

JPMorgan Chase Bank N.A. v Nunez

2019 NY Slip Op 32649(U)

September 6, 2019

Supreme Court, Suffolk County

Docket Number: 27242/2011

Judge: Howard H. Heckman

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This opinion is uncorrected and not selected for official publication.

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

PRESENT:

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

INDEX NO.: 27242/2011
MOTION DATE: 7/9/2019
MOTION SEQ. NO.: #001 MG
#002 MD
#003 MG

-----X
JPMORGAN CHASE BANK N.A.,

Plaintiff,

-against-

ANA NUNEZ, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
FEIN SUCH & CRANE, LLP.
747 CHESTNUT RIDGE RD. STE 200
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DEFENDANTS' ATTORNEY:
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Upon the following papers numbered 1 to 66 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-22 (#001) 34-41 (#003); Notice of Cross Motion and supporting papers 23-33 (#002); Answering Affidavits and supporting papers 42-48; Replying Affidavits and supporting papers 49-57, 58-66; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff JPMorgan Chase Bank, N.A., seeking an order: 1) granting a default judgment; 2) substituting Bayview Loan Servicing, LLC as the named party plaintiff in place and stead of JPMortgan Chase Bank, N.A.; 3) substituting Manny Rivera, Kelly Davison, Jennifer Nunez, Marisol Beltre, Evaristo Beltre, and Herminio Beltre as named party defendants in place and stead of defendants designated as "John Doe"; 4) correcting and reforming the legal description of the mortgaged premises as set forth in Schedule A and the Order of Reference; 5) deeming all 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 Ana Nunez seeking an order pursuant to CPLR 3212 & 3215(c) denying plaintiff's motion and dismissing plaintiff's complaint is denied; and it is further; and it is further

ORDERED that plaintiff's motion seeking an order pursuant to CPLR 2004 granting leave to serve reply papers to defendant's cross motion is granted; 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 \$278,400.00 executed

by defendants Ana R. Nunez and Eric Carrera on December 22, 2003 in favor of Fairmont Funding, Ltd. On the same date mortgagor Nunez executed a promissory note promising to re-pay the entire amount of the indebtedness to the lender. The mortgage and note were subsequently assigned to the Washington Mutual Bank, FA, by assignment dated April 14, 2005. Plaintiff Chase is the successor in interest to Washington Mutual. The mortgage and note were assigned to Bayview Loan Servicing, LLC, by assignment dated April 15, 2014. Plaintiff claims that the mortgagors defaulted in making timely monthly mortgage payments beginning May 1, 2009 and continuing to date (*1). Plaintiff commenced this action by filing the notice of pendency, summons and complaint in the Suffolk County Clerk's Office on August 19, 2011. Defendants thereafter defaulted in serving timely answers.

Plaintiff's motion seeks an order granting a default judgment and for the appointment of a referee to compute the sums due and owing to the lender. In opposition, defendant Ana R. Nunez submits a cross motion claiming that plaintiff's motion must be denied and plaintiff's complaint must be dismissed based upon plaintiff's failure to seek a default judgment within one year of the mortgagor's default in answering the complaint (CPLR 3215(c) and plaintiff's failure to strictly comply with RPAPL 1304 requirements. Defendant also claims that plaintiff has failed to prove it has standing to prosecute this foreclosure action.

Plaintiff's motion was served on March 26, 2018 and made originally returnable on April 17, 2018 assigned to IAS Part 40. Defendant's cross motion was served on May 10, 2018 and made originally returnable on June 13, 2018 assigned to IAS Part 40. Both motions remained sub judice until this foreclosure action and both motions were reassigned to this IAS Part 18 by Administrative Order 40-19 dated June 6, 2019. Upon assemblage of motion papers and additional submissions by the parties these motions were marked submitted on this IAS Part 18 motion calendar on July 9, 2019.

Two days prior to this foreclosure action and both motions being assigned to this IAS part, plaintiff served an application seeking leave to serve a late reply to defendant's cross motion. Plaintiff's counsel inadvertently neglected to timely serve opposing papers and both motions thereafter remained sub judice for nearly a year. While defendant opposes plaintiff's application, there can be no significant prejudice to his ability to assert the claims set forth in his cross motion given the fact that she has in fact submitted reply papers to plaintiff's proposed opposition. The issues raised in defendant's cross motion were necessarily intermingled with issues surrounding plaintiff's default judgment motion, and these additional submissions provide a complete picture of the record and what actions were taken by the parties since the defendant's conceded default in serving an answer and the ensuing period of years while ongoing negotiations took place. Under these circumstances and in the discretion of the court, plaintiff's application seeking leave to serve its opposition is granted.

*1- The default date used to calculate the amount of damages has been amended in view of the defaulting mortgagor's subsequent payments made during loss mitigation efforts.

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 sufficient facts to require a trial on any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted in favor of the movant 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 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)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to the 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, N.A. v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed promissory note to its complaint, coupled with submission of a certificate of merit required pursuant to CPLR 3012-b constitutes due proof of the plaintiff's possession of the note prior to and at commencement of the action and thus standing to prosecute its claims 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 NYS2d 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, 46 NYS3d 185 (2nd Dept., 2017); *U.S. Bank, N.A. v. Saravanan*, 146 AD3d 1010, 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)).

With respect to both defendant's cross motion seeking dismissal based upon plaintiff's failure to seek a default judgment within one year of her default in serving an answer, CPLR 3215 (c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed." "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a judgment, the action should not be subject to dismissal" (*Brown v. Rosedale*

Nurseries, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, 32 NYS3d 249 (2nd Dept., 2016)). Where no motion is interposed within one year a plaintiff is required to establish “sufficient cause” why the complaint should not be dismissed which requires a showing of a reasonable excuse for the delay and of a potentially meritorious cause of action (*Wells Fargo Bank, N.A. v. Bonanno*, 146 AD3d 844, 45 NYKS3d 173 (2nd Dept., 2017); *Maspeth Federal Savings & Loan Assn. v. Brooklyn Heritage, LLC*, 138 AD3d 793, 28 NYS3d 325 (2nd Dept., 2016); *Aurora Loan Services, LLC v. Hiyo*, 130 AD3d 763, 13 NYS3d 554 (2nd Dept., 2015); *Pipinias v. J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 (2nd Dept., 2014); *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 (2nd Dept., 2011); *Kohn v. Tri-State Hardwoods, Ltd.* 92 AD3d 642, 937 NYS2d 865 (2nd Dept., 2012)). The determination of whether an excuse is reasonable in any given instance is committed to the discretion of the motion court (*HSBC Bank USA, N.A. v. Grella*, 145 AD3d 669, 44 NYS3d 56 (2nd Dept., 2016); *Maspeth Federal Savings & Loan Assn. V. Brooklyn Heritage, LLC, supra.*). Delays attributable to the parties participation in mandatory settlement conferences or in litigation settlement negotiations have been held to negate any intention to abandon the action and are excusable under CPLR 3215(d) (*HSBC Bank USA, N.A. v. Grella, supra.*; *Brooks v. Somerset Surgical Associates*, 106 AD3d 624, 966 NYS2d 65 (2nd Dept., 2013); *Laourdakis v. Torres*, 98 AD3d 892, 950 NYS2d 703 (1st Dept., 2012)).

Based upon the submission of the parties and a review of court records, the undisputed facts related to plaintiff’s failure to seek a default within one year are the following:

1. Defendant Ana Nunez was personally served with a summons and complaint pursuant to CPLR 308(1) by in-hand delivery at the mortgaged premises on August 31, 2011;
2. Defendant Ana Nunez defaulted in serving an answer and remains in default;
3. Defendant/mortgagor Ana Nunez filed a Chapter 7 Bankruptcy petition in the United States Bankruptcy Court, Eastern District of New York on January 23, 2012. The debtor was granted a discharge by Order (Eisenberg, USBJ) dated April 24, 2012;
4. Defendant/mortgagor Eric Carrera filed a Chapter 7 Bankruptcy petition in the United States Bankruptcy Court, Eastern District, Eastern District of New York on October 3, 2012. The debtor was granted a discharge by Order (Grossman, USBJ) dated January 3, 2013;
5. Based upon plaintiff having filed its request for judicial intervention in July, 2013, the first of six (6) CPLR 3408 mandatory court settlement conferences was conducted on November 1, 2013. Thereafter five (5) additional CPLR 3408 conferences were held on: January 28, 2014, April 8, 2014, June 10, 2014, June 23, 2014 and August 14, 2014. Court records show that the mortgagors were represented by counsel during each of the six (6) court conferences. At the conclusion of the August 14, 2014 conference the court attorney/referee responsible for conducting the conference marked this action as “not settled” and this action was referred for assignment to IAS Part 40;
6. Court records indicate that the next court appearance/conference occurred in IAS Part 40 on October 21, 2015. Thereafter this action was the subject of twelve (12) additional court conferences which were held on: December 16, 2015, February 3, 2016,

