

HSBC Bank USA v Palmore

2020 NY Slip Op 33362(U)

October 13, 2020

Supreme Court, Suffolk County

Docket Number: 11748-2013

Judge: Howard H. Heckman, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

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

INDEX NO.: 11748-2013
MOTION DATE: 9-11-2020
MOTION SEQ. NO.: #003 MG
#004 MD

-----X
HSBC BANK USA,

Plaintiff,

-against-

HEATHER PALMORE, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
GROSS, POLOWY & ORLANS, ESQ.
1775 WEHRLE DRIVE, STE 100
WILLIAMSVILLE, NY 14221

DEFENDANTS' ATTORNEY:
JEFFREY A. SPINNER, ESQ.
35 PINEWLAWN RD. STE. 106E
MEVILLE, NY 11747

Upon the following papers numbered 1 to 38 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-18 (#003); Notice of Cross Motion and supporting papers 19-26 (#004); Answering Affidavits and supporting papers 27-38; 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 HSBC Bank USA, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Heather Palmore and Helisse D. Palmore; 2) discontinuing the action against defendants designated as "John Doe"; 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 granted; and it is further

ORDERED that the cross motion by defendants Heather Palmore and Helisse D. Palmore seeking an order pursuant to CPLR 3212 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 amending the caption upon the Calendar Clerk of the Court; 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 \$304,000.00 executed by defendants Heather Palmore and Helisse D. Palmore on June 13, 2005 in favor of First Suffolk Mortgage Corporation. On the same date the mortgagors/borrowers executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that the borrowers defaulted under the terms of the mortgage by failing to make timely monthly

mortgage payments beginning April 1, 2012 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 April 29, 2013. Defendants/mortgagors served an answer dated July 13, 2013 asserting eleven (11) affirmative defenses.

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, defendant s submit a cross motion and claim that plaintiff has failed to submit sufficient admissible evidence to prove its entitlement to foreclose the mortgage; that plaintiff lacks standing to maintain this action; and that plaintiff has failed to prove compliance with pre-foreclosure RPAPL 1304 default notice requirements.

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 does not contest their failure to make timely payments due under the terms of the promissory note and mortgage agreement since April 1, 2012. In fact there is evidence submitted in the form of a signed letter from both mortgagors conceding that they are in default in making timely payments due under the terms of the mortgage loan since 2012. 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 mortgagors' continuing default, plaintiff's lack of standing, and plaintiff's compliance with 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 record reveals that Wells Fargo Bank, N.A. has been servicing this mortgage loan since

October, 2005. The four affidavits submitted from the mortgage servicer/attorney-in-fact's (Wells Fargo Bank, N.A.'s) vice president loan documentation dated July 11, 2019 ("Julian affidavit"); from a vice president loan documentation dated July 10, 2019 ("Majors affidavit"); from a vice president loan documentation dated March 4, 2013 ("Ringquist affidavit") and from a vice president loan documentation dated August 30, 2012 ("Leal-Salgado affidavit") provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth each employee's review of the business records maintained by Wells Fargo; the fact that the books and records are made in the regular course of Wells Fargo's business; that it was Wells Fargo'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 (*Bank of New York Mellon v. Gordon*, 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019)). Based upon the submission of these affidavits, 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.

With respect to the issue of standing, Uniform Commercial Code 3-804 provides in pertinent part the following:

"The owner of an instrument which is lost, whether by destruction, theft, or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms....."

The law provides that where a promissory note is lost, destroyed or stolen, a mortgage lender may foreclose provided that the lender proves ownership of the note, the circumstances surrounding the lost, destroyed or stolen note, and the terms of the note (*Marrazzo v. Piccolo*, 163 AD2d 369, 558 NYS2d 103 (2nd Dept., 1990); *Brown Bark II, LP v. Weiss & Mahoney, Inc.*, 90 AD3d 963, 935 NYS2d 637 (2nd Dept., 2011); *Ventricelli v. DeGennaro*, 221 AD2d 231, 633 NYS2d 315 (1st Dept., 1995); *Genger v. Sharon*, 910 FSupp2d 656 (U.S. Dist.Ct., S.D., N.Y., 2012); *see also Weiss v. Phillips*, 157 AD3d 1, 65 NYS3d 147 (1st Dept., 2017)).

Plaintiff has submitted sufficient evidence in the form of a copy of the original indorsed in blank promissory note to establish ownership together with affidavits from vice presidents of the mortgage servicer to prove the fact that the original indorsed in blank promissory note was in plaintiff's possession prior to commencement of this action and was subsequently lost. The final element concerning proof of the terms of the note has been established by plaintiff's submission of a copy of the original promissory note signed by the borrowers. Under these circumstances plaintiff has established the three elements necessary to prove the lender's right to foreclose the mortgage and its standing to maintain this action based upon possession of the indorsed in blank note prior to commencement of this action (*Marrazzo v. Piccolo, supra.*; *Weiss v. Phillips, supra.*; *see also 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)). 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)).

With respect to the issue of the borrowers' default in making payments, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see Property Asset Management, Inc. v. Souffrant et al.*, 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018); *PennyMac Holdings, Inc. V. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como*, 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk*, 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to the mortgagors' undisputed default in making timely mortgage payments, together with documentary evidence in the form of internal business servicing records reflecting the mortgage loan history of this mortgagors' account which specifically confirm the default in payments by the mortgagors and is sufficient to sustain its burden to prove the mortgagors have defaulted under the terms of the parties agreement by failing to make timely payments since April 1, 2012 (CPLR 4518; *see Bank of New York Mellon v. Gordon*, 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019); *Wells Fargo Bank, N.A. v. Thomas, supra.*; *Citigroup v. Kopelowitz, supra.*). Moreover, plaintiff has provided a copy of a letter signed by both borrowers acknowledging the default in payment by both borrowers which is clearly an admission of default. Accordingly, and in the absence of any proof to raise an issue of fact concerning the mortgagors' continuing default, plaintiff's application for summary judgment based upon defendants' breach of the mortgage agreement and promissory note must be granted.

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 two affidavits from the mortgage servicer/attorney-in-fact's (Wells Fargo's) vice presidents ("Julian affidavit" & "Majors affidavit") each of whom attest and confirm the mailing of the 90-day notices was done in compliance with statutory requirements on April 19, 2012 which was more than ninety days prior to commencement of this foreclosure action. This testimony, coupled with plaintiff's submission of documentary evidence in the form of copies of the actual 90 day notices mailed by first class and certified mail addressed to the borrowers at the mortgaged premises, together with business records confirming both mailings were done including the certified mailing receipt signed by Heather Palmore verifying the borrower's actual *individual, personal* receipt of the "3242" certified mailing on April 25, 2012, and a copy of the RPAPL 1306 filing statements confirming compliance and mailing of the RPAPL

1304 notices filed with the New York State Department of Financial Services to the mortgagor-- 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 conclusory denials of compliance are not supported by any relevant, admissible evidence to contradict the proof submitted by the plaintiff and to raise a genuine 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)).

As to defendants' contention that separate notices are required under the terms of the statute, no such requirement is written into the statute and this court declines to interpret the statute in such manner. Clearly the intent of RPAPL 1304 (and its related statutory partner-- CPLR 3408) was to provide a preliminary mechanism for defaulting homeowners to become aware that legal action was about to be initiated by the mortgage lender (as a result of their continuing default which presumably each borrower is very much aware of) and to introduce a compulsory court settlement conference program where the defaulting borrowers could meet with mortgage lender's representatives and court personnel in an attempt to amicably resolve the borrowers' breach of contract and to thereby avoid foreclosure. The intent of the statute was not however to provide a defaulting borrower with a technical legal mechanism to delay, forestall, and/or seek to avoid the natural and necessary consequences of breaching a promise based upon decades of established contract law. In this instance the borrowers were clearly served with notices advising them of their default and the opportunities which existed to address the breach prior to commencement of a foreclosure action. Tellingly, the borrower/mortgagor who did not sign the certified mailing receipt did not submit an affidavit claiming that she was not aware of the RPAPL 1304 notice. Instead the only admissible proof submitted by these borrowers is an affidavit from the mortgagor who actually signed for the certified mailing and clearly therefore received statutory notice of the default. Her complaint that she did not receive an individual notice addressed solely in her name is illogical since she clearly was on notice of the default by signing the receipt for the certified mailing. Absent an affidavit from the borrower claiming that she never received such notice-- which is not a part of this record-- there exists no legal grounds to dismiss plaintiff's complaint since the intent of the notice was clearly fulfilled by plaintiff's proof of mailing and the borrower's admitted receipt of the notice. Based upon these circumstances, plaintiff has submitted sufficient proof of strict statutory compliance.

Finally, defendants have failed to submit any admissible evidence to support their remaining affirmative defenses in opposition to plaintiff's motion. Accordingly, those defenses must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, defendants' cross motion is denied and plaintiff's motion seeking an order granting summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: October 13, 2020

HON. HOWARD H. HECKMAN, JR.

J.S.C.