

Wells Fargo Bank, N.A. v Toral
2018 NY Slip Op 31659(U)
July 19, 2018
Supreme Court, Suffolk County
Docket Number: 013699/2013
Judge: Linda Kevins
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 17 - SUFFOLK COUNTY
HON. LINDA KEVINS

PRESENT: Hon. _____
Justice of the Supreme Court

MOTION DATE: 12/22/16 (002)
1/12/17 (003)

ADJ. DATE: 3/17/17
MOT. SEQ. # 002 - -MotD
MOT. SEQ. # 003 - XMotD

WELLS FARGO BANK, NATIONAL ASSOCIATION AS
TRUSTEE FOR STRUCTURED ASSET MORTGAGE
INVESTMENTS II INC. STRUCTURED ASSET
MORTGAGE INVESTMENTS II TRUST 2007-AR4,
MORTGAGE PASS-THROUGH CERTIFICATES SERIES
2007-AR4,

MCGLINCHEY STAFFORD
Attorney for Plaintiff
112 West 34th Street, Suite 1515
New York, NY 10120

Plaintiff,

LAW OFFICE OF KEITH SCOTT LEDERMAN
Attorney for Defendant
Jose Toral
166 Broadway, Suite 9
Amityville, NY 11701

-against-

JOSE TORAL; NATIONAL CITY BANK; INTERNAL
REVENUE SERVICE - UNITED STATES OF AMERICA;
CAPITAL ONE BANK (USA), NA; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
ADVANTAGE ASSETS II, INC.; PETRO INC.; and JOHN
DOE and JANE DOE #1 through #7, the last seven (7) names
being fictitious and unknown to the plaintiff, the persons or
parties, if any, having or claiming in interest in or lien upon
the mortgaged premises described in the Complaint,

Defendants.

_____x

Upon consideration of the notice of motion for an order granting summary judgment in favor of the plaintiff WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE INVESTMENTS II INC. STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST 2007-AR4, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-AR4 ["the plaintiff"], and dismissing the affirmative defenses in the answer of the defendant José Toral ["the defendant"], fixing the defaults of the non-answering defendants, appointing a referee to compute, amending the caption, and if necessary, extending the time to serve the defendant pursuant to CPLR 306-b, the supporting affidavit, affirmation, exhibits, and memorandum of law (motion sequence 002), and the defendant's cross-motion for an order striking the introduction of the affidavit in support of summary judgment of Jill Johnson pursuant to CPLR 3124 and 3126, respectively, striking/precluding the testimony of Jill Johnson pursuant to CPLR 3124 and 3126, striking all documents and things referenced in the affidavit in support of summary judgment of Jill Johnson but not provided to the defendant during the discovery process, denying plaintiff's motion for summary judgment without prejudice to renew after the defendant is given sufficient time to depose Jill Johnson, and ordering production of all documents and things referred to and/or relied upon by Jill Johnson,

vacating the note of issue and certificate of readiness and other related relief, the supporting affirmation, affidavit, and exhibits (motion sequence 003), and the plaintiff's reply affirmation in opposition to the cross-motion and in further support of the motion, the reply memorandum of law, and supporting exhibits, it is

ORDERED that so much of the plaintiff's motion for an order granting summary judgment against the defendant, appointing a referee to compute, awarding a default judgment against the non-answering defendants, and amending the caption is denied without prejudice to renewal in accordance herewith; and it is further

ORDERED that so much of the plaintiff's motion for an order extending the time to serve the defendant pursuant to CPLR 306-b is denied as moot; and it is further

ORDERED that so much of the defendant's cross-motion seeking an order imposing the sanction of preclusion with respect to the affidavit and/or testimony of Jill Johnson and compelling the plaintiff to produce any and all documents to be relied upon to establish the mailing of contractual and statutory notices either upon a trial or upon renewal of summary judgment is granted only to the extent that the plaintiff is directed to exchange any records upon which it intends to rely either on a renewal of its motion for summary judgment or at trial on the issue of mailing of contractual and statutory notices within thirty days of being served with this order with written notice of its entry or be precluded from introducing such evidence on renewal or at trial and the cross motion is otherwise denied; and it is further

ORDERED that any renewal of summary judgment must be made within sixty days of plaintiff's counsel being served with this order with written notice of its entry, not to be extended without leave of Court; and it is further

ORDERED that the defendant shall serve a copy of this order with written notice of its entry upon the plaintiff and all other parties entitled to notice by first-class mail within 30 days of entry of the order.

In this residential foreclosure action, the plaintiff alleges that the defendant executed a note payable to the original lender, American Brokers Conduit, for the principal amount of \$585,000.00 on June 26, 2007. The note was secured by a mortgage executed by the defendant encumbering premises located at 4 Hayfield Court, Commack, Suffolk County ["the subject premises"]. The complaint alleges that the defendant defaulted under the terms of the note and mortgage for the payment due on March 1, 2008, and the payments due thereafter.

The action was commenced on May 23, 2013. Attached to the summons and complaint was a copy of the subject note with a blank endorsement. By order dated October 1, 2014, so much of the defendant's motion seeking an order extending the defendant's time to serve an answer to the plaintiff's complaint was granted and that branch of the defendant's motion seeking an order dismissing the complaint pursuant to CPLR 3211 (a) (8) insofar as asserted against him for lack of personal jurisdiction was denied. The Appellate Division affirmed the order while the instant motions (002 and 003), were still pending, the Appellate Division concluding that service of the summons and complaint upon the defendant was adequately established (*see Wells Fargo Bank, Nat. Ass'n v. Toral*, 151 AD3d 113, 115, 58 NYS3d 113 [2d Dept 2017]). Thus, so much of the plaintiff's motion for an order extending the time to serve the defendant pursuant to CPLR 306-b is denied as moot.

The defendant filed his answer generally denying the allegations in the complaint and asserting numerous unnumbered affirmative defenses including lack of standing to commence the action and failure to comply with contractual and statutory notice requirements. Pre-trial discovery was conducted between the parties including depositions of the defendant and a representative from the plaintiff's current servicer, Select Portfolio Services, Inc. ["SPS"], before the plaintiff filed a note of issue on or about August 26, 2016. Plaintiff timely moved for summary judgment, an order of reference, and related relief by notice of motion dated November 30, 2016. The defendant then cross moved for, inter alia, the imposition of sanctions against the plaintiff including preclusion of the affidavit in support of summary judgment and certain documents. In support of its motion for summary judgment the plaintiff submitted the affidavit of Jill Johnson, an officer of SPS, dated November 18, 2016 ["the Johnson affidavit"]. The defendant's cross motion seeks, inter alia, preclusion of any testimony by Jill Johnson at trial or the use of the Johnson affidavit in support of the plaintiff's application for summary judgment. The cross motion also seeks preclusion of two exhibits attached to the Johnson affidavit that were not previously exchanged by the plaintiff during pre-trial discovery.

The following facts are taken from the Johnson affidavit in support of summary judgment. SPS is the attorney-in-fact for the plaintiff and the servicer of the subject mortgage. Johnson's affidavit was based upon her review of SPS's records relating to the subject loan and from her own personal knowledge of how the records are kept and maintained in the regularly conducted business activities of SPS. According to Johnson,

"[t]o the extent that the business records of the loan in this matter were created by a prior servicer, the prior servicer's records for the loan were integrated and boarded into SPS's systems, such that the prior servicer's records concerning the loan are now part of SPS's business records. SPS maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records. It is the regular practice of SPS to integrate prior servicer's records into SPS's business records, and to rely upon the accuracy of those boarded records in providing its loan servicing functions. These prior servicer records are integrated and relied upon by SPS as part of SPS's business records."

In connection with making her affidavit, Johnson acquired personal knowledge by personally examining the business records pertaining to the subject loan. According to the Johnson affidavit, on January 25, 2011, the original note bearing an endorsement in blank below the defendant's signature was delivered to the plaintiff's document custodian. The original note was thereafter forwarded to plaintiff's counsel on January 20, 2015. The loan records reflect that the defendant breached his obligations under the note and mortgage by failing to pay the installment due on March 1, 2008, and the payments due thereafter. According to the loan records that Johnson reviewed, EMC Mortgage Corporation, a subsidiary of Chase, then the servicer of the subject loan ["EMC"], mailed a notice of default or breach letter dated May 1, 2008, to the defendant addressed to the subject property ["the notice of default"]. A copy of the referenced notice of default indicating EMC as the sender was annexed to the Johnson affidavit.

