

CitiMortgage, Inc. v Humphrey
2019 NY Slip Op 32098(U)
July 16, 2019
Supreme Court, Suffolk County
Docket Number: 0008537/2013
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:

HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 8537/2013

MOTION DATE: 6/28/2019

MOTION SEQ. NO.: #003 MG

#004 MD

-----X
CITIMORTGAGE, INC.,

Plaintiff,

-against-

MICHAEL HUMPHREY, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:

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99 POWERHOUSE RD. 1ST FLR.
ROSLYN HEIGHTS, NY 11577

DEFENDANT PRO SE:

MICHAEL HUMPHREY
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DEFENDANT ATTORNEY

FOR TARA HUMPHREY:

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Upon the following papers numbered 1 to 32 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-20 (#003) ; Notice of Cross Motion and supporting papers 21-27 (#004) ; Answering Affidavits and supporting papers 28-32 ; Replying Affidavits and supporting papers ____ ; Other ____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff CitiMortgage, Inc. seeking an order: 1) granting summary judgment striking the answers asserted by defendants Michael Humphrey and Tara Humphrey;; 2) substituting MTGLQ Investors, L.P., as the named party plaintiff in place and stead of CitiMortgage, Inc.; 3) adding The Meyers Law Group, P.C. as a named party defendant; 4) discontinuing the action against defendants designated as "John Doe"#1-10 and "Jane Doe"#1-10; 5) deeming all appearing and non-appearing defendants in default; 6) amending the caption; and 7) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Michael Humphrey seeking an order pursuant to CPLR 3212 & RPAPL 1304 denying plaintiff's motion and dismissing plaintiff's complaint or, in the alternative, compelling discovery and remanding this action to the foreclosure settlement part for additional settlement conferences is denied; and it is further

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

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$325,000.00 executed by defendants Michael Humphrey and Tara Humphrey on May 30, 2006 in favor of First West Mortgage Bankers, Ltd. On the same date mortgagor Michael Humphrey executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated July 3, 2012 the mortgage and note were assigned to the plaintiff. The mortgage and note have been subsequently assigned to MTGLQ Investors, L.P. by assignment dated August 30, 2017. Plaintiff claims that the mortgagors defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning February 1, 2012 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on March 25, 2013. Defendant/mortgagor Michael Humphrey served an answer dated April 22, 2013 asserting one (1) affirmative defense; defendant/mortgagor Tara Humphrey served an answer dated April 29, 2013 asserting five (5) affirmative defenses.

Plaintiff's motion seeks an order granting summary judgment striking both defendants' answers and for the appointment of a referee. Defendant Michael Humphrey's opposition in the form of a cross motion claims that plaintiff's motion must be denied and the complaint must be dismissed because: 1) plaintiff has failed to prove standing; and 2) plaintiff has failed to prove service of pre-foreclosure notices required by the mortgage and pursuant to RPAPL 1304. Defendant Michael Humphrey also claims in the alternative that he is entitled to discovery and to additional CPLR 3408 foreclosure settlement conferences. Defendant Tara Humphrey has submitted no opposition.

Plaintiff's motion seeking summary judgment was served on April 26, 2018 and made originally returnable on May 29, 2018 assigned to IAS Part 40. Defendant's cross motion was served on May 21, 2018 and made originally returnable on May 29, 2018 assigned to IAS Part 40. Both motions remained without decision for the past twelve (12) months until this foreclosure action and the two pending motions were reassigned to this IAS Part 18 by Administrative Order #40-19 (Hinrichs, J.) dated June 6, 2019. Upon assemblage of motion papers the motions were submitted on the IAS Part 18 motion calendar on June 28, 2019.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (see *Wells Fargo Bank N.A. v. Erobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015);

