HSBC Bank USA, N.A. v Zacpal
2018 NY Slip Op 30707(U)
April 17, 2018
Supreme Court, Suffolk County
Docket Number: 33958/2013
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.: 33958/2013
MOTION DATE: 02/069/2018
MOTION SEQ. NO.: 001 MG

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HSBC BANK USA, N.A., et.al.,

Plaintiffs,

-against-

MIROSLAV ZACPAL, THE STROBER ORGANIZATION, INC., F/K/A PROBUILD ORGANIZATION, LLC,

Defendants.

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PLAINTIFF'S ATTORNEY:
HOGAN LOVELLS US LLP
875 THIRD AVENUE
NEW YORK, NY 10022

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

Upon the following papers numbered 1 to 32 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 23- 29 ; Replying Affidavits and supporting papers 30 - 32 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff HSBC Bank USA, N.A. seeking an order: 1) granting summary judgment striking the answer and counterclaims asserted by defendant Miroslav Zacpal ; 2) discontinuing the action against defendants designated as "John Does" and "Jane Does"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; 5) reforming the legal description of the mortgaged premises to match the actual description set forth in the complaint; 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 $637,000.00 executed by defendant Miroslav Zacpal on September 5, 2007 in favor of Wells Fargo Bank, N.A.. On the same date Zacpal also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that the defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning September

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 27, 2013. Defendant Zacpal served an answer dated January 13, 2014 with fifteen affirmative defenses and two counterclaims. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition to plaintiff's motion, defendant Zacpal claims that: 1) plaintiff has failed to prove that it complied with the service requirements set forth in the mortgage and pursuant to RPAPL 1303 & 1304; 2) plaintiff lacks standing to maintain this action; 3) plaintiff failed to negotiate in good faith by failing to offer a loan modification.; 4) plaintiff has failed to seek a timely default judgment against defendant Strober; 5) plaintiff's failure to file a consent to change attorney form with the court requires that its motion be denied since plaintiff cannot be represented by two law firms; 6) plaintiff has failed to submit a power of attorney to establish its servicer's authority to act on its behalf; 7) plaintiff should not be granted permission to reform the legal description of the premises absent production of documentary evidence in the form of a copy of the deed; and 8) non-party Jodi Ghanem, defendant Zacpal's wife when the mortgage was signed (September, 2007) retains a homestead exemption which prevents plaintiff from selling the mortgaged premises.

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 his failure to make timely payments due under the terms of the promissory note and mortgage agreement. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's continuing default, plaintiff's compliance with mortgage and statutory pre-foreclosure notice requirements, plaintiff's standing to maintain this action, and numerous other claims asserted by the defendant set forth hereinabove.

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)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*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 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.

With respect to defendant's arguments concerning the mortgage servicer's (Wells Fargo Home Mortgage's) authority to act on behalf of the plaintiff, plaintiff has provided sufficient admissible evidence to establish the servicer's authority to act on the Trust's behalf by submission of a copy of the November 28, 2007 Pooling and Servicing Agreement (PSA) and the May 4, 2004 Merger Agreement of Wells Fargo Home Mortgage, Inc. into Wells Fargo Bank, N.A. The PSA grants Wells Fargo "full power and authority" to act on behalf of the plaintiff Trust and empowers Wells Fargo "authority to do all things necessary in connection with " servicing this mortgage loan. While defense counsel argues throughout his affirmation that Wells Fargo representatives have not established their authority to act on behalf of the plaintiff absent a "power of attorney", the plaintiff has submitted sufficient evidence of the authority granted to Wells Fargo to act on behalf of HSBC Bank USA and, based upon such evidence, the testimony submitted by the servicer's representatives is admissible to provide the factual and legal foundation in support of plaintiff's summary judgment

motion. There is no requirement that the mortgage servicer is limited to submit a "power of attorney" to establish its authority to act on behalf of the Trust and an agreement in the form of the PSA submitted by the plaintiff is sufficient to establish such authority (*see Mortgage Corporation as Mortgage Loan Servicer for Wilmington Christiana Trust v. Adames et al.*, 153 AD3d 474, 60 NYS3d 198 (2nd Dept., 2017)). Moreover the merger agreement also establishes the relationship between Wells Fargo Home Mortgage and Wells Fargo Bank, N.A., and defendant's redundant claims that these entities are separate and distinct are without merit. Having submitted sufficient, admissible evidence proving Wells Fargo's representatives' authority to act on behalf of the mortgagee, defendant's multiple claims asserting a lack of authority are not viable (*C.W. Capital Asset Management LLC v. Great Neck Towers, LLC*, 99 AD3d 850, 953 NYS2d 89 (2nd Dept., 2012); *C.W. Capital Asset Management LLC v. Charney-FPG 114 41st Street, LLC*, 84 AD3d 506, 923 NYS2d 453 (1st Dept., 2011); *cf. HSBC Bank USA, N.A. v. Cooper*, 157 AD3d 775, 69 NYS3d 350 (2nd Dept. 2018); *Mortgage Corporation as Mortgage Loan Servicer for Wilmington Christiana Trust v. Adames, et al., supra.*)).

