Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 28704/2011
MOTION DATE: 6/25/2019
MOTION SEQ. NO.: #001 MG
#002 MD

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WELLS FARGO BANK N.A.,

Plaintiff,

-against-

ELLEN MCMAHON, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 64 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-12 (#001) ; Notice of Cross Motion and supporting papers 13-24 (#002) ; Answering Affidavits and supporting papers 25-30, 31-35, 36-40, 41-48, 49-52 ; Replying Affidavits and supporting papers 53-62, 63-64 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank N.A. seeking an order: 1) granting summary judgment striking the answer and counterclaims asserted by defendant Ellen McMahon ; 2) discontinuing the action against defendants designated as "John Doe"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) 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 McMahon seeking an order pursuant to CPLR 3212 & RPAPL 1303, 1304 & 1306 denying plaintiff's motion and dismissing plaintiff's complaint 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 $329,500.00 executed by defendant Ellen McMahon on June 9, 2005 in favor of Wells Fargo Bank, N.A.. On the same date mortgagor McMahon executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that the mortgagor defaulted under the terms of

the mortgage and note by failing to make timely monthly mortgage payments beginning August 1, 2010 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 September 9, 2011. Mortgagor Ellen McMahon served an answer dated September 30, 2011 asserting five (5) affirmative defenses and three (3) counterclaims.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's opposition, in the form of a motion, claims that plaintiff's motion must be denied and the complaint must be dismissed because: 1) plaintiff has failed to prove service and filing of statutorily compliant pre-foreclosure notices required pursuant to RPAPL 1304 & 1306; and 2) plaintiff has failed to prove service of the RPAPL 1303 notice.

Plaintiff's original summary judgment motion was served on August 15, 2014 and made originally returnable on September 8, 2014 assigned to IAS Part 51. That motion remained sub judice for well more than three (3) years until counsel for both parties in January, 2018 stipulated to submit supplemental papers in the form of affidavits and memorandum of law and to adjourn the submission of the original motion until March 23, 2018.. The stipulation signed by counsel for both parties limited the issues in contest to plaintiff's compliance with RPAPL 1303, 1304 & 1306 requirements. On March 23, 2018 plaintiff's motion was fully submitted and assigned to IAS Part 51, and remained without a decision for more than another year until this foreclosure action and the underlying motion were assigned to this IAS Part 18 by Administrative Order 26-19 (Hinrichs, J.) dated April 1, 2019. In April, 2019 during the period the motion papers were being assembled, defendant served her motion seeking summary judgment dismissing plaintiff's complaint. That motion, deemed a cross motion, was served on April 22, 2019 and made returnable on May7, 2019. Both motions were thereafter adjourned on consent for submission on this IAS Part 18 motion calendar on June 25, 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. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC*

Bank USA, N.A. v. Baptiste, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). In this case there is no issue concerning standing since Wells Fargo Bank, N.A. is and remains the original mortgage lender in possession of the original promissory note.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest her failure to make timely payments due under the terms of the promissory note and mortgage agreement since August 1, 2010. 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 RPAPL 1304 & 1306 notice and filing requirements, and plaintiff's compliance with service requirements pursuant to RPAPL 1303.

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 plaintiff/mortgage servicer's (Wells Fargo Bank, N.A.'s) vice presidents of loan documentation dated July 28, 2014 ("Mulder affidavit") and dated January 18, 2018 ("Smith affidavit") respectively provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavits set forth the employee's review of the business records maintained by the plaintiff/mortgage servicer; the fact that the books and records are made in the regular course of Wells Fargo's business; that it was Wells Fargo's regular course of business to maintain such records; and that the records were contemporaneously created at the time the underlying transactions occurred. 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 the 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 the mortgagor's undisputed default in making timely mortgage payments together with business records in the form of the notices of default which were mailed to McMahon confirming her continuing default in making timely payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments since August 1, 2010 (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 mortgagor's continuing default, plaintiff's application for summary judgment against the defendant/mortgagor based upon her 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 her 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 her 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)).

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 from the plaintiff/mortgage servicer's vice presidents of loan documentation each confirming that the 90-day notices were mailed by first class and certified mail to the defaulting mortgagor McMahon on December 9, 2010 at the mortgaged premises. In addition, plaintiff submits a copy of the RPAPL 1304 90-day notice which was mailed

to the defaulting mortgagor McMahon by certified and first class mail— the copy submitted contains the twenty (20) digit article tracking number (7160 3901 9848 9456 0455) imposed at the top of the notice copy. In addition, plaintiff submits internal redacted business records identified as the "Loan Archive" and the "Notes Log" which confirm the first class and certified mailing on December 9, 2010. In addition, plaintiff has submitted a copy of two RPAPL 1306 filing statements with the State Banking Department further confirming step one and step two compliance of the mailing of the 90-day notices. Such proof provides sufficient evidence to prove strict compliance with RPAPL 1304 & 1306 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 service of the RPAPL 1303 notice, plaintiff's proof consists of a copy of the affidavits of service from the process server confirming the summons, complaint and RPAPL 1303 notice in proper form were served upon the defendant/mortgagor McMahon by personal service in-hand delivery pursuant to CPLR 308(1) on September 19, 2011 at 7:17 p.m. at the mortgaged premises The affidavit of service, together with the documentary proof consisting of a copy of the RPAPL 1303 notice which was served upon this defendant, constitute prima facie evidence of proper service of the RPAPL 1303 notice. In opposition defendant has failed to submit relevant, admissible proof in the form of an affidavit containing specific and detailed contradictions of the claims set forth in the process server's affidavit. Absent submission of such evidence no grounds exist to raise a genuine issue of fact concerning service of the RPAPL 1303 notice (*see Nationstar Mortgage LLC v. Kamil*, 155 AD3d 968, 63 NYS3d 890 (2nd Dept., 2017); *Eastern Savings Bank, FSB v. Tromba*, 148 AD3d 675, 48 NYS3d 499 (2nd Dept., 2017); *Deutsche Bank National Trust Company v. Quinones*, 114 AD3d 719, 981 NYS2d 107 (2nd Dept., 2014); *U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013)). Defendant's conclusory affidavit provides no details concerning why the process server would have neglected to serve an RPAPL 1303 notice, while at the same time serving a copy of the summons and complaint which defendant concedes having received. Absent any explanation or details concerning this anomaly and to raise an issue of fact sufficient to contradict the process server's affidavits, no legal grounds exist to not strike defendant's RPAPL 1303 defense and the defense is hereby stricken (*see HSBC Bank USA v. Ozcan, supra.; OneWest Bank, N.A. v. Mahoney*, 154 AD3d 770, 62 NYS3d 144 (2nd Dept., 2017); *Nationstar Mortgage LLC v. Kamil, supra.*)).

With respect to defendant's remaining claims concerning: the alleged deficiency of content in the 90-day notice served by plaintiff; the alleged untimeliness of the 90-day notice based upon the notice having been mailed prior to the dismissal of a prior foreclosure action; the contention that this action must be dismissed since it was commenced while a prior action was pending; and the claim that a defaulting mortgagor is unable to reinstate a delinquent mortgage loan based upon a mortgage lender's commencement of a foreclosure action– none of these four claims provide a legal basis to dismiss plaintiff's complaint or to deny plaintiff's summary judgment motion.

First: As to the issue of dismissal of this (second) action based upon a "prior action pending"— counsel for both parties stipulated to limit the remaining issues between the parties to claims concerning RPAPL 1303, 1304 & 1306. Having

so stipulated defendant is barred from seeking to raise this issue as a defense to plaintiff's complaint in this action. Moreover, the record shows that the initial foreclosure action (Index # 44262-2010) was the subject of a motion by plaintiff seeking to discontinue that action. The motion, which was served on July 27, 2011, was consented to by defendant as evidenced by a letter from defense counsel dated July 29, 2011- which was more than forty-two (42) days prior to commencement of this action. No legal grounds therefore exist to dismiss this pending action which was commenced five days before the formal Order (Whelan, J.) discontinuing the original action was signed on September 14, 2011.

Second: As to the "timeliness" of the 90-day notice mailed on December 9, 2010 – defendant claims that plaintiff had previously commenced a foreclosure action (under Index Number 44262-2010) seeking to foreclose the mortgaged premises by filing a summons and complaint in the County Clerk's Office on December 8, 2010 and that action was then pending when plaintiff served its 90-day notice on December 9, 2010 thereby rendering the notice as defective. There is no restriction under the terms of the statute which prevents the mortgagee from serving a 90-day notice under such circumstances— the only relevant requirement is that the RPAPL 1304 90-day notice be served more than ninety (90) days prior to commencement of any subsequent action.

Third: As to defendant's "inability" to make payments to cure her default based upon plaintiff's commencement of the original foreclosure action– such a claim is wholly without merit. A defaulting mortgagor has the right to cure her default at any time prior to judgment pursuant to paragraph nineteen (19) of the mortgage agreement she signed.

Fourth: As to the claimed deficiency of the 90-day notice mailed to the defaulting mortgagor— the statute in effect at the time the RPAPL 1304 90-day notices were mailed on December 9, 2010 required that the 90-day notice contain "a list of at least five housing counseling agencies that *serve* the region where the borrower resides". The defaulting borrower resided in Suffolk County and the notice sent lists as "New York Approved Counseling Agencies" under "Suffolk" "County Code- 103" five housing agencies– two with listed addresses in Suffolk County; one addressed in Nassau County; one addressed in New York City; and one addressed in Jefferson County. Defense counsel's objection makes no reference to two of the five agencies located in Nassau County and New York County- his only objection is premised upon the agency listed as located in Jefferson County. However there is no relevant, admissible evidence to prove that the housing agency listed as "CCCS of Central New York" did not serve the defaulting mortgagors who in December, 2010 were served with a 90-day notice. Absent proof that this particular agency did not *serve* Suffolk County residents during this period (December, 2010) there is no substantial issue of fact to be determined which would defeat the prima facie showing made by the plaintiff in proving strict compliance with the statute. Moreover, even were this court to interpret that the inclusion of this fifth agency constituted a defect or irregularity in the content of the RPAPL 1304 notice sent to the defaulting borrower, the defect or irregularity must be considered so minimal as to warrant the exercise of the court's discretion

pursuant to CPLR 2001 to avoid dismissal of this action (based upon this minor technical error) and to therefore consider the notice as compliant with the statute (CPLR 2001; *Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 108, 923 NYS2d 609 (2nd Dept., 2011)).

As to this fourth argument advanced by the defendant–underlying defendant's attempt to seek dismissal of plaintiff's complaint nearly four and one-half years after plaintiff had submitted its original summary judgment motion (which defendant originally defaulted in opposing) is this argument premised upon the claimed deficiency in the 90-day pre-foreclosure notice served by plaintiff in December 9, 2010. The borrower, who concedes that she has not made a mortgage payment for nearly nine years (yet continues to reside in the mortgaged premises while also not paying property taxes or hazard insurance), is in essence claiming that even if she were mailed by first class and certified mail the 90-day notice and acknowledged receiving the 90-day notice, this court is required to dismiss plaintiff's complaint solely because the fifth housing counseling agency listed in the 90-day notice she acknowledged receiving, contains a housing agency which was not located in the Suffolk County region. Defendant's argument is that this claimed error– alone and of itself– mandates dismissal of plaintiff's complaint since "strict compliance" must be observed. The argument need not be buttressed by any claim by the defaulting mortgagor that she actually made an attempt to contact the fifth housing agency listed in the notice— nor made any attempt to contact any of the other four agencies listed in the notice. Dismissal is required solely due to this fifth housing agency listing. The question which then must be considered is whether the intent of this statute was to provide a recurring legal mechanism for a defaulting borrower to avoid the consequences of her continuing default simply by claiming that the pre-foreclosure notice that was sent and received (and ignored) had some minor inconsequential defect, or was the intent of the statute something entirely different.

Clearly the "intent" of the RPAPL 1304 (and its related statutory partner: CPLR 3408) was to provide a preliminary mechanism for a defaulting homeowner to become aware that legal action was about to be initiated against the defaulting borrower by the mortgage lender should payments continue to not be forthcoming and to introduce a compulsory court settlement program where the defaulting borrower(s) could meet with mortgage representatives and court personnel in an attempt to resolve the borrower's breach of the parties' agreement and to avoid foreclosure. While the statute has been subsequently interpreted to require "strict compliance", the parameters of the term "strict compliance" are ever the source of attempts at expansive interpretation in litigation such as the arguments advanced in this case — which in its essence makes any variation of the statutory language a per se violation of the statute and therefore grounds for "dismissal". To interpret legislative intent to require dismissal based upon the fact pattern in this particular case defies both logic and common sense, and would result in an outcome (dismissal) which under the circumstances reaches a point of absurdity (see *McKinney's, 'Statutes" Sections 145 & 148*). The statute is intended to bring the parties together prior to litigation to discuss possible solutions; it was not intended to be promoted and used as a weapon by a defaulting mortgagor's (or some other intermediary third party attempting to stand in the shoes of the original defaulting borrower and profit from its usage and enforcement) counsel to either seek dismissal or to be used to further delay the consequences of the defaulting borrower's continuing breach based upon a trivial, inconsequential and insignificant detail which had no relevance or effect in the interaction among the parties.

Court records in this case reveal that this defaulting borrower was afforded three CPLR 3408 court mandated settlement conferences on August 28, 2012, November 14, 2012 and January 31, 2013. Defendant was represented by counsel during each conference. Plaintiff has also submitted proof that in July, 2017 the defaulting borrower was offered a trial loan modification which she subsequently declined to accept. Having been afforded numerous opportunities to resolve the default (which is the intent of the statute recited by the defense counsel as grounds for dismissal) there are no legal or equitable grounds in this record to grant defendant's motion or to deny plaintiff's motion which has been sub judice for nearly five years.

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

Accordingly 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 31, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.