At an IAS Term, Part FRP4, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 10th day of April 2026.

PRESENT:

HON. CAROLYN WALKER-DIALLO, J.S.C.

Index No.: 500014/2020

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THE BANK OF NEW YORK MELON f/k/a THE BANK OF NEW YORK, AS TRUSTEE (CWABS 2006-10),

Plaintiff,

DECISION AND ORDER

-against-

STAY L. DANIELS, et al.,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these Motions:

Papers	**Numbered**
Motion, Affirmation in Support, and Exhibits	NYSCEF Doc. Nos. 44-67
Cross-Motion, Affirmation in Support, and Exhibits	NYSCEF Doc. Nos. 72-76
Affirmation in Opposition	NYSCEF Doc. Nos. 77-81[1]

Motion Sequence #1 & 2

Upon the foregoing cited papers, the Decision/Order on these Motions is as follows:

Plaintiff moves for an Order: (1) granting summary judgment; (2) striking Stay L. Daniels' ("Defendant") answer; (3) for default judgment; (4) for an order of reference; and (5) amending the caption. Defendant cross-moves for an Order granting leave for Defendant to amend her answer and denying Plaintiff's motion for summary judgment based upon its failure to comply

[1] Plaintiff's affirmation in opposition is repeated as NYSCEF Doc. Nos. 82-86.

with CPLR 4518 (a). Plaintiff submits opposition papers. For the foregoing reasons, Plaintiff's motion is DENIED and Defendant's cross-motion is GRANTED.

DISCUSSION

I. PLAINTIFF HAS FAILED TO DEMONSTRATE ITS PRIMA FACIE BURDEN IN THIS ACTION, AND ITS MOTION IS DENIED.

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) (Internal citations omitted). Further, it is well established that "[i]n a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default." *Onewest Bank v. Wellington Roy Mahoney*, 154 A.D.3d 770, 771 (2d Dep't 2017); *Loancare v. Firshing*, 130 A.D.3d 787 (2d Dep't 2015).

"[A] motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence. Records made in the regular course of business are hearsay when offered for the truth of their contents. When a party relies upon the business records exception to the hearsay rule in attempting to establish its prima facie case, [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." *HSBC Bank USA,*

N.A. v. Vasishta, 241 A.D.3d 1299, 1300 (2d Dep't 2025) (Internal quotations and citations omitted). "Accordingly, to establish a foundation for the admission of a business record, the proponent of the record must satisfy the requirements identified in the statute (*see* CPLR 4518[a]). First, the proponent must establish that the record be made in the regular course of business—essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business. Second, the proponent must also demonstrate that it be the regular course of such business to make the record . . . essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record. Third, the proponent must establish that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured." *Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 205 (2d Dep't 2019) (Internal quotations marks and citations omitted).

"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'. RPAPL 1304 requires that the notice be sent by registered or certified mail, and also by first-class mail to the last known address of the borrower. Strict compliance with RPAPL 1304 notice to the borrower is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of the condition precedent. Proof of the requisite mailings of the RPAPL 1304 notices may be 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." *Deutsche Bank Natl. Trust Co.*

v. Bucicchia, 193 A.D.3d 682, 684-85 (2d Dep't 2021) (Internal quotation marks and citations omitted). Further, "in order for the presumption to arise, [the] office practice must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed." *Wells Fargo Bank, N.A. v. Shields*, 201 A.D.3d 1007, 1009 (2d Dep't 2022).

Here, the affirmation proffered by Dorian S. Cook, a Document Verification Specialist of NewRez LLC, f/k/a New Penn Financial LLC, d/b/a Shellpoint Mortgage Servicing ("NewRez"), the servicer and attorney-in-fact for Plaintiff, is insufficient to establish compliance. *See* Affirmation of Dorian S. Cook, dated May 5, 2025, NYSCEF Doc. No. 45. Mr. Cook does not aver that he personally sent the subject notices, but rather provides that Bayview Loan Servicing, LLC ("Bayview") sent the notices, Bayview's records were incorporated into NewRez's records, and that these records reflect that the notices were sent. *Id*. However, the affiant fails to proffer proof of standard office mailing procedures designed to ensure that items are properly addressed and mailed, and does not allege personal familiarity with the mailing practices and procedures of Bayview, the entity that sent the notices. Furthermore, only a single RPAPL 1304 notice is proffered in Plaintiff's motion papers, while the Letter Log proffered references two: a regular and a certified mailing. *See* RPAPL 1304 Notice, dated April 30, 2019 and Purported Letter Log, NYSCEF Doc. Nos. 51-52. Finally, the records do not specify that both notices were properly mailed.

Therefore, Plaintiff has failed to establish its prima facie requirement that it strictly complied with RPAPL 1304, and its motion must be DENIED without regard to the sufficiency of the opposition papers. *See Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) ("Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers").

II. DEFENDANT'S MOTION TO AMEND THE PLEADINGS IS GRANTED.

"Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit. A court must not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt." *TD Bank, N.A. v. Keenan*, 221 A.D.3d 1040, 1041 (2d Dep't 2023) (Internal citation omitted).

Plaintiff does not allege prejudice in the granting of Defendant's motion to amend the pleadings. The proffered records that Plaintiff filed as part of its motion papers raised *its own* concerns regarding statute of limitations. *See* Affirmation in Opposition of Naomi Zeltser, dated June 24, 2025, Purported Letter Log, NYSCEF Doc. Nos. 73 at ¶¶8-16, 52. Plaintiff concedes that no payments were made on the subject loan since 2008. *See* Affirmation of Lucas Bennett, Document Verification Specialist, dated August 22, 2025, NYSCEF Doc. No. 78 at ¶7. Further, the Letter Log proffered by Plaintiff is incomplete and the notice of default expressly attempts to revoke any previous acceleration. *See* Notice of Default dated April 30, 2019, Purported Letter Log, NYSCEF Doc. Nos. 50, 52 Therefore, the proposed amendment cannot be said to be "palpably insufficient or patently devoid of merit," and discovery exchanges may result in evidence of prior acceleration by letter, monthly statements, or bills demanding payment in full. Therefore, Defendant's motion to amend its answer is GRANTED.

CONCLUSION

Accordingly, Plaintiff's motion is DENIED and Defendant's cross-motion is GRANTED. Defendant's answer is deemed amended and served on all parties. To the extent that any relief requested was not addressed by the Court, it is hereby DENIED. This Court extends the time to

file a note of issue until November 16, 2026, to provide the parties with an opportunity to exchange discovery. The parties are to complete discovery and proceed to trial. Plaintiff shall serve notice of entry within fifteen (15) days of the upload of the order to NYSCEF upon Defendants and all parties who have appeared in this action.

This constitutes the Decision and Order of the Court.

ENTER:

Hon. Carolyn Walker-Diallo, J.S.C.