According to Johnson, SPS's loan records also reflect that Chase sent 90 day pre-foreclosure notices pursuant to RPAPL 1304 dated January 7, 2013, addressed to the defendant at the subject premises by first-class mail and certified mail, return receipt requested, on that same date. The Johnson affidavit provided the United States Postal Service tracking number for the certified mailing as well as copies of the 90 day notices.

In addition, attached to the Johnson affidavit was a copy of a document entitled, "Chase Mortgage Banking Certified Regulatory Mail Register" indicating the certified mailing of the 90 day notice on January 7, 2013, and a copy of a certificate of bulk first class mailing for January 7, 2013. The certificate of bulk mailing indicates the mailing of 19,888 pieces of first class mail by "JPMC BREACH DEPARTMENT" on January 7, 2013; the certificate of bulk mailing does not reference any particular item mailed on that date. Defense counsel asserts, and the plaintiff does not dispute, that the mail register purporting to document the certified mailing of the 90 day notice and the first class bulk mailing certificate were not provided to defense counsel during pre-trial discovery.

In support of summary judgment, the plaintiff also attached a copy of the examination before trial testimony of Patrick Pittman, REO Director at SPS, taken on July 21, 2016. Pittman testified that he is familiar with the creation of SPS's servicing records as well as those servicing records created by the plaintiff's prior servicer, Chase. The following facts are taken from the Pittman examination before trial.

Pittman has worked for SPS since June, 2002. At the time of the examination before trial, Pittman worked within SPS's foreclosure department. SPS has been servicing the subject loan since August of 2013. The records maintained at SPS are scanned documents that consist of copies of the original note, mortgage and assignments and documents that are pertinent to the servicing of the loan. SPS worked directly with Chase on the transfer of the servicing of this file to SPS in August of 2013.

SPS's servicing records also include servicing records created by EMC, a subsidiary of Chase and the original loan servicer, including the notice of default dated May 1, 2008. EMC's records were part of Chase's records that were ultimately transferred to and relied upon by SPS. Pittman identified the notice of default that was purportedly sent to the defendant at the property address. The notice of default contained the tracking number and a bar code which Pittman testified represented the first-class mailing. According to Pittman, although he never worked at Chase or EMC, he received training from Chase with respect to Chase's servicing practices and its mailing of mortgage documents. Pittman testified that Chase had an automated computerized mailing system that generated the notice letters. Notice letters that were sent by certified mail, i.e. the 90 day notice, had a bar code and tracking number on the letter which Pittman maintained is the proof that the notice was mailed. The letters themselves are not imaged into Chase's system until there is proof on the services side that the mail had been picked up by the courier. Pittman testified that the 90 day notice that was sent by first class mail also contained a tracking number and bar code.

"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, 986 NYS2d 843 [2d Dept 2014]; see *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684, 37 NYS3d 25 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002, 16 NYS3d 459 [2d Dept 2015]). 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, 46 NYS3d 185 [2d Dept 2017]; *Wells Fargo Bank, N.A. v. Arias*, 121 AD3d 973, 973-974, 995 NYS2d 118 [2d Dept 2014]).

A plaintiff in a mortgage foreclosure action has standing where 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, 12 NYS3d 612, 34 NE3d 363 [2015]; *U.S. Bank N.A. v. Handler*, 140 AD3d 948, 949, 34 NYS3d 463 [2d Dept 2016]). “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, 890 NYS2d 578 [2d Dept 2009]).

