milvia Calderon, to dismiss the complaint insofar as asserted against her, based upon lack of standing and failure to comply with RPAPL 1306.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF Doc. #28-#42
Notice of Cross Motion - Affidavits - Exhibits	EF Doc. #44-#52
Answering Affidavits - Exhibits	EF Doc. #53-#62
Reply Affidavits	EF Doc. #63-#67

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

In 2014, Milvia Calderon executed and delivered a note in favor of Vanguard Funding LLC (Vanguard) in the principal amount of $183,658.00, plus interest. As security for the note, Calderon executed and delivered a mortgage dated December 23, 2014, and recorded on January 8, 2015 (the subject mortgage) to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Vanguard, encumbering the real property known as 102-15 160th Avenue, Howard Beach, New York (the subject property). The subject mortgage was assigned by MERS, as nominee for Vanguard, to plaintiff, by assignment of mortgage executed on March 9, 2016, and recorded on March 16, 2016.

Plaintiff commenced this foreclosure action on July 15, 2016, alleging it is the owner and holder of the note and subject mortgage, and that defendant, Milva Calderon, defaulted in paying the monthly mortgage installment due on January 1, 2016. In the complaint, plaintiff alleged that as a consequence, it elected to accelerate the amount due under the mortgage.

Defendant, Milva Calderon, appearing in a self-represented capacity, served an answer, asserting affirmative defenses based upon lack of standing, failure to comply with RPAPL 1304, failure to comply with the regulations of the U.S. Department of Housing and Urban Development (HUD), and interposing a counterclaim for an award of attorneys' fees pursuant to Real Property Law § 282. The remaining defendants failed to timely appear or answer the complaint.

The matter was referred to the Foreclosure Settlement Conference Part (FSCP) where, a conference was held on September 27, 2016, and continued on December 2, 2016 and January 20, 2017. By order dated January 20, 2017, the Court Attorney Referee determined that the case met the criteria of the FSCP, but had not settled, and granted plaintiff leave to proceed with the action. The Court Attorney Referee noted that defendant, Milva Calderon, was denied an "FHA loan modification due to unaffordability." The Court Attorney Referee directed plaintiff to appear at a status conference on April 18, 2017, and file an "[f]oreclosure [a]ffirmation" or certificate of merit pursuant to Administrative Order 208/13, and an application for an order of reference by the status conference date. By status conference order dated April 18, 2017, the Court Attorney Referee directed plaintiff to appear at a final status conference on June 27, 2017, and file an "[f]oreclosure [a]ffirmation" or certificate of merit pursuant to Administrative Order 208/13, and an application for an order of reference by the final status conference date.

Plaintiff's motion is timely made. Defendant, Milva Calderon, now appearing by counsel, opposes the motion, and cross moves to dismiss the complaint insofar as asserted against her for lack of standing and based upon plaintiff's alleged failure to comply with RPAPL 1306. Plaintiff opposes the cross motion. The remaining defendants have not appeared in relation to the motion or cross motion.

That branch of the motion by plaintiff for leave to amend the caption substituting Miguel Reyes, Alejandro Calderon, Johnny Calderon, "John" Calderon and David Reyes in place and stead of "John Doe" is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

WELLS FARGO BANK, NA, Index No. 708314/2016

Plaintiff,

- against -

MILVA CALDERON, CITY OF NEW YORK
Milva Calderon; City of New York Environmental Control Board; City of New York Parking Violations Bureau; City of New York Transit Adjudication Bureau; Miguel Reyes; Alejandro Calderon; Johnny Calderon; "John" Calderon and David Reyes,

Defendants

With respect to that branch of the motion by plaintiff for summary judgment against defendant, Milva Calderon, CPLR 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses (*see Stone v Continental Ins. Co.*, 234 AD2d 282 [2d Dept 1996]; *accord Morley Maples, Inc. v Dryden Mut. Ins. Co.*, 130 AD3d 1413 [3d Dept 2015]; *Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516 [1st Dept 1980]). To do so, the proponent must tender sufficient evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014]; *see Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]). Additionally, where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725 [2d Dept 2017]; *Wells Fargo Bank, N.A. v. Arias*, 121 AD3d 973, 973-974 [2d Dept 2014]). Furthermore, where, as here, the plaintiff in a residential foreclosure action alleges in

its complaint that it has served an RPAPL 1304 notice on the borrower, and has timely filed the requisite form with the superintendent, pursuant to RPAPL 1306, plaintiff must prove its allegation by tendering sufficient evidence demonstrating the absence of material issues of fact as to its strict compliance with RPAPL 1304 (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]) and RPAPL 1306 (*see Hudson City Savings Bank v Seminario*, 149 AD3d 706 [2d Dept 2017]; *TD Bank, N.A. v Leroy*, 121 AD3d 1256 [3d Dept 2014]). A plaintiff must also, as part of its *prima facie* case, establish satisfaction with a condition precedent set forth in the loan documents if a defendant alleges that plaintiff failed to comply with such condition precedent (*see GMAC Mortgage, LLC v Bell*, 128 AD3d 772 [2d Dept 2015]; *Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152, 1153 [2d Dept 2015]; *HSBC Mortg. Corp. [USA] v Gerber*, 100 AD3d 966, 967 [2d Dept 2012]; *see also Green Planet Servicing, LLC v Martin*, 135 AD3d 1063 [3d Dept 2016]).

