Elizon Master Participation Trust 1 v Yoko Cheng
2020 NY Slip Op 32943(U)
September 4, 2020
Supreme Court, Kings County
Docket Number: 510711/15
Judge: Ellen M. Spodek

At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of September, 2020

PRESENT:
HON. ELLEN M. SPODEK,
Justice.

----------X

ELIZON MASTER PARTICIPATION TRUST 1, U.S. BANK TRUST NATIONAL ASSOCIATION, as OWNER TRUSTEE,

Index No. 510711/15

Plaintiff,

-against-

Mot. Seq. Two

YOKO CHENG, LUIS R. GUAMAN, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION, CRIMINAL COURT OF THE CITY OF NEW YORK, and JOHN DOE,

Defendants.

----------X

The following e-filed papers read on this motion:	Papers:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	
Other Papers: Memoranda of Law in Support and Reply	3[1]

Upon the foregoing papers in this action for mortgage foreclosure, plaintiff moves for orders:

1. Pursuant to CPLR 3212, granting summary judgment in the underlying mortgage foreclosure action, dismissing the defendants' amended answer

[1] While not normally numbered, plaintiff relies heavily on memoranda to deliver his supporting and reply arguments, therefore, the court has numbered them as papers considered.

and appointing a referee to compute the amounts due on the note and mortgage;

2. Pursuant to CPLR 3013,[2] dismissing the answer in this action for failing to plead with the required specificity;

3. Pursuant to CPLR 3211(b),[3] dismissing the defendants' affirmative defenses on the ground that no defense is stated and/or defenses have no merit;

4. Amending the caption, removing the fictitious names and substituting the names of the proposed non-appearing defendants; and

5. Entering a default judgment against the proposed non-appearing defendants.

Defendants Yoko Cheng and Luis Guaman oppose those portions of the motion seeking summary judgment, striking the answer and affirmative defenses, and appointing a referee to compute.

Background

On September 1, 2015, plaintiff Elizon Master Participation Trust 1, U.S. Bank National Association, as Owner Trustee (plaintiff), commenced the instant mortgage foreclosure action by filing a summons, complaint, and a notice of pendency with the Kings County Clerk's Office. The complaint alleges that on June 8, 2006, defendants Yoko Cheng and Luis Guaman executed and delivered to Chinatown Federal Savings Bank (CFSB) a note in the principal sum of three hundred and eighty-two thousand dollars ($382,000.00) secured by a mortgage encumbering certain real property known as 1943 62nd Street, Brooklyn, New York - - Block 5527, Lot 60 (the subject property).

[2] Incorrectly denoted in the Notice of Motion as CPLR 3211 (b).
[3] Incorrectly denoted in the Notice of Motion as CPLR 3013.

CFSB endorsed the note and assigned the mortgage to First American International Bank (FAIB) on February 20, 2007. The principal amount due and owing was three hundred seventy-five thousand seven hundred seventy-two dollars and twenty-eight cents ($375,772.28). Defendants also executed and delivered to FAIB a gap mortgage in the amount of one hundred twenty-three thousand two hundred twenty-seven dollars and seventy-two cents ($123,227.72). The note and mortgage were consolidated pursuant to a consolidation extension and modification agreement (CEMA), consolidated note, and consolidated mortgage to form a single lien in the amount of four hundred ninety-nine thousand dollars ($499,000.00). The CEMA, gap mortgage and consolidated mortgage were executed by both defendants. The consolidated note was executed solely by defendant Cheng. The complaint alleges that defendant Cheng defaulted on making payments due and owing on the note from January 1, 2014.

Plaintiff filed the underlying action and defendants interposed a verified answer dated September 29, 2015 asserting general denials, seventeen affirmative defenses and six counterclaims. Plaintiff filed a reply to counterclaims on October 12, 2015. On May 6, 2019, defendants filed an order to show cause seeking to amend their answer. By order dated August 13, 2019, this court granted defendants' motion to amend the answer and extended the time for summary judgment motions to be filed. Defendants' amended answer contains general denials and twenty-five affirmative defenses. On October 29, 2019, plaintiff filed the instant motion. Defendants Cheng and Guaman are the only defendants that have answered the complaint or opposed the instant motion.

Discussion

Summary Judgment

The law is well settled that 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 issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In residential mortgage foreclosure actions, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note and evidence of the default (*see W & H Equities, LLC v Odums*, 113 AD3d 840 [2d Dept 2014], citing *Washington Mut. Bank v Schenk*, 112 AD3d 615, 616 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2d Dept 2009]). Once the plaintiff makes a *prima facie* showing, the burden shifts to defendants to demonstrate the existence of a triable issue of fact as to a *bona fide* defense to the action. (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2d Dept 2012], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466,467 [2d Dept 1997]). "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare, and reveal his proofs, in order to show that the matters set up in his answer are real and capable of being established upon a trial" (*Nel Taxi Corp. v Eppinger*, 203 AD2d 438 [2d Dept 1994], quoting *DiSabato* v *Soffes*, 9 AD2d 297, 301 [1st Dept 1959]).

Production of Mortgage and Unpaid Note

Where a plaintiff's standing to bring a foreclosure action is placed in issue by the defendant, the plaintiff must prove its standing to be entitled to relief. (*see U.S. Bank, N.A. v Akande*, 136 AD3d 887 [2d Dept 2016], citing *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 973-974 [2d Dept 2014]). A plaintiff establishes standing by demonstrating that it is the holder or assignee of both the mortgage and the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor* 114 AD3d 627 [2d Dept 2014), citing *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). "Either 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" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). Plaintiff is not required to give factual details regarding the delivery to establish that possession was obtained prior to a particular date (*see JP Morgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]). "...[I]n the event that a note and mortgage are validly assigned to a third party subsequent to the commencement of a foreclosure action...the assignee can continue an action in the name of the original mortgagee even in the absence of a formal substitution" (*Woori Am. Bank v Global Universal Group Ltd.*, 134 AD3d 699, 700 [2d Dept 2015], citing CPLR 1018; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760 [2d Dept 2004]; *Central Fed. Sav., FSB v 405 W. 45th St.*, 242 AD2d 512 [1st Dept 1997]).

Plaintiff's counsel submitted an affirmation in support of the instant motion averring that his office has been in possession of the original note and mortgage since July 13, 2015, before this action was commenced. A certified copy of the note was attached to the summons and complaint as Exhibit C. Plaintiff also provides an affidavit from Roberto Montoya (hereinafter "Montoya"), Assistant Secretary of Rushmore Loan Services Management, LLC (hereinafter "Rushmore"), purported servicing agent for plaintiff, which avers that the note came into plaintiff's possession on July 2, 2015. A copy of the note is attached to the affidavit.

Since there was no agreement, power of attorney, or similar documentation of Rushmore's authority to act as servicer on behalf of the plaintiff, Montoya's affidavit fails to demonstrate plaintiff's possession of the note (*see 21st Mtge. Corp. v Adames*, 153 AD3d 474 [2d Dept 2017). However, plaintiff has demonstrated its physical possession of the note by appending a CPLR 2105 attorney-certified copy of it to the summons and complaint. As the mortgage passes with the debt as an inseparable incident, plaintiff has established its standing to commence this foreclosure action. While the record also reflects that the loan was transferred to plaintiff's successor-in-interest, Residential Mortgage Loan Trust 1, U.S. Bank National Association Not In Its Individual Capacity But Solely As Legal Trustee (Residential) on or about October 2, 2015, plaintiff has a statutory right under CPLR 1018 to continue with this action until such time as the court determines that Residential should be substituted.

Having established its standing to move for foreclosure, those branches of plaintiff's motion seeking to dismiss defendants' first, third and twenty-first affirmative defenses are granted.

Evidence of Defendants' Default

Paragraph II of the CEMA combines all prior notes and mortgages into one obligation to be paid in accordance with the terms of the consolidated note and consolidated mortgage. Section 6 (B) of the consolidated note defines a default as follows: "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default"

In support of the instant motion, plaintiff submitted the affidavit of Thomas O'Connell (O'Connell), Senior Vice President of Planet Home Lending, LLC d/b/a Planet Home Servicing (Planet) as servicing agent for Residential, successor-in-interest to plaintiff. He avers:

> "With respect to business records annexed hereto and/or reviewed by me, I am familiar with the onboarding process of loan files received from prior servicers and the annexed records have been incorporated into Planet's business records. I am familiar with how said records are incorporated into the records of Planet and how said records are maintained and retrieved. Said records are relied upon by Planet in the day-to-day course of its servicing business...There is a default under the terms and conditions of the Promissory Note and Mortgage because the January 1, 2014 payment has not been made. To date the default has not been cured...The amount due the Plaintiff on said Note through October 18, 2019 is $760,444.06..."

Attached to the affidavit were copies of a servicing agreement dated October 7, 2016 and a limited power of attorney dated October 12, 2016 authorizing Planet to act as servicer for Residential. In opposition to the motion, defendants claim that O'Connell's affidavit fails to establish the default as it relies upon inadmissible hearsay.

Plaintiff also submitted the affidavit of Nicholas Raab, Assistant Vice President of Specialized Loan Servicing (SL), servicer for Huskies Trust 2013-1 (Huskies Trust), the predecessor-in-interest to plaintiff. Raab's affidavit states that the consolidated note and mortgage were assigned to Huskies Trust by specific endorsement of the note and an assignment of mortgage dated December 31, 2013. SLS became the servicer for Huskies Trust by virtue of a servicing agreement dated January 16, 2014 and a limited power of attorney dated July 31, 2014. Raab avers:

> "That I have received training on and have personal knowledge of how records are created and maintained by SLS. That said records, including the records annexed hereto, are created and maintained in the ordinary course of SLS's servicing business. Said records are created by someone with personal knowledge of the act, transaction, occurrence or event being recorded. Said records are created at or near the time of the act, transaction, occurrence or event being recorded. With respect to electronic records, said records cannot be modified or edited subsequent to recording without a record of the modification or edit being reflected on the record...That Defendants defaulted in their payment obligations under the Note and Mortgage with respect to the installment payment due January 1, 2014. *See* Affidavit of Merit and Amounts Due and Owing, submitted herewith. Attached hereto as Exhibit "E" is a copy of the screenprints from SLS's system as of October 2, 2014 evidencing the Defendants' default and the amount due as of that date."

Attached to Raab's affidavit were photographs of computer screens representing an account inquiry conducted on October 2, 2014 related to the loan taken out by defendant Cheng and secured by the subject property. Huskies Trust was listed as the investor. The printout reflects the total amount due as of the date of the printout and that the last payment was received on December 9, 2013.

When a party relies upon the business records exception to the hearsay rule to establish its *prima facie* case, a proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*see U.S. Bank, N.A. v Kochhar,* 176 AD3d 1010, 1011 [2d Dept 2019], quoting *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019]). In accordance with CPLR 4518(a), a proper foundation is established by the proponent of the record by satisfying the following requirements: (1) that the record is made in the regular course of business; (2) that it is the regular course of the business to make the record and (3) that the record be made at or about the time of the event being recorded. In order to provide a proper foundation for business records that were created by another entity, the proponent must establish that the records were incorporated into the recipient's own records and were routinely relied upon by the recipient in its own business (*see Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [2d Dept 2019], quoting *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 739 [3d Dept 2015]).

This court finds that plaintiff failed to submit evidence in admissible form to establish a default. Raab's affidavit is insufficient to lay a proper foundation for

admission of SLS's documents under the business record exception to the hearsay rule. While Raab avers generally that he has personal knowledge of how records are created and maintained by SLS, he fails to plainly state that he has personal knowledge of SLS's record keeping practices and procedures as they relate to the account inquiry he provides. He also fails to provide an account history or escrow analysis to support the numbers provided in the account inquiry. As to the default date, the loan was assigned to Huskies Trust on December 31, 2013, several weeks after the last payment was allegedly made. However, Raab's affidavit does not allege that the date of default is based upon the records of a prior servicer that are incorporated into SLS's records and are routinely relied upon in their servicing business. O'Connell's affidavit is also insufficient to lay a proper foundation for admission of Planet's documents under the business record exception to the hearsay rule. While he states that he is generally familiar with the onboarding process of loan files he receives from other servicers, he does not identify the particular records used to establish the date of default and amount due on this loan or the name of the servicing entity that provided them.

Consequently, as plaintiff cannot establish the defendants' default, it has failed on its prima facie burden on this motion for summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 851; *Zuckerman v City of New York*, 49 NY2d at 557) Having failed to meet its prima facie burden, that burden does not shift to defendants to demonstrate the existence of a triable issue of fact (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d at 793, quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d

at 467). As a result. that portion of plaintiff's motion seeking summary judgment, dismissing the answer and appointing a referee to compute the amounts due is denied without regard to the sufficiency of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Dismissal of Answer pursuant to CPLR 3013

In support of its request to dismiss defendants answer for failing to plead with required specificity, plaintiff argues as follows:

> "*The Answer of the Defendants* contains general denials of the allegations contained in the Complaint. *Such unsubstantiated denials are insufficient to defend a motion for summary judgment.* Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986); Hellyer v. Law Capitol. Inc.,124 A.D.2d 782 (2d Dep't 1986). Defendants' denials create no triable issues of fact and are unsupported by any evidentiary showing. Averments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment. Banco Popular N. Am. v. Victory Taxi Mgmt., I N.Y.3d 381, 382 (2004); Ehrlich v. American Moninger Greenhouse Mfg. Corp., 26 N.Y.2d 255, 259 (1970)" [emphasis added].

From the above paragraph, plaintiff seems to confuse the sufficiency of defendants' answer with the sufficiency of defendants' opposition to plaintiff's instant motion. This issue aside, plaintiff offers no evidence to support its request for an order pursuant to CPLR 3013, to wit, that defendants' answer lacks required specificity. Consequently, as plaintiff has failed to meet its prima facie burden (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 851; *Zuckerman v City of New York*, 49 NY2d at 557) that burden does not shift to defendants to demonstrate the existence of a triable issue of fact (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d at 793, quoting *Mahopac Natl. Bank*

v Baisley, 244 AD2d at 467). That portion of plaintiff's motion seeking summary judgment, dismissing the answer for failing to plead with the specificity required by CPLR 3013 is denied without regard to the sufficiency of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Dismiss Affirmative Defenses pursuant to CPLR 3211(b)

"In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference. Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed" (*Fireman's Fund Ins. Co. v Farrell,* 57 AD3d 721, 723 [2d Dept 2008]). However, a defense not properly stated or one that has no merit is subject to dismissal pursuant to CPLR 3211 (b) and, thus, may be the target of a summary judgment motion after joinder of issue (*see Feinstein v Levy*, 121 AD2d 499 [2d Dept 1986]).

Defendants' amended answer raises twenty-five (25) affirmative defenses. Defendants' had predicated their opposition to plaintiff's motion by arguing only certain limited positions. These were plaintiff's lack of standing to prosecute the action, plaintiff's failure to establish a default (both opposing the request to dismiss affirmative defenses one, three, and twenty-one), plaintiff's failure to provide proper notice of default and acceleration (opposing the request to dismiss affirmative defense fourteen), and plaintiff's noncompliance with the notice requirements of RPAPL 1304 (opposing the request to dismiss a portion of affirmative defense six).

The failure to raise and support pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses and counterclaims abandoned and thus subject to dismissal (see *Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, [2d Dept 2010]; *Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312 [2d Dept 2017]; *JPMorgan Chase Bank v Cao*, 160 AD3d 821 [2d Dept 2018]; *U.S. Bank, N.A. v Gonzalez*, 172 AD3d 1273 [2d Dept 2019]). However, a CPLR 3211(b) motion cannot be used to strike general denials as contrasted with specific defenses such as those contained in CPLR 3018[b] (*see Rochester v Chiariella*, 65 NY2d 92 [1985]). As a result, those branches of plaintiff's motion seeking to dismiss defendants' affirmative defenses is granted as to the fourth, fifth, those portions of the sixth affirmative defense pertaining only to RPAPL 1303 and 1306, seventh through thirteenth, fifteenth through twentieth, and the twenty-second through twenty-fifth affirmative defenses.

Pursuant to the discussion regarding summary judgment above, those branches of defendants' motion seeking to dismiss plaintiff's first, third and twenty-first causes of action were granted.

Pursuant to CPLR 3211(e) defendants' second affirmative defense of improper service is deemed waived, thus dismissed, upon their failure to move for judgment on that ground within sixty (60) days after the service of the answer.

Defendants' Sixth Affirmative Defense

In the remaining branch of their sixth affirmative defense, defendants allege that plaintiff has failed to comply with the notice requirements of RPAPL 1304. Plaintiff claims that Raab's affidavit with attached notices and proof of mailing establishes compliance with RPAPL 1304. Defendants claim that plaintiff has failed to lay the proper foundation for the court to consider the records he provides.

RPAPL 1304 provides that at least ninety days prior to commencing a mortgage foreclosure action involving a home loan, a lender, assignee or loan servicer must send notice by registered or certified mail and also by first-class mail to the borrower at the property address and the last known address of the borrower. The notice must be in fourteen-point type, in a separate envelope from any other notice, and must contain the phone numbers of the New York State Attorney General's Homeowner Protection Program and the New York State Department of Financial Services (DFS). The notice must also provide the names and contact information for at least five housing counseling agencies in the county where the property is located from a list compiled by the DFS. Notice is considered given as of the date it is mailed.

Raab's affidavit avers that ninety-day notices were mailed to both defendants at the subject property and the Great Neck address by certified mail, return receipt requested and first-class mail. Raab further avers that notices are generated by SLS, but the actual mailing is completed by an employee of Computershare Communication Solutions (CCS). Raab states:

> "...I have received training on and have personal knowledge of the standard office practices and procedures employed by SLS on a day to day basis designed to ensure the proper addressing and mailing of items, which procedure is described in more detail herein...SLS, on behalf of the trust, electronically generated the 90 Day Pre-Foreclosure Notices...upon confirmation that the 90 Day Notices were properly generated and the information contained therein is accurate, the 90 Day Notices are printed by Computershare Communication Solutions (hereinafter "CCS")...CCS and SLS are wholly owned subsidiaries of Computershare US Services, Inc. Upon printing of the 90 Day Notices, they are enclosed by an employee of CCS in the envelopes corresponding to the coversheet for each Notice. Two copies of each 90 Day Notice are printed for each borrower and address, where applicable. One copy of the 90 Day Notice is deposited in an envelope intended to be mailed by USPS Certified Mail, while a second copy of the 90 Day Notice is deposited in an envelope intended to be mailed by USPS first-class (regular) mail. The procedure for generating, printing, and enclosure of two copies of the 90 Day Notice, one for each method of mailing, is employed for all 90 Day Notices issued with respect to a mortgaged premises situated within New York State. Envelopes intended to be mailed by Certified Mail are stamped with the appropriate postage by a CCS employee. Envelopes intended to be mailed by first-class mail are stamped with the appropriate postage by a CCS employee. Once the 90 Day Notices are enclosed and sealed in the corresponding envelopes, they are deposited in a mail bin located at the CCS Facility. The mail bin is then delivered to the USPS for mailing. To further ensure the proper addressing and mailing of the notices, the 90 Day Notices mailed by Certified Mail are tracked using USPS "Package Trackr" system, which summarizes the delivery progress of the Ninety 90 Day Notices. Screenprints for the Package Trackr system are maintained by SLS and incorporated into its business records as pertain to a specific loan."

"In order to provide a proper foundation for business records that were created by another entity, the proponent must establish that the records were incorporated into the recipient's

own records and were routinely relied upon by the recipient in its own business" (*Litkowski*,172 AD3d 780, quoting *Monica*, 131 AD3d at 739). While Raab avers that his affidavit is based on records maintained by SLS, he did not state that CCS records were incorporated into SLS records and were routinely relied upon in their business as a loan servicer. He merely states "Screenprints for the Package Trackr system are maintained by SLS and incorporated into its business records as pertain to a specific loan." Thus, the Screenprints cannot be used as proof of certified mailing.

Plaintiff also fails to supply any proof of first-class mailing. Generally, proof that an item was mailed gives rise to a rebuttable presumption that the item was received by the addressee (*see Rodriguez v Wing*, 251 AD2d 335 [2d Dept 1998], citing *Rosa v Bd of Examiners*, 143 AD2d 351 [2d Dept 1988]). "The presumption may be created by proof of actual mailing or proof of a standard office practice or procedure designed so that items are properly addressed and mailed" (*Residential Holding Corp v Scottsdale Ins. Co.*, 28 AD2d 679, 680 [2d Dept 2001]). While Raab avers that he has personal knowledge of the business practices for addressing and mailing by SLS, he describes the mailing procedures purportedly used by CCS, a completely different entity. In order to create a rebuttable presumption of receipt by the borrowers, plaintiff should have provided either an affidavit of mailing by the person who completed the mailing or an affidavit from an employee of CCS with personal knowledge attesting to the company's mailing practices and procedures. It is also worth noting that the notice is facially deficient as it fails to include the contact information for the New York State Attorney

General's Homeowner Protection Program. Having failed to provide proof of compliance with RPAPL 1304, plaintiff's request to dismiss that portion of defendants' sixth affirmative defense is denied.

Defendants' Fourteenth Affirmative Defense

As to the fourteenth affirmative defense - - failure to provide notice of default and acceleration - - Section 6 (C) of the consolidated note provides:

> "If I am in default the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least thirty (30) days after the date on which the notice is mailed to me or delivered by other means."

Section 7 further states:

> "Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder notice of a different address."

Section 15 of the consolidated mortgage provides:

> "All notices given by me or Lender in connection with this Security Instrument will be in writing. Any notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means. Notice to any one Borrower will be notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice

> address is the address of the Property unless I give notice to Lender of a different address."

Section 22 of the consolidated mortgage provides, in pertinent part, as follows:

> "Lender may require immediate payment in full...only if all of the following conditions are met: (a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including but not limited to, the promises to pay the Sums Secured when due...(b) the Lender sends to me a notice that states: (1) the promise or agreement that I failed to keep or the default that has occurred; (2) the action that I must take to cure that default; (3) a date by which I must correct the default...at least thirty (30) days from the date on which the notice is given; (4) that if I do not correct the default by the date stated in the notice, Lender may require immediate payment in Full and Lender or another Person may acquire the Property by means of Foreclosure and Sale...; and (C) I do not correct the default stated in the notice from Lender by the date stated in that notice."

In support of the motion, plaintiff provides a copy of a letter dated December 18, 2014 with the heading "default notice" signed by plaintiff's counsel and addressed to defendant Cheng at an address in Great Neck, New York. The letter states that the reason for default is failure to make payments, that payment of overdue amounts by a date certain is necessary to cure the default, and that the lender may accelerate the debt by requiring payment in full if the default is not cured. The cure date provided is January 17, 2014. The letter contains a statement that it was mailed via first class mail and certified mail return receipt requested with a certified mail number. Attached to his affirmation are copies of an envelope and certified mail return card addressed to defendant Cheng and a certified mail receipt. The section of the card entitled "Complete This Section Upon Delivery" is blank. Paragraph 31 of the affirmation in support states:

> "Plaintiff's counsel has in place a standard office practice and procedure designed to ensure the proper addressing and mailing of notices...Plaintiff's counsel has received training on and is familiar and has personal knowledge of said procedure, including the methods used to create and maintain records documenting and addressing such items. Said records are made at or near the time of the event being documented and in the regular course of Plaintiff's business as attorney for Lenders and Loan Servicers. Said procedure was adhered to with respect to the notice of default in this action."

In opposition to the motion, defendants claim that the notice of default is facially defective in that it does not provide a cure date within thirty days of the date of the notice and that plaintiff has failed to establish proper mailing.

As defendants do not challenge the Great Neck, New York mailing address, the court concludes that it was the notice address provided for purposes of servicing the account. Further, as defendants have not cited any law expressly requiring that notice of contractual default be given to all mortgagors, notice to defendant Cheng would constitute notice to defendant Guaman under the terms of the consolidated note. In order to establish mailing, plaintiff may provide proof of actual mailing or a description of its office's practice and procedure for mailing (*see Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Taylor*, 170 AD3d 921 [2d Dept 2019]). In this respect, plaintiff fails. There is no affidavit or affirmation of service by plaintiff's counsel or anyone in his office to demonstrate mailing by first class mail. Further, although he claims familiarity with his office's practices and procedures for mailing, he does not describe them. Therefore, plaintiff has failed to demonstrate that notice was given by first-class mail. If another method of mailing is used, notice is given when actually

delivered to the notice address. The certified mail receipt provided by plaintiff demonstrates when the notice was mailed, but not when it was delivered. Thus, plaintiff has failed to demonstrate notice by certified mail. The court further notes that the default notice is facially defective in that it fails to provide a cure date within thirty (30) days of the notice. The cure date of January 17, 2014 was eleven (11) months prior to the date of the notice. Having failed to provide proof of proper notice, plaintiff's request to dismiss affirmative defense fourteen is denied.

Default against Non-Answering Defendants
and Amending the Caption

Plaintiff seeks orders amending the caption substituting Giovanna Rosario, Piana Rosario, John Rosario, John Guaman, Jane Guaman, and Luis Doe, occupants of the subject property, in place of defendant John Doe and for a default judgment as against them. The court notes that this branch of plaintiff's motion is unopposed and is supported by the affirmation of its counsel. Further, plaintiff has demonstrated service upon these proposed defendants and none have answered or otherwise moved in this matter. Accordingly, that branch of plaintiff's motion to amend the caption to substitute the aforementioned defendants and for a default judgment against same is granted (*see Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 556 [2d Dept 2014], citing CPLR 1024; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 1046 [2d Dept 2012]).

Conclusion

Based upon the foregoing,

1. That branch of plaintiff's motion, pursuant to CPLR 3212, for an order granting summary judgment on the underlying mortgage foreclosure action, dismissal of the amended answer and appointment of a referee to compute monies due is denied;

2. That branch of plaintiff's motion, pursuant to CPLR 3103, for an order dismissing the amended answer for failing to plead with the required specificity is denied;

3. That branch of plaintiff's motion, pursuant to CPLR 3211 (b), for an order dismissing the defendants' affirmative defenses is granted to the following extent:
    a. Affirmative defenses numbered one through five are dismissed.
    b. Affirmative defense six is dismissed only as to those branches relating to RPAPL 1303 and 1306.
    c. Affirmative defenses seven through thirteen and fifteen through twenty-five are dismissed;

4. That branch of plaintiff's motion for an order amending the caption by striking the name of John Doe and substituting the non-appearing occupants of the subject premises is granted as unopposed;

5. That portion of plaintiff's motion for a default judgment against all non-answering defendants is granted as unopposed.

The court, having considered the parties remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R,

Ellen Spodek
J.S.C.