

Wells Fargo Bank, N.A. v Stroman
2020 NY Slip Op 30848(U)
March 9, 2020
Supreme Court, Kings County
Docket Number: 509310/2014
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of March, 2020.

P R E S E N T:

HON. CARL J. LANDICINO, JSC

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WELLS FARGO BANK, N.A.,

Plaintiff(s),

Index No: 509310/2014

TRIAL DECISION

- against -

ELAINE STROMAN AKA ELAINE D. STROMAN;
NEW YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU;
BOARD OF MANAGERS GEORGETOWN VILLAGE
CONDOMINIUMS; JP MORGAN CHASE BANK, N.A.;
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD; "JOHN DOES" AND "JANE DOES", said names
being fictitious, parties intended being possible tenants or
occupants of premises and corporations, other entities or
persons who have, claim, or may claim, a lien against, or
other interest in, the premises,

Defendant(s).

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HISTORY

Plaintiff WELLS FARGO BANK, N.A., (hereinafter "Plaintiff") commenced this foreclosure action in relation to properties known as, 1120 and 1122 Bergen Avenue, Unit 93 and Garage 65, Brooklyn, New York, Block 8343, Lot 1168 and 1130 (hereinafter the "Subject Property" or "Premises"), by the filing of a Summons and Complaint on October 9, 2014. Defendant Elaine Stroman a/k/a Elaine D. Stroman (hereinafter "Defendant") interposed an Answer, *pro se*, which was filed on January 6, 2015. Note of Issue was filed on November 17, 2017. Notice of Appearance was filed by Defendant's Counsel on May 27, 2018. Defendant raises an affirmative defense in her Amended Answer filed by Defendant's counsel on November 17, 2017:

"FIRST AFFIRMATIVE DEFENSE: FAILURE TO MEET CONDITION PRECEDENT CONTAINED IN MORTGAGE. 20. "The instant mortgage provides as a condition precedent to commencing a foreclosure action that the plaintiff require 'Immediate Payment in Full,' as that term is defined in paragraph 22 of the mortgage. It also requires the plaintiff send written notice, in the manner required by paragraph 15 of the mortgage, to the borrower requesting that the default be cured within at least thirty days from the date of the notice."

This matter was assigned to this Part 81 by the Honorable Lawrence Knipel, J.S.C. (Administrative Judge of the 2nd Judicial District, Civil Term), from the Non-Jury Trial Assignment Part on February 5, 2019, at which time there was a Pre-Trial Conference held and the trial was scheduled by "So Ordered" Stipulation. The trial in this matter proceeded for two days; May 14, 2019 and May 31, 2019. By "So Ordered" Stipulation of the parties, dated May 31, 2019, and in accordance therewith, submissions were due on July 31, 2019. Written

Summations and Transcripts were filed on July 31, 2019 and hard courtesy copies with transcripts were received in chambers on August 2, 2019, pursuant to the Part 81 Rules. On that date the matter was deemed fully submitted.

TESTIMONY

Christina Traynor (Plaintiff's witness)

The witness stated that she was an employee of Wells Fargo Bank and worked in the home mortgage area. She indicated that her duties included the servicing of "consumer mortgages." She stated that she also worked with borrowers concerning loss mitigation. She stated that "[l]oss mitigation is when there is a default on the account and we would work with the borrower or borrowers to try to work out some type of resolution, whether it be a loan modification where we adjust the terms of the original contract that was signed..." She also testified regarding possible resolution options and alternatives. (Tt. 5/14/19; Pg. 10, Line 7 - Pg. 11, Line 7)

The witness testified that her then current position was "loan verification consultant" and that she had that position since 2011. "I work with our attorney firms where there is an active foreclosure, a bankruptcy or any type of litigation and I review, research and interpret our business records for non jury trials, jury trials, mediations, depositions." (Tt. 5/14/19; Pg 11, Lines 8-17)

The witness testified that she commenced her employment with the Plaintiff in May of 2005. (Tt. 5/14/19; Pg 11, Lines 21-22) The witness testified that she was familiar with how Plaintiff services loans. "I've gone through training, we go through yearly training and we have

on-the-job training as needed if processes change or if something is updated.” She further stated that she can access all relevant loan documents. She testified that she was familiar with the process as to how the records are created and maintained and that her familiarity is a product of training and working with the systems daily. (Tt. 5/14/19; Pg 12, Lines 3-24) The witness also stated that she was familiar with Plaintiff’s record keeping procedures and practices. Included in that familiarity is knowledge as to how documents and records are created - “[t]hey are created by - - well, depends on what record, but they are created by the person who is actually completing the action when it’s happening and then it’s inputted in the system that day.” The witness stated that for the purpose of trial she reviewed a number of relevant documents, including notices, payment history, note, mortgage and other origination documents. (Tt. 5/14/19; Pg 13, Lines 5-23)