In support of its motion, plaintiff offers, among other things, an affirmation of its counsel, a copy of the pleadings, affidavits of service, the note, allonge, mortgage, assignment of mortgage, a copy of a proof of filing statement issued by the New York State Department of Financial Services, and affidavits of Mahilet Ayalew and Asahia Brooks, vice presidents of loan documentation for plaintiff.

With respect to the issue of standing, a plaintiff has standing in a mortgage foreclosure action when it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]). A "holder" is the person or entity in possession of a negotiable instrument that is payable either to bearer or to an identified person or entity that is the person or entity in possession (*see* UCC 1-201[b][21]; *U.S. Bank National Association for Citigroup Mortgage Loan Trust, Inc., 2006-NC2 v Brody*, 156 AD3d 839 [2d Dept 2017]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d at 361-362; *Dyer Trust 2012–1 v Global World Realty, Inc.*, 140 AD3d 827, 828 [2d Dept 2016]).

To the extent plaintiff relies upon the assignment of mortgage to establish standing, that assignment does not specifically assign the note. Rather, it assigns the mortgage only and consequently, is inadequate to demonstrate that the note also was assigned at that time (*see Deutsche Bank Nat. Trust Co. v Weiss*, 133 AD3d 704 [2d Dept 2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 666 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 767 [2d Dept 2015]; *US Bank N.A. v Faruque*, 120 AD3d 575, 577 [2d Dept 2014]).

To the extent plaintiff claims it was in physical possession of the note at the time of commencement of the action, a copy of the note, including an allonge, was attached to the complaint filed in the action. The note bears an undated certification by an attorney, and the

allonge bears a special endorsement by Vanguard to plaintiff, and an additional endorsement in blank by plaintiff. The endorsements on the allonge are undated. Ayalew avers, based on her review of plaintiff's business records maintained by plaintiff for the purpose of servicing mortgage loans, that plaintiff possessed the note on January 17, 2015 and "on or before July 15, 2016, the date this action was commenced." Such averment, however, appears to contradict or be in conflict with the statement made by James R. Adam, counsel for plaintiff, in his reply affirmation, which indicates that his law office possessed the original note on July 15, 2016. He states that the law firm received from plaintiff a "copy of the complete collateral file on or about May 27, 2016," "[t]he complete collateral file included the original, wet ink note," and "an attorney from this office reviewed said original note, including the attached allonge, reviewed a complete copy of said note, and certified such as a complete and accurate copy." He also states that "[p]laintiff's counsel remained in possession of said original note on July 15, 2016," and "[t]he collateral file, with the original note was returned to [plaintiff] on or about July 25, 2016. It is notable that Ayalew makes no statement in her affidavit that the note had been delivered to plaintiff's counsel prior to commencement. Under such circumstances, plaintiff has failed to demonstrate the absence of genuine issues of material fact with respect to the issue of whether plaintiff was in physical possession of the note, with the allonge containing an endorsement in blank endorsed, affixed thereto, at the time of commencement, and therefore had standing to bring this action.

With respect to the issue of compliance with RPAPL 1304, plaintiff alleged in its complaint that if the subject mortgage loan is a subprime home loan or high cost home loan, then it complied with RPAPL 1304. When RPAPL 1304 was first enacted, it applied only to "high-cost," "subprime" and "non-traditional" home loans (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 104 [2d Dept 2011], citing L 2008, ch 472, § 2). The statute, however, was amended effective January 14, 2010, by deleting all references to high-cost, subprime and non-traditional home loans (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 105) (L 2009, ch 507, § 1-a), and RPAPL 1304 currently applies to any "home loan" as defined in RPAPL 1304(5)(a). Plaintiff makes no claim that RPAPL 1304 is inapplicable to this case insofar as the mortgage is not a "home loan" for purposes of the statute.[1]

In her affidavit, Brooks states that based upon her review of plaintiff's business records, a 90-day pre-foreclosure notice was sent to defendant, Milvia Calderon, by certified and first class mail to the last known address of Milva Calderon at 102-15 160th Avenue, Howard Beach, New York, and to the mortgaged premises, on February 17, 2016. She states that plaintiff made an electronic filing with the Superintendent of Financial Services on February 15, 2016, and that the Department issued a confirmation number (NYS3961316). Annexed to Brooks's affidavit is

