Nationstar Mtge. LLC v Vedova
2018 NY Slip Op 31286(U)
June 21, 2018
Supreme Court, Suffolk County
Docket Number: 022824/2013
Judge: James Hudson
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[* 1]

SHORT FORM ORDER **COPY** INDEX NO. 022824/2013

SUPREME COURT - STATE OF NEW YORK
IAS PART 40 - SUFFOLK COUNTY

PRESENT: Hon. JAMES HUDSON
Acting Supreme Court Justice

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NATIONSTAR MORTGAGE LLC,

Plaintiff,

-against-

SALVATORE DELLA VEDOVA, MARIO DELLA VEDOVA, LUCIA DELLA VEDOVA, LEONARD HORCHOS, DAVID G. DEBRUIN, LOIS TOPPER, JPMORGAN CHASE BANK, NA, COMMISSIONER OF TAXATION AND FINANCE-CIVIL ENFORCEMENT REGION 5D, PEOPLE OF NEW YORK,

"John Doe #1" through "John Doe #12" the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming interest in or lien upon the premises described in the complaint,

Defendants.

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MOTION DATE: 2-21-17
ADJ. DATE: ________
Mot. Seq. # 001 -MotD
Mot. Seq. # 002 -XMD

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Melville, NY 11747

Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers 10 - 14 ; Answering Affidavits and supporting papers 15 - 17 ; Replying Affidavits and supporting papers ______; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the answering defendants, striking the answer; fixing the defaults of the non-answering defendants; appointing a referee; and amending the caption is granted in part and denied in part; and it is

ORDERED that the caption is amended by substituting Joann Della Vedova for the fictitious "JOHN DOE #1" defendant, and excising the remaining fictitious "JOHN DOE #2-12" defendants, together with the related descriptive wording relating thereto; and it is

ORDERED that the plaintiff shall to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is

ORDERED that this cross motion (#002) by the answering defendants for, inter alia, an order pursuant to CPLR 3025 (b) for leave to interpose an amended answer asserting standing and other defenses as affirmative defenses; or, in the alternative, deeming their answer with affirmative defenses, which was allegedly filed with the court on November 18, 2013, but never served upon the plaintiff, to be the answer in this action is granted solely to the extent indicated below, otherwise denied; and it is further

ORDERED that the moving parties shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date of this order, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on the property known as 27 Deer Park Road, Huntington, New York 11743. On January 15, 2008, the defendants Salvatore Della Vedova, Mario Della Vedova and Lucia Della Vedova (collectively "the defendant mortgagors") executed a note in favor of Bank of America, N.A. ("the lender") in the principal sum of $350,000.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated January 15, 2008 on the property. The mortgage was subsequently duly recorded in the Suffolk County Clerk's Office on March 28, 2008.

By way of an undated endorsement in blank and an assignment executed on April 5, 2013, the note was transferred from the lender to Nationstar Mortgage LLC ("the plaintiff"), prior to commencement. More specifically, the assignment provides, in relevant part, that the lender transferred the mortgage to the plaintiff "with all interest secured thereby, all liens, and any rights due or to become due thereon." The assignment was subsequently duly recorded in the Suffolk County Clerk's Office on September 13, 2013. Thereafter, by way of assignment dated August 17, 2016 the plaintiff transferred the mortgage to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("U.S. Bank"). The assignment was subsequently duly recorded in the Suffolk County Clerk's Office on November 3, 2016.

The defendants Salvatore Della Vedova, Mario Della Vedova and Lucia Della Vedova ("the defendant mortgagors") allegedly defaulted on the note by failing to make the monthly payment of principal and interest due on or about April 1, 2010, and each month thereafter.
After the defendant mortgagors allegedly failed to cure the default in payment, the plaintiff commenced this action by the filing of the summons and complaint on August 23, 2013.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated November 12, 2013. In the answer that was served upon the plaintiff (and submitted by it with its moving papers), the defendant mortgagors deny knowledge or information as to paragraphs entitled "1" through "5" of the complaint. There are no other denials in the answer and no affirmative defenses have been asserted by the defendant mortgagors. The remaining defendants have neither answered nor appeared herein.

In compliance with CPLR 3408, a settlement conferences were conducted or continued before the specialized foreclosure conference part on March 25, June 3, July 30 and September 29, 2015. On the last

date, the court's records were marked to indicate that the parties were unable to modify the loan or otherwise settle this action. Accordingly, there has been compliance with CPLR 3408; no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagors and striking their answer; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

In support of the motion, the plaintiff submitted, among other things, the note, mortgage and two assignments; the pleadings; affidavits of service; the affirmation from the plaintiff's counsel, Alexander Ponze, Esq.; the affidavit in support of Romauldo D. Fernandez, an "Authorized Signatory" of Caliber Home Loans, Inc., "servicer and attorney in fact" for U.S. Bank, as assignee of the plaintiff; six copies of a 90-day pre-foreclosure notice from the plaintiff dated May 21, 2013 and addressed to the defendant mortgagors individually at the property; and a filing statement pursuant to RPAPL 1306.

In one affidavit of service, Gary Waldren ("Waldren"), acting as the plaintiff's agent, alleges that he served the defendant Salvatore Della Vedova ("Salvatore") on August 31, 2013 by substitute service upon his wife, "Joanne Della Vedova," at the property, his "dwelling place/usual place of abode." In this affidavit, Walden alleges, among other things, that he served the summons and complaint upon Salvatore, along with notice pursuant to RPAPL 1303 in bold fourteen point type and printed on a colored paper. The plaintiff's agent also alleges that the title of this notice was printed in bold twenty-point type in compliance with RPAPL 1303.

In a second affidavit of service, Waldren alleges that he served the defendant Mario Della Vedova ("Mario") on August 31, 2013 by substitute service upon Rob Levogene, a co-resident, at 14 Richmond Place, Huntington Station, New York 11746 ("Richmond Place"), Mario's "dwelling place/usual place of abode." In a third affidavit of service, Waldren alleges that he served the defendant Lucia Della Vedova ("Lucia"), on August 31, 2013 by substitute service upon Rob Levogene, a co-resident, at Richmond Place, Mario's "dwelling place/usual place of abode." The court notes that the affidavits of service upon Mario and Lucia are devoid of any allegations of compliance with RPAPL 1303. In a fourth affidavit of service, Waldren alleges that he served the defendant "Joann Della Vedova" as JOHN DOE #1 on October 9, 2013 by personal delivery of the summons and complaint to her at the property.

The defendant mortgagors oppose the motion-in-chief and cross move for, inter alia, an order pursuant to CPLR 3025 (b) for leave to interpose an amended answer asserting standing and certain other affirmative defenses; or, in the alternative, deeming their answer with affirmative defenses, which was allegedly filed with the court on November 18, 2013, but never served upon the plaintiff, to be the answer in this action. In support of their cross motion, the defendant mortgagors submit, inter alia, the affirmation of their counsel, Steven F. Lowenhar, Esq., an answer dated November 12, 2013, with an attached verification made by the defendant, Salvatore Della Vedova, sworn to on November 12, 2013, and certain other documentation, including an answer dated November 12, 2013 with thirteen enumerated paragraphs and four affirmative defenses.

Regarding procedure, Mr. Lowenhar asks the court to excuse his office's error in not properly interposing a complete copy of the defendant mortgagors' answer upon the plaintiff. Mr. Lowenhar postulates that his office inadvertently mailed an incomplete copy of the answer upon the plaintiff, instead of the complete one with affirmative defenses, which he avers was filed with the Clerk of the Court on November 18, 2013. Concerning substantive matters, Mr. Lowenhar argues that the affidavit of the plaintiff's officer is insufficient to establish, inter alia, its prima facie burden because, among other things, the note is undated and endorsed in blank. More specifically, counsel contends that the plaintiff has not produced any admissible evidence of an assignment of the note prior to commencement. While acknowledging that "the [n]ote was attached to the summons and complaint," counsel asserts that the Fernandez affidavit is based upon inadmissible hearsay. Mr. Lowenhar also asserts that the defendant mortgagors are entitled to discovery "to investigate the legal sufficiency of the assignment" because it was not attached to the summons and complaint along with the copy of the note.

In opposition to the cross motion and in support of the motion-in-chief, the plaintiff's counsel argues that the defendant mortgagors waived the issue of standing by failing to assert the alleged lack of standing by way or timely motion or in their answer. The defendant mortgagors also assert that the defendant mortgagors have not shown a reasonable excuse for failing to move to amend their answer, and that the same is untimely and prejudicial to it at this stage in this case.

The court first turns to the branch of the motion by the defendant mortgagors for leave to interpose an amended answer. As a general rule, motions for leave to amend pleadings pursuant to CPLR 3025 (b) are to be liberally granted, absent prejudice or surprise resulting from the delay (***U.S. Bank, N.A. v Sharif***, 89 AD3d 723, 724, 933 NYS2d 293 [2d Dept 2011]; ***Lucido v Mancuso***, 49 AD3d 220, 222, 851 NYS2d 238 [2d Dept 2008]). The movant, however, must make some evidentiary showing that the proposed amendment has merit; otherwise it will not be permitted (***Buckholz v Maple Garden Apts., LLC***, 38 AD3d 584, 585, 832 NYS2d 255 [2d Dept 2007]; ***Curran v Auto Lab Serv. Ctr.***, 280 AD2d 636, 637, 721 NYS2d 662 [2d Dept 2001]).

Initially, the cross motion is procedurally defective to the extent that the moving papers submitted herein do not fully recite the grounds for the relief sought along with the specific provisions of the civil practice law and rules or other laws relating thereto (*see*, CPLR 2214 [a]). To the extent that the requested relief is supported by the affirmation of counsel, it has been considered.

The branch of the cross motion to amend the answer is denied (*see*, ***Majestic Invs., Ltd. v Lopez***, 111 AD2d 844, 490 NYS3d 585 [2d Dept 1985] [no excuse for several year delay in moving to amend, inadequate affidavit of merits, and movants' failure to demonstrate a lack of prejudice]; ***Tarantini v Russo Realty Corp.***, 273 AD2d 458, 712 NYS2d 358 [2d Dept 2000] [leave to amend denied where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit]; *see also*, ***Lighting Horizons, Inc. v E. A. Kahn & Co.***, 120 AD2d 648, 502 NYS2d 398 [2d Dept 1986] [where motion-in-chief is granted, cross motion rendered academic when that cross motion is for a determination that could not have any practical effect on the existing controversy]). The defendant mortgagors have not proffering a legally sufficient explanation for the more than three year delay in moving to amend, and they waited until after the plaintiff already moved for summary judgment (*see*, ***Majestic Invs., Ltd. v Lopez***, 111 AD2d 844, *supra*). In this case, the original answer was interposed on or about November 12, 2013 (*see*, CPLR 320[a]; ***Goonan v***

New York City Tr. Auth., 74 AD3d 747, 902 NYS2d 159 [2d Dept 2010]; ***Cerrito v Galioto***, 216 AD2d 265, 627 NYS2d 767 [2d Dept 1995] [A defendant appears, inter alia, by serving an answer upon the plaintiff]). Even though any motions would have been held in abeyance during the approximate six month period that foreclosure settlement conferences were held, the last such conference was held on September 29, 2015, approximately seventeen months before the plaintiff moved for summary judgment in this action. An amendment of the answer at this juncture would be significantly prejudicial to the plaintiff and would unduly delay the resolution of this action (*see*, ***Wells Fargo Bank, N.A. v Fanto***, 146 AD3d 1012, 45 NYS3d 546 [2d Dept 2017]; ***South Point, Inc. v Rana***, 139 AD3d 935, 30 NYS3d 710 [2d Dept 2016]).

In any event, the instant cross motion to amend the filed answer to conform to the served answer would not have any practical effect on the existing controversy between the parties (*see*, ***Castle Peak 2012-1 Loan Trust Mtge. Backed Notes, Series 2012-1 v Sottile***, 147 AD3d 720, 46 NYS3d 161 [2d Dept 2017] [proposed amendment devoid of merit because plaintiff demonstrated its standing]; *see also*, ***Village Bank v Wild Oaks Holding, Inc.,*** 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). For the reasons set forth below, the defendant mortgagors' assertion that the plaintiff lacks standing to sue in this action is without merit.