June 1, 2016, July 13, 2016, September 14, 2016, December 7, 2016, February 8, 2017, March 22, 2017, June 7, 2017, December 5, 2017, March 7, 2018, and May 9, 2018 in IAS Part 40— in Acting Justice Hudson’s courtroom. At the conclusion of the May 9, 2018 conference the clerk marked the action as “status conference held” and no other conferences were thereafter scheduled in IAS Part 40;

7. Plaintiff served this motion seeking a default judgment on March 26, 2018.

Based upon this record plaintiff did fail to serve its default judgment motion within one year of defendant Nunez’s default and plaintiff’s complaint must therefore be dismissed unless plaintiff can show “sufficient cause” why the complaint should not be dismissed (CPLR 3215(c)).

With respect to the issue of “sufficient cause” plaintiff claims that throughout the period commencing with the initial CPLR 3408 conference, the mortgage lender was engaged in attempting to provide the defaulting borrower with a solution to her continuing default in the form of a loan modification. In point of fact this record is replete with evidence showing that the mortgage lender made continuing good faith efforts to accommodate the defaulting borrower in an ongoing years-long series of attempts to reach a settlement agreement by permitting Nunez to modify the original mortgage loan she had agreed to pay. Not only has plaintiff provided numerous details of the unsuccessful series of attempts to negotiate an acceptable solution, but the defaulting mortgagor in her June 29, 2019 affidavit concedes and confirms the mortgage lender’s attempts. Mortgagor Nunez states that she “attempted to obtain a loan modification on three separate occasions” (para. 15) and that she was represented by “Long Island Housing Services, Inc. during these processes” (para. 16). Underlying the parties’ ultimate failure in resolving the plaintiff’s attempt to grant a loan modification was the fact (as conceded by Nunez) that the mortgaged premises was encumbered by a second mortgage lien in the approximate sum of \$183,000.00 which sum Nunez had obtained by a credit line mortgage executed in March, 2007. Plaintiff was not aware of the incumbrance until after offering the mortgagor a trial modification in April, 2014 -- and after Nunez had made the three required trial payments. The title report required for final loan approval revealed the second mortgage lien and the mortgagor was advised that a subordination agreement was required to grant final loan approval. Negotiations continued to obtain the subordination agreement until March 26, 2015 when the second mortgagee refused to sign the agreement.

While plaintiff’s attorney’s affirmation dated March 6, 2018 (“Mullane affidavit”) claims that this action was marked “settled” after six (6) conferences were held in the foreclosure settlement part, there is no indication in court records of that marking. Court records indicate that the last time this action was conferenced in the CPLR 3408 foreclosure settlement part was August 14, 2014 when it was marked “not settled” and remanded for assignment to an IAS Part. It would appear however that after the action was marked “not settled” in the foreclosure settlement part that negotiations continued between the parties for a significant period of time in an attempt to obtain the subordination agreement. Having reached an impasse, plaintiff’s counsel wrote a letter to the court dated September 2, 2015 seeking to restore this action for additional conferences. Court records indicate that as a result of that letter the action was restored for a conference — but not in the foreclosure settlement part (as stated in plaintiff’s counsel’s affirmations dated March 6, 2018 (“Mullane affidavit”) and dated June 27, 2019 (“Sears affidavit”) — but rather as a conference in the IAS Part then assigned to this action (Acting Justice Hudson).