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[1] The record indicates that the subject property is improved by a one to two family dwelling (*see* plaintiff's Exhibit "A," Mortgage), and defendant, Milva Calderon, resided at the property at the time the action was commenced (*see* plaintiff's Exhibit "E," affidavit of service dated July 29, 2016).

a copy of the 90-day notices dated February 15, 2016,[2] as well as the "Proof of Filing Statement" from the New York State Department of Financial Services. Although Brooks states she received training on, and has knowledge of how, the bank sends letters in the servicing process, such statement is insufficient to establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (*see Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049 [2d Dept 2017]). The Proof of Filing Statement pursuant to RPAPL 1306, while constituting some proof that a mailing was done, contains no information indicating that the mailing was done by both registered or certified mail and first-class mail in accordance with RPAPL 1304 (*see Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890, 892). Thus, plaintiff has failed to establish, *prima facie*, that it strictly complied with the requirements of RPAPL 1304. Because plaintiff has failed to demonstrate *prima facie* compliance with RPAPL 1304, it necessarily also has failed to establish *prima facie* strict compliance with RPAPL 1306 (*see Hudson City Savings Bank v Seminario*, 149 AD3d 706; *see also TD Bank, N.A. v Leroy*, 121 AD3d 1256).

In addition, plaintiff has failed to show that it complied with certain federal regulations applicable to acceleration and foreclosure of the subject mortgage by virtue of terms of the loan documents, a defense that defendant, Milva Calderon, validly asserted in her answer. The subject mortgage "does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary [of HUD]" (§ 9[d]). Likewise, the underlying note "does not authorize acceleration when not permitted by HUD regulations." Under the HUD regulations applicable to a mortgage insured by the FHA, a lender must make reasonable efforts to arrange for a face-to-face meeting with defendant prior to commencing the foreclosure action or submit proof that it was excused from doing so. As relevant here, it was incumbent upon plaintiff, prior to commencing this action, to have a face-to-face meeting with defendant, Milva Calderon, or, at the very least, make reasonable efforts to arrange such a meeting before three full monthly installments due on the mortgage became unpaid (*see* 24 CFR 203.604[b]; 203.606[a]). Plaintiff offers no proof that it attempted to arrange a face-to-face meeting, or was exempt from complying with the federal regulations (*see* 24 CFR 203.604[c]; 203.606[b]; *Green Planet Servicing, LLC v Martin*, 141 AD3d 892 [3d Dept 2016]). Rather, plaintiff contends that any failure on its part to attempt to arrange a face-to-face meeting was inconsequential because defendant, Milva Calderon, appeared at the mandatory settlement conference pursuant to CPLR 3408 and the case did not settle when in the FSCP. Plaintiff, however, has offered no persuasive reason for dispensing with the federal requirement of attempting to arrange a face-to-face meeting in advance of acceleration and foreclosure based upon a payment default.

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[2] To the extent Brooks states that a copy of the "affiliated certified mailing receipt" is attached to her affidavit, no such copy of a receipt was submitted to the court. Rather, there is a computer printout from the USPS website which indicates a piece of mail was in transit, and a "Transaction Report" of Walz Group, Inc. which indicates "Unsigned" in connection with the status of "Certified Mail."

That branch of the motion by plaintiff for summary judgment against defendant, Milva Calderon, and for an order of reference is denied regardless of the sufficiency of Milva Calderon's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Bank of New York Mellon v Zavolunov*, 157 AD3d 754 [2d Dept 2018]).

To the extent defendant, Milva Calderon, cross-moves, in effect, for summary judgment dismissing the complaint insofar as asserted against her for lack of standing, " 'the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied' (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59–60; *see Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650, 652 [2d Dept 2016])" (*Citicorp Mortg. v Adams*, 153 AD3d 779 [2d Dept 2017]). Here, defendant, Milva Calderon, has failed to eliminate triable issues of fact regarding plaintiff's standing as the holder of the note on the date of the commencement of the action (*see Citicorp Mortg. v Adams*, 153 AD3d 779, 780; *see U.S. Bank N.A. v Handler*, 140 AD3d 948, 950 [2d Dept 2016]).

To the extent defendant, Milva Calderon, cross-moves, in effect, for summary judgment dismissing the complaint insofar as asserted against her on the ground plaintiff failed to strictly comply with the filing requirement of RPAPL 1306, compliance with RPAPL 1306 is a statutory condition precedent to the commencement of the foreclosure action (*see Hudson City Savings Bank v Seminario*, 149 AD3d 706; *TD Bank, N.A. v Leroy*, 121 AD3d 1256). Defendant, Milva Calderon, contends that plaintiff's admitted filing with the Superintendent before the claimed mailings of the 90-day pre-foreclosure notice does not comply with RPAPL 1306.

Plaintiff asserts that defendant, Milva Calderon, has waived any claim that it failed to comply with RPAPL 1306, having failed to raise the alleged noncompliance as an affirmative defense in her answer. Failure to comply with RPAPL 1304 and 1306 is not jurisdictional (*see 40 BP, LLC v Katatikarn*, 147 AD3d 710 [2d Dept 2017]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept 2016]; *U.S. Bank Nat. Assn v Carey*, 137 AD3d 894 [2d Dept 2016]). It is a defense which may be raised at any time during an action (*see U.S. Bank Nat. Assn. v Carey*, 137 AD3d 894; *Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2d Dept 2015]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 105 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]), irrespective of whether the claim of noncompliance is asserted in an answer, and a failure to demonstrate compliance warrants dismissal of the complaint (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162). Furthermore, plaintiff alleged in its complaint that it complied with RPAPL 1306 by filing the form required by the superintendent of financial services within three business days of the mailing of the RPAPL 1304 notice, and defendant, Milva Calderon, denied such allegation (*see JPMorgan Chase Bank, Nat. Assn v Kutch*, 142 AD3d 536 [2d Dept 2016]).

In opposition to defendant, Milva Calderon's cross motion, plaintiff offers no alternative proof of mailing of the 90-day pre-foreclosure notice in an effort to show that it mailed the such

notice in advance of the filing with the superintendent. Rather, plaintiff argues that RPAPL 1306 does not require the filing with the superintendent be made after the mailing of the pre-foreclosure notice but rather within three business days of the mailing.

RPAPL 1306 provides that lenders "shall file with the superintendent of financial services (superintendent) within three business days of the mailing of the notice required by [RPAPL 1304]" a form containing certain information regarding the borrower and mortgage (RPAPL 1306[1]; *see* RPAPL 1306[2]). It also provides that:

> "[e]ach filing delivered to the superintendent shall be on such form as the superintendent shall prescribe, and shall include at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent to ascertain the type of loan at issue. The superintendent may subsequently request such readily available information as may be reasonably necessary to facilitate a review of whether the borrower might benefit from counseling or other foreclosure prevention services" (RPAPL 1306[2]).

The statute mandates the development by the superintendent, with the assistance of the commissioner of the division of housing and community renewal, of an electronic database which is capable of receiving all filings required under RPAPL 1306 (*see* RPAPL 1306[3]). The superintendent is authorized to promulgate such rules and regulations as "shall be necessary to implement the purposes of this section" (RPAPL 1306[5]).

The Superintendent has developed a three-part filing process whereby, as a first step, the lender is required to file within three business days *after* the mailing of the 90-day pre-foreclosure notice, and in connection with the filing, provide the day, month, and year the letter was mailed to the borrower. Plaintiff's interpretation of RPAPL 1306 does not meet the Superintendent's rules, and in addition, fails to further the goals and purposes of the filing set forth in the statute. RPAPL 1306 provides that the information from the filing "shall be used by the superintendent exclusively for the purposes of monitoring on a statewide basis the extent of foreclosure filings within this state, to perform an analysis of loan types which were the subject of a pre-foreclosure notice and directing as appropriate available public and private foreclosure prevention and counseling services to borrowers at risk of foreclosure" (RPAPL 1306[4]), and that upon the filing, "the superintendent may subsequently request such readily available information as may be reasonably necessary to facilitate a review of whether the borrower might benefit from counseling or other foreclosure prevention services" (RPAPL 1306[2]). The superintendent is also permitted to share information contained in the database with housing counseling agencies designated by the division of housing and community renewal, as well as with other state agencies with jurisdiction over housing, for the purpose of coordinating or securing help for borrowers at risk of foreclosure. The foregoing goals and purposes are reflected in the legislative history of the statute (*see TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1259 [to protect borrowers and prevent a foreclosure crisis in the future, and to reduce the

number of preventable foreclosures]). Allowing a lender to commence an action and allege compliance with the filing requirement based on a filing that was performed before a mailing– as long as the mailing was made within three days after the filing– would frustrate the goals and purposes of RPAPL 1306 (*cf. Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 107).

Because plaintiff admits it made its filing before any mailing of the pre-foreclosure notice, it has failed to strictly comply with the condition precedent required by RPAPL 1306, and that failure is not excusable (*see TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1259-1260). Summary judgment dismissing the complaint insofar as asserted against defendant, Milva Calderon, is warranted (*see id.*). Accordingly, the cross motion by defendant, Milva Calderon, in effect, for summary judgment dismissing the complaint insofar as asserted against her is granted.

Dated: March 15, 2018

DARRELL L. GAVRIN, J.S.C.