The defendant mortgagors may nonetheless raise certain other defenses related to certain conditions precedent even in the absence of specifically pleaded affirmative defenses in the answer (*see generally*, ***Rivera v N.Y. City Transit Auth***., 11 AD3d 333, 782 NYS2d 912 [1st Dept 2004]). Thus, the branch of the cross motion to deem the answer filed with the Office of the Suffolk County Clerk to be the answer filed in this action is granted, solely with respect to the additional denials in the answer and the third affirmative defense. The failure to comply with RPAPL 1304 is not jurisdictional (***Pritchard v Curtis***, 101 AD3d 1502, 1505, 957 NYS2d 440 [3d Dept 2012]). Rather, it is a defense which may be raised by a non-defaulting defendant prior to judgment (*see*, ***JP Morgan Chase Bank, N.A. v Salmon***, 154 AD3d 603, 62 NYS3d 361 [1st Dept 2017][defendant's failure to plead affirmative defenses relating to RPAPL 1304 in answer did not preclude raising these issues in response to the summary judgment motion]; ***Flagstar Bank, FSB v Jambelli***, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; ***U.S. Bank N.A. v Carey***, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]; ***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup Ct, Suffolk County 2013] [finding that the failure to comply with RPAPL 1304 is not subject to waiver]; *cf.*, ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015] [defendant precluded from raising RPAPL 1304 defense since he was not entitled to an order vacating his default pursuant to CPLR 5015 [a]).

Because the plaintiff alleged compliance with certain conditions precedent in the complaint, and the defendant mortgagors have asserted the lack of compliance with same in their papers, they may now raise defenses related to the lack of compliance with RPAPL 1302, 1303, 1304 and 1306 (*see*, ***Allis-Chalmers Mfg. Co. v Malan Constr. Corp***., 30 NY2d 225, 331 NYS2d 636 [1972] [exception made if the performance or occurrence of a condition precedent has been expressly pleaded in the complaint, in which case a general denial will suffice to place satisfaction of the condition in issue]; *cf.*, ***Signature Bank v Epstein***, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012] [defense based upon lack of compliance with default notice waived by failing to assert as an affirmative defense in answer and failing to raise it in response to plaintiff's motion for summary judgment on the complaint]; ***First N. Mortgagee Corp. v Yatrakis***, 154 AD2d 433, 546 NYS2d 9 [2d Dept 1989] [defense based upon failure to comply with condition precedent waived where never asserted in answer, or in motion to amend answer, and where never raised in response to the plaintiff's motion for summary judgment]).

The court reaches a different conclusion with respect to the alleged lack of compliance with the "NYS Banking Law," however, because the unsupported, overly broad statements made by counsel are insufficient to put the plaintiff on notice or inform the court as to any specific violations (*see*, CPLR 3013, 3014, 3015, 3018[b]; *see also*, ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [compound, boilerplate defenses are in contravention of the civil practice rules]; ***Bank of America, NA v Jaklitsch***, 2018 NY Misc LEXIS 1665, 2018 WL 2187078, 2018 NY Slip Op 30826 [U] [Sup Ct, Suffolk County 2018] [same]).

The court now turns to the motion-in-chief. In this case, the issue of the plaintiff's standing was waived because it was not interposed in the answer (*see*, CPLR 3211[e]; *see*, ***HSBC Bank USA v Philistin***, 99 AD3d 667, 952 NYS2d 83 [2d Dept 2012]; ***U.S. Bank Natl. Assn. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Citibank, N.A. v Swiatkowski***, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]). Even if standing were not waived, the plaintiff nevertheless demonstrated its standing by, inter alia, the submission of the written assignment of the mortgage and the note executed prior to commencement (*see*, ***Wells Fargo Bank, N.A. v Archibald***, 150 AD3d 937, 54 NYS3d 439 [2d Dept 2017]; ***Deutsche Bank Natl Trust Company v Romano***, 147 AD3d 1021, 48 NYS3d 237 [2d Dept 2017]; ***U.S. Bank N.A. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In this case, the assignment, which was executed prior to commencement, includes a reference to the note (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*). Such evidence demonstrates that the plaintiff holds and/or owns the original note and mortgage. Thus, the plaintiff demonstrated its prima facie burden as to its standing.

The court turns next to the issue of the plaintiff's compliance with certain conditions precedent to this action. Where applicable, proper service of the RPAPL 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 103, 923 NYS2d 609 [2d Dept 2011]; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Where a loan is a home loan for the borrower's principal residence (*see*, RPAPL 1304[5] [b]), the mortgage creditor contemplating a mortgage foreclosure action is required, pursuant to RPAPL 1304, to serve the borrower with notice of his or her default in a specified form by registered or certified mail and first class mail at least 90 days prior to the commencement of the action (*see*, RPAPL 1304 [2]).