Here, the plaintiff established, prima facie, that it had standing by demonstrating that it had physical possession of the endorsed note prior to the commencement of the action, as evidenced by its attachment of the note to the complaint at the time the action was commenced (*U.S. Bank Nat'l Ass'n v. Henry*, 157 AD3d 839, 841, 69 NYS3d 656, 658 [2d Dept 2018]; *Deutsche Bank Nat. Tr. Co. v. Logan*, 146 AD3d 861, 862, 45 NYS3d 189, 191 [2d Dept 2017] [citations omitted]). The plaintiff also established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the note, and the affidavit of an officer of its servicer and attorney-in-fact attesting to the defendant's default in payment (*see Deutsche Bank Nat'l Tr. Co. v. Iarrobino*, 159 AD3d 670, 69 NYS3d 503 [2d Dept 2018]; *Bank of Am., Nat. Ass'n v. Brannon*, 156 AD3d 1, 8, 63 NYS3d 352, 358 [1st Dept 2017], *citing Citigroup v. Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; *Wells Fargo Bank, N.A. v. Jones*, 139 AD3d 520, 521, 32 NYS3d 95, 98 [1st Dept 2016], *citing Landmark Capital Invs., Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]; *Deutsche Bank Nat. Tr. Co. v. Monica*, 131 AD3d 737, 739, 15 NYS3d 863, 865 [3d Dept 2015]; *compare U.S. Bank, Nat. Ass'n v. Noble*, 144 AD3d 788, 790, 41 NYS3d 79, 81 [2d Dept 2016]). Contrary to the defendant's arguments, while “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” (*People v. Cratsley*, 86 NY2d 81, 90, 629 NYS2d 992, 653 NE2d 1162 [1995] [internal quotation marks and citation omitted]), such records are nonetheless 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” (*Deutsche Bank Nat. Tr. Co. v. Monica*, 131 AD3d at 739, 15 NYS3d 863, 865, *citing State of New York v. 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1296, 956 NYS2d 196 [2012], *lv. denied* 20 NY3d 858, 960 NYS2d 350, 984 NE2d 325 [2013]). Notably, the defendant admitted at his examination before trial that he defaulted on his loan obligations (Jose Toral Transcript, p. 73).

Nevertheless, the Johnson affidavit was insufficient to establish that the notices required under the terms of the mortgage and pursuant to RPAPL 1304, respectively, were mailed. Regarding the contractual notice, the Johnson affidavit avers that “the Loan Records reflect that a Notice of Default dated May 1, 2008 (the “Notice of Default”) was mailed to Defendant and addressed to the Subject Property. A true and accurate copy of the Notice of Default is annexed hereto as Exhibit 5.” This conclusory and unsubstantiated statement is insufficient to demonstrate that the contractual notice was mailed to the defendant by first-class mail, or actually delivered to the designated address if sent by other means, which was required by the terms of the mortgage as a condition precedent to foreclosure (*see U.S. Bank Nat. Ass'n v. Sabloff*, 153 AD3d 879, 880–81, 60 NYS3d 343, 345 [2d Dept 2017]; *Emigrant Bank v. Myers*, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017]; *Citimortgage, Inc. v. Espinal*, 134 AD3d 876, 879, 23 NYS3d 251 [2d Dept 2015]; *GMAC Mtge., LLC v. Bell*, 128 AD3d 772, 11 NYS3d 73 [2d Dept 2015]; *Wells Fargo Bank, N.A., v. Eisler*, 118 AD3d 982, 988 NYS2d 682 [2d Dept 2014]; *HSBC Mtge. Corp. [USA] v. Gerber*, 100 AD3d 966, 967, 955 NYS2d 131 [2d Dept 2012]).

Pittman's examination before trial testimony does not cure the deficiencies in the Johnson affidavit

as to the contractual notice condition precedent. Pittman testified that he had “full training” regarding Chase’s services and practices including Chase’s procedures for the mailing of mortgage documents. Pittman’s testimony about Chase’s mailing practices and procedures was limited to the statements that 1) Chase’s mailing procedures and those of its subsidiary, EMC, were automated/computerized and 2) the existence of copies of the notices in the servicing records complete with a barcode and tracking number on the notice was itself the proof that the notices were mailed.

Generally, “proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee” (*Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 114 AD3d 33, 46, 977 NYS2d 292, *affid.* 25 NY3d 498, 14 NYS3d 283, 35 NE3d 451 [2015] [internal quotation marks omitted]; see *Matter of Rodriguez v. Wing*, 251 AD2d 335, 673 NYS2d 734 [2d Dept 1998]). “ ‘The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed’ ” (*New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 AD3d 547, 547, 814 NYS2d 687, quoting *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]; see *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 114 AD3d at 47, 977 NYS2d 292). However, for the presumption to arise, the office practice must be geared so as to ensure the likelihood that the item is always properly addressed and mailed (see *Nassau Ins. Co. v. Murray*, 46 NY2d 828, 414 NYS2d 117, 386 NE2d 1085 [1978]; *Progressive Cas. Ins. Co. v. Metro Psychological Servs., P.C.*, 139 AD3d 693, 694, 32 NYS3d 182, 184 [2d Dept 2016]).

In order to trigger the presumption of mailing, the sender must provide a sworn statement that the particular document was mailed by a particular person, or that a particular process, which resulted in mailing, was uniformly and diligently followed (*Kearney v. Kearney*, 42 Misc. 3d 360, 370, 979 NYS2d 226, 234 [Sup. Ct. 2013][citations omitted]). Pittman’s testimony, even if sworn (which it wasn’t), did not establish proof of a standard office practice and procedure on the part of Chase or EMC designed to ensure that notices of default were properly addressed and mailed (*CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 901, 47 NYS3d 415, 417 [2d Dept 2017]). Notably, at his examination before trial Pittman did not recall if there was any additional proof of mailing that was reflected in SPS’s system over and above the notice letters themselves imprinted with a barcode and tracking number (Pittman transcript, p. 40).

“[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*CitiMortgage, Inc. v. Pappas*, 147 AD3d at 901, citing *Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95, 106, 923 NYS2d 609 [2d Dept 2011]; see *Deutsche Bank Natl. Trust Co. v. Spanos*, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]). The statute requires that such notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (see RPAPL 1304[2]). The Johnson affidavit was likewise insufficient to establish that the 90 day notice was sent to the defendant in the manner required by RPAPL 1304, as the Johnson affidavit did not provide proof of Chase’s standard office mailing procedure (*U.S. Bank Nat’l Ass’n v. Henry*, 157 AD3d 839, 842, 69 NYS3d 656, 659 [2d Dept 2018]). The only independent proof of the actual mailing were the two documents that the plaintiff failed to disclose during pre-trial discovery- the “Chase Mortgage Banking Certified Regulatory Mail Register” indicating the certified mailing of the 90 day notice to the defendant on January 7, 2013, and a copy of a certificate of bulk first class mailing by “JPMC BREACH DEPARTMENT” for January 7, 2013.

In order for there to be strict compliance with RPAPL 1304, there must be proof of both the certified mailing and the first class mailing (*Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 1051, 55 NYS3d 134, 136 [2d Dept 2017]). Addressing the certificate of bulk mailing first, this document is not independent proof that the 90 day notice was sent to the defendant by first class mail on January 7, 2013, because there is nothing on the document that identifies the subject 90 day notice or confirms its mailing. Thus, whether the plaintiff provided that certificate of bulk mailing to defense counsel during pre-trial discovery is academic. The document, without more, does not demonstrate that the 90 day notice was mailed to the defendant at the subject address on January 7, 2013, by first class mail. Chase's mail register, however, may constitute some evidence the certified mailing requirement was met, assuming a proper foundation, and should have been provided to the defendant during pre-trial discovery. Nevertheless, even considering the Johnson affidavit, the Pittman testimony, the Chase mail register, and the certificate of bulk mailing, the plaintiff failed to demonstrate, prima facie, strict compliance with RPAPL 1304 or that it satisfied the condition precedent notice requirement in the mortgage.

As part of his cross motion, the defendant seeks an order, inter alia, striking all documents and things referenced in the Johnson affidavit but not provided to the defendant during the discovery process. However, "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" *Household Fin. Realty Corp. of New York v. Della Cioppa*, 153 AD3d 908, 910, 61 NYS3d 259, 261 [2d Dept 2017]). There is no such showing here and so much of the defendant's motion that seeks an order precluding the introduction of the single page mail register as evidence of the certified mailing of the 90 day notice to the defendant either on renewal of summary judgment or at trial is denied. Since the plaintiff's summary judgment motion is being denied for insufficient proof of mailing of the contractual and statutory notices, any prejudice that might have ensued to the defendant by the withholding of the document until now has abated. On any renewal or at trial, the defendant now has the mail register.

The defendant also seeks an order striking the introduction of the affidavit in support of summary judgment of Jill Johnson pursuant to CPLR 3124 and 3126, respectively, and precluding Ms. Johnson's testimony at trial. The justification for the relief sought is that by virtue of having produced Mr. Pittman as its witness at the examination before trial, the plaintiff is now limited to producing Mr. Pittman as an affiant in support of summary judgment or as a witness at trial.

If Mr. Pittman had personal knowledge of some or all of the transactions involving the defendant, defendant's argument might have some merit. However, neither Pittman's nor Johnson's personal knowledge as to the creation of the documents was a prerequisite to their admission so long as each could testify as to their review of the books and records of the company maintained in the ordinary course of business (*HSBC Bank USA, Nat. Ass'n v. Sage*, 112 AD3d 1126, 1127, 977 NYS2d 446, 448 [3d Dept 2013]), and the records themselves actually evinced the facts for which they [we]re relied upon (*Citigroup v. Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223, 224 [2d Dept 2017]). The proof are the records themselves, not the witness who is used to lay a foundation for their introduction as business records. The foundation for their introduction can be provided by any affiant or witness who can attest to that individual's familiarity with the creation of the business records relied upon.

Johnson laid a sufficient foundation for the introduction of the business records that established the existence of the note, the mortgage, and nonpayment. Neither Johnson nor Pittman laid a sufficient


foundation for proving mailing of the contractual and statutory notices because neither provided sufficient information as to EMC/Chase's standard office practice and procedure designed to ensure that notices of default were properly addressed and mailed (*CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 901, 47 NYS3d 415, 417 [2d Dept 2017]; *Bank of Am., Nat'l Ass'n v. Wheatley*, 158 AD3d 736, 738, 73 NYS3d 88 [2d Dept 2018]; *J.P. Morgan Mortg. Acquisition Corp v. Kagan*, 157 AD3d 875, 876, 70 NYS3d 216, 217 [2d Dept 2018]; *Bank of New York Mellon v. Zavolunov*, 157 AD3d 754, 757, 69 NYS3d 356, 359 [2d Dept 2018]; *Wells Fargo Bank, N.A. v. Lewczuk*, 153 AD3d 890, 892, 61 NYS3d 244, 247 [2d Dept 2017]; *Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 1051, 55 NYS3d 134, 136 [2d Dept 2017]). As discussed *supra*, Pittman's conclusory testimony that notices sent by Chase and its predecessor, EMC, are "system generated", and the existence of the letters themselves in the loan file prove they were mailed is, in this Court's view, not enough to establish a standard office practice and procedure designed to ensure that notices of default were properly addressed and mailed. Noticeably absent from Pittman's testimony is any reference to the lately disclosed bulk mailing certificate or the Chase mail register as part of Chase's standard office practice and procedure to raise the presumption of mailing.

So much of the defendant's cross motion for an order vacating the note of issue and certificate of readiness filed almost two years ago is denied. The plaintiff has demonstrated the defendant's default more than ten years ago. Not only has the defendant failed to raise an issue of fact as to his default, he has admitted his default.

As to the affirmative defenses asserted in the answer, excepting those dealing with RPAPL §1304 compliance and failure to comply with the notice provisions in the mortgage, the remaining affirmative defenses were not substantiated with factual allegations and were conclusory in nature. Accordingly, that branch of the plaintiff's motion which was for summary judgment dismissing the affirmative defenses is granted excepting the affirmative defenses alleging failure to comply with contractual and statutory notice requirements (*see* CPLR 3013, 3018[b]; *Becher v. Feller*, 64 AD3d 672, 677, 884 NYS2d 83, 88 [2d Dept 2009]).

Only the notice issues are left for resolution before judgment may be entered by one of the parties. Any additional records/documents on the issues of contractual and statutory notice are to be produced by the plaintiff within thirty days of service of this order upon the plaintiff with written notice of its entry. The contractual and statutory notice issues shall be resolved either by trial or renewal of summary judgment within sixty days of plaintiff's counsel being served with this order with written notice of its entry.

Dated: 7/19/18



 Peter H. Mayer, J.S.C.

HON. LINDA KEVINS

____ FINAL DISPOSITION XX NON-FINAL DISPOSITION


 JSC