DECISION AFTER TRIAL **INDEX NO: 27417/2013**

SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE LXS 2006-14N,

Plaintiff,

-against-

LEE LACORTE A/K/A LEE IDELL LACORTE A/K/A LEE I LACORTE; WILLIAM LACORTE A/K/A WILLIAM J. LACORTE; INDYMAC BANK FSB; BANK OF AMERICA; and "JOHN DOE #1" to "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Upon consideration of the testimony and exhibits entered into evidence during the limited issue trial that began on December 5, 2018 and was continued to October 17, 2019, it is

ORDERED that this action is dismissed on the grounds that U.S. Bank National Association, as Trustee for the LXS 2006-14N ("the Plaintiff") failed to demonstrate compliance with the 90-day notice requirement under Real Property Actions and Proceedings Law § 1304; and it is further

ORDERED that *pro se* litigants Lee and William LaCorte's ("the Defendants") application to dismiss this action on the grounds that the Plaintiff has failed to name a necessary party under RPAPL § 1311, is denied as academic.

The Court assumes the parties' knowledge of the underlying facts of this case since they are set forth in detail in the Court's prior Orders. The subject of the instant decision is the limited issue trial on Plaintiff's compliance with RPAPL § 1304 and on whether all necessary parties have been named in accordance with RPAPL § 1311, respectively.

The trial commenced on December 5, 2018, at which time Lee LaCorte and counsel for the Plaintiff, Christopher Valencia, appeared. The Plaintiff's counsel called Mr. Richard Schwiner ("Schwiner") as a witness. Schwiner testified that he is a Senior Loan Analyst at Ocwen Financial Corporation ("Ocwen"), where he has been employed since 2013 (12/5/2018 Tr. 9:9-13). Counsel asked Schwiner whether he has "personal knowledge of the practices and procedures of a mortgage servicer," and Schwiner responded that he does (Tr. 9:14-16). In this regard, Shwiner testified that Ocwen uses a system called Real Servicing to "track payments and incoming payments from borrowers, as well as outgoing payments from escrow taxes and insurance. That system is also used to record loss mitigation information, foreclosure status updates, communication from borrower and/or from our counsel" (Tr. 9:24-25;10:1-5). Shwiner represented that he uses the system "on a daily basis" (Tr. 10:7). Schwiner explained that employees input information into the system—such as payment information and review information—"contemporaneous as it's taking place" (Tr. 10:10-15). Counsel then inquired into the types of records Ocwen maintains in the regular course of business (Tr. 10:16-18). Schwiner responded that Ocwen keeps records regarding "the notes, the mortgages, the loss mitigation history, the payment history, the tax and insurance information, letters and correspondence sent to mortgagors, things of that nature" (Tr. 10:19-25). He further testified that: "I have been reviewing information and documentation with regard to this case using the system I've just mentioned by reviewing our Real Servicing platform as well as other systems that we have" (Tr. 11:5-9).

Counsel asked Schwiner whether there are any documents demonstrating that Ocwen has the authority to act on behalf of the Plaintiff (Tr. 11:10-12). Schwiner responded in the affirmative and counsel presented him with a copy of a November 1, 2013 Limited Power of Attorney. Schwiner testified that the document "allows Ocwen to service the loan on behalf of the named plaintiff in this case, US Bank." (Tr. 13:12-15). The Limited Power of Attorney was accepted into evidence as Plaintiff's Exhibit 1 (Tr. 13:6-8).

Counsel presented to Schwiner a second document, which Schwiner identified as a "letter that was sent regarding the property at 634 Alwick Avenue in West Islip, New York, 11793" (Tr. 14:19-23, 29:1-7). He explained "it is in regards to the mortgage loan being in default and it also references that would [sic] be proceeding if the default was not cured" (Tr. 14:19-23, 29:1-7). Schwiner testified that the letter, dated October 19, 2012, is addressed to Lee LaCorte and was prepared by IndyMac, the prior servicer (Tr. 29:9-17; 29:20). Ms. LaCorte objected to the introduction of this letter into evidence on the grounds that it was not the original notification since it was dated 2012 and the first action to foreclose the subject premises was commenced in 2010 (Tr. 15:21-25). Ms. LaCorte's objection precipitated a discussion regarding the litigation history of the property. It was ultimately determined that there were two prior actions to foreclose the subject premises, both of which were discontinued. The Court put the parties on notice that the discontinuances may present an issue under CPLR § 3217(c), which provides that a discontinuance by notice operates as an adjudication on the merits where the action was previously discontinued by any method (Tr. 25:1-13). The Court reserved ruling on the matter and advised the parties they would be given an opportunity to present their positions at a later date (Tr. 25:19-21). The letter was accepted into evidence, over Ms. LaCorte's objection, as Plaintiff's Exhibit 6 (Tr. 19:3-4). Counsel then asked Schwiner by what means the notice was mailed. Schwiner responded that it was sent by "certified mail per the letter itself" (Tr. 29:23-24).

Counsel presented to Schwiner a second letter. Schwiner explained that "[t]his is also a letter sent to the same address regarding the loan being in default and also explaining that it would need to be resolved within 90 days. This one was sent to William LaCorte" (Tr. 30:21-24). Schwiner further testified that the document is part of Ocwen's business records and was acquired from the prior servicer" (Tr. 31:1-4). He responded in the affirmative when asked whether the document was possessed by Ocwen with regard to the instant loan, whether it's the regular course of Ocwen's practice to maintain such documents, and whether Ocwen would rely on the document in the regular course of business (Tr. 31:2-14). Schwiner explained that the notice is dated October 19, 2012, was prepared by the prior servicer IndyMac and was mailed by certified mail (Tr. 32:12-22). The letter was accepted into evidence, over Ms. LaCorte's objection as Plaintiff's Exhibit 7 (Tr. 32: 2-10). The Plaintiff's counsel rested as to the RPAPL § 1304 issue.

Ms. LaCorte proceeded to cross-examine Schwiner. She inquired into whether he was aware of any title issues with the loan, to which he responded in the negative (Tr. 34:23-34). The Court gave Ms. LaCorte the opportunity to explain to counsel her position regarding the ownership of the property and its effect on this case (Tr. 37:22-25). Ms. LaCorte did so, and the Plaintiff's counsel responded (Tr. 38:1-25; 39:1-20; 40:2-25; 41:1-16). The Court did not render a determination on the matter, but advised that it would provide the parties with another date to address it further (Tr. 41:19-22). The trial was concluded for that day.

The parties subsequently submitted briefs in support of their respective positions with regard to CPLR § 3217. By Order dated August 1, 2019, the Court held that the Orders discontinuing the two prior actions to foreclose on the subject premises were without prejudice and, as such, the Plaintiff was not precluded from commencing the instant action. The Court ordered that the limited issue trial would continue on September 19, 2019 on the issues of Plaintiff's compliance with RPAPL § 1304 and the issue of joinder of the appropriate parties under RPAPL § 1311.

The trial ultimately resumed on October 17, 2019, at which time the Plaintiff's counsel, Edward Rugino, as well as the LaCortes and Ms. LaCorte's brother, Jay Donoff, appeared. Prior to any testimony, the Plaintiff objected to the introduction of defenses on the grounds that the Defendants are in default—they were served with the summons and complaint on December 22 and 31, 2013 and did not file their answer until January 30, 2014 (10/17/2019 Tr. 7:21-25; 8:1-7). As such, counsel argued, the Defendants must move to vacate their default prior to the Court entertaining their defenses on the merits (*Id.*). The Court reserved its ruling on the objection and directed the parties to proceed with testimony (Tr. 8:11-17). The testimony focused almost exclusively on whether Mr. Donoff is a necessary party to this action under RPAPL § 1311. No further testimony was offered regarding RPAPL § 1304.

Prior to addressing the merits of the trial, the Court considers counsel's objection based on the Defendants' purported default. Assuming the dates for service of the pleadings, as represented by counsel, are true, any delay in the *pro se* Defendants' filing of their Answer was minimal. As such, and in view of the Defendants' active participation in this case, the Court finds that the Plaintiff cannot demonstrate prejudice (*see* ***Jolkovsky v. Legeman***, 32 AD3d 418, 419 [2d Dept 2006] [reversing the lower court's decision to grant the plaintiff's motion for default judgment where the defendant's "delay

in appearing and answering was brief, the default was not willful, and there was no evidence that the plaintiff was prejudiced") (internal quotation marks omitted)). And importantly, public policy favors the resolution of cases on the merits (***McKiernan v. Vaccaro***, 168 AD3d 826, 827 [2d Dept 2019]). For these reasons, the Court, in its discretion and pursuant to CPLR § 2004, accepts the Defendants' answer as timely. The Court also finds that counsel's objection based on laches is without merit. The Court turns to RPAPL § 1304.

At the outset, the Court notes that it is applying the version of RPAPL § 1304 that was effective when this action was commenced on October 10, 2013 (*see* ***Emigrant Mortg. Co. v. Persad***, 117 AD3d 676, 677 [2d Dept 2014]; *see also* ***BAC Home Loans Servicing, L.P. v. Chertov***, 165 AD3d 1214, 1216 [2d Dept 2018]). RPAPL § 1304, which applies to home loans, provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." RPAPL § 1304 requires that "such notice shall be sent by such lender, assignee or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage." Proper service under RPAPL § 1304 is a condition precedent to the commencement of a foreclosure action, and as such, the plaintiff has the burden of establishing satisfaction of the condition (***Wells Fargo Bank, NA v. Mandrin***, 160 AD3d 1014, 1015–16 [2d Dept 2018]). A plaintiff may do so by: (1) providing proof of the actual mailing, such as affidavits of mailing, signed return receipts, or certificate of first class mailing, or (2) "providing proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" (***JPMorgan Chase Bank, Nat'l Ass'n v. Grennan***, 175 AD3d 1513 [2d Dept September 25, 2019]).

Here, the Plaintiff has not provided proof of the actual mailing—the Plaintiff failed to provide any United States Post Office document indicating that the notice was sent by certified mail and first-class mail (*see* ***U.S. Bank Nat'l Ass'n v. Cope***, 175 AD3d 527, 529 [2d Dept 2019]). Moreover, Schwiner, an employee of Ocwen, did not testify that he has knowledge of the mailing procedures of IndyMac, the entity that is alleged to have mailed the 90-day notices to Mr. and Mrs. LaCorte (*see* ***Citibank, N.A. v. Conti-Scheurer***, 172 AD3d 17, 21 [2d Dept 2019]; *see also* ***Wells Fargo Bank, N.A. v. Tricario***, No. 2017-01975, 2020 WL 717919, at *2 [2d Dept Feb. 13, 2020]).

It is questionable whether, through his testimony, Schwiner sufficiently established that IndyMac's records were incorporated into those of Ocwen. He merely states Ocwen "acquired" the 90-day notice addressed to Mr. LaCorte from the prior servicer (*see* ***New York Mellon v. Gordon***, 171 AD3d 197, 209 [2d Dept 2019]; ***Aurora Loan Servs., LLC v. Vrionedes***, 167 AD3d 829, 832 [2d Dept 2018]). Even assuming the records of the prior servicer were incorporated and relied upon, Schwiner failed to reference in his testimony any independent evidence from those records that the mailing took place (***Cope***, 175 AD3d at 529–30; ***U.S. Bank Nat'l Ass'n v. Herzberg***, 115 NYS3d 913, 914 [2d Dept 2020]; ***HSBC Bank USA, Nat'l Ass'n v. Dubose***, 175 AD3d 1270, 1273, [2d Dept 2019]). With regard to the notice addressed to Ms. LaCorte, Schwiner merely stated that the notice was sent via certified mail, "per the letter itself" (12/5/2018 Tr. 29:23-24), and turning to the notice addressed to Mr. LaCorte, Schwiner simply stated that it was sent by certified mail (Tr. 32:22). Schwiner neither references nor

utilizes the computer print-out in Defendants' Exhibit 6 as evidence that the required mailings actually happened (*see* ***Citibank, N.A. v. Wood***, 150 AD3d 813, 814 [2d Dept 2017]). Nor did Schwiner testify that the letter was sent via first-class mail, as required under RPAPL § 1304. In view of the above, the Court finds that the Plaintiff has failed to demonstrate compliance with RPAPL § 1304. On this grounds, the action is dismissed.

In view of the Court's decision, the Defendants' application to dismiss this action for failure to join a necessary party is denied as academic.

Dated: May 15, 2020

C. Randall Hinrichs

HON. C. RANDALL HINRICHS, J.S.C.

[X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION