

**U.S. Bank N.A. v Cambardella**

2019 NY Slip Op 34994(U)

October 11, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 600870/2018

Judge: Howard H. Heckman, Jr.

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**E-FILE**

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

**PRESENT:**

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

INDEX NO.: 600870/2018  
MOTION DATE: 6/28/2019  
MOTION SEQ. NO.: #001 MG  
#002 MD

-----X  
U.S. BANK N.A.,

Plaintiff,

-against-

MARIO CAMBARDELLA, et al.,

Defendants.

**PLAINTIFF'S ATTORNEY:**  
SHAPIRO DICARO & BARAK, LLC  
175 MILE CROSSING BLVD.  
ROCHESTER, NY 14624

**DEFENDANTS' ATTORNEY:**  
CHARLES WALLSHEIN, ESQ.  
35 PINELAWN ROAD, STE 106E  
MELVILLE, NY 11747-3100

Upon the following papers numbered 1 to 33 read on this motion 1-20 : Notice of Motion/ Order to Show Cause and supporting papers 1- ; Notice of Cross Motion and supporting papers 21-32 ; Answering Affidavits and supporting papers     ; Replying Affidavits and supporting papers 33 ; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff US Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of the defendant Mario Cambardella; 2) deeming all appearing and non-appearing defendants in default; and 3) 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 Mario Cambardella seeking an order: 1) denying plaintiff's motion for summary judgment; 2) granting summary judgment dismissing the complaint for failure to strictly comply with pre-foreclosure 90 day notices; and 3)for sanctions is denied<sup>1</sup>.

**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 \$560,000 executed by defendant Mario Cambardella on September 25, 2006 in favor of Wilmington Finance, Inc. On the same date defendant Cambardella executed a promissory note promising to re-pay the entire amount of indebtedness to the mortgage lender. The note and mortgage were subsequently assigned to the plaintiff as memorialized by an assignment of mortgage dated March 10, 2008. The defendant thereafter entered into a Loan Modification Agreement with Bank of American, N.A. as loan servicer for the plaintiff on September 5, 2012, in the sum of 938,735.58. Plaintiff claims that defendant has defaulted in making timely monthly mortgage payments pursuant to the note, mortgage and loan

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<sup>1</sup>In defendant's notice of cross motion defendant seeks dismissal pursuant to CPLR 213(4). However, defendant fails to address this argument in his moving papers. As such, dismissal under CPLR 213(4) is denied and not addressed herein.

modification agreement by failing to make the monthly payment due July 1, 2013 and subsequent payments thereafter. Plaintiff commenced this foreclosure action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on January 16, 2018. Defendant served an answer dated January 26, 2018 asserting fifteen (15) affirmative defenses and one (1) counterclaim.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. In opposition, the defendant claims that plaintiff has failed to strictly comply with RPAPL 1304 pre-foreclosure notice requirements and seeks sanction against plaintiff claiming plaintiff's motion is frivolous.

Plaintiff served this motion for summary judgment on July 5, 2018 and made it originally returnable on July 27, 2018. The defendant filed a cross motion dated August 29, 2018 and made it originally returnable on September 12, 2018. The motions remained sub judice in IAS Part 51 until by Administrative Order 40-19 (Hinrichs, J.) dated June 11, 2019, the action and the underlying motions were reassigned to this IAS Part 18. Upon assemblage of motion papers, the motion was marked submitted on the IAS Part motion calendar on June 28, 2019.

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

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (see *Wells Fargo Bank N.A. v. Erobo*, 127 AD3d 1176, 9 NYS3d 312 (2<sup>nd</sup> Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2018) *Tribeca Lending Corp. v. Lawson*, 159 AD3d 936 (2<sup>nd</sup> Dept., 2018); *Deutsche Bank National Trust Co. v. Iarrobino*, 159 AD3d 670 (2<sup>nd</sup> Dept., 2018); *Central Mortgage Company v. Davis*, 149 AD3d 898 (2<sup>nd</sup> Dept., 2017); *U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d

