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.: 25330/2011
MOTION DATE: 11-22-2019
MOTION SEQ. NO.: #004 MD
#005 MD

----------X

WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

KEVIN G. COULSTING, et al.,

Defendants.

----------X

PLAINTIFF'S ATTORNEY:
BERKMAN HENOCH PETERSON PEDDY
100 GARDEN CITY PLAZA
GARDEN CITY, NY 11530

DEFENDANTS' ATTORNEY:
CARL E. PERSON, ESQ.
225 EAST 36TH STREET, STE 3A
NEW YORK, NY 10016

Upon the following papers numbered 1 to 36 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-18 (#004) ; Notice of Cross Motion and supporting papers 19-27 (#005) ; Answering Affidavits and supporting papers 28-36 ; Replying Affidavits and supporting papers ____; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Kevin G. Coulsting and Lisa Coulsting; 2) substituting Residential Mortgage Loan Trust 2013-TT2, by U.S. Bank National Association, Not in its Individual Capacity, but solely as Legal Title Trustee as the named party plaintiff in place and stead of Wells Fargo Bank, N.A.; 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 denied without prejudice to renewal; and it is further

ORDERED that defendants' Kevin Coulsting and Lisa Coulsting cross motion seeking an order pursuant to CPLR 3212 & RPAPL 1304 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 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 $360,000.00 executed by defendants Kevin G. Coulsting and Lisa Coulsting on December 1, 2006 in favor of Tribeca Lending Corporation. On the same date the mortgagor/borrower Kevin G. Coulsting executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage and note were assigned to the plaintiff by assignment dated October 29, 2010. The mortgage and note were subsequently assigned to U.S. Bank, N.A. by assignment dated March 25, 2014 Plaintiff claims that the borrowers defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments beginning February 1, 2009 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 August 9, 2011. Defendants/mortgagors served an answer dated September 19, 2018 asserting eighteen (18) affirmative defenses and five (5) counterclaims.

Plaintiff's motion seeks an order granting summary judgment and for the appointment of a referee to compute the sums due and owing to the mortgage lender. In opposition, defendants submit a cross motion claiming that plaintiff has failed to submit sufficient admissible evidence to prove its entitlement to foreclose the mortgage based upon its lacks standing to maintain this action. Defendants contend that the complaint must be dismissed based upon plaintiff's failure to prove compliance with pre-foreclosure mortgage and RPAPL 1304 default notice requirements.

Court records indicate that plaintiff served this summary judgment motion by mail on April 16, 2018 making it originally returnable on May 9, 2018 assigned to IAS Term Part 34. Defendants' cross motion was served on July 18, 2018 and made originally returnable on August 15, 2018 assigned to IAS Term Part 34. Both motions remained sub judice without decision until this foreclosure action and the underlying motions were reassigned to this IAS Term Part 18 on November 12, 2019 by Administrative Order 85-19 (Hinrichs, J.) dated November 6, 2019. Upon assemblage of the papers comprising these motions, both motions were marked submitted on the IAS Part 18 motion submission calendar on November 22, 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)). 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 defendants do not contest their failure to make timely payments due under the terms of the promissory note and mortgage agreement for the past eleven (11) years or since February 1, 2009 . Rather, the issues raised by the defendants/borrowers 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 lack of standing, and plaintiff's compliance with mortgage and statutory pre-foreclosure 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 affidavits submitted from the current mortgage servicer/attorney-in-fact's (Planet Home Lending LLC's) senior vice president ("O'Connell affidavit) dated August 9, 2017, from the plaintiff (Wells Fargo's) assistant vice president ("Cobarrubias affidavit") dated March 10, 2016, from the prior mortgage servicer/attorney-in-fact's (Acqura Loan Services') vice president ("Paxton affidavit") dated October 10, 2012, from the prior mortgage servicer/attorney-in-fact's (Home Servicing, LLC's) agent ("Hannan affidavit") dated April 4, 2013, and the attorney affirmation from Ted Eric May, Esquire, an attorney from the law firm formerly representing the plaintiff in this action ("May affirmation") dated January 16, 2013 provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. Each affidavit/affirmation sets forth the employee/attorney's review of the business records maintained by the servicer/lender/law firm; the fact that the books and records are made in the regular course of the servicer/lender/law firm's business; that it was the servicer/lender/law firm's regular course of business to maintain such records; that the records were made at or near the time the underlying transactions took place; and that the records were created by an individual with personal knowledge of the underlying transactions. Based upon the submission of these affidavits and the attorney's affirmation, 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 as it relates to the issues of standing and service of pre-foreclosure notices.

