MTGLQ Invs., LP v Gross
2022 NY Slip Op 34514(U)
May 9, 2022
Supreme Court, Westchester County
Docket Number: Index No. 64020/2019
Judge: Sam D. Walker
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.

To commence the statutory time 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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

--x

MTGLQ INVESTORS, LP,

Plaintiff,

-against-

STEVEN GROSS; JACQUELINE GROSS; "JOHN DOE 1 to JOHN DOE 25," said names being fictitious, the persons or parties intended being the persons, parties, corporations, or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint, Defendants,

Defendants.

DECISION & ORDER
Index No. 64020/2019
Sequence 1 & 2

--x

The following papers were considered on the plaintiff's motion seeking a default judgment, order of reference, as well as defendant's cross-motion denying plaintiff's motion in its entirety and granting defendant summary judgment against plaintiff.

Notice of Motion/Affirmations/Affidavits/Exhibits A-K	1-15
Memorandum of Law in Support of Motion	16
Notice of Cross-Motion/Affirmation/Affidavit/	17-20
Memorandum of Law in Support of Cross-Motion/Exh. A-I	21-30
Affirmation/Affidavit in Opposition to Cross-Motion/Exh 1	31-32
Memorandum of Law in Reply	33

This is an action to foreclose a Mortgage on real property located at 14 Grandview Avenue, Ardsley, New York 10502. Defendant Steven Gross borrowed the sum of $417,000.00 from Countrywide Bank, FSB, as evidenced by a Note dated July 25, 2008. As security for repayment of this obligation, on July 25, 2008, Defendants Steven Gross and Jacqueline Gross, executed, acknowledged, and delivered a certain Mortgage granting Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") solely as nominee for Countrywide Bank, FSB a mortgage lien on the premises. The Mortgage was duly recorded with the Office of the Westchester County Clerk on August 26, 2008.

The Mortgage was then assigned from MERS as nominee for Countrywide Bank, FSB to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP, by Assignment of Mortgage dated August 26, 2010, which was recorded with the Westchester County Clerk on September 16, 2010. The Note and Mortgage were then transferred and assigned from Bank of America, N.A successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP to Nationstar Mortgage, LLC by indorsement of the Note to blank and Assignment of Mortgage dated April 9, 2014 and recorded with the Westchester County Clerk on April 22, 2014. The Note and Mortgage were then transferred and assigned from Nationstar Mortgage, LLC to Bank of America, N.A. by indorsement of the Note to blank and Assignment of Mortgage dated January 17, 2017, and recorded with the Westchester County Clerk on February 14, 2017.

The Note and Mortgage were then transferred and assigned from Bank of America, N.A. to Nationstar Mortgage, LLC by indorsement of the Note to blank and Assignment of Mortgage dated May 15, 2013 and recorded with the Westchester County Clerk on June 24, 2014. The Note and Mortgage were then ultimately transferred from Nationstar Mortgage, LLC to Plaintiff by indorsement of the Note to blank and Assignment of Mortgage dated January 17, 2017 and recorded with the Westchester County Clerk on February 14, 2017. Pursuant to Plaintiff's business records, Plaintiff's Note Custodian, Wells Fargo Bank, N.A. has been in possession of the original Note from December 10, 2016 to present.

Plaintiff alleges that Defendants defaulted in making the monthly payment due pursuant to the Note and Mortgage on September 1, 2009 and monthly thereafter. Plaintiff alleges that on June 6, 2019, a notice of default was mailed by first class mail to Defendants at the address designated for such notice pursuant to the terms of the Mortgage. Plaintiff also alleges that on June 6, 2019, Plaintiff through its servicer, served a RPAPL 1304 Notice (pre-foreclosure 90-Day Notice) with a list of at least five HUD Housing Counseling Agencies, by regular and certified mail, to Defendants at the Premises. Pursuant to the acceleration provisions of said Note and Mortgage, Plaintiff, upon notice, elected that the whole of the principal sum secured be immediately due and payable. By virtue of such acceleration, the principal sum of $412,661.05, plus fees, costs and interest thereon from August 1, 2009 became due and owing.

The within foreclosure action was commenced by filing the Notice of Pendency, Summons and Complaint, and Certificate of Merit on September 9, 2019. Plaintiff alleges that service upon all Defendants with the Summons and Complaint as well as the notices required by RPAPL §1303 and RPAPL §l320 was completed on or before September 19,2019. None of the defendants have appeared or answered the Complaint except Defendants, who filed an Answer with Counterclaims on October 7, 2019 and an Amended Answer with Counterclaims on October 21, 2019.

Plaintiff then filed a Reply to Counterclaims on October 9, 2019 and a Reply to Counterclaims to Defendants' Amended Answer on December 20, 2019 after the parties executed a stipulation permitting Plaintiff to file same.

Mandatory settlement conferences pursuant to CPLR 3408 was held between October 28, 2019 to January 21, 2020. The parties were unable to settle and Plaintiff was given leave to continue prosecution of the foreclosure action.

Plaintiff now seeks an Order pursuant to RPAPL § 1321 and CPLR R. 3212 granting summary judgment in favor of Plaintiff; granting a default judgment against all the non-appearing Defendants; substituting Matt Gross and Alexa Gross for John Doe 1 to John Doe 25 as party Defendants, amending the caption to reflect said amendments; and appointing a referee to compute the amount of the mortgage debt owed Plaintiff pursuant to RPAPL § 1321. Defendants oppose Plaintiff's motion and cross-move for an order dismissing the instant action and granting summary judgment in favor of Defendants pursuant to CPLR 3212 and quiet title pursuant to RPAPL Article 15 and for such other and further relief which may be appropriate.

In their cross-motion, Defendants' allege that this is the third action commenced by Plaintiff. On September 10, 2010, a foreclosure action on the same property and the same loan as this action was initiated by BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP by the filing of a Summons and Complaint, under Index number 22082/2010 with the Westchester County Clerk. That Summons and Complaint referenced a September 1, 2009 date of default. The first action was ultimately discontinued, as BAC Home Loans filed a motion to discontinue the action. Defendants allege that the discontinuance was due to potential defects with the 90-day notice, and said discontinuance was granted on or about January 29, 2013.

On December 31, 2014, a Second Action was initiated on the same property and loan, by Nationstar Mortgage, LLC, with the filing of the Summons and Complaint, under Index No. 71926/2014, which contained the same date of default of September 1, 2009. Defendants, Steven Gross and Jacqueline Gross served an Answer on February 12, 2015. After the conclusion of the Residential Foreclosure Settlement Conference Part, on April 22, 2016, Defendant Jacqueline Gross filed a Chapter 7 Bankruptcy with the Southern District of New York. Jacqueline Gross received a discharge of bankruptcy on January 17, 2017. Thereafter, motion practice was conducted by Plaintiff and Defendants which ultimately led to a Decision and Order by the Honorable Charles D. Wood, dated July 3, 2017, which found Plaintiff had standing but failed to prove its compliance with conditions precedent to the commencement of the action.

The matter remained inactive, and the Court subsequently scheduled a status conference in the Mandatory Appearance Part for March 15, 2018 and at that conference, the Court scheduled the matter for a trial for April 27, 2018 and filed a Trial Scheduling Order. Prior to the scheduled Trial, on April 5, 2018, Plaintiff filed a second motion for summary judgment which was opposed by Defendants and resulted in another denial based on Plaintiff's failure to prove compliance with the conditions precedent. The Court further directed the parties to appear in the Foreclosure Trial Part on July 2, 2018, prepared to proceed with trial. At the conclusion of the trial, Referee Albert J. Degatano issued a Referee's Report to the Court in favor of Defendants

pursuant to CPLR 4401 for judgment as a matter of law. Defendants thereafter made a motion to confirm the referee's report.

Plaintiff then requested three different adjournments, and ultimately filed opposition, which led to a Decision and Order by the Honorable Kathie E. Davidson which *inter alia* confirmed the Referee's Report, granted Defendants judgment as a matter of law pursuant to CPLR 4401 and directed Defendants *inter alia* to serve a proposed judgment on notice. A corresponding Judgment dismissing the matter pursuant to CPLR 5013 was executed on May 28, 2019 and entered with the Westchester County Clerk on May 30, 2019 and notice of entry was filed on June 19, 2019.

On September 9, 2019, Plaintiff commenced this action by the filing of the Summons and Complaint and Notice of Pendency. Defendants, Steven Gross and Jacqueline Gross filed an Answer with Counterclaims on October 7, 2019, and the matter thereafter was transferred to the Residential Conference Part from October 28, 2019 to January 21, 2020. On December 8, 2020, Plaintiff brought the instant motion for summary judgment. Due to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, passed on December 28, 2020, the matter was stayed for a period of 60 days and therefore, Plaintiff's motion was adjourned. Defendants argue that for the reasons set forth in their memorandum of law, in Defendant's cross-motion for summary judgment should be granted and the action dismissed.

DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); CPLR 3212[b]). "To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment," (*see Campaign v. Barba*, 23 AD3d 327 [2d Dept. 2005]). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, (*see Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 [1986]).

"In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced," (*see Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *U.S. Bank N.A. v. Cange*, 96 A.D.3d 825, 826, 947 N.Y.S.2d 522; U.S. *Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753–754, 890 N.Y.S.2d 578; *Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709, 888 N.Y.S.2d 914). "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," (*see U.S. Bank, N.A. v. Collymore*, 68 A.D.3d at 754, 890 N.Y.S.2d 578; *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 939 N.Y.S.2d 120).