The plaintiff's submissions are insufficient to demonstrate evidentiary proof of proper service of the 90-day pre-foreclosure notice upon the defendant mortgagors (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]). The plaintiff submitted neither an affidavit of service of the 90-day notice upon the defendant mortgagors, nor an affidavit from one with personal knowledge of the alleged mailings by regular and certified mail as well as familiarity with the sender's mailing practices and procedures (*see*, ***Citibank, N.A. v Wood***, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017] [plaintiff's submissions devoid of proof of a standard office mailing procedure or an independent proof of the actual mailing]; ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, 47 NYS3d 415 [2d

Dept 2017] [plaintiff's representative did not allege that he was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed]; ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016] [affidavit insufficient to establish RPAPL 1304 compliance where no showing of personal knowledge of procedures customarily used in ordinary course of business for mailing of statutory notices]; ***Deutsche Bank Nat. Trust Co. v Bertini***, 2018 NY Misc. LEXIS 616, 2018 WL 1072107, 2018 NY Slip Op. 30305 [U] [Sup Ct, Suffolk County 2018] [plaintiff's submissions devoid of proof of a standard office mailing procedure or any independent proof of actual mailing]; *cf.*, ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016] [affidavit describing the sender's standard business practice]; ***Wells Fargo Bank, N.A. v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015] [affidavit of mailing and certified mailing receipts]).

The conclusory statements set forth in the affidavit of Mr. Fernandez, that the 90-day notice was sent to the defendant mortgagors by both certified and first-class mail and addressed to them at the property address, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Wells Fargo Bank, N.A. v Trupia***, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, *supra*). Even though Mr. Fernandez alleges that the 90-day notice was "sent" to the defendant mortgagors "on or about May 21, 2013," he did not set forth sufficient facts as to how or when compliance was accomplished by the plaintiff (*see*, CPLR 4518; ***Viviane Etienne Med. Care v Country-Wide Ins. Co.***, 25 NY3d 498, 14 NYS3d 283 [2015]). Mr. Fernandez also did not state that he served the notices; nor did he identify the individual(s) who allegedly did so. Further, it is noted that Mr. Fernandez' affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 776 [2d Dept 2001]). In this case, Mr. Fernandez did not allege that he is familiar with the standard *mailing* practices or procedures of the plaintiff with respect to the *90-day notices*, and that those practices or procedures were followed in this instance. Nor did the plaintiff submit any other proof of mailing such as proof of mailing from the United States Postal Service, combined with an authenticated business ledger, or affidavits of service.

In any event, the plaintiff submitted conflicting proof as to whether the subject property is Mario and Lucia's principle residence and, if so, whether the notice requirements of RPAPL 1304 apply to them in this action (*see*, ***US Bank N.A. v Richard***, 151 AD3d 1001, 57 NYS3d 509 [2d Dept 2017]; ***Richlew Real Estate Venture v Grant***, 131 AD3d 1223, 17 NYS3d 475 [2d Dept 2015]; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]; *see also*, ***JP Morgan Chase Bank, N.A. v Venture***, 148 AD3d 1269, 48 NYS3d 824 [3d Dept 2017]; ***CitiMortgage, Inc. v Simon***, 137 AD3d 1190, 28 NYS3d 454 [2d Dept 2016]; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 985 NYS2d 254 [2d Dept 2014]; ***MLF3 Jagger LLC v Kempton***, 56 Misc3d 227, 50 NYS3d 247 [Sup Ct, Suffolk County 2017]). In this case, the plaintiff proffered no explanation by way of an affidavit or affirmation from one with personal knowledge, such as an investigator, as to why Mario and Lucia were sent 1304 notices at the property, but served with process at Richmond Place, their alleged "dwelling place/usual place of abode." Additionally, the plaintiff's motion is not supported by an authenticated copy of the uniform residential loan application or other loan documentation that would bear upon these issues. If Mario and Lucia did not reside or to intend at the

subject property at the time of origination, then, in that event, the mandates of RPAPL 1304 would not apply as to them, thus, raising additional triable issues of fact (*see*, RPAPL 1304[5]).

The plaintiff failed to demonstrate prima facie compliance with the filing requirements of RPAPL 1306 (*see*, ***Wells Fargo Bank, N.A. v Lewczuk***, 153 AD3d 890, 61 NYS3d 244 [2d Dept 2017]; *cf.*, ***Wells Fargo Bank, N.A. v Walker***, 141 AD3d 986, 35 NYS3d 591 [2d Dept 2016]). The plaintiff's moving papers contain insufficient sworn statements made by one with personal knowledge as to the filing requirements of the information required by RPAPL 1306. Even though the attorney-verified complaint contains allegations of compliance with the filing requirements imposed by RPAPL 1306, these statements, by themselves, are insufficient to demonstrate compliance with the statute.

The court next turns to the issue of compliance with the notice requirements of RPAPL 1303. In the version of RPAPL 1303 in effect at the time of commencement of this action, the foreclosing party in a mortgage foreclosure action, involving residential real property was required to provide notice pursuant to this provision to "any mortgagor if the action relates to an owner-occupied one-to-four family dwelling[]" (*see*, former RPAPL 1303, as amended by Laws 2009, ch 507, § 1). The statute "requires the foreclosing party in a residential mortgage foreclosure action to deliver statutory-specific notice to the homeowner, together with the summons and complaint" (***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 165, 899 NYS2d 256 [2d Dept 2010]).

With respect to RPAPL 1303, the plaintiff's submissions sufficiently establish proper service of the notice upon Salvatore (*see*, ***Nationstar Mtge., LLC v Kamil***, 155 AD3d 968, 63 NYS3d 890 [2d Dept 2017]; ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]). As noted above, the plaintiff's submissions include an affidavit of service of the RPAPL 1303 notice upon Salvatore, the occupant of the property.

With respect to Mario and Lucia, the plaintiff failed to demonstrate compliance of compliance with RPAPL 1303, if required, because its submissions do not include any affidavits of service of said notice upon them. In any event, there are unresolved issues as to whether the plaintiff was required to serve Mario and Lucia with notice pursuant to RPAPL 1303 for the same reasons the court has found with respect to the 90-day notice (*i.e.*, whether the property was owned-occupied by them, or whether they executed the loan documents for the convenience of Salvatore and never resided or intended to reside in the property as their primary residence).

Turning to other conditions precedent, the plaintiff demonstrated that it complied with the pleading requirements of RPAPL 1302 (*see*, ***Tribeca Lending Corp. v Lawson***, 159 AD3d 936, 73 NYS3d 575 [2d Dept 2018]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra*; ***US Bank N.A. v McPherson***, 35 Misc3d 1219 [A], 951 NYS2d 84 [Sup Ct, Queens County 2012]). In the complaint, the plaintiff alleges "directly or through an agent, it has possession of said note," and "the said note is either made payable to the plaintiff or has been duly endorsed" (Compl. ¶ 6). The plaintiff also alleges, in sum and substance, that it has complied with all of the provisions of Banking Law 595-a and any rules and regulations promulgated thereunder, Banking Law 6-l or 6-m, and RPAPL 1304 to the extent that the loan is defined as a "high cost home loan" or a "subprime home loan" (Compl. ¶ 7).

The plaintiff failed to submit sufficient evidence that the defendant mortgagors were served with a 30-day notice of default prior to demanding payment of the loan in full (*see*, ***US Bank N.A. v Singh***, 147 AD3d 1007, 47 NYS3d 439 [2d Dept 2017]; ***Nationstar Mtge., LLC v Dimura***, 127 AD3d 1152, 7 NYS3d 573 [2d Dept 2015]; ***HSBC Mtge. Corporation (USA) v Gerber***, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]; *cf.*, ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013] [compliance with 90-day notice requirements satisfies the 30-day default notice requirement in the mortgage]; ***OneWest Bank, N.A. v Rosado***, 2016 US Dist LEXIS 74422, 2016 WL 3198305 [SDNY 2016][notice of default substantially complied with terms of mortgage]). In this case, Mr. Fernandez did not allege that he is familiar with the standard mailing practices or procedures of the plaintiff, and that those practices or procedures were followed in this instance.

With respect to the first cause of action in the complaint, the plaintiff failed to demonstrate its prima facie case as to the alleged default in payment because the affidavit made by Mr. Fernandez and submitted in support of the motion is partially supported by inadmissible hearsay (*see*, CPLR 4518 [a]; ***HSBC Mtge. Servs., Inc. v Royal***, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; ***Citibank, N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; ***Palisades Collection, LLC v Kedik***, 67 AD3d 1329, 890 NYS2d 230 [2d Dept 2009]; *see also*, ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). More specifically, the plaintiff's representative did not allege that he is familiar with the plaintiff's record keeping practices and procedures as to the payment history since the time of the default (*see*, ***U.S. Bank, N.A. v Noble***, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]). Nor did Mr. Fernandez allege that the plaintiff's records were incorporated into Caliber's own records as current loan servicer or routinely relied upon by it in its business (*see*, ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]).