After having identified Plaintiff’s Exhibit 1 as a copy of the original note, which was exhibited at trial but retained by Plaintiff, the witness testified that the note was in the amount of \$193,125.00, that the lender was Wells Fargo Home Mortgage, Inc. and that the borrower was the Defendant Elaine Stroman. (Tt. 5/14/19; Pg 21, Lines 5-10) The witness identified Plaintiff’s Exhibit 2, the Subject Mortgage, which was admitted on consent of the parties. (Tt. 5/14/19; Pg 23, Lines 2-11) The witness stated that the Wells Fargo entities reflected in the subject business records are all related entities. (Tt. 5/14/19; Pg 26, Lines 4-19)

The witness testified in relation to the creation and maintenance of the records in relation to the loan documents and explained that although various departments submit information, changes cannot be made. She stated further that the records are relied upon as an “accurate

accounting of a loan's history throughout the years. It's all electronic." She also stated that all of the records are identified by loan number. (Tt. 5/14/19; Pg. 27, Line 10 - Pg. 28, Line 12)

Upon review of the documents and the loan history (Plaintiff's Exhibit 3) the witness stated that the last payment on the subject loan was made in June of 2009, was applied to outstanding payments due and owing for April and May of 2009, and that the June, 2009 payment was still due and owing. The witness testified that the records reflected that due to the delinquent status of the loan, the application of the June 2009 payment was made in July of 2009. (Tt. 5/14/19; Pg 30, Lines 10-24)

The witness identified Plaintiff's Exhibit 4 as two demand letters. After indicating that the letters were notices of default which indicated the possibility of further legal action, the witness confirmed that the letters (Plaintiff's Exhibit 4) were part of the records maintained by the Plaintiff. "Once its printed and mailed we scan a copy of the letters into our imaging system." The witness further testified that the letters identify the particular loan number, address and name of the borrower. (Tt. 5/14/19; Pg. 33, Line 6 - Pg. 34, Line 12) The witness testified as to the creation of the document. "So, all of the information that's contained within the letter is information that Wells Fargo created. We do use print vendors, but the information gets sent over electronically so all they can do is just print, they cannot edit, change, make any type of alterations to the information that's sent to them." (Tt. 5/14/19; Pg 35, Lines 4-8)

The witness stated that Plaintiff's Exhibit 4 was comprised of two letters sent by 1st Class Mail to the Defendant. One letter to "1122 Bergen Avenue, Garage Unit 65, Brooklyn New York 11234" and one letter to "1120 Bergen Avenue, Unit 93, Brooklyn, New York 11234." (Tt. 5/14/19; Pg 42, Lines 11-23)

The witness stated that Plaintiff's Exhibit 5 was comprised of two letters, "90-day notice[s]", sent by 1st Class Mail to the Defendant at the same addresses reflected in Plaintiff's Exhibit 4. She testified that the letters were dated June 13, 2014. The witness stated that these exact same two letters, "90-day notices", were sent by certified mail. (Plaintiff's Exhibit 6) (Tt. 5/14/19; Pg. 43, Line 1 - Pg. 44, Line 16)

The witness identified Plaintiff's Exhibit 7 as the Plaintiff's letter log relating to the subject loan. The witness stated that the letter log is maintained in relation to all loans. She indicated that the log is password protected and cannot be edited. (Tt. 5/14/19; Pg. 45, Line 3 - Pg. 46, Line 18)

The witness identified Plaintiff's Exhibit 8 as a document related to the Track Right system. "Track Right is the system that we use with our print vendor to verify that letters were mailed and sent - - printed and mailed, sorry." "...[O]nce they get the document and they print it out and they mail it they put the line entry in there to say that the document was mailed out." "Again, so Lender Live is what they are now called, it used to be WALZ. They put when they are printed the document, when they mailed it out and then they also put in there confirmation when USPS is showing that they mailed it out. So it's both Lender Live and it's USPS that would have information in there." (Tt. 5/14/19; Pg. 55, Line 16 - Pg. 57, Line 4) The witness stated that the records of third-party mailing are incorporated in Plaintiff's records and relied upon by Plaintiff. The witness also testified that she was familiar with the third-party mailing practice based upon training that she receives. (Tt. 5/14/19; Pg 63, Lines 5-20)