269 (2<sup>nd</sup> Dept., 2016); *JPMorgan Chase Bank v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2<sup>nd</sup> Dept., 2016); *CitiMortgage, Inc. v. Klein*, 140 AD3d 913, 33 NYS3d 432 (2<sup>nd</sup> Dept., 2016); *U.S. Bank, N.A. v. Godwin*, 137 AD3d 1260, 28 NYS3d 450 (2<sup>nd</sup> Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph*, 137 AD3d 896, 26 NYS3d 583 (2<sup>nd</sup> Dept., 2016); *Emigrant Bank v. Larizza, supra.*; *Deutsche Bank National Trust Co. v. Whalen*, 107 AD3d 931, 969 NYS2d 82 (2<sup>nd</sup> Dept., 2013); *Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2<sup>nd</sup> Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2018); *Bank of New York Mellon v. Theobalds*, 161 AD3d 1137 (2<sup>nd</sup> Dept., 2018); *HSBC Bank USA, N.A. v. Oscar*, 161 AD3d 1055, 78 NYS3d 428 (2<sup>nd</sup> Dept., 2018); *CitiMortgage, Inc. v. McKenzie*, 161 AD3d 1040, 78 NYS3d 200 (2<sup>nd</sup> Dept., 2018); *U.S. Bank, N.A. v. Duthie*, 161 AD3d 809, 76 NYS3d 226 (2<sup>nd</sup> Dept., 2018); *Bank of New York Mellon v. Genova*, 159 AD3d 1009, 74 NYS3d 64 (2<sup>nd</sup> Dept., 2018); *Mariners Atl. Portfolio, LLC v. Hector*, 159 AD3d 686, 69 NYS3d 502 (2<sup>nd</sup> Dept., 2018); *Bank of New York Mellon v. Burke*, 155 AD3d 932, 64 NYS3d 114 (2<sup>nd</sup> Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2<sup>nd</sup> Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2<sup>nd</sup> Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2<sup>nd</sup> 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. Here, the plaintiff in moving for summary judgment produced the mortgage, the unpaid note, and evidence of defendant Cambardella's default. In addition plaintiff established its standing as holder of the note at the time the action was commenced. The defendant does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreement since January 1, 2012. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based plaintiff's compliance with statutory pre-foreclosure notice requirements.

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 (2<sup>nd</sup> Dept., 2017); *Bank of New York Mellon v. Aquino*, 131 AD3d 1186, 16 NYS3d 770 (2<sup>nd</sup> Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2018); *HSBC Bank USA, N.A. v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2<sup>nd</sup> Dept., 2017);

*CitiMortgage, Inc. v. Pappas*, supra pg. 901; see *Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 AD2d 679, 729 NYS2d 766 (2<sup>nd</sup> Dept., 2001)).

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 (3<sup>rd</sup> 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. 158<sup>th</sup> 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 (3<sup>rd</sup>

Dept., 2015); *People v. DiSalvo*, 284 AD2d 547, 727 NYS2d 146 (2<sup>nd</sup> Dept., 2001); *Matter of Carothers v. GEICO*, 79 AD3d 864, 914 NYS2d 199 (2<sup>nd</sup> 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 (3<sup>rd</sup> Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3<sup>rd</sup> 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 (2<sup>nd</sup> 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.

Here, the plaintiff established, prima facie, that it complied with RPAPL 1304. In moving for summary judgment, plaintiff submitted two affidavits from Ebony White, a representative of its loan servicer. Through her affidavits, Ms. White establishes her ability to testify as to Nationstar’s business records pursuant to the requirements of CPLR 4518(a). White stated that “in compliance with RPAPL 1304, a notice...was sent on May 1, 2017, separate from any other mailing or notice, enclosed in both a certified mail postage prepaid envelope and also a first-class mail, postage prepaid, sealed envelope.” According to White, the notices were sent to the last known address of the borrower and to the subject residence. **White annexed** copies of the 90-day notices mailed to the defendant. Moreover, White made the requisite showing that she was familiar with the plaintiff’s mailing practices and tracking system (WALZ TrackRight system) and therefore established “proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed.” White also attached a copy of the WALZ TrackRight tracking results for the mailings of the 90-day notices.

Based upon the submission of this affidavit, 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. This testimony, coupled with plaintiff’s submission of documentary evidence in the form of copies of the actual 90 day notices mailed by first class and certified mail addressed to the borrower at the mortgaged premises, and a copy of the RPAPL 1306 filing statement confirming compliance and mailing of the RPAPL 1304 notices filed with the New York State Department of Financial Services to both mortgagors, provides more than sufficient evidence to prove strict compliance with service requirements pursuant to RPAPL 1304 (*CitiMortgage, Inc. v. Borek*, 171 AD3d 848, 97 NYS3d 657 (2<sup>nd</sup> Dept., 2019); *Nationstar Mortgage LLC v. LaPorte, supra.*; *HSBC Bank USA, N.A. v. Ozcan, supra.*).

Here, the defendant’s opposition and cross motion rest solely on objections to the content of

the RPAPL 1304 notice. Defendant Cambardella does not deny receipt of the RPAPL 1304 notice. Defendant also does not make any objection to plaintiff's proof of mailing required by RPAPL 1304. Rather, defendant alleges that plaintiff violated the "strict compliance" requirements of RPAPL 1304(2). Specifically, defendant, through his attorney, states that the "impermissible additional "notices" at issue are: a. a cover letter bearing a FDCPA notice; and b. a New York City department of consumer affairs notice; and c. a New York State Wage Garnishment Notice".

Defendant's argues that the additional "notices" violate RPAPL 1304 which "mandates strict compliance as to method of mailing, content and form," citing *Hudson City Savings Bank v. DePasquale*, 113 A.D. 3d 595 (2<sup>nd</sup> Dept. 2014) and *Eastern Savings Bank v. Tromba*, 148 A.D. 3d 675 (2<sup>nd</sup> Dept. 2017). However, both cases cited by the defendant contain factual differences not present in the case herein. In *Tromba*, the defendant therein asserted an objection to the RPAPL 1303 notice (that the notice was not on colored paper and did not use a type size and style that complied with the statute). The court found in *Tromba* that plaintiff's showing was sufficient to establish that the notice served on the defendant complied with the statute. Here, defendant does not claim the notice was not in a type or style that complied with the statute. In *DePasquale, supra*, the RPAPL 1304 notice contained a factual inaccuracy. Here, no such claim is made by the defendant. Specifically, the dates and figures contained in the mailing indicating that "as of 05/01/2017, your home loan is 1399 days and \$181,961.59 in default" is not challenged.

It is undisputed that the RPAPL 1304 90-day notice in this action consists of twenty-six (26) pages. Pages five (5) through twenty-six (26) consists of the list of government approved counseling agencies. There is no issue of fact as to what information is contained in the RPAPL notice sent to the defendant. Defendant's opposition focuses on the first four (4) pages. Defendant's objection rest solely on what he determines are "additional notices" and does not dispute that the RPAPL 1304 notice contained all the statutory mandated language accurately. The additional language objected to by defendant is as follows:

"NATIONSTAR IS A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. HOWEVER, IF YOU ARE CURRENTLY IN BANKRUPTCY OR HAVE RECEIVED A DISCHARGE IN BANKRUPTCY, THIS COMMUNICATION IS NOT AN ATTEMPT TO COLLECT A DEBT FROM YOU PERSONALLY TO THE EXTENT THAT IT IS INCLUDED IN YOUR BANKRUPTCY OR HAS BEEN DISCHARGED, BUT IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY"

"New York Residents: Nationstar Mortgage LLC is license by the New York City Department of Consumer Affairs License Number: 1392003. **If you believe a Loss Mitigation request has been wrongly denied, you may file a complaint with the New York State Department of Financial Services at 1-8000342-3736 or [www.dfs.ny.gov](http://www.dfs.ny.gov).**"

"New York Residents Income Disclosure: If a creditor or debt collector receives a money judgment against you in court, state and federal laws may prevent the following types of income from being taken to pay the debt: supplemental security income (SSI); social security; public assistance (welfare); spousal support, maintenance (alimony) or child support; unemployment benefits; disability benefits; worker's compensation benefits; public or private pensions; veteran's benefits; federal student loans, federal student grants, and federal work study funds; and ninety percent of your

wages or salary earned in the last sixty days.

Contrary to defendant's contention, the defendant failed to establish that the notice that the plaintiff provided to Cambardella was defective on its face. With respect to defendants' strict compliance argument, a fair reading of the language recited in the statute reveals that there is no prohibition of the additional information provided in the notice as long as the 90-day notice itself contains the specific language required by the statute—which in this case it clearly does. Plaintiff's 90-day notice sets forth the number of days the borrowers' home loan is in default (1399) and the payment amount required to cure the default (\$181,961.59). The content of plaintiff's 90-day notice therefore strictly complies with statutory requirements and no legal grounds exist to dismiss the complaint by the de minimis inclusion of additional language. The RPAPL notice is neither deceptive nor prejudicial, and merely amplifies the debtor's rights and responsibilities with respect to the underlying default. Moreover, even were this court to interpret the inclusion of a the additional language as a "defect", or irregularity, in the content of the 90-day notice, the "defect" or irregularity is considered so minimal as to warrant the exercise of this court's discretion pursuant to CPLR 2001 to avoid dismissal of the action and to consider the notice as compliant with the statute (CPLR 2001; see *Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 108, 923 NYS2d 609 (2<sup>nd</sup> Dept., 2011)). Further, the notice sent to Cambardella furthered the statutory purpose of HETPA to "preserve and protect home equity for homeowners of this state" (RPL 265-a[1][d]), and the purpose of RPAPL 1304 to "bridge [the] communication gap [between distressed homeowners and lenders] in order to facilitate a resolution that avoids foreclosure" (Senate Introducer's mem in Support, Bill Jacket, L 2008, Ch 472 at 10). Defendants and defense counsel's arguments do not raise a genuine an issue of fact which would defeat plaintiff's summary judgment motion on these grounds (see *PHH Mortgage Corp. v. Muricy*, 135 AD3d 725, 24 NYS3d 137 (2<sup>nd</sup> Dept., 2016); *HSBC Bank USA, N.A. v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2<sup>nd</sup> Dept., 2016)).

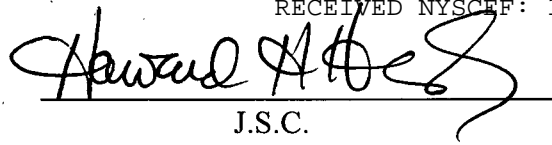
In light of the foregoing, it is not necessary to determine whether RPAPL 1304 affords the defendant a defense in this action as plaintiff has complied with the statute.

With respect to that portion of defendant's motion seeking sanctions pursuant to 22 NYCRR 130-1.1(c), plaintiff has not engaged in "frivolous conduct" and as such there is no basis to impose sanctions.

Finally, defendant Cambardella 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 (2<sup>nd</sup> Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2012); *Flagstar Bank v. Bellafore*, 94 AD3d 0144, 943 NYS2d 551 (2<sup>nd</sup> Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2<sup>nd</sup> Dept., 2007)).

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

Dated: October 11, 2019

  
J.S.C.