Wells Fargo Bank, N.A. v. Ali, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012-b has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*Bank of New York Mellon v. Theobalds*, 161 AD3d 1137, 79 NYS3d 50 (2nd Dept., 2018); *Bank of New York Mellon v. Burke*, 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Garrison*, 147 AD3d 725, 726, 46 NYS3d 185 (2nd Dept., 2017); *U.S. Bank, N.A. v. Saravanan*, 146 AD3d 1010, 1011, 45 NYS3d 547 (2nd Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreement since February 1, 2012. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon the mortgagor's continuing default, plaintiff's compliance with mortgage default and RPAPL 1304 notice requirements, plaintiff's standing to maintain this action, defendant's right to conduct discovery prior to judgment, and defendant's right to additional CPLR 3408 court settlement conferences.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice*, 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records

systematically made for the conduct of business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise." (quoting *People v. Kennedy*, 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (see *Trotti v. Estate of Buchanan*, 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records- (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (see *People v. Kennedy*, supra @ pp. 579-580)). The "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records." (*People v. Cratsley*, 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business." (*State of New York v. 158th Street & Riverside Drive Housing Company, Inc.*, 100AD3d 1293, 1296, 956 NYS2d 196 (2012); *leave denied*, 20 NY3d 858 (2013); see also *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company*, 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica*, 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo*, 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO*, 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). In this regard, with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it incorporated the original records into its own records and relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record, particularly in this case, where there is a business relationship between mortgage servicing entities responsible for entering and maintaining accurate records, and where the current servicer has incorporated and relied upon the business records it maintains in its regular course of business (see *Citibank N.A. v. Abrams*, 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang*, supra.)). As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a foreclosure action rely on a particular set

of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a) and the records themselves actually evince the facts for which they are relied upon.” Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business; 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the time the transaction occurred. – if demonstrated, make the records admissible since such records are considered trustworthy and reliable. Moreover, the language contained in the statute specifically authorizes the court discretion to determine admissibility by stating “*if the judge finds*” that the three foundational requirements are satisfied the evidence shall be admissible.

The affidavits submitted from the prior mortgage servicer/plaintiff’s (CitiMortgage, Incorporated’s) vice president of document control dated April 21, 2017 and from the current subservicer/attorney-in-fact’s (New Penn Financial’s) litigation specialist dated January 9, 2018, respectively, provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavits set forth each employee’s review of the business records maintained by the mortgage servicers/attorneys-in-fact; the fact that the books and records are made in the regular course of CitiMortgage/New Penn Financial’s business; that it was CitiMortgage/New Penn Financial’s regular course of business to maintain such records; that the records were contemporaneously created at the time the underlying transactions occurred; and that to the extent the records were compiled by a prior servicer those records were integrated into the records maintained by New Penn Financial and relied upon in the regular course of its business (*see Bank of New York Mellon v. Gordon*, 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019)). Based upon the submission of these two affidavits, plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to the issues raised in this summary judgment application.

With respect to the issue of standing, plaintiff has proven standing by submission of an affidavit from the CitiMortgage vice president of document control attesting to plaintiff CitiMortgage’s physical possession of the original indorsed in blank promissory note beginning on June 15, 2006 and continuously until February 1, 2014 when the note was transferred. Such proof proves standing based upon the undisputed fact that plaintiff had possession of the indorsed in blank promissory note prior to and on the date this action was commenced on March 25, 2013 (*Aurora Loan Services v. Taylor, supra.*; *Wells Fargo Bank, N.A. v. Parker, supra.*; *U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *GMAC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016); *U.S. Bank, N.A. v. Carnivale*, 138 AD3d 1220 (3rd Dept., 2016)). Any alleged issues surrounding the mortgage assignment are irrelevant in this case concerning the issue of standing since the plaintiff has established possession of a duly indorsed promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)).

With respect to the issue of this mortgagor’s default in making payments, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see PennyMac Holdings, Inc. V. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como*, 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk*, 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to both

mortgagors' undisputed default in making timely mortgage payments together with business records in the form of copies of internal business notations and copies of the notices of default which were mailed to the mortgagors confirming their continuing default in making timely payments sufficient to sustain its burden to prove defendants have defaulted under the terms of the parties agreement by failing to make timely payments since February 1, 2012 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.*; *Citigroup v. Kopelowitz, supra.*). Accordingly, and in the absence of any proof to raise an issue of fact concerning the mortgagors' continuing default, plaintiff's application for summary judgment against the defendants/mortgagors based upon their breach of the mortgage agreement and promissory note must be granted.