At a conference conducted in Acting Justice Hudson's courtroom on October 21, 2015, the court and the parties agreed to continue negotiations for a loan modification and a second loan modification plan was approved in late December, 2015. Defendant again made a series of trial plan payments required under the terms of the proposed HAMP agreement. However, again, the loan modification which was offered was contingent upon the second mortgagee's execution of a subordination agreement. The court continued to monitor the proposed agreement with conferences held in Acting Justice Hudson's part throughout 2016 and 2017. A total of five conferences were held in 2016 with an additional four conferences held in 2017. Plaintiff was not permitted to serve its motion seeking a default judgment during this period while the court attempted to bring about a settlement. During the court conference on December 5, 2017, after it had become apparent that the subordination agreement was not going to be executed by the second mortgagee, the court directed the plaintiff to submit its default judgment motion by March 7, 2018. Plaintiff's counsel requested additional time to obtain an amended affidavit of merit and served this motion on March 26, 2018.

Based upon this record plaintiff has demonstrated "sufficient cause" to justify its failure to serve this default judgment motion until March 26, 2018. During the initial phase of its prosecution of this action after defendant's conceded default in appearing, plaintiff was forestalled from commencing prosecution based upon both mortgagors' filing of petitions in bankruptcy. While defendant Nunez argues that her ex-husband's (co-mortgagor Eric Carrera's) bankruptcy petition should not have stayed prosecution of this action—given the fact that Carrera signed the mortgage agreement and was a named defendant, this action would have been stayed as a result of his bankruptcy filing until such time as an application was made to discontinue the plaintiff's claims against him. As a result therefore of both bankruptcy filings plaintiff could not have submitted a motion seeking a default judgment based upon the bankruptcy stays and the time period set forth in the statute was clearly tolled. Thereafter, once plaintiff filed its request for judicial intervention, a mandatory settlement conference prevented plaintiff from continuing prosecution through litigation and during the ensuing period of time plaintiff appears to have made every effort to negotiate a fair settlement with the defaulting borrower. Initially negotiations resulted in an approved modification plan during a period when CPLR 3408 conferences were conducted (April, 2014) and thereafter during the period when the action was reassigned to Acting Justice Hudson who, upon scheduling an initial conference in the IAS part on October 21, 2015, directed and conferred with the parties to oversee a second loan modification until December 5, 2017 when it became apparent to all concerned that there was no resolution of this action short of litigation. Clearly this record bespeaks of the fact that plaintiff never sought to abandon prosecution of this action and that plaintiff made every conceivable effort to resolve it. As a court of equity it would seem wholly inequitable to now dismiss this action after the mortgage lender made every reasonable effort to offer defendant a loan modification (during which time it refrained from and/or was required to seek permission from the court prior to submitting a motion for a default judgment) and due to no fault of the mortgage lender the loan modification could not be granted. In "equitable" contrast, the defaulting borrower began her default on May 1, 2009 and, although she now complains that the mortgage lender "continued to accept payments from me knowing that they would never provide a permanent modification" (para. 20 of "Nunez affidavit"), she remains in default (even crediting her loan modification trial payments) since August 1, 2010 – a period in excess of nine years— **and**- continues to profit from her default by collecting and keeping rent payments from her tenants while permitting the mortgage lender to pay property taxes and hazard insurance. Surely given the legislation passed during the past decade in this state (CPLR 3408 & RPAPL 1304 et seq.) with its overwhelming emphasis on compelling mortgage lenders to modify the terms of its mortgage loans so that defaulting borrowers can remain

in their homes, to punish the lender in this situation when it has made extraordinary efforts to provide a loan modification by dismissing the complaint, and as a result, to reward this defaulting landlady/borrower (who has benefitted for the past decade by not only defaulting in making payments due under the terms of the agreement she signed, but also by renting the premises and making a profit from her default with a “free house”), is clearly neither equitable, nor could it possibly be the intent of the statute the defendant seeks to use. In view of the court’s authority to use its discretion to determine the merits of this issue, it is the court’s determination that plaintiff has provided a reasonable excuse and has demonstrated a meritorious claim to justify its delay in serving this default judgment motion. Based upon these circumstances, no legal basis therefore exists to dismiss this action as abandoned since plaintiff has demonstrated “sufficient cause” why the complaint should not be dismissed.

With respect to defendant’s remaining claims, mortgagor Nunez is in default in answering the complaint. She has fully conceded that point. As a result she cannot assert the two defenses she seeks to advocate in her opposition to plaintiff’s motion. In order to assert the defenses of standing and a violation of RPAPL 1304 (neither of which is a jurisdictional defense) she is required to first make application to vacate her default-- which requires a showing of a reasonable excuse for the default and a demonstration of a potentially meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2nd Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2nd Dept., 2016)). Absent a showing of both factors she is without capacity to assert those two defenses-- and in this case she concedes that she has no reasonable excuse for failing to serve a timely answer. Accordingly, in the absence of a reasonable excuse, the law is clear that it is unnecessary to consider the second factor concerning whether the defendant has demonstrated the existence of an arguably meritorious defense to the foreclosure complaint (*Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2012)).

Moreover, even were the court to consider the proposed defenses sought to be asserted-- which it does not---none of the defenses (which include lack of standing and failure to serve pre-foreclosure notices of default) raised in opposition to plaintiff’s motion are meritorious since the defendant waived a lack of standing defense by defaulting in serving an answer (*see HSBC Bank USA v. Angeles*, 143 AD3d 671, 38 NYS3d 580 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Avella*, 142 AD3d 594, 36 NYS3d 679 (2nd Dept., 2016); *Bank of New York Trust Co., N.A. v. Chiejina*, 142 AD3d 570, 36 NYS3d 512 (2nd Dept., 2016); *U.S. Bank, N.A. v. Gulley*, 137 AD3d 1008, 27 NYS3d 601 (2nd Dept., 2016); *FCDB FF1 2008-1 Trust v. Videjus*, 131 AD3d 1004, 17 NYS3d 54 (2nd Dept., 2015); *Southstar III, LLC v. Entienne*, 120 AD3d 1332, 992 NYS2d 558 (2nd Dept., 2014); *BAC Home Loans Servicing, LP v. Reardon*, 132 AD3d 790, 18 NYS3d 664 (2nd Dept., 2015); *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 (2nd Dept., 2007)). And, with respect to defendant’s claim concerning Chase’s alleged failure to strictly comply with statutory pre-foreclosure notices, while service of such notices are considered conditions precedent to a mortgage foreclosure action (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)), a failure to comply with such provisions are not jurisdictional defects

sufficient to provide independent grounds to vacate a default by a party who has otherwise defaulted in appearing in an action (*U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012); *Deutsche Bank National Trust Co. v. Posner*, 89 AD3d 674, 933 NYS2d (2nd Dept., 2011)). Again, in this case, the defendant has failed to provide any reasonable excuse for her failure to timely serve an answer and the mere showing of an arguably meritorious defense (i.e. plaintiff's alleged failure to strictly comply with the statute) is legally insufficient to provide grounds to set aside her continuing default in appearing in this action (*Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Pritchard v. Curtis*, *supra.*; *Wassertheil v. Elburg*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012)). Any remaining contentions raised by the defendant are without merit and need not be addressed.

With respect to plaintiff's motion for a default judgment and the appointment of a referee to compute the sums due and owing to the mortgage lender, plaintiff has submitted sufficient evidence in the form of an affidavit from the plaintiff assignee/mortgage servicer's (Bayview Loan Servicing, LLC's) assistant vice president dated March 8, 2018, which satisfies the business records exception to the hearsay rule, and which shows that the mortgagor has defaulted under the terms of the parties' mortgage loan agreement by failing to make timely monthly payments beginning May 1, 2009 and continuing to date. Prima facie entitlement to judgment as a matter of law is established in a foreclosure action by submission of the mortgage, the promissory note and an affidavit from a plaintiff/mortgage loan servicer's employee attesting to the default in payment. Such testimony from the plaintiff assignee/loan servicer's representative does not require personal knowledge of the plaintiff's record-keeping practices and procedures when the loan servicer's representative attests, pursuant to the business records exception to the hearsay rule (CPLR 4518), that the records reflect the defendant's default (*Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *Citigroup vs. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017)).

The bank, having proven entitlement to a default judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the mortgage lender is not entitled to foreclose. Defendant has not submitted any evidence to contradict the fact that she has defaulted in making timely monthly mortgage payments required under the terms of the mortgage loan she executed more than fifteen (15) years ago. Plaintiff is therefore entitled to an award of judgment.

Accordingly, defendant Nunez's cross motion is denied and plaintiff's motions for an order granting leave to serve reply papers and granting a default judgment and for the appointment of a referee to compute the sums due and owing to the plaintiff is granted. The proposed order appointing a referee has been signed simultaneously with the execution of this order.

Dated: September 6, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.