COPY

SHORT FORM ORDER **INDEX NO.: 32092/2010**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 12/07/16
Motion Seq 4 MG; RTC

PLAINTIFF'S COUNSEL:
Eckert Seamans Cherin & Mellot, LLC
10 Bank Street, Ste 700
White Plains, New York 10606

DEFENDANT'S COUNSEL:
Westerman Ball Ederer Miller Zucker & Sharfstein, LLP
1201 RXR Plaza
Uniondale, NY 11556

U.S. BANK NATIONAL ASSOCIATION, as Trustee, on behalf of the holders of the CSMC Mortgage-Backed Pass-Through Certificate, Series 2007-2,

Plaintiff,

-against-

WILLIAM J. FOWKES a/k/a WILLIAM J. FOWKES, JR., BIG SKY RENTAL CORPS., JENNIFER FOWKES, JEFFREY DILANDRO, HENRY FAREZ, MAX FAREZ, ROBERTO FAREZ, ASHLEY FAREZ & SANDRA SALCEDO,

Defendants.

On defendant's motion to vacate his default on motion and the prior grant of summary judgment and order of reference, the Court considered the following papers:

1. Notice of Motion & Affirmation in Support dated May 19, 2016 and supporting papers;
2. Affirmation in Opposition & Memorandum of Law in Opposition dated June 17, 2016 and other opposing papers;
3. Reply Affirmation in Further Support dated June 30, 2016; and on due deliberation and full consideration; it is

ORDERED that defendant's motion pursuant to CPLR 5015(a)(1), 2004, 2005 and 3012(d) to vacate his default on motion , vacate the prior entry of summary judgment on default and order of reference on excusable default, and to permit late filing and compel acceptance of a late answer is **granted** as follows; and it is further

ORDERED that counsel for defendant serve a copy of this decision with notice of entry no later than 30 days from issuance of the same; and it is further

ORDERED that the parties are hereby directed to appear by counsel for a status conference on October 17, 2018 at 10:00 a.m. at the Supreme Court Annex, IAS Part 38 at 1 Court Street, Riverhead, New York 11901.

This matter is a residential mortgage foreclosure on a premises commonly known as 2 President Street, East Hampton, New York 11937. On December 21, 2006, defendants William Fowkes and his wife Jennifer Fowkes entered into a promissory note borrowing in principal $ 510,000 at 7.625% in favor of Continental Home Loans, Inc. The note was secured by a mortgage of the same date on the subject property which was recorded by the Suffolk County Clerk at Liber 21476 page 7 on February 13, 2007. Accompanying the promissory note was an undated allonge by Continental Home Loans, Inc., bearing an attachment in favor of the plaintiff U.S. Bank, National Association as Trustee. The note was further transferred by assignment dated August 3, 2010 from the Mortgage Electronic Registration Systems, Inc ("MERS") as nominee for Continental Home Loans, Inc. to plaintiff, recorded by the Suffolk County Clerk on September 14, 2010 at Liber 21987, page 465.

Alleging defendants defaulted on their obligation to render timely monthly payment pursuant to the note on March 1, 2010, plaintiff commenced this action filing a summons, complaint and notice of pendency on August 27, 2010. Defendant proceeding *pro se* joined issue filing an answer with affirmative defenses on September 21, 2010. This matter was conferenced in Supreme Court's Foreclosure Settlement Part as mandated by CPLR 3408 with no resolution on August 23, 2012.

Plaintiff previously moved for an order of reference and summary judgment before Supreme Court (Pines, J.) which denied the application in a short-form order dated March 26, 2014 determining plaintiff provided insufficient proof *inter alia* as to its standing concerning plaintiff's Pooling and Servicing agreement; insufficient proof of service on defendants to warrant entry of default judgment; and insufficient proof of compliance with the 90-day prelitigation notice requirement of RPAPL 1304.

In that decision, the court further determined that defendant's affirmative defenses were without merit and thus the answer was stricken on that basis, providing that defendant was granted leave to amend or supplement its answer to include a then unpled affirmative defense challenging plaintiff's standing. Subsequently, plaintiff renewed its application on defendant's default on the motion before this court which was granted awarding plaintiff default judgment against defendant and an order of reference by order dated February 2, 2016.

This motion by defendant followed seeking to vacate his default and the entry of default and summary judgment against him. Defendant bases his application under CPLR 5015(a) arguing excusable default premised upon law office failure by his prior counsel. He further asserts meritorious defenses of standing, plaintiff's lack of compliance with RPAPL 1304 & 1306 notice requirements further supporting his motion to vacate. Plaintiff opposes the request in its entirety.