The witness identified Plaintiff's Exhibit 9. She identified the document as Certified mailing receipts relating to the certified mailing of the notices as referenced in Plaintiff's Exhibit

6. She confirmed that these documents are maintained as part of Plaintiff's business records. She explained that any returns on mailings are returned to the Plaintiff directly. She further explained that any return would be scanned into the system. (Tt. 5/14/19; Pg. 76, Line 5 - Pg. 77, Line 6)

The witness identified Plaintiff's Exhibit 11 as "judgment figures." "Total amount due on the account as of a certain date." She stated that the calculation was performed through January 10, 2019. She stated that the judgment figures include principal, interest, advances and fees due. (Tt. 5/14/19; Pg. 79, Line 10 - Pg. 80, Line 14)

The witness acknowledged that the address on Plaintiff's Exhibits 1 and 2 was 1122 Bergen Avenue, Brooklyn, New York 11234. The witness acknowledged the Plaintiff's Exhibit 3 at page 18616 listed a "unit c" as part of the 1122 Bergen Avenue address. (Tt. 5/14/19; Pg. 81, Line 11 - Pg. 83, Line 1) The witness stated that only the notices contained the 1120 Bergen Avenue address, and that the address was not reflected elsewhere in Plaintiff's records. Similarly, the witness also stated that she did not know why the description "Garage Unit Number 65", in relation to the 1122 Bergen Avenue address, was utilized. (Tt. 5/14/19; Pg. 83, Lines 7-18) Upon review of Plaintiff's Exhibit 9, the witness also acknowledged that there was a sticker on the 1122 Bergen Avenue, Garage Unit 65 that stated "not deliverable as addressed, unable to forward." (Tt. 5/14/19; Pg. 83, Line 19 - Pg. 84, Line 21) Upon review of Plaintiff's Exhibit 10 the witness acknowledged that although the filing represented that a 90 day notice was mailed to 1122 Bergen Avenue, Unit C, no mailings were sent as specified. (Tt. 5/14/19; Pg. 84, Line 22 - Pg. 85, Line 22) The witness also acknowledged that the mailing date reflected on Plaintiff's Exhibit 10 (June 13, 2014) was not the date reflected in her records (June 17, 2014). (Tt. 5/14/19; Pg. 85, Line 23 - Pg. 86, Line 10)

The witness, upon review of the cover page of Plaintiff's Exhibit 2 (mortgage documents) indicated that there were two addresses listed, 1120 Bergen Avenue, Unit 93 and 1122 Bergen Avenue, Unit 65. She further acknowledged that the mailing to 1120 Bergen Avenue, Unit 93 was unclaimed. (Tt. 5/14/19; Pg 93, Lines 5-24) (See also Plaintiff's Exhibit 9).

Elaine Stroman (Defendant)

The witness stated that her legal address was 1122 Bergen Avenue, Unit 93, Brooklyn, New York 11234 and that her mailing address was 1122 Bergen Avenue, Unit 3, Brooklyn, New York 11234. She stated that she resided at the Premises since August of 2003. (Tt. 5/31/19; Pg 5, Lines 11-25)

The Defendant stated that she did not remember ever receiving the notices as reflected in Plaintiff's Exhibits 4 and 5 or being served with the summons and complaint or a colored piece of paper with the summons and complaint. "No. I don't recall." (Tt. 5/31/19; Pg. 6, Line 5 - Pg. 7, Line 16)

The Defendant acknowledged that her unit has been referred to as Apartment C. (Tt. 5/31/19; Pg 8, Lines 1-8)

As to the documents/notices as reflected in Plaintiff's Exhibit 4 and 5 and whether she received them, the Defendant reiterated, "[w]ell, I don't recall receiving them. I don't believe I received them. They weren't delivered to me." (Tt. 5/31/19; Pg 8, Lines 8-9)