With respect to the issue of standing, plaintiff has proven standing by submission of two affidavits ("Cobarrubias affidavit" & "Hannan affidavit" who each confirm through their sworn testimony that the original promissory note with an attached allonge indorsed in blank by a representative of the original mortgage lender was in the plaintiff's (Wells Fargo's) physical possession beginning July 16, 2010 which was prior to commencement of this action on August 9, 2011 thereby establishing plaintiff's standing (*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)). The relevant, admissible evidence reveals that the promissory note with the allonge was subsequently released to plaintiff's agent/law firm on December 16, 2010 and remained in the law firm's possession until being returned to Wells Fargo on November 15, 2012. Plaintiff's affidavits provide sufficient evidence to confirm that the affidavit submitted by a prior servicer ("Paxton affidavit") stating that Wells Fargo's possession of the promissory note beginning July 20, 2010 was the result of a scrivener's error. Any alleged issues concerning the mortgage assignments are therefore irrelevant to the issue of standing since plaintiff has established possession of the promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Company v. Leigh,* 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)).

As to defendants' claims set forth in their cross motion asserting that the complaint must be dismissed based upon plaintiff's failure to prove service of pre-foreclosure notices of default required by the mortgage and pursuant to RPAPL 1304, a review of the Coulstings' answer (and contrary to the representation by defense counsel in his affirmation in support) reveals that none of

the eighteen affirmative defenses contained in their answer asserts any affirmative defense related to plaintiff's alleged failure to comply with conditions precedent to commencing this foreclosure action. As a result the defendants have waived the right to assert those defenses absent a timely application seeking to amend their answer. There has been no application seeking such an amendment and therefore both such defenses have been waived:

> 1) To the extent that the defaulting mortgagors attempt to raise plaintiff's alleged failure to serve a mortgage default notice required by the terms of the mortgage, such defense is waived as a result of defendants' failure to assert it in their answer (CPLR 3015; *JPMorgan Chase Bank, N.A. v. Akanda,* 177 AD3d 718, 111 NYS3d 642 (2nd Dept., 2019); *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 9 (2nd Dept., 1989); *see also Wilmington Trust Company v. Sukhu,* 155 AD3d 591, 63 NYS3d 853 (1st Dept., 2017); *Karel v. Clark,* 129 AD2d 773, 514 NYS2d 766 (2nd Dept., 1987)).
>
> 2) To the extent that the defaulting mortgagors attempt to raise plaintiff's alleged failure to serve pre-foreclosure notices in compliance with RPAPL 1304, such a defense is waived as a result of the defendants' failure to assert it as an affirmative defense in their answer (*Nationstar Mortgage LLC v. Tamargo,* 177 AD3d 750, 111 NYS3d 699 (2nd Dept., 2019); *see also Capital One, N.A. v. Saglimbeni,* 170 AD3d 508, 96 NYS3d 48 (1st Dept., 2019)).

Moreover, even were the Court to address the merits of defendants' arguments as if they had been asserted in their answer, plaintiff has submitted sufficient evidence to prove service of all required pre-foreclosure notices

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 proving strict compliance pursuant to RPAPL 1304 mailing requirements. Plaintiff submitted proof in the form of affidavits from the mortgage servicers/attorney-in-fact's employees and an attorney affirmation from the law firm which formerly represented the plaintiff and which did the actual mailing of both the 90-day notices and the

mortgage default notices. The RPAPL 1304 90-day notices were mailed on May 2, 2011. This testimony, coupled with plaintiff's submission of documentary evidence in the form of: 1) a copy of the actual 90 day notice mailed by first class and certified mail addressed to the borrowers at the mortgaged premises; 2) copies of the addressed envelopes of certified mailing containing the twenty digit article tracking numbers; 3) a copy of the signed domestic return receipt with Lisa Coulsting's signature indicating that signed for the certified mailing on May 19, 2011; and 4) copies of the two certified mailing receipts addressed to each mortgagor individually. Such proof 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 (2nd Dept., 2019); *Nationstar Mortgage LLC v. LaPorte, supra.; HSBC Bank USA, N.A. v. Ozcan, supra.*). Defense counsel's and the defaulting mortgagors self-serving and conclusory denials of service are not supported by any relevant, admissible evidence to contradict the proof submitted by the plaintiff and to 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 (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 mortgage default notice, plaintiff has submitted sufficient admissible proof to show that the default notice required under the terms of the mortgage was mailed to the defaulting mortgagors on May 12, 2011 in compliance with mortgage requirements. Plaintiff's proof consists of affidavits from the mortgage servicers/attorney-in-fact's employees and an attorney affirmation from the law firm which formerly represented the plaintiff and which did the actual mailing. This testimony, coupled with plaintiff's submission of documentary evidence in the form of: 1) a copy of the mortgage default notice dated May 12, 2011; 2) copies of the addressed envelopes of certified mailing containing twenty digit tracking numbers; 3) copies of the domestic return receipt each unsigned containing the identical twenty digit tracking number; and 4) copies of the two certified mailing receipts addressed to each mortgagor individually. Such proof provides sufficient evidence of substantial compliance with mortgage default notice requirements (*see Hudson City Savings Bank v. Friedman,* 146 AD3d 757, 43 NYS3d 912 (2nd Dept., 2017); *PennyMac Holdings, LLC v. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Carcano,* 106 AD3d 724, 965 NYS2d 516 (2nd Dept., 2013); *IndyMac Bank, FSB v. Kamen,* 68 AD3d 931, 890 NYS2d 649 (2nd Dept., 2009)). Defense counsel's and the defaulting mortgagors' self-serving and conclusory denials of service fails to raise a genuine issue of fact concerning service of the default notice (*see PHH Mortgage Corp. v. Muricy, supra.; HSBC Bank USA v. Espinal, supra.)*. In addition, even were this court to deem the proof submitted by the plaintiff with respect to service of the mortgage default notice insufficient, plaintiff's proof submitted in support of service of the RPAPL 1304 90-day notices, satisfies the mortgage lender's obligations under the terms of the mortgage concerning the notice of default requirements (*see Wachovia Bank, N.A. v. Carcano,* 106 AD3d 724, 965 NYS2d 516 (2nd Dept., 2013)). Based upon this record defendants' cross motion seeking dismissal of plaintiff's complaint must be denied in its entirety.

With respect to plaintiff's summary judgment motion, the sole issue remaining concerns whether plaintiff has submitted sufficient admissible proof to establish its right to foreclose the mortgage based upon the mortgagor defendants continuing default in making any mortgage payments. The necessary proof includes the submission of copies of the mortgage(s) and promissory note and admissible evidence to prove default (*see Property Asset Management, Incorporated v. Souffrant et al.,* 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018)). In most cases proof of default in payment requires the submission of an affidavit describing the borrowers' default which is

determined to be admissible pursuant to the business records exception to the hearsay rule (CPLR 4518), together with submission of the actual business records referred to in the affidavit from the mortgage servicer/attorney-in-fact (*see Bank of New York Mellon v. Gordon,* 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019)). While plaintiff has submitted an affidavit from the mortgage servicer/attorney-in-fact detailing the mortgagors' continuing default, there has been no submission of the records referred to in the affidavit in the form of the account history, account statements reflecting the default, and/or other business records which are required to prove default.

Accordingly, defendants' cross motion is denied and plaintiff's motion is denied without prejudice to renewal upon submission of proof sufficient to establish its right to foreclose.

HON. HOWARD H. HECKMAN, JR.

Dated: January 31, 2020

J.S.C.