Here, Plaintiff has established through the Affidavit of Wilma Colon, Litigation FC Specialist of New Rez, LLC, F/K/A, New Penn Financial, LLC, D/B/A Shellpoint Mortgage Servicing, as services and attorney-in-fact for Plaintiff MTGLQ Investors, L.P., who states that she has personal knowledge of the facts of this matter and that based upon her review of the books and records of Plaintiff and knowledge of the procedures for creating these records, that pursuant to the business records of Plaintiff, Plaintiff's Note Custodian, Wells Fargo Bank, N.A. has been in possession of the original Note from December 10, 2016 to present. Plaintiff provided a copy of Plaintiff s records demonstrating possession of the original Note as contained in Shellpoint's business records.

Plaintiff has also established standing by physical delivery of the Note and Mortgage prior to the time the action was commenced. To support physical delivery of the Note and Mortgage at the time the action was commenced, Plaintiff produced the copy of the Note and Mortgage as attachments to its Complaint that was served upon Defendant as evidence that it possessed the same at the time the action was commenced. By attaching the Note, Plaintiff has proven that delivery of the Note occurred prior to the commencement of the action. Since Plaintiff established its standing by physical delivery, the Court need not address the validity of any prior or] subsequently executed document assigning the Mortgage and Note, (*see Deutshe Bank Nat'l. Trust Co. v. Whalen*, 107 A.D.3d 931 citing cf *Deutshe Bank Nat'l. Trust Co. v. Spanos*, 102 A.D.3d at 912). Furthermore, as a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the Note, (*see Bank of New York v. Silverberg*, 86 A.D.3d 274, 926 N.Y.S.2d 532, 2011 N.Y. Slip Op. 050 (2d Dept. 2011). Plaintiff has, therefore, established standing for the purpose of commencing foreclosure against Defendants.

Wilma Colon also stated in her Affidavit that she had personal knowledge of the records and record making practices, and how such records are made, used and kept. Based upon these records, Defendants, Steven Gross has defaulted under his Note for $417,000.00 and no payment has been received by Plaintiff from Defendant despite demand and the Defendant has failed to make monthly payment on September 1, 2009 and monthly thereafter. The principal amount of $412,661.05 is due and owing to Plaintiff, plus interest, costs and fees from August 1, 2009.. Plaintiff, therefore, elected to declare the entire balance of principal together with interest due and payable immediately.

Plaintiff must also establish that it satisfied all of the conditions precedent to commencing an action in foreclosure. Paragraph 22 of the Mortgage provides that in the case of default, the lender must send to the borrower a notice of default giving the borrower at least 30 days from the date of the notice to correct the default. This notice must be sent pursuant to paragraph 15 of the Mortgage by first class mail to the

property address or any other address the borrower designates by notice to the lender. Providing this Notice is a condition precedent to commencing a foreclosure action.

Wilma Colon stated in her Affidavit, that in the regular performance of her job functions, she is familiar with the business records maintained by Shellpoint on behalf of Plaintiff for the purpose of servicing mortgage loans and she has personal knowledge of the operation of, and the circumstances surrounding the preparation, maintenance, distribution, and retrieval of records in Shellpoint's record keeping systems. These records are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the ordinary course of business activity conducted regularly by Shellpoint. In connection with making this Affidavit, she has acquired personal knowledge of the matters stated by examining the business records to the extent they relate to the subject loan. Colon further avers that the Loan Comments are one of the business records generated and maintained by Shellpoint. It is a computer- generated record of communications between Shellpoint and a borrower. She personally reviewed the Loan Comments for the subject loan, a portion of which she attached to her Affidavit. The entries of the attached Loan Comments were made at or near the time of the occurrence and were made in the ordinary course of business to make and keep a record of communications regarding the subject loan.

According to Wilma Colon the written 90 Day Notice and Notice of Intent to Foreclose for the subject loan was created during the ordinary course of business of Shellpoint to contemporaneously: a) create and print a hard copy of the letters; b) create an entry in the computerized record keeping system that the 90 Day Notice and Notice of Intent to Foreclose were generated; c). scan and save a copy of the written 90 Day Notice and Notice of Intent to Foreclose to the computer record associated with the relevant loan number for the subject loan; d). send the letters by certified mail and first class mail to Defendants at the Premises and last known addresses of Defendants as reflected in Shellpoint's computerized record keeping system; e). affix the proper postage for the letters sent by certified mail and first class mail, f). ensure that the title of the 90 Day Notice was typed in at least fourteen point font and the text following the title of the 90 Day Notice was also typed in at least fourteen point font, and insuring that the Notice of Intent for Foreclose contained the appropriate information pursuant to the terms of the Mortgage; and, g). generate and retain in the Shellpoint's computerized record keeping system a loan level detailed written report summarizing the mailings completed on a daily basis. Plaintiff attached copies of the notice of default and the 90-Day Notice that was saved to the computer record associated with the subject loan on the same date such letters were sent by certified mail and first class mail to Defendants at their last known addresses as reflected in Shellpoint's computerized record keeping system.

The general rule is, a letter or notice that is properly stamped, addressed, and mailed is presumed to be received by the addressee,(*see News Syndicate Co. v. Gatti Paper Stock Corp.*, 256 N.Y. 211, 176 N.E. 169 [1931]; *New York New Jersey Products Dealers Coop. v. Mocker*, 59 A.D.2d 970, 399 N.Y.S.2d 280 [3d Dept.1977]). A simple

denial of receipt has been held insufficient to rebut this presumption, (*see ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 478, 779 N.Y.S.2d 808, 812 N.E.2d 298 [2004]); *Countrywide Home Loans, Inc. v. Brown*, 305 A.D.2d 626, 760 N.Y.S.2d 200 [2d Dept 2003]). However, New York courts have stated that in order to raise the presumption, more than a general mailing affidavit is required. The presumption of receipt may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed, (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679, 729 N.Y.S.2d 776 [2d Dept 2001]; Phoenix Ins. Co. v. Tasch, 306 A.D.2d 288, 762 N.Y.S.2d 99 [2d Dept.2003]).

Wilma Colon, Litigation FC Specialist for Shellpoint, described the standard mailing practice of Shellpoint and the office procedures that were followed to generate the computer print-out sheet. Once a notice is mailed, the presumption of receipt may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed, (see *Residential Holding Corporation v. Scootsdale Insurance Company*, 286 A.D.2d 679, 729 N.Y.S.2d 776, 2001 N.Y. Slip Op. 07060[2d Dept. 2001]). Here Plaintiff has established a standard office practice or procedure designed to ensure that the notices was properly addressed and mailed.

Plaintiff is also required to establish that a Notice pursuant to RPAPL § 1304 was properly served upon Defendant. RPAPL § 1304 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 in at least fourteen-point type", RPAPL § 1304(1); (*see also Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 [2d Dept. 2013]). RPAPL § 1304 sets forth the requirements for the content of such notice,, and further provides 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, (RPAPL § 1304(1) & (2); *see also Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 [2d Dept. 2013]).

The RPAPL § 1304 notice was served in the same manner as the default notice as set forth above based upon a standard office practice and procedure designed to ensure that the notice was properly addressed stamped and mailed. Wilma Colon certified and affirmed that a 90 Day Notice was sent, separate from any other mailing or notice, enclosed in both a certified / registered and also a first-class mail, postage pre-paid, sealed envelope, in accordance with the policies, practices and procedures described above. The envelopes were separately addressed to Defendants at 14 Grandview Avenue, Ardsley, New York 10502 and 4 New King Street, White Plains, New York 10604 and all letters were deposited into the exclusive care and custody of the United States Postal Service. Plaintiff provided a copy of each notice mailed as well as a copy of the envelop addressed to the Defendants at the different addresses with a UPSP tracking and certified mailing number.

As stated above, once a notice is mailed, the presumption of receipt may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed, (*see Residential Holding Corporation v. Scotsdale Insurance Company*, 286 A.D.2d 679, 729 N.Y.S.2d 776, 2001 N.Y. Slip Op. 07060(2d Dept 2001). A "mere denial of receipt is not enough to rebut the presumption," (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *see also Grogg v S. Rd. Assoc., L.P.*, 74 AD3d 1021 [2d Dept 2010] [*citing Countrywide Home Loans, Inc. v Brown*, 305 AD2d 626 [2d Dept 2003]). Here, Plaintiff offered proof of a standard office practice or procedure designed to ensure that the notices were properly addressed and mailed.

As the Second Department, opined in (*HSBC Bank USA, National Association v. Ozcan*, 154 A.D.3d 822, 64 N.Y.S.3d 38 [2017]), "[t]here is no requirement that a plaintiff in a foreclosure action rely on any 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" (*see Citigroup v. Kopelowitz*, 147 A.D.3d 1014, 1015, 48 N.Y.S.3d 223; cf. *Wells Fargo Bank, NA v. Thomas*, 150 A.D.3d 1312, 52 N.Y.S.3d 894). Thus, mailing of the RPAPL § 1304 notice and the notice of default may be proven by any number of documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518 (*see Viviane Etienne Med. Care, P.C. v. Country–Wide Ins. Co.*, 25 N.Y.3d 498, 508, 14 N.Y.S.3d 283, 35 N.E.3d 451; *CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 901, 47 N.Y.S.3d 415).

Here, Plaintiff is only required to demonstrate the admissibility of the records relied upon by Wilma Colon under the business record exception to the hearsay rule (CPLR 4518[a]). "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 Citibank, N.A. v. Cabrera*, 130 A.D.3d 861, 861, 14 N.Y.S.3d 420; *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1331, 890 N.Y.S.2d 230). Wilma Colon's Affidavit is based upon personal knowledge which was acquired from her review of the business records maintained in the ordinary course of business in the servicing of Defendants' loan. Colon avers that Shellpoint maintained these records for the purpose of servicing mortgage loans, and that the records are made at or near the time by, or from information provided by persons with knowledge of the activity and transactions reflected in such records, and are kept in the regular conducted business activities by Shellpoint.

With respect to the mailing of the RPAPL § 1304 Notices, Wilma Colon further avers that: she made her affidavit based upon her review of Shellpoint's records relating to the Borrower's loan including proof of mailing documents, and from her own personal knowledge of how such records are kept and maintained . In this regard and with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgagee, and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers, provided that the assignee/plaintiff establishes that it relied

upon those records in the regular course of business, (*see Landmark Capital Inv. Inc. v. Li–Shan Wang*, 94 A.D.3d 418, 941 N.Y.S.2d 144 [1st Dept., 2012]; *Portfolio Recovery Associates, LLC v. Lall*, 127 A.D.3d 576, 8 N.Y.S.3d 101 [1st Dept., 2015]; *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 A.D.3d 336, 819 N.Y.S.2d 223 [1st Dept., 2006]).

Plaintiff has met its initial burden of establishing its entitlement to judgment as a matter of law by producing the Mortgage, the unpaid Note, and an Affidavit from Wilma Colon establishing the default in the payment obligations of Defendants,(*see Baron Assoc., LLC v. Garcia Group Enters., Inc.*, 96 A.D.3d 793, 793, 946 N.Y.S.2d 611; *GRP Loan, LLC v. Taylor*, 95 A.D.3d 1172, 1173, 945 N.Y.S.2d 336; *Citibank, N.A. v. Van Brunt Props., LLC*, 95 A.D.3d 1158, 1159, 945 N.Y.S.2d 330). Plaintiff has also established compliance with the default notice provision of the Mortgage as well as the notice requirement of RPAPL § 1304. The burden now shifts to Defendants to establish triable issues of fact rebutting Plaintiff's prima facie showing or in support of the affirmative defenses asserted in their Answer or otherwise available to them (*see Nationstar Mtge., LLC v. Silveri*, 126 AD3d 864, 2015 WL 1212321 [2d Dept 2015]; *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 N.Y.S.2d 551 [2d Dept 2012]; *Grogg Assocs. v. South Rd. Assocs.*, 74 AD3d 1021 907 N.Y.S.2d 22 [2d Dept 2010]; *Wells Fargo Bank v. Karla*, 71 AD3d 10,06, 896 N.Y.S.2d 681 [2d Dept 2010]).

In opposing the motion, Defendants rely upon their Answer to Plaintiff's Complaint as well as a cross-motion seeking summary judgment and dismissal of the action. Defendants' Answer contained general denials or denials based upon information and belief as well as ten affirmative defenses, and three counterclaims . An answer containing general denials is insufficient to defeat summary judgment, (*see Bankers Trust of Rockland County v. Keesler*, 49 A.D.2d. 918, 373 N.Y.S.2d 637 (2d Dep't 1975). Furthermore, general denials in an answer are insufficient to raise an issue of fact, (*see Anderson v. City of New York*, 58 A.D.2d 588, 17 N.Y.S.2d 326, 329 [2d Dep't 1940]). To succeed in defeating Plaintiff's motion for summary judgment, Defendants are required to produce evidentiary proof in admissible form establishing a triable issue of material fact, not mere conclusions, hope, unsubstantiated allegations or assertions, (*see Zuckerman v. City of New York*, 49 N.Y.2d 577).

Defendants' first contention in opposing Plaintiff's motion for summary judgments and in support of their claim for summary judgment is that Plaintiff's action is barred under the doctrine of res judicata. "Under the doctrine of res judicata, or claim preclusion, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in [a] prior proceeding" (*see U.S. Bank N.A. v. Friedman*, 175 A.D.3d 1341, 1342, 109 N.Y.S.3d 88 [internal quotation marks omitted]; see *HSBC Bank USA, N.A. v. Pantel*, 179 A.D.3d 650, 650–651, 116 N.Y.S.3d 336). The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again, (*see, O'Connell v Corcoran*, 1 NY3d 179, 184-185 (2003);

Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481, 485 [1979]; *Estate of Hunter v Chinello, et al.*, 4 NY3d 260 [2005]).

The first action was discontinued, allegedly the result of the then Plaintiff filing a motion to discontinue the action. The record suggests that the discontinuance was due to potential defects with the service of the 90-day notice, and the notice of intent to foreclose, and discontinuance was granted on or about January 29, 2013. However, "[a] voluntary discontinuance ordinarily is not a decision on the merits, and *res judicata* does not bar a [plaintiff] from maintaining another proceeding for the same claim unless the order of discontinuance recites that the claim was discontinued or settled on the merits" (*see Matter of AutoOne Ins. Co. v. Valentine*, 72 A.D.3d at 955, 899 N.Y.S.2d 354). Unlike "[a] judgment of foreclosure and sale [which] is final as to all questions at issue between the parties, and concludes all matters of defense which were or could have been litigated in the foreclosure action" (*see Eaddy v. U.S. Bank National Association*, 180 A.D.3d 756, 119 N.Y.S.3d 212 [2d Dept. 2020[), it is clear from the record that the first action was voluntarily discontinued by Plaintiff, and therefore, was not subject to *res judicata*.

The Second Action on the other hand, presents a different scenario. In the second action a trial was conducted by a court-attorney referee, who has broad authority to hear and determine or report in a wide range of courts, subject to supervision by a judge. With the large backlog of pending foreclosure cases, the Court relies heavily on court-attorney referees to conduct non-jury trials and render decisions or report their findings to the Court. This is done with the consent of the parties.

In the Second Action, a non-jury trial was conduced by the court-attorney referee based upon the same Note and Mortgage. Furthermore, the relief requested in both the Second Action and this action are identical. In the Second Action, Plaintiff made two attempts at summary judgment and was denied in both based upon failure to establish compliance with RPAPL § 1304 and properly serve the 30-days Notice of Intent or Default Notices, which are both conditions precedent to the commencement of the action in foreclosure. The matter was ultimately assigned to the Foreclosure Trial Part and was referred to a court-attorney referee for trial. A trial was conducted before a court-attorney referee on July 2, 2018. At the conclusion of the trial the referee filed a report with the Court. The referee's report was confirmed by the Court, entering a judgment in favor of the Defendants pursuant to CPLR 5013; a judgment dismissing the action; and, canceling the notice of pendency.

The first question is whether or not the dismissal after trial is on the merits rendering any retrial of the same issues *res judicata*. Plaintiff argues that since the dismissal of the action was based upon failure on the part of Plaintiff to satisfy the conditions precedent to commencing an action in foreclosure, and not upon the substance of the foreclosure itself, it was not a final determination on the merits and, therefore, *res judicata* does not apply. To avoid the issue of statute of limitation in the instant action, Plaintiff relies upon the application of CPLR 205(a), which allows Plaintiff

six months after dismissal to commence a new action without invoking the six years statute of limitation for breach of contract.

In (*U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*), the Court of Appeal differentiates between a dismissal based upon violation of a procedural condition precedent and substantive condition precedent. In that case, the Court opined that "failure to comply with a procedural condition precedent may be a fatal flaw to maintaining the prior action and grounds for dismissal but is not a judgment on the merits for purposes of CPLR 205(a)" (*U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72, 80, 98 N.Y.S.3d 523, 122 N.E.3d 40 [2019]; *see Sabbatini v. Galati*, 43 A.D.3d 1136, 1139, 842 N.Y.S.2d 539 [2d Dept. 2007]). If the failure to satisfy the requirement of RPAPL § 1304 and to properly serve the Notice of Default is treated as a violation of a procedural condition precedent, then, the dismissal would not be on the merits and Plaintiff would be free to proceed with the action under CPLR 205(a). On the other hand, if it is treated as a violation of a substantive condition precedent, then the dismissal would be on the merits and *res judicata* would attach preventing the application of CPLR 205(a).

In addressing whether the dismissal of the Second Action was based upon violation of a substantive condition precedent, Plaintiff also looked to the holding of the Court of Appeals in (*U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*) where the court stated that a condition precedent is substantive when it "describe[s] acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract" (*see IDT Corp. v. Tyco Grp.*, 13 N.Y.3d 209, 214, 890 N.Y.S.2d 401, 918 N.E.2d 913 [2009]). In other words, the condition is "part of the cause of action and necessary to be alleged and proven, and without this no cause of action exist[s]" (*see ACE*, 25 N.Y.3d at 597, 15 N.Y.S.3d 716, 36 N.E.3d 623, *quoting Dickinson v. Mayor of City of N.Y.*, 92 N.Y. 584, 591 [1883]).

This distinction is made even clearer in 28 N.Y. Prac., Contract Law § 11.2, which states that:

> Most conditions precedent describe acts or events that must occur before a party is obliged to render its promised performance.16 Such conditions must be distinguished from a condition precedent to the formation or existence of the contract itself.17 There is a difference between conditions precedent to performance and those prefatory to the formation of a binding agreement.17.30 Most conditions precedent describe acts which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract.17.70 The parties may condition the enforceability of an agreement upon one or more designated events.18 The parties to a contract may condition the performance of either party, or the validity of the contract itself, on the occurrence of an event.18.50 A party cannot have breached a contract by a failure to perform if conditions precedent to its performance have not been met.19 (28 N.Y. Prac., Contract Law § 11.2)

The Court made it even clearer in (*Citimortgage, Inc. vs Moran*, 188 A.D.3d 407, 135 N.Y.S.3d 378 [1st Dept 2020) that the dismissal of an action for failure to comply with RPAPL § 1304 is not a judgment on the merits for purposes of CPLR 205(a)" but simply failure to comply with a condition precedent and not a determination on the merits. (*see U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72, 80, 98 N.Y.S.3d 523.

It is clear from the record that the Second Action for mortgage foreclosure was never decided by the Court. In fact the Court's Decisions in both summary judgement motions filed by Plaintiff in the Second Action were based upon the Court's finding that there were questions of facts as to whether or not the RPAPL § 1304 Notice and Default Notice were properly served which were conditions precedent to commencing an action in foreclosure. The only issues sent to the Trial Readiness Part and heard by the Referee, were the services of the notices which were simply conditions precedent to commencing foreclosure proceedings. Therefore, since the dismissal of the Second Action was based solely upon satisfying the conditions precedent rather than Plaintiff's cause of action for foreclosure, said ruling does not preclude this action or invoke the doctrine of *res judicata*, so long as the action is in compliance with CPLR 205(a).

With respect to the wording of the judgment dismissing Plaintiff's Second Action, "CPLR 5013 does not require that the prior judgment contain the precise words 'on the merits' in order to be given *res judicata* effect; it suffices that it appears from the judgment that the dismissal was on the merits", (*see QFI, Inc. v. Shirley*, 60 A.D.3d 656, 874 N.Y.S.2d 238 [2d Dept 2009]). However, even where a dismissal is specifically "on the merits" or "with prejudice", the circumstances must warrant barring the litigant from further pursuit of his claim in order for those phrases to be given preclusive effect, (*see Art Guild Gallery, Inc. v. Charmack*, 107 A.D.2d 777, 484 N.Y.S.2d 614 [2d Dept 1985]). Here, Plaintiff is pursuing foreclosure of a mortgage where it is alleged that Defendants have not made a single mortgage payment since August 1, 2009.

With respect to the mailing of the RPAPL § 1304 Notice and the Notice of Default, the Court relies upon the analysis above setting forth a standard office practice and procedure designed to ensure that items are properly addressed and mailed. All that Plaintiff is required to show is that she 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" (*see U.S. Bank N.A. v. Henderson*, 163 A.D.3d at 603, 81 N.Y.S.3d 80). Plaintiff provided a copy of each notice mailed as well as a copy of the envelope addressed to Defendants at the different addresses with a UPSP tracking and certified mailing number. Plaintiff also attached proof of filing statement with the NYS Department of Financial Services. Plaintiff further attached a copy of the Loan Comments which is a computer generated business record.

On the issue of standing, the Court in addressing the summary judgment motion in the Second Action did find that Plaintiff had established standing. Furthermore, the Note, indorsed in blank, was annexed to the Complaint at the time the action was

commenced, which was sufficient to establish standing (*see Deutsche Bank Natl. Trust Co. v. Carlin*, 152 A.D.3d 491, 492, 61 N.Y.S.3d 16; *U.S. Bank N.A. v. Saravanan*, 146 A.D.3d 1010, 1011, 45 N.Y.S.3d 547; *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d 643, 645, 37 N.Y.S.3d 286).

With respect to Plaintiff's compliance with RPAPL § 1306, Plaintiff attached copies of the proof of mailing. RPAPL § 1306 (1) provides that in an action to foreclose a mortgage, lenders "shall file with the superintendent of financial services...within three business days of the mailing of the notice required by [RPAPL § 1304]" a form containing certain information regarding the borrower and mortgage (*see* RPAPL 1306 [2]). A proof of filing statement from the New York State Department of Financial Services is sufficient to establish, prima facie, that the plaintiff complied with RPAPL § 1306 (*see HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 670-671 [2019]). Here, Plaintiff met its burden by submitting such a proof of filing statement.

With respect to the remaining Affirmative Defenses and Counterclaims not addressed above and raised by Defendants in their Answer, in opposing a motion for summary judgment, it is incumbent upon the answering Defendants to submit proof sufficient to raise a genuine question of fact rebutting Plaintiff's prima facie showing or in support of the affirmative defenses asserted in their Answer or otherwise available to them, (*see Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 943 N.Y.S.2d 551 [2d Dept 2012]; *Grogg Assocs. v. South Rd. Assocs.*, 74 A.D.3d 1021 907 N.Y.S.2d 22 [2d Dept 2010]; *Wells Fargo Bank v. Karla*, 71 A.D.3d 1006, 896 N.Y.S.2d 681 [2d Dept 2010]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require Plaintiff to respond to alleged affirmative defenses which are based on such allegations, (*see Charter One Bank, FSB v. Leone*, 45 A.D.3d 958, 845 N.Y.S.2d 513 [3d Dept 2007]; *Rosen Auto Leasing, Inc. v. Jacobs*, 9 A.D.3d 798, 780 N.Y.S.2d 438 [3d Dept 2004]).

Since Defendants did not raise the Affirmative Defenses not addressed above in its opposition to Plaintiff's motion for summary judgment, no triable issue of fact was raised in response to Plaintiff's prima facie showing or as to the merits of any of Defendants' Affirmative Defenses, (*see Nationstar Mortgage LLC v. Silveri*, 126 A.D.3d 864, 7 N.Y.S.3d 158, 2015 N.Y. Slip Op. 02102 [2d Dept 2015]). Defendants have, therefore, failed to raise questions of fact sufficient to rebut Plaintiff's prima facie case establishing its entitlement to judgment as a matter of law. Defendants' Counterclaims must also be dismissed for being vague, and conclusory, and not containing sufficiently particularized allegations from which a cognizable cause of action could be inferred, (CPLR 3211[a][7]; *see V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 723, 966 N.Y.S.2d 95 [2d Dept 2013]).

On the issue of statute of limitation, an action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213[4]; *U.S. Bank N.A. v. Vitolo*, 182 A.D.3d 627, 628, 120 N.Y.S.3d 791; *Milone v. U.S. Bank N.A.*, 164 A.D.3d 145, 151, 83 N.Y.S.3d 524). "'The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the

statute of limitations begins to run on the entire debt'" (*see Kashipour v. Wilmington Sav. Fund Socy.*, FSB, 144 A.D.3d 985, 986, 41 N.Y.S.3d 738, *quoting EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605, 720 N.Y.S.2d 161).

The First Action was voluntarily discontinued by Plaintiff on January 29, 2013. Where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the note holder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the note holder. In other words, a voluntary discontinuance evinces revocation of acceleration (*see Freedom Mortgage Corporation v. Engel*, --- N.E.3d ----, 2021 WL 623869, 2021 N.Y. Slip Op. 01090 [2021]).

The Summons and Complaint in the Second Action was filed on December 31, 2014. The commencement of the Second Action accelerated the demand and began the running of a new six year statute of limitation. This six year statute of limitation expires on December 31, 2020. The Second Action was dismissed after trial on May 28, 2019. On September 9, 2019, Plaintiff commenced the instant action by the filing of the Summons and Complaint and Notice of Pendency.

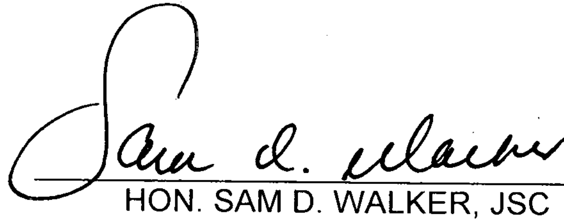
Plaintiff has also demonstrated its entitlement to default judgment, by submitting proof of service of a copy of the Summons and Complaint, proof of the facts constituting the claim, and proof of the defaulting Defendants' failure to answer or appear, CPLR 3215(f); *see also HSBC Bank USA, NA v. Alexander*, 124 A.D.3d 838, 4 N.Y.S.3d 47, 2015 N.Y. Slip Op. 00728 [2d Dept 2015]). Accordingly, the defaults of all such Defendants are hereby fixed and determined. Since Plaintiff has been awarded summary judgment against the answering Defendants and has established a default in answering by the remaining Defendants, Plaintiff is entitled to an order appointing a referee to compute amounts due under the subject Note and Mortgage, (RPAPL § 1321; *see also Vermont Fed. Bank v. Chase*, 226 A.D.2d 1034, 641 N.Y.S.2d 440 [3d Dep't 1996]; Bank of East Asia, Ltd. v. Smith, 201 A.D.2d 522, 607 N.Y.S.2d 431 [2d Dep't 1994]; Perla v. Real Prop. Holdings, LLC, 23 Misc.3d 697, 874 N.Y.S.2d 873 [Sup. Ct. Kings County 2009]; HSBC Mtge. Serv., Inc. v. Alphonso, 16 Misc.3d [A], 2007 WL 2429711 [Sup. Ct. Kings County 2007]).

Therefore, Plaintiff's application for an Order pursuant to RPAPL § 1321 and CPLR 3212 granting summary judgment in favor of Plaintiff and striking Defendants' Counterclaims; granting a default judgment against all the non-appearing defendants; appointing a Referee and directing him/her to compute the amount due to Plaintiff; amendment of the caption to substitute Matt Gross and Alexa Gross for John Doe 1 to John Doe 25; and for such other and further relief as to this Court may deem just and proper is GRANTED.

Defendants' application, for an order dismissing the instant action and granting summary judgment in favor of Defendants pursuant to CPLR 3212 and quiet title pursuant to RPAPL Article 15 and for such other and further relief which may be appropriate, is DENIED.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
May 9, 2022



HON. SAM D. WALKER, JSC