Relying on CPLR 5015(a)(1), movant seeking to vacate an order entered on his default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (***Hamilton v Adriatic Dev. Corp.***, 150 AD3d 835, 835, 55

NYS3d 106, 107 [2d Dept 2017]); "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 789, 921 NYS2d 643, 644 [2d Dept 2011]). Such an application must be "made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party" (***New Century Mortg. Corp. v Chimmiri***, 146 AD3d 893, 894, 45 NYS3d 209, 210 [2d Dept 2017]). This application is addressed to the sound discretion of the court (***Braynin v Dunleavy***, 109 AD3d 571, 571, 970 NYS2d 611, 611 [2d Dept 2013]).

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

CPLR 3012(d) states that a court may "compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." (***Holloman v City of New York***, 52 AD3d 568, 569, 861 NYS2d 356, 357 [2d Dept 2008]). Thus, the Appellate Division cautions that in light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists (***Yongjie Xu v JJW Enterprises, Inc.***, 149 AD3d 1146, 1147, 53 NYS3d 660, 661 [2d Dept 2017]).

Generally speaking, under CPLR 2005, "[l]aw office failure may, in the court's discretion, serve as a reasonable excuse" however at the same time, "a 'pattern of willful default and neglect will not be excused" (***Gironda v Katzen***, 19 AD3d 644, 645, 798 NYS2d 109, 110 [2d Dept 2005]; ***Nakollofski v Kingsway Properties, LLC***, 157 AD3d 960, 961, 70 NYS3d 230, 231 [2d Dept 2018]["mere neglect is not accepted as a reasonable excuse"]; *see also* ***Mollica v Ruzza***, 151 AD3d 714, 715, 54 NYS3d 678, 679 [2d Dept 2017][law office failure should not be excused where a default results not from an isolated, inadvertent mistake, but from repeated neglect]; *but see* ***Hudson City Sav. Bank v Bomba***, 149 AD3d 704, 705, 51 NYS3d 570, 572 [2d Dept 2017][ruling that motion court providently exercised discretion rejecting the proffered excuse of law office failure where movant's affidavit revealed that prior counsel made a conscious and tactical decision not to respond to the plaintiff's motion for summary judgment thus evidencing strategic provision of advice and not law office failure]).

Thus, to warrant vacatur on excusable default premised on law office failure, movant the defaulting party must submit evidence in admissible form establishing both a reasonable excuse and a potentially meritorious cause of action or defense which includes a detailed and credible explanation of the default (***Onewest Bank, FSB v Singer***, 153 AD3d 714, 716, 59 NYS3d 480, 482 [2d Dept 2017]).

Here, defendant supports his application by affidavit wherein he explains that he hired prior legal counsel to defend his interests in this foreclosure action. That attorney however he testifies failed to amend or supplement his answer, despite the opportunity to do so having been afforded by prior court order. Further, movant states that his prior attorney defaulted on the prior plaintiff's motion. Defendant has since hired present counsel who prepared the instant

application. Contrary to plaintiff's claim otherwise, defendant's affidavit adequately establishes a reasonable excuse for his default in opposing the prior motion. His affidavit testimony provides, within this Court's discretion, concrete, detailed and specific allegations sufficient for a reasonable excuse of default. In contrast, while plaintiff has noted that defendant's prior counsel has not offered any affidavit offering any position or opinion, plaintiff also does not dispute defendant's allegations or opine on whether defendant's default was inadvertent or strategic.

Therefore, defendant having adequately established a reasonable excuse for his default next leads the court to weigh whether movant had identified meritorious defenses to plaintiff's foreclosure action. Here, defendant disputes plaintiff's standing arguing that the bank officer affidavit previously offered constitutes inadmissible hearsay insufficient to establish standing. Defendant also argues plaintiff has failed to demonstrate compliance with RPAPL 1304 notice requirements, a condition precedent to suit. Plaintiff for its part makes several different arguments. First, plaintiff argues that defendant waived standing having not plead it previously in the answer. Additionally, plaintiff argues that despite having plead compliance with RPAPL 1304, its requirements are not applicable to defendant's defaulted loan since his loan application indicates this property was not owner occupied, but rather an investment property. Thus, plaintiff contends that defendant's mortgage was not a "home loan," rendering unnecessary 1304 compliance in this instance.

The law of standing in foreclosure litigation within the Second Department is well settled by this point. Generally speaking, 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" (***US Bank, N.A. v Zwisler***, 147 AD3d 804, 805, 46 NYS3d 213, 215 [2d Dept 2017]; ***Deutsche Bank Tr. Co. Americas v Garrison***, 147 AD3d 725, 726, 46 NYS3d 185, 186–87 [2d Dept 2017]; ***Hudson City Sav. Bank v Genuth***, 148 AD3d 687, 688–89, 48 NYS3d 706, 708 [2d Dept 2017]).

Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by [a] defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (***Deutsche Bank Tr. Co. Americas v Garrison***, 147 AD3d 725, 726, 46 NYS3d 185, 187 [2d Dept 2017]; ***Deutsche Bank Nat. Tr. Co. v Romano***, 147 AD3d 1021, 1022, 48 NYS3d 237, 239 [2d Dept 2017]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept. 2011][where an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief]).

Plaintiff in a mortgage foreclosure action may establish its standing to sue in a number of ways: proof of its status as holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been assigned to it prior to the commencement of the action, as evidenced by its attachment of the endorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced has judicially accepted as one way (***Deutsche Bank Nat. Tr. Co. v Leigh***, 137 AD3d 841, 842, 28 NYS3d 86, 87 [2d Dept 2016]). Plaintiff may also sustain it *prima facie* burden on a challenge to its standing via submission of the mortgage, the note, and an affidavit of its loan servicer's assistant vice president, attesting to the borrower's default under the terms of the loan (***Bank of New York Mellon v Burke***, 155 AD3d 932, 933, 64 NYS3d 114, 115 [2d Dept 2017]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the

commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (***DLJ Mortg. Capital, Inc. v Pittman***, 150 AD3d 818, 819, 56 NYS3d 120, 121–22 [2d Dept 2017]; ***U.S. Bank Nat. Ass'n v Sabloff***, 153 AD3d 879, 880, 60 NYS3d 343, 344 [2d Dept 2017]; ***Dyer Tr. 2012-1 v Glob. World Realty, Inc.***, 140 AD3d 827, 828, 33 NYS3d 414, 416 [2d Dept 2016]; ***U.S. Bank Nat. Ass'n v Saravanan***, 146 AD3d 1010, 1011, 45 NYS3d 547, 548 [2d Dept 2017]; ***Cent. Mortg. Co. v Davis***, 149 AD3d 898, 900, 53 NYS3d 325, 328 [2d Dept 2017][finding plaintiff's submission of the note with an allonge containing an endorsement in blank entitled a determination that plaintiff was a holder of the note within the meaning of UCC 1–201(b)(21)]). Where plaintiff traces its standing as a holder of a negotiable instrument bearing an endorsement in blank, as the plaintiff does here, there is no requirement to establish how plaintiff came into possession of the instrument in order to be able to enforce it (***Wells Fargo Bank, NA v Thomas***, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]).

Furthermore, the Second Department has also clearly determined that "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" ... "in the absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment" ... thus making it "sufficient if the assignor has, in some fashion, *manifested an intention to make a present transfer of his rights to the assignee*" (***Deutsche Bank Nat. Tr. Co. v Romano***, 147 AD3d 1021, 1023, 48 NYS3d 237, 240 [2d Dept 2017][emphasis in original, internal citations omitted]).

In a foreclosure action, plaintiff establishes *prima facie* entitlement to judgment as a matter of law on its complaint by producing the mortgage, the unpaid note, and evidence of default (***Prompt Mortg. Providers of N. Am., LLC v Singh***, 132 AD3d 833, 834, 18 NYS3d 668, 669 [2d Dept 2015]) and by demonstrating that defendant's asserted affirmative defenses lack merit (***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 998, 985 NYS2d 254, 255 [2d Dept 2014]).

Applied here, plaintiff seeks judgment as a matter of law and appointment of a referee to compute amounts due and owing under the mortgage and note and to examine whether the mortgaged premises should be sold as one parcel. In support of that application, plaintiff has submitted copies of the note bearing an undated endorsement in blank and allonge to it, mortgage, and documentary evidence of defendant's default in payment. In its efforts to establish standing, plaintiff also previously offered the affidavit of Sherry Benight, document control officer of plaintiff's servicer Select Portfolio Servicing, Inc dated April 10, 2015. Benight testified that she reviewed her employer's electronic computer records keeping database containing payment and disbursement information on defendant's serviced mortgage loan. She further stated that she reviewed the litigation file including the pleadings and motion papers. Bearing squarely on the issue of RPAPL 1304 notice compliance, she testified that defendants were sent 90-day prelitigation notices by certified and first-class mail. However, missing from the affidavit is any testimony specifying precisely who sent those notices, a routine office mailing procedure, tracking numbers for either mailing, or a copy of the affidavit of service corroborating affiant's conclusory statements.

As regards standing more generally, plaintiff urges this Court that defendant waived that affirmative defense not having specifically plead it as such in his *pro se* answer. Previously

proceeding *pro se* defendant did not specifically deny or dispute plaintiff's standing, but rather instead "denied sufficient knowledge or information sufficient to form a belief" as to plaintiff's contentions as a note holder. Precedent dictates that where defendant does not plead standing as an affirmative defense in the answer, it is waived (***FCDB FF1 2008-1 Tr. v Videjus***, 131 AD3d 1004, 1004, 17 NYS3d 54, 54–55 [2d Dept 2015]; ***U.S. Bank Nat. Ass'n v Flowers***, 128 AD3d 951, 952, 11 NYS3d 186, 188 [2d Dept 2015][Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing]). Thus, in the ordinary course this Court would be of the view that defendant waived that defense, however the prior court's ruling permitted defendant to preserve that defense and replead it in a supplemental and amended pleading. Thus, that defense survives for determination on another day.

However, concerning a more narrowed and nuanced argument, defendant is correct that despite the provision of its servicer's affidavit, plaintiff has to date failed to prove compliance with RPAPL 1304. The Second Department has clearly held insufficient for purposes of 1304 compliance under analogous circumstances as those presented here, a bank officer's affidavit which merely which referenced purported tracking numbers stamped on the notice since the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing (*compare* ***Citibank, N.A. v Wood***, 150 AD3d 813, 814, 55 NYS3d 109, 111 [2d Dept 2017]; *with* ***Citimortgage, Inc. v Banks***, 155 AD3d 936, 937, 64 NYS3d 121, 123 [2d Dept 2017], *lv to appeal dismissed,* 2018-390, 2018 WL 2977756 [June 14, 2018][plaintiff established that it complied with the requirements of RPAPL 1304 via submission of proof of mailing through banking officer which annexed a copy of its 90–day notice and its business records demonstrating its standard office mailing procedure and showing that the notices were mailed to the defendants by certified and regular mail in accordance with its standard office mailing procedure]; *see also* ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 900, 32 NYS3d 278, 280 [2d Dept 2016][plaintiff's submission of an affidavit describing standard business practice with regard to sending RPAPL 1304 90–day notices to borrowers based on the business records reviewed concerning service of 1304 notices found sufficient where movant submitted copies of the RPAPL 1304 notices sent and copies of the domestic return receipts, with date of delivery and signature of one of the appellants entitling plaintiff to a rebuttable inference of mailing of the required notices and that defendants actually received them]; ***HSBC Bank USA, Nat. Ass'n. v Ozcan***, 154 AD3d 822, 826–27, 64 NYS3d 38, 43 [2d Dept 2017]).

Given this development, plaintiff argues that it was not required to comply with 1304 at all since defendant's loan was for an investment vehicle since he did not reside on premises. Here, plaintiff relies on unauthenticated loan application records for the proposition that defendant had disclosed several investment properties and that his home address differed form that of the mortgaged premises. The evidence plaintiff has submitted on this point is not in admissible for and thus cannot for the basis of judgment as a matter of law on this ground. More important, as argued by defendant, the prior determination of Supreme Court that 1304 applied here is law of the case, and it is not the role of this court sitting coordinate to review or overturn other sister courts' determination. On this point, the Second Department has made clear " '[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.' " " '[T]he 'law of the case' operates to foreclose re-examination of [the] question absent a showing of subsequent evidence

or change of law.' " "The doctrine 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision.' " (***Strujan v Glencord Bldg. Corp.***, 137 AD3d 1252, 1253, 29 NYS3d 398, 400 [2d Dept 2016][internal citations omitted]). Thus, plaintiff's remedy was to renew its application in a timely fashion or appeal the adverse determination by the prior court. This Court is of the view that plaintiff despite having renewed its application, did not evidence satisfactory compliance with RPAPL 1304 notice requirements.

As a result, this Court **grants** defendant's motion to vacate the prior grant of summary judgment and order of reference on excusable default (*see e.g.* ***Flagstar Bank, FSB v Damaro***, 145 AD3d 858, 860, 44 NYS3d 128, 131 [2d Dept 2016][holding that movant adequately established a reasonable excuse for her failure to oppose the plaintiff's summary judgment motion by providing a detailed and credible explanation of the law office failure which led to her default]).

Thus, it is

ORDERED that the prior Order of Reference dated February 2, 2016 is hereby vacated and recalled; and it is further

ORDERED that defendant's default is vacated to the extent that his proposed answer interposing and preserving an affirmative defense going to plaintiff's standing for noncompliance with RPAPL 1304 is unresolved and may continue to be litigated herein; and it is further

ORDERED that the appointment of referee John L. Juliano, Esq. for the purposes of computing amounts due and owing and examine whether the subject premises could be sold as one parcel is also hereby vacated and recalled subject to the dictates of the within order; and it is further

ORDERED that the parties appear before the undersigned as indicated above for a status conference for the continued prosecution of this matter; and it is further

ORDERED that defendant serve a copy of its proposed supplemental and amended answer **no later than** 14 days from entry of this order; and it is further

ORDERED that plaintiff may seek leave to renew or reargue this decision no later than 90 days from its service with notice of entry.

The foregoing constitutes the decision and order of this Court.

Dated: August 22, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**