With respect to the issue of standing, plaintiff has provided sufficient proof in the form of two affidavits from the mortgage servicer's (Wells Fargo Bank N.A.) vice presidents of loan documentation together with business record entries confirming the mortgage lender's physical possession of the indorsed in blank promissory note since November 28, 2007. The Wells Fargo's representatives' affidavits coupled with an affidavit from an employee of the law firm representing the lender provide additional evidence of the plaintiff's agent's (the law firm's) actual physical possession of the promissory note beginning August 5, 2013 and continuing through the date of commencement of this action (December 27, 2013) until returning the note on March 18, 2014. These sworn statements, which are admissible pursuant to the business records exception to the hearsay rule (CPLR 4518), 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 each and any of these affidavits 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 has established possession of a duly indorsed in blank promissory note at and 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)). In addition, plaintiff has further established standing by attaching a certified copy of the indorsed in blank promissory note to its complaint, which taken together with the CPLR 3012-b attorney certification, provides sufficient proof of standing in and of itself (*see JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*)).

With respect to the issue of the defendant's default in making payments, 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 from the Wells Fargo vice president of loan documentation dated August 24, 2016 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 September 1, 2011 (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 his continuing default, plaintiff's application for summary judgment against the defendant based upon his 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 Wells Fargo's regular mailing practices during the time period in issue and that the mailings were done more than 90 days prior to commencing this action on April 4, 2013; together with copies of the 90 day notices; the servicer's (Wells Fargo's) historical tracking records identified as "Delinquency Notes" detailing and confirming the first class and certified mailings of the 90-day notices on April 4, 2013; copies of the certified mailing post-marked envelope and mailing labels with tracking numbers affixed; together with the signed domestic-receipt card confirming delivery on May 7, 2013; and a copy of the proof of filing statement filed with the New York State Department of Financial Services 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.*).

As to defendant's denial of having been served the 90-day notices, such denial is premised upon claims that: 1) the 90-day notices should have been sent to another address where he resided since the storm; and 2) he never signed the certified mailing receipt submitted as evidence by the plaintiff based upon defendant's submission of a copy of his signature on his state driver's license. Neither claim raises a genuine issue of fact concerning plaintiff's compliance with the statute. While the statute (RPAPL 1304) does require that the 90-day notice be served "to the last known address of the borrower, and if different, to the residence which is the subject of the mortgage", there is no relevant proof submitted by Zacpal to show that he ever notified the lender of his change of residential address sufficient to place the plaintiff on notice of his "last known address". Defendant's proof in this regard is merely a generalized claim that he "had numerous conversations" with bank representatives about his change of address. However, absent some proof of notification in writing, as required under the terms of mortgage (see paragraph 15 of "Notices Required under the

Security Agreement"), defendant's self-serving claim does not provide legal grounds to defeat plaintiff's prima facie showing of service. Nor does defendant's self serving denial of having signed the certified mailing receipt (by submission of a photo copy of his New York State driver's license) provide any credible evidence to defeat plaintiff's proof of delivery, since upon inspection of both signatures contained on the certified receipt and the driver's license it appears that both signatures are near identical matches which is contrary to the defendant's argument. Under these circumstances absent credible, admissible evidence to contradict plaintiff's proof of service, both the defendant and defense counsel's conclusory denials of service, fail to provide sufficient proof 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 notice, the plaintiff's proof consists of the Wells Fargo servicer's representative's affidavit confirming the servicer's "regular business practice" utilizing a tracking file known as "Mailbook" (which memorialized the first class mailing) and stating that service was made in compliance with mortgage requirements (paragraphs 15 & 22) by mailing of the "notice of default" via first class mail on February 23, 2013. Plaintiff submits copies of the default notice containing the ten digit article mailing number and which sets forth the information required under the terms of the mortgage. In addition, plaintiff submits a copy of the service provider's relevant electronic notes known as "Delinquency Notes" which further confirms the mailing was done by first class mail on February 23, 2013. 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 Hudson City Savings Bank v. Friedman,* 146 AD3d 757, 43 NYS3d 912 (2nd Dept., 2017); *PHH Mortgage Corp. v. Muricy, supra.; HSBC Bank v. Espinal, supra.*)).