CREDIBILITY

It is axiomatic that with respect to the credibility of the parties, the Court during the trial, "had the opportunity to view the demeanor of the witnesses," and accordingly "was in the best

position to gauge their credibility.” *Massirman v. Massirman*, 78 AD3d 1021, 911 N.Y.S.2d 462 [2nd Dept. 2010], quoting *Peritore v. Peritore*, 66 AD3d 750, 888 N.Y.S.2d 72 [2nd Dept. 2009]; see also *Varga v. Varga*, 288 AD2d 210, 732 N.Y.S.2d 576 [2nd Dept. 2001], quoting *Diacio v. Diacio*, 278 AD2d 358, 717 N.Y.S.2d 635 [2nd Dept. 2000]; *Ferraro v. Ferraro*, 257 AD2d 596, 684 N.Y.S.2d 274 [2nd Dept. 1999]. The Court in this case observed the parties during their respective testimony under examination. “In a non-jury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's sound discretion.” *Goldstein v. Guida*, 74 AD3d 1143, 904 N.Y.S.2d 117 [2nd Dept. 2010], quoting *Ivani v. Ivani*, 303 AD2d 639, 17 757 N.Y.S.2d 89 [2nd Dept. 2003], quoting *L'Esperance v. L'Esperance*, 243 AD2d 446, 663 N.Y.S.2d 95 [2nd Dept. 1997]; see also *Schwartz v. Schwartz*, 67 AD3d 989, 890 N.Y.S.2d 71 [2nd Dept. 2009].

“Where the findings of fact rest in large measure on considerations relating to credibility of witnesses, deference is owed to the trial court’s credibility determinations.” (internal quotations omitted) *Ning Xiang Liu v. Al Ming Chen*, 133 A.D.3d 644, 19 N.Y.S.3d 565 [2nd Dept. 2015] quoting *Papovitch v. Papovitch*, 84 A.D.3d 1045, 923 N.Y.S.2d 209 [2nd Dept. 2011] quoting *Paraimnath v. Torres*, 59 A.D.3d 419, 873 N.Y.S.2d 133 [2nd Dept. 2009]; See also, *Zwaryez v. Marina Constr.*, 130 A.D.3d 922, 15 N.Y.S.3d 86 [2nd Dept. 2015]. An assessment of credibility by the trial court is afforded a significant level of discretion and deference by the appellate courts. This Court had the ability to observe the witnesses over the course of examination during trial on many issues related to the Subject Property and the history of the servicing of the loan.

The witness for Plaintiff, Ms. Traynor, was clear and credible in her testimony. She openly acknowledged when she did not have the answer to certain questions. She also did not appear to be advocating for either side. Much of the Court's determination will rest on a review of and the weight afforded the documentary evidence, admitted based upon Ms. Traynor's testimony.

The Defendant was guarded, cautious and evasive in answering some questions. Generally the Defendant seemed to be advocating for herself. The Defendant seemed willfully vague and forgetful. As such the Defendant was not credible. The Court gives little to no weight to Defendant's testimony.

DISCUSSION

When a Defendant challenges the Plaintiff's standing in a foreclosure action the Plaintiff must prove that it was the "...holder or assignee of the note at the time the action is commenced". *Nationstar Mortgage, LLC v. LaPorte*, 162 A.D.3d 784, – N.Y.S.3d – (2d Dept., 2018); see, *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 34 N.E.3d 363 (2015). Once standing has been established Plaintiff must provide sufficient proof that the 90 day notice requirements of RPAPL §1304 have been met as a condition precedent to suit. RPAPL §1304 requires that the Defendant/Borrower(s) are notified of the commencement of the foreclosure action at the borrower's last-known address, the subject address and any other address of record, by both registered or certified and first-class mail. (See, RPAPL §§1304(2); *Nationstar Mortgage, LLC v. LaPorte*, 162 A.D.3d 784; – N.Y.S.3d – (2d Dept., 2018)); *U.S. Bank National Association v. Henderson*, – N.Y.S.3d –, 2018 WL 3291660 (2d Dept., 2018). In addition, Plaintiff's

compliance with the requirements of RPAPL 1303 must be established as a condition precedent to suit. See *Prompt Mortg. Providers of N. Am., LLC v. Singh*, 132 A.D.3d 833, 18 N.Y.S.3d 668 (2nd Dept., 2015).

Standing

A Plaintiff is found to have standing in a foreclosure action by proving that at the time of commencement of the action it was the holder or assignee of the mortgage at issue. *Nationstar Mortgage, LLC v. LaPorte*, 162 A.D.3d 784, – N.Y.S.3d – (2d Dept., 2018); see, *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 34 N.E.3d 363 (2015); *Deutsche Bank Natl. Trust Co. v. Brewton*, 142 A.D.3d 683 (2d Dept., 2016); *U.S. Bank National Association v. Henderson*, – N.Y.S.3d –, 2018 WL 3291660 (2d Dept., 2018). “[E]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.” *Bank of New York Mellon v. Alli*, 156 A.D.3d 597 (2d Dept., 2017); see, *Deutsche Bank Trust Co. Ams. v. Garrison*, 147 A.D.3d 725 (2d Dept., 2017); *U.S. Bank Nat. Ass’n v. Saravanan*, 146 A.D.3d 1010 (2d Dept., 2017); *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 34 N.E.3d 363 (2015).

