

**HSBC Bank USA, N.A. v Besharat**

2020 NY Slip Op 35441(U)

December 21, 2020

Supreme Court, Putnam County

Docket Number: Index No. 500293/2018

Judge: Gina C. Capone

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF PUTNAM**

-----X  
HSBC BANK USA, N.A.

Plaintiff,

-against-

WALID BESHARAT, CINDY ANN BESHARAT, "JOHN DOE" said name 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 complaint

Defendants.

-----X  
**CAPONE, J.S.C.**

**DECISION & ORDER**

Index No.: 500293/2018  
Sequence Nos. 2 & 3

The following papers, numbered 1-25, were read and considered on the Plaintiff's motion to: (1) strike Defendants Walid Besharat and Cindy Ann Besharat's answer and grant summary judgment in Plaintiff's favor; (2) amend the caption in the action to name Julian Besharat in place of "John Doe"; (3) reforming the legal description of the mortgaged premises contained in the recorded mortgages consolidated by the CEMA by substituting the complete Intended Legal Description; (4) appoint a referee; and (4) grant Plaintiff such other and further relief as the Court may deem just and proper; and Defendants' cross motion to dismiss the action in its entirety.

**PAPERS**

**NUMBERED**

Notice of Motion/Affirmation of Settlement Conference Compliance/  
Attorney Affirmation in Support/ Exhibits 1, 1A, 1B, 1C, 1D, 1E, 2-10

1-18

Notice of Cross Motion/ Attorney Affirmation in Opposition to Plaintiff's  
Motion and in Support of Defendants' Cross Motion/ Affidavit of Walid

19-22

Besharat in Support of Cross Motion/ Affidavit of Cindy Ann Besharat  
in Support of Cross Motion

Affirmation of Plaintiff's Counsel in Opposition to Cross Motion and in  
further support of Plaintiff's Motion/ Exhibit 1 23-24

Attorney Affirmation in Reply 25

HSBC Bank USA, NA commenced this mortgage foreclosure action against, among others, the Defendants Walid Besharat and Cindy Ann Besharat (hereinafter the Defendants). The Defendants interposed an answer in which they asserted various affirmative defenses, including the Plaintiff's failure to comply with RPAPL §1304 and with a condition precedent in the subject mortgage requiring the Plaintiff to send notice of default prior to accelerating the mortgage. The Plaintiff now moves, inter alia, for summary judgment on the complaint. The Defendants cross-move to dismiss the action on the grounds that the Bank has failed to comply with conditions precedent to commencing the foreclosure action.

*A. RPAPL § 1304*

The Plaintiff contends that it is entitled to summary judgment and an order of reference. The Defendants contend that the Bank cannot prove it complied with RPAPL § 1304 and, thus, the action insofar as asserted against them must be dismissed.

“[P]roper service of RPAPL § 1304 notice on the borrower ... is a condition precedent to the commencement of a foreclosure action, and the Plaintiff has the burden of establishing satisfaction of this condition” (*Nationstar Mtge., LLC v Durane-Bolivard*, 175 AD3d 1308, 1309 [2d Dept 2019], quoting *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]; see *JPMorgan Chase Bank, National Association v Nellis*, 183 AD3d 583, 584 [2d Dept 2020]). RPAPL § 1304(1) 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.”

“The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower” (*U.S. Bank N.A. v Ahmed*, 174 AD3d 661, 663 [2d Dept 2019]; *see* RPAPL § 1304[2]). “Proof of the requisite mailing is established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or 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” (*U.S. Bank, N.A. v Ahmed*, 174 AD3d at 663, *quoting Wells Fargo Bank, NA v Mandrin*, 160 AD3d 1014, 1016 [2d Dept 2018]). Where a defendant raises the issue of compliance with RPAPL § 1304 as an affirmative defense, a party moving for summary judgment is required to make a prima facie showing of strict compliance with RPAPL 1304 (*see Bank of Am., N.A. v Bittle*, 168 AD3d 656, 657 [2d Dept 2019]; *Bank of Am., N.A. v Wheatley*, 158 AD3d 736, 737 [2d Dept 2018]).

Here, the Plaintiff failed to establish, prima facie, that it strictly complied with the requirements of RPAPL § 1304. The Plaintiff did not submit affidavits of mailing or proof of mailing by the United States Postal Service to establish that it properly mailed notice to the Defendants as required by RPAPL § 1304. Instead, the Plaintiff relied on an affidavit of Christopher Miranda, who was employed as Vice President and Assistant Secretary of the Residential Mortgage Loan Administrative Services Division DMI of the Plaintiff, together with copies of the purported notices themselves to establish compliance with RPAPL § 1304. Miranda stated that, “[b]ased upon [his] review of the business records and [his] knowledge of procedures regarding the creation and mailing of correspondence to borrowers,” the notices were mailed to the property address of the real estate and the last known address of the borrowers, if different, separate from any other mailing, by certified mail and also by first class mail (NYSCEF Doc. 53, ¶6). Despite Miranda’s statement of having “knowledge of procedures regarding the creation and

mailing of correspondence to borrowers” (NYSCEF Doc. 53, ¶6, 8), he did not describe the mailing practices and procedures themselves and, therefore, failed to make the requisite showing that he was familiar with the Plaintiff’s mailing practices and procedures to establish “proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed” (*U.S. Bank N.A. v Henderson*, 163 AD3d 601, 603 [2d Dept 2018]; *see Nationstar Mortgage, LLC v Jean-Baptiste*, 178 AD3d 883, 886 [2d Dept 2019]).

The Plaintiff also failed to attach as exhibits to its motion, any documents that establish that the mailing actually happened. With respect to the attached notices themselves, while the first four notices contain the statement “sent via certified mail” with a 20–digit number below it, no receipt or corresponding document issued by the United States Postal Service was submitted proving that the letter was actually sent by certified mail more than 90 days prior to commencement of the action. The Plaintiff also failed to submit any documentary evidence that the other four notices which were purportedly sent by first-class mail were indeed mailed (*see Deutsche Bank National Trust Company v Dennis*, 181 AD3d 864, 867 [2d Dept 2020]). While the Plaintiff did submit an additional affidavit of mailing in reply, which will be discussed more substantively below, submissions made for the first time in reply cannot be used to satisfy the Plaintiff’s prima facie burden (*see Everbank v Greisman*, 180 AD3d 758, 760 [2d Dept 2020]).

Since the Plaintiff failed to provide evidence of the actual mailing by either certified mail or first-class mail, “or 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 ... the Plaintiff failed to establish, prima facie, that it complied with RPAPL § 1304” (*Citibank, N.A. v Conti–Scheurer*, 172 AD3d 17, 21 [2d Dept 2019] [citations and internal quotation marks omitted]; *see US Bank National Association v Mendelovitz*, \_\_AD3d \_\_; 2020 NY SLIP OP 07621 [2d Dept; December 16, 2020]).

B. *Notice of Default*

For the same reasons, the Plaintiff's submission of Miranda's affidavit, together with a copy of the purported 30-day notice required by the terms of the mortgage agreement itself, also failed to establish, prima facie, "that it mailed a notice of default to the defendant by first-class mail on any particular date, or actually delivered such notice to the designated address if sent by other means, as required by the terms of the mortgage as a condition precedent to foreclosure" (*U.S. Bank N.A. v Ahmed*, 174 AD3d at 663–664; see *Deutsche Bank National Trust Company v Dennis*, 181 AD3d at 867; *Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848, 851-852 [2d Dept 2020]).

Since the Plaintiff failed to establish its prima facie entitlement to judgment as a matter of law, those branches of its motion which were for summary judgment on the complaint insofar as asserted against the Defendants, to strike the Defendants' answer, and for an order of reference must be denied regardless of the sufficiency of the Defendant's opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

C. *The Defendants' Cross Motion*

Despite the failure of proof on the Plaintiff's prima facie case, the Defendants still have the burden of establishing prima facie that a condition precedent to commencing the foreclosure action were not fulfilled in order to be entitled to dismissal of the action (*see Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 24). Here, the Defendants assert that the Plaintiff failed to provide notice pursuant to RPAPL § 1304 and notice of default as required by the mortgage itself.

The Defendants each submitted affidavits denying that they were ever served with a notice of default or with any notice pursuant to RPAPL § 1304. Each affirmed that, at the time of the purported service, they were residing in the subject property and were and had received regular mail at that address, which was also their home (NYSCEF Docs. 70-71). The Defendants

also incorporated by reference the Plaintiff's submissions in support of its motion for summary judgment, specifically Mr. Miranda's affidavit and the copies of the purported notices. Since the Defendants offered more than a bare denial of receipt, we find these submissions sufficient to establish their prima facie burden on their motion to dismiss for failure to strictly comply with the requirements of RPAPL § 1304 and a condition precedent in the mortgage itself (*cf. Deutsche Bank National Trust Company v Dennis*, 181 AD3d at 871; *Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 24 [Defendant did not meet burden on cross motion to dismiss where defendant only stated that she never received the notice; She did not confirm that she still lived at the address on the date it was mailed, she did not confirm that she had been receiving other mail at that address, and she did not state that she was never contacted by the USPS regarding mail for which she was required to sign]).

In opposition to the Defendants' cross motion to dismiss (and also in reply), the Plaintiff submitted a new affidavit of mailing of William Long, a Contract Management Coordinator for PHH Mortgage Corporation, a purported prior sub-servicer of the loan at issue (NYSCEF Doc. 76). Mr. Long affirmed that, based upon his personal knowledge of PHH's mailing practices and procedures, the proper RPAPL § 1304 notices were sent by both First Class and Certified Mail to the borrowers, separately from any other mailing, and at least 90 days before commencement of the action. Moreover, notices of default were prepared and addressed to the borrower and mailed First Class mail to the address associated with the loan at issue (NYSCEF Doc. 76, ¶4). In explaining the mailing practices and procedures, Mr. Long affirmed that the 90-day pre-foreclosure notices and notices of default were systematically generated after 30 or more days of delinquency, and that these notices were generated when electronic data and information from PHH's internal servicing system is sent to PHH's vendor mailing agent, who then creates the physical letters and addresses the letters to all the parties identified on the note and mortgage at

issue and then deposits the letters with the USPS for mailing by First Class and Certified Mail. After the notices are mailed, a file is then transmitted back to PHH with electronic data and PDF images of the notices and that data and images are incorporated back into PHH's business records via its internal servicing system (NYSCEF Doc. 76, ¶4).

This submission by the Plaintiff is insufficient to raise a genuine issue of material fact with respect to its compliance with the notice requirements of RPAPL § 1304 and the notice of default requirement contained in the mortgage. Indeed, the Plaintiff appears to distance itself from the affidavit of Mr. Miranda, which it had submitted in support of its motion, and has now proffered a new account of the mailing of the required notices. Nevertheless, according to Mr. Long's affidavit, Plaintiff admits that it did not, in fact, mail any notices directly in connection with this loan. Neither did PHH, the purported prior sub-servicer of this loan by whom Mr. Long was employed. Rather, an unidentified "vendor mailing agent" created the notices, addressed them, and mailed them. Far from establishing that the Plaintiff had complied with the requirements of RPAPL § 1304, the Plaintiff's submission of Mr. Long's affidavit of mailing has only revealed further deficiencies in its proof. Even if this Court were to accept Mr. Long's recitation of the mailing practices of this unnamed vendor mailing agent at face value, which this Court does not, the Plaintiff has further failed to establish that PHH Mortgage Corporation was actually a servicer of the loan at issue or that PHH has been given any authority to act on behalf of the Plaintiff by failing to submit an appropriate power of attorney. Ultimately, Mr. Long's affidavit constitutes hearsay and is not competent evidence to establish compliance with the conditions precedent to commencing the foreclosure action (*cf. Deutsche Bank National Trust Company v Silverman*, 178 AD3d 898, 900 [2d Dept 2019]). The Plaintiff's submissions have utterly failed to rebut the Defendants' prima facie showing.

Accordingly, it is hereby

ORDERED that the Plaintiff's motion (Seq. #2) is denied in its entirety; and it is further

ORDERED that the Defendants' cross motion to dismiss (Seq. #3) is granted; and it is further

ORDERED that the action is dismissed without prejudice.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York  
December 21, 2020

  
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**HON. GINA C. CAPONE, J.S.C.**