None of the remaining claims raised by the defendant provide any viable defense to plaintiff's summary judgment motion. Those claims include:

1. A *defense* of plaintiff's violation of CPLR 3215(c)– Not valid because counsel provides no proof that the attorney has authority to raise such issue on behalf of defendant Strober an entity that he does not represent and moreover, defendant Strober is not in default having filed a notice of appearance which is the equivalent of an answer hence CPLR 3215(c) does not apply (*see Bank of America, N.A. v. Rice et al.,* 155 AD3d 593, 63 NYS3d 486 (2nd Dept., 2017); *U.S. Bank, N.A. v. Gustavia Home, LLC,* 156 AD3d 843, 67 NYS3d 242 (2nd Dept., 2017));

2. A *defense* of plaintiff's failure to prove service of the RPAPL 1303 notice- Not viable since defendant has waived this defense by not asserting it in his answer (*see U.S. Bank, N.A. v. Carey,* 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016)) and moreover, plaintiff has submitted sufficient proof in the form of its process server's affidavit confirming personal delivery of the RPAPL 1303 notice with the summons and complaint as statutorily required (*FV-1, Inc. v. Reid,* 138 AD3d 922, 31 NYS3d 119 (2nd Dept., 2016));

3. A *defense* of plaintiff's breach of good faith while negotiating with the defendant for a possible loan modification– Not valid since there is no credible, admissible evidence to support this claim. Court records show that defendant was afforded two CPLR 3408 court mandated settlement conferences on September 3, 2014 and November 20, 2014 during which he was represented by

counsel. There is no notation by the court attorney/referee responsible for conducting and overseeing these conferences that the lender's representatives failed to act in good faith and defendant has no inherent right to a loan modification after having defaulted in making payments he promised to repay under the terms of his original mortgage and note (*see Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012));

4. A *defense* denying plaintiff's application to reform the mortgage- Not viable since the credible evidence establishes the lender's right to reform the description of the mortgaged premises based upon a scrivener's error (*see FDIC v. Five Star Management*, 258 AD2d 15, 692 NYS2d 69 (1st Dept., 1999));

5. A *defense* claiming plaintiff's summary judgment motion is improper based upon incoming counsel's failure to file a change of attorney notice reciting CPLR 321(b)- Not valid since court records reveal that counsel has filed with the court a notice indicating that moving counsel is co-counsel representing the foreclosing party plaintiff and moreover, even if plaintiff's counsel technically failed to comply with the statute, absent some showing of prejudice or confusion no legal basis exists to dismiss the motion (*Diamadopolis v. Balfour*, 152 AD2d 532, 543 NYS2d (2nd Dept., 1989)) ;

6. A *defense* based upon the defaulting defendant's wife's right to a homestead exemption– Not viable since the non-party neither owns nor is a party to the mortgage and moreover, since the law is clear that the purpose of CPLR 5206 is to protect a "homeowner" from seizure of his/her home to satisfy a ***money judgment*** and therefore a foreclosure proceeding does not apply (*Wells Fargo Bank, N.A. v. Goans*, 136 AD3d 709, 24 NYS3d 386 (2nd Dept., 2016));

7. A *defense* based upon a "defect" contained in the RPAPL 1304 90-day notices- Not valid since there is no proof to support defendant's claim that the phone number set forth in the 90-day notice for the NY State Department of Financial Services was incorrect and moreover, even if it were, such a defect or irregularity is so minimal as to not provide independent grounds to warrant denial of plaintiff's motion (*see* CPLR 2001*; Aurora Loan Services LlC v. Weisblum*, 85 AD3d 95, 108, 923 NYS 609 (2nd Dept., 2011)) ;

8. A *defense* claiming plaintiff has failed to name "necessary" parties– Not viable since there is no proof submitted in support of defense counsel's random statement (RPAPL 1311(3); *Private Capital Group, LLC v. Hosseinpour*, 48 AD3d 746, 853 NYS2d 159 (2nd Dept., 2008));

9. A *defense* claiming that a state assembly bill grants a defaulting mortgagor a 36 month stay from prosecution– Not valid since no such law presently exists in New York.

Finally, although the defendant has raised many arguments, including ones not asserted in his answer, as to those remaining fifteen affirmative defenses and two counterclaims he has failed to raise in opposition to plaintiff's motion, those remaining affirmative defenses and counterclaims 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)).

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

Dated: April 17, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.