It is undisputed, that while annexing a copy of the Note, endorsed in blank, to the Summons and Complaint at the time of commencement is *prima facie* evidence of standing, the Plaintiff did not do so in this action. See, *Nationstar Mortgage, LLC v. LaPorte*, 162 A.D.3d 784, – N.Y.S.3d – (2d Dept., 2018); *US Bank N.A. v. Coppola*, 156 A.D.3d 934 (2d Dept., 2017); *Deutsche Bank Natl. Trust Co. v. Carlin*, 152 A.D.3d 491 (2d Dept., 2017); *Wells Fargo Bank*,

N.A. v. Thomas, 150 A.D.3d 1312 (2d Dept., 2017). In any event, standing is not at issue in this matter. The post-trial memoranda and issues discussed at trial are principally in relation to the RPAPL §1303 and §1304 notices.

Business Records.

As indicated above, records can be admitted into evidence through the Business Records Exception of the hearsay rule, CPLR §4518, which specifically provides as follows:

“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.” (CPLR §4518(a))

A proper foundation for these records will be made when it is provided “by someone with personal knowledge of the maker’s business practices and procedures.” *Aurora Loan Servs., LLC v. Mercius*, 138 A.D.3d 650 (2d Dept., 2016); quoting, *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861 (2d Dept., 2015). Purported business records based upon testimony by employees of the current servicer will be admitted when the affiant attests to having personal familiarity with the record keeping practices and procedures of the record keeper. *Aurora Loan Servs., LLC v. Mercius*, 138 A.D.3d 650 (2d Dept. 2016); *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861 (2d Dept. 2015); *U.S. Bank N.A. v. Madero*, 125 A.D.3d 757 (2d Dept. 2015); see; *Aurora Loan Services, LLC v. Komarovsky*, 151 A.D.3d 924 (2d Dept. 2017). Additionally, the records will also 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" and that the record be made at the time of the act or transaction as part of that routine. *HSBC Bank USA, N.A. v. Zacpal*, 2018 WL 1976525 (N.Y.Sup.) (2018) quoting; *State v. 158th Street & Riverside Drive Housing Co., Inc.*, (100 A.D.3d 1293 (3d Dept. 2012)). See, *Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 35 N.E.3d 451 (2015). The statute clearly does not intend that a person have personal knowledge of each individual entry or transaction contained in the business record and the language in the statute "specifically authorizes the court discretion to determine admissibility by stating 'if the judge finds' that the three fundamental requirements are satisfied" that evidence is admissible. *HSBC Bank USA, N.A. v. Zacpal*, 2018 WL 1976525 (N.Y.Sup.) (2018); *Citigroup v. Kopelowitz*, 147 A.D.3d 1014 (2d Dept. 2017); *People v. Kennedy*, 68 N.Y.2d 569, 503 N.E.2d 501 (1986).

Plaintiff's witness, Ms. Traynor, an employee of Wells Fargo since 2005, credibly testified as to the documents and logs of Wells Fargo, through its normal business record keeping practices. Ms. Traynor attested to the procedure by which Wells Fargo's records are utilized and the reliance upon their veracity. Additionally, the witness was credible in her information regarding Wells Fargo and its servicing department. She also indicated her experience in relation to her familiarity with the loan documents and her work in relation to loss mitigation.

Ms Traynor testified that when a record of a transaction is made by the individual who preformed the action, it is recorded that day and changes cannot be made retroactively. Ms. Traynor did competently testify that the entries on the logs and records were made contemporaneously by employees with first hand knowledge of the transactions and who had a

duty to report and maintain these records. She also testified that this occurred in the ordinary course of business of Plaintiff, thereby satisfactorily establishing that the records and logs of Wells Fargo be admitted under the Business Records Exception to the Hearsay Rule, pursuant to CPLR §4518(a). *Matter of Leon RR*, 48 N.Y.2d 117, 397 N.E.2d 374 (1979). See, *People v. Patterson*, 28 N.Y.3d 544, 68 N.E.3d 1242 (2016); *Murray v. Donlan*, 77 A.D.2d 337, 433 N.Y.S.2d 184 (2d dept. 1980). However, once admitted, the weight and relevance of that evidence must be determined by the trier of fact in light of the totality of the evidence in the case.