With respect to the issue of plaintiff's service of pre-foreclosure default notices, a review of the affirmative defenses asserted in defendant's answer reveals that the mortgagor/defendant never asserted plaintiff's failure to serve a mortgage default notice as required under the terms of the mortgage as an affirmative defense in his answer. Based upon defendant's failure to assert plaintiff's alleged failure to serve a pre-foreclosure default notice required by the mortgage as an affirmative defense, the defendant has waived his right to assert it in opposition to plaintiff's motion (CPLR 3015 & 3018(b); *see Emigrant Bank v. Marando*, 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016); *Signature Bank v. Epstein*, 95 AD3d 1199, 945 NYS2d 347 (2nd Dept., 2012); *First N. Mortgage Corporation v. Yatrakis*, 154 AD2d 433, 546 NYS2d (2nd Dept., 1989); *see also Wilmington Trust v. Sukhu*, 155 AD3d 591, 63 NYS3d 853 (1st Dept., 2017); *Karel v. Clark*, 129 AD2d 773, 514 NYS2d 766 (2nd Dept., 1987)).

Moreover, even were the court to consider defendant's answer as having asserted such defense related to the failure to serve a mortgage default notice required under the terms of the mortgage, the plaintiff has submitted sufficient proof to show that the mortgage default notice was mailed to mortgagor Michael Humphrey on March 7, 2012 in compliance with mortgage requirements. Plaintiff's proof consists of an affidavit submitted by the plaintiff/prior mortgage servicer's (CitiMortgage's) vice president of document control confirming that the first class mailing was done by CitiMortgage on March 7, 2012; together with a copy of the actual notice of default dated March 7, 2012 addressed to the defaulting mortgagor at the mortgaged premises; together with an internal redacted business record entitled "Consolidated Note Report" confirming the first class mailing was done on March 7, 2012. Such proof provides sufficient evidence of substantial compliance with the mortgage default notice requirements (*see Hudson City Savings Bank v. Friedman*, 146 AD3d 757, 43 NYS3d 912 (2nd Dept., 2017); *PennyMac Holdings, LLC v. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Carcano*, 106 AD3d 724, 965 NYS2d 516 (2nd Dept., 2013); *IndyMac Bank, FSB v. Kamen*, 68 AD3d 931, 890 NYS2d 649 (2nd Dept., 2009)) Defendant's conclusory denial of service, fails to raise a genuine issue of fact concerning service of the default notice (*see PHH Mortgage Corp. v. Muricy, supra.*; *HSBC Bank v. Espinal, supra.*). In addition, even were the court to deem the proof submitted by the plaintiff with respect to service of the mortgage default notice insufficient, plaintiff's proof submitted in support of service of the RPAPL 1304 90-day notices, satisfies the mortgage lender's obligations under the terms of the mortgage concerning the notice of default requirements (*see Wachovia Bank, N.A. v. Carcano*, 106 AD3d 724, 965 NYS2d 516 (2nd Dept., 2013)).

With respect to service of pre-foreclosure RPAPL 1304 90-day notices, the law provides that although this defense is non-jurisdictional, it is a special defense which must be proven by submission of proof by submission of an affidavit of service of the notices (*CitiMortgage, Inc. v.*

Pappas, 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Deutsche Bank National Trust Company v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or by plaintiff's submission of sufficient proof to establish proof of mailing of the notices (*see Nationstar Mortgage LLC v. LaPorte*, 162 AD3d 784, 79 NYS3d 70 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*Viviane Ettienne Medical Care, P.C. v. Country-Wide Insurance Company, supra.*; *Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016)).

In this case the record shows that there is sufficient evidence to prove that mailing by certified and first class mail was done proving strict compliance pursuant to RPAPL 1304 mailing requirements. Plaintiff's proof consists of two affidavits confirming strict compliance with mailing requirements set forth in the statute—the first “affidavit of possession and mailing” from the CitiMortgage vice president of document control attests to compliance and mailing of the 90-day notices from the representative of the entity (i.e. CitiMortgage) which did the actual mailing; the second “affidavit in support” from the current subservicer/attorney-in-fact's (New Penn Financial's) litigation specialist attests to his review of the prior servicers' records (which are integrated and relied upon by New Penn Financial in its regular course of business) and confirms the mailing of the 90 day notices. In addition, plaintiff submits four copies of the RPAPL 1304 90-day notices: the first addressed to mortgagor Michael Humphrey at the mortgaged premises, which is the correct address, together with the mailing label which contains a twenty (20) digit article tracking number (7012 1010 0003 2297 9372) confirming the certified mailing of the 90-day notice on September 19, 2012; the second addressed to mortgagor Michael Humphrey at the mortgaged premises, which is the correct address, confirming the first class mailing. Two additional notices are submitted in identical form which were mailed to the co-mortgagor Tara Humphrey at the correct address. In addition, plaintiff submits three pages of internal redacted business records entitled “Consolidated Note Screen” which lists the twenty digit certified article tracking numbers matching the address label copy (recited above) and confirming the dates both mailings were done- September 19, 2012. In addition, plaintiff has submitted two copies of the RPAPL 1306 filing statements filed with the State Banking Department further confirming the mailing of the 90-day notices. Such proof provides sufficient evidence to prove strict compliance with RPAPL 1304 requirements (*CitiMortgage, Inc. v. Borek*, 171 AD3d 848, 97 NYS3d 657 (2nd Dept., 2019); *Nationstar Mortgage LLC v. LaPorte, supra.*; *HSBC Bank USA, N.A. v. Ozcan, supra.*). Defendant's denial of service is not supported by any relevant, admissible evidence to contradict the plaintiff's proof and fail to raise a genuine issue of fact which would defeat plaintiff's summary judgment motion (*see PHH Mortgage Corp. v. Muricy*, 135 AD3d 725, 24 NYS3d 137 (2nd Dept., 2016); *HSBC Bank USA, N.A. v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to defendant's remaining claims that he is entitled to discovery and additional court settlement conferences, neither contention has merit. CPLR 3214(b) imposes an automatic stay of discovery upon service of a summary judgment motion. Moreover, even were the court to further consider defendant's claim of entitlement to discovery, no legal grounds exist to further delay prosecution of this action, since there has been no showing by the defendant how any additional evidence would create a genuine issue of fact. Absent some demonstration that reasonable attempts to discover facts might give rise to significant issues of fact, no basis exists to continue litigation in view of the fact that plaintiff has submitted sufficient proof to establish its entitlement to foreclose this mortgage (*see Lee v. T.F. DeMilo Corp.*, 29 AD3d 867, 815 NYS2d 700 (2nd Dept., 2006);

Sasson v. Setina Mfg. Co., 26 AD3d 487, 810 NYS2d 500 (2nd Dept., 2006)).

As to defendant's right to additional settlement conferences, court records indicate that the mortgagors were afforded three (3) CPLR 3408 foreclosure settlement conferences on July 19, 2013, October 23, 2013 and November 13, 2013. Records indicate that the mortgagors failed to appear for the November 13, 2013 conference and therefore the action was referred to an IAS Part for assignment. While defendant claims to not having received prior notice of the third conference date, there is no indication that Humphrey, a practicing attorney, made any further effort at the time to reschedule another date after the action had been referred to an IAS Part, nor is there any record to support the attorney's claim that he was entitled to and waiting for a notice of the conference date. Nor is there any notation in court records by the court attorney responsible for conducting the foreclosure conferences that the mortgage lender's representatives who appeared for the settlement conferences failed to negotiate in good faith. Absent any evidence to justify scheduling additional court conferences, there are no legal or equitable grounds which would require any additional conferences, particularly in view of the fact that the mortgagor has never sought a loan modification and in view of the undisputed fact that the mortgagor, a practicing attorney, has not made a single mortgage payment for the past seven (7) years and five (5) months and has permitted the mortgage lender to make payments for property taxes and hazard insurance on his behalf so that he can continue to reside in the premises without making any good faith payments. Equity clearly rests in favor of the mortgage lender in these circumstances and defendant has made no legal showing to further justify tolling the interest which has accumulated as a result of the mortgagor's continuing default.

Finally, defendant has failed to raise any admissible evidence to support his remaining affirmative defense asserted in his answer in opposition to plaintiff's motion. Accordingly the affirmative defense and any other defense which could have been raised by the defendant must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafigliore*, 94 AD3d 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

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

Dated: July 16, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.