At an IAS Term, Part FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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SUNTRUST BANK,

Plaintiff,

- against - Index No. 515194/15

CHARMAINE WARD; JPMORGAN CHASE BANK, N.A. D/K/A WASHINGTON MUTUAL BANK, F.A.; ANDRE "DOE"; MR. CAMPBELL; MRS. CAMPBELL; VINCENT "DOE"; CHUCK "DOE",

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	186-192 193-194, 196-221
Opposing Affidavits (Affirmations)	193-194, 196-221 223-228
Reply Affidavits (Affirmations)	229

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1150 East 87th Street in Brooklyn (Block 8052, Lot 61) (Property), Defendant Charmaine Ward (Ward or Defendant) moves (in motion sequence [mot. seq.] seven) for an order, pursuant to CPLR 3212, granting her summary judgment dismissing the complaint (NYSCEF Doc No. 186).

Plaintiff Suntrust Bank (Suntrust or Plaintiff) cross-moves (in mot. seq. eight) for an order: (1) granting it summary judgment, pursuant to RPAPL § 1321 and CPLR 3212;

(2) granting it a default judgment against all non-appearing defendants, pursuant to CPLR 3215; (3) appointing a referee to compute the amount due to Plaintiff, pursuant to RPAPL § 1321; (4) amending the caption to substitute U.S. Bank as plaintiff in place and instead of Suntrust;[1] and (5) denying Ward's summary judgment motion (NYSCEF Doc No. 193).

Background

On December 15, 2015, Suntrust commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1 and 3). The complaint alleges that on August 31, 2005, Ward executed and delivered a $380,000.00 promissory note, which was secured by a mortgage encumbering her residential Property (NYSCEF Doc No. 1 at ¶¶ 2 and 4-5). The complaint alleges that Ward "failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on May 1, 2015, and each subsequent payment thereafter" (*id.* at ¶ 9). The complaint further alleges, upon information and belief, that Plaintiff complied with RPAPL 1304 and RPAPL 1306 unless exempt from doing so" (*id.* at ¶ 7).

The defendants, all of whom were served with process *at the latest* in the first week of January, 2016 (NYSCEF Doc Nos. 5-19), failed to answer or otherwise respond to the complaint and their time within which to do so expired in February 2016.

[1] *See* NYSCEF Doc No. 194 at ¶ 27.

On June 28, 2017, the court (Dear, J.) issued an order granting Suntrust a default judgment against the non-appearing defendants, including Ward, the appointment of a referee and amendment of the caption (NYSCEF Doc No. 55). On November 3, 2017, Suntrust moved for an order confirming the referee's report and granting it a judgment of foreclosure and sale (NYSCEF Doc No. 58). On September 12, 2018, the court (Dear, J.) granted Suntrust's motion and issued a Judgment of Foreclosure and Sale (NYSCEF Doc No. 79).

On January 28, 2019, Ward moved, by order to show cause (OSC) for an order vacating her default, pursuant to CPLR 5015 (a) (4), and dismissing the complaint, pursuant to CPLR 3211 (a) (8), or, alternatively, ordering a traverse hearing to determine whether the court has personal jurisdiction over her (NYSCEF Doc No. 84). In addition, on February 19, 2019, Ward moved by OSC to enjoin a foreclosure sale of the Property (NYSCEF Doc No. 94). By a May 1, 2019, decision an order, the court (Dear, J.) granted Ward's dismissal motion to the extent that the matter was set down for a traverse hearing, and the remainder of Ward's motion to dismiss and for a stay was held in abeyance (NYSCEF Doc No. 110).

Thereafter, by a September 20, 2019, stipulation "so ordered" by the court on September 24, 2019, the parties agreed that Ward's OSCs were withdrawn, Ward waived her challenge to personal jurisdiction, the Judgment of Foreclosure and Sale was vacated and Ward had until October 21, 2019 to answer the complaint (NYSCEF Doc No. 116).

On October 6, 2019, Ward answered the complaint, denied the material allegations therein and asserted several affirmative defenses, including that Suntrust's 90-day pre-foreclosure notice "is defective on its face as it fails to comply with the requirements of R[PAPL] § 1304" (NYSCEF Doc No. 117 at ¶ 36).

On February 18, 2020, defense counsel filed a note of issue and certificate of readiness for trial indicating that discovery was complete (NYSCEF Doc No. 141).

Ward's Summary Judgment Motion

On April 21, 2022, Ward moved for summary judgment dismissing the complaint (NYSCEF Doc No. 186). Ward submits an attorney affirmation asserting that Suntrust failed to comply with RPAPL § 1304 based on caselaw from the Second Department holding that additional information cannot be sent in the same envelope as a RPAPL § 1304 notice (NYSCEF Doc No. 187 at ¶¶ 25-29). Specifically, defense counsel asserts that "there are two full pages of extraneous disclosures enclosed in the same envelope as the notice" and "[t]he additional pages contain 'IMPORTANT FEDERAL DISCLOSURES' and 'SELECTED STATE DISCLOSURES'" (*id.* at ¶¶ 27-28). Defense counsel relies on the Second Department's holding in *Bank of Am., N.A. v Kessler*, 202 AD3d 10, 13 (2d Dept 2021), wherein the court articulated "a bright-line rule" that compliance with the 'separate envelope' requirement of RPAPL 1304 mandates that no material other than the notices described in RPAPL § 1304 be contained in the envelope. Defense counsel argues that Suntrust's April 20, 2015 notice sent pursuant to RPAPL § 1304 is defective under the *Kessler* holding because it contains additional language not in RPAPL 1304 (2).

Suntrust's Opposition and Summary Judgment Cross-Motion

On June 8, 2022, *more than six years after* Suntrust commenced this foreclosure action, it moved for summary judgment, an order of reference and a default judgment against the non-appearing defendants (NYSCEF Doc No. 193).

Suntrust submits a fact affidavit from Nik Fox (Fox), "the Default Contested Case Manager" of Selene Finance, LLP (Selene), the servicer and attorney-in-fact for U.S. Bank Trust National Association, not in its individual capacity but solely as Owner Trustee for RCF2 Acquisition Trust (US Bank), successor in interest to Suntrust (NYSCEF Doc No. 197 at ¶ 1). Fox attests that his affidavit is based on his review of Selene's business records and the records of US Bank and Plaintiff, which have been incorporated therein (*id.*). Fox attests that "[t]o the extent that said records were created by a prior servicer and/or holder of the note and mortgage at issue herein, those records were integrated and boarded into Selene's system such that the prior servicer's records are now part of Selene's records" (*id.* at ¶ 2). Based on his review of the payment history of the loan in Selene's records (NYSCEF Doc No. 202), Fox attests that Ward "failed to comply with the terms of the Note and Mortgage by defaulting in the monthly payment due on May 1, 2015, and monthly thereafter" and "the principal sum of $380,000.000 plus interest at the contract rate from April 1, 2015 remains due and owing" (*id.* at ¶¶ 9-10).

Suntrust also submits an affidavit from Luis E. Carlo (Carlo), the AVP of Truist Bank (Truist), successor by merger to Suntrust, who attests that his affidavit is based on his review of Truist's and Suntrust's business records and "[d]ue to the merger between

SunTrust Bank and BB&T (forming Truist Bank), the records of SunTrust Mortgage are now the records of Truist Bank" (NYSCEF Doc No. 203 at ¶ 1). In addition to documents evidencing the merger (NYSCEF Doc No. 204), Carlo also submits the note, mortgage and the payment history of the loan (NYSCEF Doc Nos. 205, 206 and 209). Carlo also attests to the "Letter History," which reflects that an April 20, 2015, 90-day pre-foreclosure notice was sent to Ward by both Certified and First Class mail at the Property (*id.* at ¶¶ 9-12 and NYSCEF Doc Nos. 210 and 211).

Plaintiff's counsel submits an affirmation in support of the cross-motion asserting that it "will conserve judicial resources by alleviating the need for trial as there is no issue of material fact as to Plaintiff's cause of action for foreclosure" (NYSCEF Doc No. 194 at ¶ 20). Plaintiff's counsel asserts that "[t]he production of the Note and Mortgage along with proof of Defendant's default establishes, as a matter of law, Plaintiff's entitlement to a Judgment of Foreclosure which can only be defeated by Defendant's affirmative showing of a bona fide defense" (*id.* at ¶ 23). Counsel contends that Ward's summary judgment motion was untimely, and otherwise "must also be denied on its merits as she has failed to demonstrate that the RPAPL 1304 Notice sent herein was improper" (*id.* at ¶¶ 24-25).

Ward's Opposition and Reply

Ward, in opposition and in reply, submits an attorney affirmation arguing that "Defendant has demonstrated good cause to seek summary judgment at this juncture" since the question of law at issue regarding Suntrust's compliance with RPAPL § 1304 would avoid the need for trial (NYSCEF Doc No. 223 at ¶ 3). Defense counsel further asserts that

"[a]s Plaintiff does not contest that its notice contains additional language, it is clear that it did not strictly comply with the statute" (*id.* at ¶ 6).

Discussion

(1)

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and admissible evidence of the borrower's payment default (*see Deutsche Bank Natl. Trust Co.*

v Karibandi, 188 AD3d 650, 651 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]).

RPAPL § 1304 (1) provides that "with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . 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 (RPAPL § 1304 [2]). "Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20 [2d Dept 2019]). The plaintiff bears the burden of establishing strict compliance with RPAPL § 1304 (*Nationstar Mortg., LLC v Osikoya*, 205 AD3d 1038, 1039 [2d Dept 2022]).

Here, Plaintiff satisfied its prima facie burden by producing the promissory note, the mortgage and admissible evidence of Ward's payment default. Plaintiff also demonstrated, prima facie, that it complied with the requirements of RPAPL § 1304 by submitting admissible evidence that it mailed the RPAPL § 1304 notice to Ward at the Property by both certified and by first-class mail and submitted a copy of the 90-day notice. The Second Department has held that proof of the requisite mailing can be demonstrated by "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" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 21 [internal quotations marks omitted]).

Defense counsel's reliance on the Second Department's holding in *Kessler* is misplaced because that holding was reversed by the Court of Appeals' subsequent decision in *Kessler* that was issued on February 14, 2023, after the parties' summary judgment motion and cross-motion were *sub judice*. Importantly, in *Bank of Am. v Kessler*, the Court of Appeals specifically rejected the bright-line rule imposed by the Second Department, and held that statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute "other notices" that must be sent in a separate envelope from the RPAPL § 1304 notice and "application of a bright-line rule would contravene the legislative purpose" of RPAPL § 1304 (*Bank of Am., N.A. v Kessler*, 39 NY3d 317, 326 [2023]).

Based on the Court of Appeals' holding in *Kessler*, Suntrust's RPAPL § 1304 notice was proper, despite the fact that it included additional information in the notice. Consequently, for the foregoing reasons, Ward's summary judgment motion is denied and those branches of Plaintiff's motion seeking summary judgment and an order of reference are granted.

(2)

Suntrust also moves for a default judgment against the non-appearing defendants *more than six years after* they defaulted in February 2016 by failing to answer or otherwise respond to the complaint. Suntrust's affidavits of service in the record reflect that all of the

defendants were served with process in late 2015 and early 2016, and thus, their answers were due, at the latest, in February 2016. CPLR 3215 (c) explicitly provides that:

> "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall dismiss the complaint as abandoned*, without costs, upon its own initiative or on motion, *unless sufficient cause is shown* why the complaint should not be dismissed" (emphasis added).

Where a plaintiff fails to seek leave to enter a default judgment within one year after a party's default, the plaintiff must show "sufficient cause," which requires the plaintiff to demonstrate both a reasonable excuse for the delay and a meritorious cause of action (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2d Dept 2011]; *First Nationwide Bank v Pretel*, 240 AD2d 629, 629 [2d Dept 1997]). The determination of whether an excuse is reasonable is within the sound discretion of the court (*Deutsche Bank National Trust Co. v Bakarey*, 198 AD3d 718, 721 [2d Dept 2021]; *Deutsche Bank National Trust Co. v Charles*, 186 AD3d 454, 456 [2d Dept 2020]).

The Second Department has clarified that, if plaintiff fails to demonstrate a reasonable excuse for the delay and a meritorious cause of action, CPLR 3215 (c) explicitly provides that the complaint "shall" be dismissed, which is not discretionary, but mandatory (*Deutsche Bank National Trust Company v Watson*, 199 AD3d 879, 880 [2d Dept 2021]; US *Bank National Assoc. v Davis*, 196 AD3d 530, 533 [2d Dept 2021]; *HSBC USA, National Assoc. v Grella*, 14 AD3d 669 [2d Dept 2016]). "The policy underlying the statute is 'to prevent parties who have asserted claims from unreasonably delaying the termination

of actions, and to avoid inquests on stale claims'" (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764 [2d Dept 2015] [quoting *Giglio*, 86 AD3d at 307]).

Here, Suntrust failed to provide any excuse for its untimely motion for a default judgment against the non-appearing defendants, which mandates dismissal of this action as abandoned against those defendants, as a matter of law. Accordingly, it is hereby

ORDERED that Ward's summary judgment motion (mot. seq. seven) is denied; and it is further

ORDERED that Suntrust's cross-motion (mot. seq. eight) is only granted to the extent that: (1) the caption is amended to substitute U.S. Bank as Plaintiff in place of Suntrust; (2) summary judgment is granted to Plaintiff, pursuant to CPLR 3212; and (3) Plaintiff is entitled to an order of reference, pursuant to RPAPL § 1321, which shall be settled on notice; the cross-motion is otherwise denied; and it is further

ORDERED that this action is dismissed as against non-appearing defendants JPMorgan Chase Bank, N.A. f/k/a Washington Mutual Bank, F.A., Vincent Doe and Chuck Doe, pursuant to CPLR 3215 (c); and it is further

ORDERED that the caption shall hereinafter read:

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U.S. BANK,

Plaintiff,

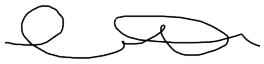
- against -

CHARMAINE WARD,

Defendant.
----------X.

This constitutes the decision and order of the court.

April 21, 2025 E N T E R,



J. S. C. Cenceria P. Edwards, CPA