RPAPL §1303 Notice

RPAPL §1303(1) states that notice shall be given to the mortgagor of an action relating to an “owner-occupied one-to-four family dwelling” and any tenant. The remainder of the provision, states in pertinent part: “The notice to any mortgagor required...shall be delivered with the summons and complaint” (RPAPL §1303(2)). Defendant did raise failure to notify under RPAPL §1303 in her Answer, at trial and in her post-trial summation. The failure to comply with this notice requirement may be raised by the Defendant at anytime. Moreover, the “proper service of an RPAPL 1303 notice is a condition precedent to the commencement of a foreclosure action, and noncompliance mandates dismissal of the complaint.” *US Bank National Association v. Nelson*, 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dept. 2019) quoting *Eastern Savings Bank, FSB v. Tromba*, 148 A.D.3d 675, 48 N.Y.S.3d 499 (2d Dept. 2017).

An Affidavit of Service service is *prima facie* evidence that proper service was made. *US Bank Nat. Ass’n v. Tate*, 102 A.D.3d 859 (2d Dept. 2013); *Aurora Loan Services, LLC, y. Weisblum*, 85 A.D.3d 95 (2d Dept. 2011). This Court finds, that the Plaintiff failed to admit any

Affidavit of Service or any other sufficient proof of compliance with RPAPL 1303. As stated, the Defendant properly and timely raised Plaintiff's failure to prove compliance with RPAPL §1303 requirements. *Aurora Loan Services, LLC, v. Weisblum*, 85 A.D.3d 95 (2d Dept. 2011); see, *Deutsche Bank Nat. Trust Co. v. Quinones*, 114 A.D.3d 719 (2d Dept. 2014); *Reich v. Redley*, 96 A.D.3d 1038 (2d Dept. 2012); *US Bank Nat. Ass'n v. Tate*, 102 A.D.3d 859 (2d Dept. 2013). The failure to comply with the requirements of RPAPL 1303 is fatal to the prosecution of the instant proceeding. The burden is on the Plaintiff to prove compliance. Compliance with RPAPL §1303 is a condition precedent to suit. The Court will not search the record in order to review the affidavit of service.

Further, the Court will not take judicial notice of the affidavit of service given that CPLR 4511 does not allow for judicial notice of facts otherwise in dispute and not properly raised by the Plaintiff. See *Paladino v. Time Warner Cable of New York City*, 16 A.D.3d 646, 647, 793 N.Y.S.2d 63, 64 (2nd Dept. 2005). What is more, Courts have held that judicial notice should not be taken of a document merely because it resides in the Court's file. See *Ptasznik v. Schultz*, 247 A.D.2d 197, 199, 679 N.Y.S.2d 665, 666 (2nd Dept. 1998). The Court should not take judicial notice of the affidavit of service filed in the original action since doing so would "deprive the defendant of the opportunity to attempt to rebut the affidavit of service." *Lull v. Van Tassell*, 171 A.D.3d 1155, 1157, 100 N.Y.S.3d 99, 102 (2nd Dept. 2019). As an affidavit of service was not proffered during the trial the defendant was denied the opportunity to challenge its sufficiency or lack thereof. Moreover, the affidavit of service in relation to compliance with RPAPL 1303 alone is hearsay. Therefore the proceeding must be dismissed. *Aurora Loan Services, LLC, v. Weisblum*, 85 A.D.3d 95 (2nd Dept. 2011); see, *Deutsche Bank Nat. Trust Co. v. Quinones*, 114

A.D.3d 719 (2d Dept. 2014); *Reich v. Redley*, 96 A.D.3d 1038 (2nd Dept. 2012); *US Bank Nat. Ass'n v. Tate*, 102 A.D.3d 859 (2d Dept. 2013).

CONCLUSION

Upon the hearing of the testimony and a review of the documents admitted the Court, finds that Plaintiff failed to provide proof of compliance with RPAPL §1303. In light of same the Court need not address any remaining issues (i.e. RPAPL §1304 requirements). Accordingly, the action is dismissed.

Defendant may settle judgment on notice, together with a copy of this Trial Decision with Notice of Entry, within 60 days of entry.

The foregoing constitutes the Decision of the Court.

ENTER:



Carl J. Landicino, J.S.C

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