SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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MORGAN STANLEY PRIVATE BANK, NATIONAL ASSOCIATION,

Plaintiff,

- v -

PHILIP LAJAUNIE, BOARD OF MANAGERS OF THE 62 EAST FIRST ST CONDOMINIUM, ELIZABETH GREENWOOD REVOCABLE TRUST, ELIZABETH GREENWOOD TRUSTEE, FERRARI & FERRARI LLP, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE,

Defendant.

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INDEX NO. 850341/2018

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 90, 92, 98, 99

were read on this motion to/for JUDGMENT - SUMMARY.

The within action is to foreclose on a mortgage encumbering a parcel of residential real property located 62 East 1st Street, Unit 4S, New York, New York. The mortgage, dated January 22, 2015, was given by Defendant Philip Lajaunie ("Lajaunie") to Plaintiff and secures a loan with an original principal amount of $1,224,000.00. The loan is memorialized by an adjustable rate note of the same date. Plaintiff commenced this action and alleged that Lajaunie defaulted in repayment of the loan on or about July 1, 2018. Defendant Lajaunie answered and pled three [3] affirmative defenses.

Now, Plaintiff moves for summary judgment against Defendant Lajaunie, striking the answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendant Lajaunie opposes the motion *pro se*.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]).

In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in

admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Lauren Benning ("Benning"), a Vice-President-Document Execution of Cenlar FSB ("Cenlar"), the Plaintiff's servicing agent. Benning's affidavit laid a proper foundation for the admission of the records of Cenlar into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Benning sufficiently established that those records were received from the makers and incorporated into the records Cenlar kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were records referenced by Benning (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Benning's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, Benning's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

Plaintiff did not raise an affirmative defense based upon RPAPL §1304 in the answer and claimed to lack sufficient knowledge and information to deny Plaintiff's allegation in the complaint that complied with the statute. However, Lajaunie did rely on same in his opposition to the motion for summary judgment. Failure to raise RPAPL §1304 in the answer did not constitute a waiver of that defense as it may be raised at any time prior to issuance of a judgment (*see eg Nationstar Mtge., LLC v Gayle*, 191 AD3d 1003 [2d Dept 2021]). Nevertheless, Plaintiff addressed the issue in the issue in its moving papers.

Proof of compliance with RPAPL §1304 requires Plaintiff to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). The Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). An affidavit from the person who performed the actual mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Proof

from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

Regarding the mailing of these notices, in addition to the affidavit of Benning, Plaintiff also submitted the affidavit of Kevin Miller ("Miller"), the CFO of Covius Document Services, LLC fka Walz Group, LLC ("Walz"). Although Benning and Miller claimed the records reviewed showed Plaintiff complied with RPAPL §1304, neither described the procedure used by Walz in any detail (*see Freedom Mtge Corp v Granger*, 188 AD3d 11631165 [2d Dept 2020]; *M & T Bank v Biordi*, 176 AD3d 11941196 [2d Dept 2019; *cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]). Benning and Miller did not claim to have personal knowledge of the mailing itself and did not annex any records reviewed to support their assertions that Walz complied with its standard practice (*cf. United States Bank Trust, N.A. v Mehl,* 195 AD3d 1054 [2d Dept 2021]). Further, "although the envelopes accompanying the 90-day notices state 'First-Class Mail, and contain a bar code above a 20-digit number, the plaintiff failed to submit any receipt or corresponding document proving that the notices were actually sent by first-class and certified mail to the defendant more than 90 days prior to the commencement of the action" (*see US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]; *US Bank v Hammer*, 192 AD3d 846, 848-849 [2d Dept 2021]).

Miller's affidavit is also deficient in that no foundation under CPLR §4518 for any of the records he relied on was proffered (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Further, absent from Miller's affidavit is any evidence demonstrating Walz's authority to act on behalf Plaintiff (*see US Bank v Tesoriero*, 204 AD3d 1066, 1068 [2d Dept 2022]; *HSBC Bank USA, NA v Betts*, 67 AD3d 735 [2d Dept 2009]). Indeed, Miller averred that Walz was engaged by PHH Mortgage Corporation, not Plaintiff.

Accordingly, Plaintiff failed to establish *prima facie* that it sent pre-foreclosure notices pursuant to RPAPL §1304 of the mortgage.

In opposition to the motion, Lajauine's assertion that Plaintiff lacked standing when the action was commenced was waived by failing to raise that affirmative defense in the answer *Dougherty v Rye*, 63 NY2d 989, 991 [1984]; *Bank of Am., N.A. v Brannon*, 156 AD3d 1, 2 [1st Dept 2017]). In any event, it is undisputed that Plaintiff, as the original lender, was in direct privity with the Lajauine when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

Defendant's argument that the motion was untimely because it was made after a deadline imposed by this Court is without merit as it is within this Court's discretion to accept the motion despite the delay (*see US Bank NA v Hadar*, 206 AD3d 688 [2d Dept 2022]). All the other arguments in opposition were entirely without merit.

As to the branch of the motion to dismiss Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

As pled, the affirmative defenses in all the answers are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden,* 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that the branches of Plaintiff's motion for a default judgment against the non-appearing parties, to strike Defendants' affirmative defenses is granted, and it is

ORDERED that "JOHN DOE" be removed as a party defendant in this action; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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MORGAN STANLEY PRIVATE BANK,
NATIONAL ASSOCIATION,

Plaintiff,

Index No. 850341/2018

-against-

PHILIP LAJAUNIE; BOARD OF MANAGERS OF THE 62 EAST FIRST ST CONDOMINIUM; ELIZABETH GREENWOOD REVOCABLE TRUST, ELIZABETH GREENWOOD TRUSTEE; FERRARI & FERRARI LLP; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

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This matter is set down for a status conference on **August 2, 2023 @ 11:40 am** via Microsoft Teams.

6/16/2023
DATE

FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE