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.: 31019/2010
MOTION DATE: 8/27/2019
MOTION SEQ. NO.: #002 MG
#003 MD

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WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

WALTER CURTIS, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
WOODS OVIATT GILMAN LLP
1900 BAUSCH & LOMB PLACE
ROCHESTER, NY 14614

DEFENDANT'S ATTORNEY:
STIM & WARMUTH, P.C.
2 EIGHTH STREET
FARMINGVILLE, NY 11738

Upon the following papers numbered 1 to 54 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-27 (#002) ; Notice of Cross Motion and supporting papers 28-37 (#003) ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 38-48, 49-54 ; 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 with counterclaims asserted by defendant Walter Curtis; 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 Walter Curtis seeking an order pursuant to pursuant to CPLR 3212 & RPAPL 1304 dismissing plaintiff's complaint or, in the alternative, reducing the interest to be awarded the mortgage lender, is denied.

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 $227,000.00 executed by defendant Walter Curtis on November 20, 2006 in favor of World Savings Bank, FSB. On the same date mortgagor Curtis executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff Wells Fargo Bank, N.A. is the successor by merger of the original mortgage lender. Plaintiff claims that the borrower defaulted under the terms of the note and mortgage by failing to make timely monthly mortgage payments beginning March 15, 2009 and continuing to date. Plaintiff commenced this foreclosure action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on August 19, 2010. Defendant/mortgagor

Curtis served an answer dated September 13, 2010 asserting fifteen (15) affirmative defenses and four (4) counterclaims.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee to compute the sums due and owing to the mortgage lender. Defendant's cross motion seeks an order denying plaintiff's motion and dismissing plaintiff's complaint for failure to prove service of pre-foreclosure statutorily compliant mortgage default 90-day notices required pursuant to RPAPL 1304 or, in the alternative, reducing the amount of interest awarded to the mortgage lender.

With respect to plaintiff's motion, 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)). 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. Mandrin,* 160 AD3d 1014 (2nd Dept., 2018) *Tribeca Lending Corp. v. Lawson,* 159 AD3d 936 (2nd Dept., 2018); *Deutsche Bank National Trust Co. v. Iarrobino,* 159 AD3d 670 (2nd Dept., 2018); *Central Mortgage Company v. Davis,* 149 AD3d 898 (2nd Dept., 2017); *U.S. Bank, N.A. v. Ehrenfeld,* 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *JPMorgan Chase Bank v. Weinberger,* 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *CitiMortgage, Inc. v. Klein,* 140 AD3d 913, 33 NYS3d 432 (2nd Dept., 2016); *U.S. Bank, N.A. v. Godwin,* 137 AD3d 1260, 28 NYS3d 450 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph,* 137 AD3d 896, 26 NYS3d 583 (2nd Dept., 2016); *Emigrant Bank v. Larizza, supra.; Deutsche Bank National Trust Co. v. Whalen,* 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013); *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 standing to prosecute its claims for foreclosure and sale (*Nationstar Mortgage, LLC v. LaPorte,* 162 AD3d 784, 75 NYS3d 432 (2nd Dept., 2018); *Bank of New York Mellon v. Theobalds,* 161 AD3d 1137 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Oscar,* 161 AD3d 1055, 78 NYS3d 428 (2nd Dept., 2018); *CitiMortgage, Inc. v. McKenzie,* 161 AD3d 1040, 78 NYS3d 200 (2nd Dept., 2018); *U.S. Bank, N.A. v. Duthie,* 161 AD3d 809, 76 NYS3d 226 (2nd Dept., 2018); *Bank of New York Mellon v. Genova,* 159 AD3d 1009, 74 NYS3d 64 (2nd Dept., 2018); *Mariners Atl. Portfolio, LLC v. Hector,* 159 AD3d 686, 69 NYS3d 502 (2nd Dept., 2018); *Bank of New York Mellon v. Burke,* 155 AD3d 932, 64 NYS3d 114 (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)).

Proper service of RPAPL 1304 notices on borrower(s) are conditions precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*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)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. 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 defendant's continuing default and plaintiff's compliance with statutory pre-foreclosure notice, form and content of notice, requirements.

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)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*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 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 two affidavits submitted from the plaintiff/mortgage lender's (Wells Fargo Bank, N.A.'s) vice president loan documentation dated October 18, 2017 and August 13, 2019 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 mortgage lender; 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; that the records were made at or near the time the underlying transactions took place; that the records were created by an individual with

personal knowledge of the underlying transactions; and that to the extent that the records were obtained from a prior servicer those records were integrated and incorporated into Wells Fargo's business records, were relied upon in Wells Fargo's day-to-day business operations and were kept and maintained during the ordinary course of Wells Fargo's business. 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 virtue of the merger with the original mortgage lender (*JPMorgan Chase Bank, N.A. v. Atedgi,* 162 AD3d 756, 79 NYS3d 81 (2nd Dept., 2018); *Bank of America v. Masri,* 158 AD3d 660, 71 NYS3d 545 (2nd Dept., 2018); *CitiMortgage, Inc. v. Rockefeller,* 155 AD3d 998, 63 NYS3d 998 (2nd Dept., 2017); *CitiMortgage, Inc. v. Goldberg,* 134 AD3d 880, 20 NYS3d 906 (2nd Dept., 2015)). In addition plaintiff has proven standing by submission of an affidavit dated October 18, 2017 from the mortgage lender's vice president document control attesting to Wells Fargo's physical possession of the indorsed in blank promissory note, beginning December 5, 2006 and continuously thereafter which was prior to the date this action was commenced on August 19, 2010 (*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)).

With respect to the issue of the borrower'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 Property Asset Management, Inc. v. Souffrant et al.,* 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018); *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 two affidavits attesting to the mortgagor's undisputed default in making timely mortgage payments, together with copies of business records maintained by the mortgage lender which includes: thirty (30) pages of this defaulting borrower's "loan payment history" reflecting Curtis's default in making timely monthly payments and eighteen (18) pages of monthly "loan statements" revealing the borrower's continuing default. The affidavits together with copies of these business records provides sufficient evidence consistent with the requirements set forth in *Bank of New York Mellon v. Gordon,* 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019) to sustain its burden to prove Curtis defaulted under the terms of the parties agreement by failing to make timely payments since March 15, 2009 (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 defendant's continuing default, plaintiff's application for summary judgment based upon the mortgagor's more than decade long breach of the mortgage agreement and promissory note must be granted.

With respect to service of the pre-foreclosure RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute (RPAPL 1304) can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961

NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (*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); *CitiMortgage, Inc. v. Pappas, supra pg. 901; see 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 (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza,* 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.,* 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

In this case the record shows that there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office proving strict compliance with RPAPL 1304 mailing requirements. Plaintiff has submitted proof in the form of two affidavits from Wells Fargo's vice president attesting to compliance with RPAPL 1304 mailing requirements– the second affidavit sets forth the affiant's personal knowledge and familiarity with the mortgage lender's regular mailing practices (paragraphs 12, & 13) and confirms that the mailings were done on April 14, 2010, which was more than 90 days prior to commencing this action on August 19, 2010; together with a copy of the 90-day notices which were addressed to the mortgagor Curtis at the mortgaged premises residential address. In addition, plaintiff has submitted a one page copy of Wells Fargo's internal business records confirming the mailing of the 90-day notices by first class and certified mailing on April 14, 2010, together with a copy of the certified mail return receipt card dated April 15, 2010 containing a twenty digit article tracking number (7107 1685 6060 1334 7144). In addition, plaintiff has submitted a copy of the RPAPL 1306 proof of filing statement with the New York State Banking Department further confirming mailing of the notices to the defendant/mortgagor. Such proof provides a sufficient showing of strict compliance with the mailing requirements of RPAPL 1304 (*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.; see also Bank of America, N.A. v. Brannon,* 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). Defendant and defense counsel's conclusory denial of strict compliance, is not supported by any relevant, admissible evidence sufficient 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 v. Espinal,* 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to defendant's remaining arguments concerning the content of the 90-day notices served by the plaintiff, the defaulting borrower claims that the notice contained erroneous information related to the amount necessary to cure the default and that the notice failed to list at least five housing agencies that serve the region where the borrower resides. Neither contention has merit.

1) As to the claim of an *error* in the amount due to cure the default which was then due the mortgage lender as set forth in the 90-day notice— plaintiff has submitted an affidavit from a Wells Fargo vice president dated August 13, 2019, together with documentary evidence in the form of business records reflecting the defaulting borrower's "loan payment history" and "monthly loan statements" which provides sufficient proof to show that the cure amount listed in the April 14, 2010 90-day notices mailed to the Curtis was accurate.

2) As to the claim that plaintiff's 90-day notice failed to list five housing counseling

agencies that serve the region where the defaulting borrower resides constitutes a violation of "strict compliance"— a review of the notice mailed to the borrower shows that the 90-day notice listed seventeen (17) housing counseling agencies, four (4) of which defendant concedes served the region where Curtis resides. During the period these notices were mailed the statute required that there be five housing counseling agencies listed that ***served*** the region (Suffolk County). Contrary to defense counsel's claim, the statute did not require that the housing counseling agencies be ***located in*** the Long Island region. Page six of the chart submitted by the defaulting borrower clearly provides a chart identified as "90-Day Pre-Foreclosure Filings by Region" with a side caption stating: "The corresponding charts represent the breakdown of 90-day pre-foreclosure notices **mailed to borrowers by Region**." The chart does not alter the language set forth in the statute which provides that the counseling agencies listed in the notices ***serve*** the region. The fact that a chart lists where the notices were mailed by breaking down the state into ten (10) regions is irrelevant as to whether the specific listed agencies (despite their location) ***served*** the borrower's residential community. There is therefore no relevant admissible evidence submitted by the defaulting mortgagor to support his claim that none of the remaining thirteen (13) housing counseling agencies listed were not ***serving*** Suffolk County residents at the time these notices were sent.

Moreover, with respect to both arguments, and most particularly defendant's "housing counseling agency" claim, even were this court to determine that there was a defect or irregularity in the content of the RPAPL 1304 notices mailed by the plaintiff, such a "defect" or "irregularity" is considered by the court to be so minimal as to warrant the exercise of the court's discretion pursuant to CPLR 2001 to avoid dismissal of the action and to therefore consider the notices as compliant with the statute (CPLR 2001; *see Aurora Loan Services, LLC v. Weisblum,* 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011). In fact, to dismiss this complaint on the grounds set forth by defense counsel, would represent an entirely irrational interpretation of the law and would result in an unjustifiable and wholly inequitable outcome. Here, in this record, a borrower has breached a promise to make thirty years of payments after having received the sum of $227,000.00 from a mortgage lender. The borrower concedes to not having made a payment in more than a decade and he has therefore had the great fortune of not only continuing to reside in the premises, but also having his property taxes and hazard insurance paid for by the very party he has wronged. The statute was enacted with a legislative intent to provide information for a homeowner (who had begun defaulting in making mortgage payments) so that he could meet, discuss, negotiate and perhaps workout a solution related to the borrower(s)' continuing breach with mortgage lender representatives so as to avoid commencement of litigation by the damaged party— the statute was never intended to be used as a mechanism to unjustly reward a decades old defaulting party by resort to an inconsequential and irrelevant argument couched in terms of an ever-expanding and elastic concept referred to as "strict compliance".

Putting this record completely in perspective as it relates to statutory intent:

1. The borrower obtains the sum of $227,000.00 on a pledge (promissory note) and collateral (the mortgage) to pay it back in thirty years (360 payments). He breaches his promise after making a total of twenty two (22) payments. He continues to reside in the premises.

2. The borrower is mailed pre-foreclosure 90-day notices in April, 2010. His affidavit in opposition dated more than nine (9) years after the notices were mailed contains an unequivocal denial of having received any such mailings.

3. The borrower retains counsel sometime in 2010 and counsel serves a timely answer dated September 13, 2010. The attorney continues to represent the borrower to date.

4. The borrower represented by counsel attends a total of sixteen (16) court settlement conferences beginning July 3, 2011 through July 10, 2013. Court records indicate in-court conferences were held on: July 3, 2011; September 7, 2011; November 30, 2011; January 25, 2012; March 14, 2012; April 25, 2012; June 6, 2012; September 5, 2012; October 31, 2012; November 28, 2012; January 9, 2013; January 16, 2013; February 27, 2013; April 17, 2013; May 29, 2013; and July 10, 2013. At the conclusion of the 16th settlement conference the court attorney/referee responsible for conducting the conference marked the action "not settled".

While being afforded sixteen chances to resolve his default, there is no indication in this record that the plaintiff's representatives ever acted in bad faith during any of the sixteen (16) conferences which, in essence and effect, satisfied the stated intent of the statutes (RPAPL 1304 & CPLR 3408) by providing a forum for the defaulting borrower to attempt to "preserve equity" by requiring theat the parties negotiate in an effort to obtain a solution to the default (which in this instance could not be reached). Having satisfied the objectives set forth in the statute, there is no legal or equitable justification for dismissing the complaint based upon this record since the statute's objectives were entirely satisfied. The defendant cannot and does not claim prejudice– initially because he denies receiving the 90-day notice- and more logically, once he did receive the notice since there is no evidence that he made any attempt to contact any of the agencies listed in the notice. Put simply his argument is hypothetical (since he claims he never received the notice) and illogical (if he did receive the notice). To dismiss this complaint at this stage for the inconsequential reason(s) articulated by this borrower and to use a "strict compliance" argument in this manner is wholly without justification.

As the appellate court observed and predicted in the *Weisblum* case in defining "strict compliance:– "there may be some instances where .... an error would be so minimal as to warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of the action"(*Weisblum at page 108*)). Even if this were such an error(s), it would clearly provide no legal or equitable grounds to justify dismissal.

Finally, defendant has failed to submit any admissible evidence to support his remaining affirmative defenses and counterclaims in opposition to plaintiff's motion. Accordingly, those 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)). And defendant's claim to deny an award of interest to the mortgage lender is denied as premature since by awarding summary judgment the issue of liability has been established. The issue of damages shall be determined after the referee has submitted his report.

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

Dated: September 17, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.