To the extent that the statements made by Mr. Fernandez are based documents that were in the possession of the plaintiff, the lender or the another servicer prior to the alleged transfer of the note and the mortgage to the plaintiff, these records constituted hearsay (*see generally*, ***People v Goldstein***, 6 NY3d 119, 810 NYS2d 100 [2005]). The mere filing of papers received from other entities, "even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, because such papers simply are not made in the regular course of the recipient, who is in no position to provide the necessary foundation testimony" (***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 494, 495, 834 NYS2d 239 [2d Dept 2007] [internal quotation marks omitted]). Because the plaintiff's representative failed to lay a proper foundation for the admission of the records relating to the payment history preceding caliber's retention as servicer, under the business records exception to the hearsay rule (*see*, CPLR 4518 [a]), those of his assertions that were based on these records are inadmissible (*see*, ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*). The court also notes the plaintiff has not submitted a recorded or an authenticated copy of the power of attorney document between the plaintiff and Caliber.

To the extent that plaintiff moves for a reformation of the legal description contained in the subject mortgage instrument, the same is denied without prejudice to renew upon submission of an affidavit or affirmation from one with personal knowledge of the facts describing the alleged errors in detail and a copy of the recorded source deed, the best evidence of the legal description (*cf.*, ***Wells Fargo Bank, N.A. v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***Baiting Hollow Props., LLC v Knolls of***

Baiting Hollow, LLC, 89 AD3d 776, 932 NYS2d 160 [2d Dept 2001]; ***Hudson City Sav. Bank v Maiman***, 2017 NY Misc LEXIS 2104, 2017 WL 2427659, 2017 NY Slip Op 31141 [U] [Sup Ct, Suffolk County 2017]). Under the facts herein, the mere submission of the corrected description ("Schedule A") and the attorney-verified complaint is insufficient to demonstrate that plaintiff is entitled to the relief requested in the second cause of action.

The court now turns to the defendant mortgagors' opposing papers. In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., 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]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

The plaintiff demonstrated its standing, as indicated above. In response, the defendant mortgagors have not come forward with any evidence to raise a triable issue of fact as to plaintiff's standing, or the validity of the assignments (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Moreover, the defendant mortgagors, who are non-parties to the assignment of the note and the mortgage, lack standing to challenge the validity thereof (*see*, ***Bank of Am., N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; *see also*, ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 2007] [those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract]).

The plaintiff is therefore awarded partial summary judgment in its favor as indicated above (*see*, ***Emigrant Bank v Myers***, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017]). The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the motion for an order amending the caption, by substituting "Joann Della Vedova" (also sued herein as Joanne Della Vedova) for the fictitious "JOHN DOE #1" defendant and by excising the fictitious "JOHN DOE #2" through "JOHN DOE #12" defendants, is granted (*see*, CPLR 1024; ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

Parenthetically, because the note and mortgage were validly assigned to U.S. Bank subsequent to the commencement of a foreclosure action, U.S. Bank can continue an action in the name of the plaintiff, even in the absence of a formal substitution (*see*, ***Brighton BK, LLC v Kurbatsky***, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]). Nonetheless, U.S. Bank may, if it chooses, take the steps necessary to effect a formal substitution (*see*, CPLR 1018).

By its moving papers, the plaintiff established the default in answering on the part of the defendants, Leonard Horchos, David G. Debruin, Lois Topper, JPMorgan Chase Bank, NA, Commissioner of Taxation

and Finance-Civil Enforcement Region 5D, People of the State of New York and Joann Della Vedova (also sued herein as Joanne Della Vedova) (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). Accordingly, the default in answering of all of the non-answering defendants is fixed and determined. In light of the outstanding issues of fact, the remainder of the ancillary relief is denied at this juncture.

In view of the foregoing, and pursuant to CPLR 3212 (g), the court finds that the sole remaining issues of fact relate to: proof of compliance with the notice requirements of RPAPL 1303 and 1304; proof of compliance with the filing requirements of RPAPL 1306; and proof of the default in payment. Thus, the undecided branches of the plaintiff's motion are denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date of this order. The plaintiff's renewal motion, if any, shall include the evidentiary proof specified above, a copy of the papers submitted with this motion and a copy of this order.

The proposed long form order submitted by the plaintiff appointing a referee to compute has been marked "not signed."

Dated: Jun 21, 2018

Hon. JAMES HUDSON, A.S.C.J.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION