MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2007-OPT4, ASSET-BACKED CERTIFICATES, SERIES 2007-OPT4,

Plaintiff,

- against -

NARHARRY GHANESS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

"JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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BY: McDONALD, J.

Index No. 704677/2015

Motion Date: 4/11/16

Motion No.: 188

Motion Seq.: 1

The following papers numbered read on this motion by plaintiff for an Order appointing a referee and amending the caption by substituting "Victor Harry" in place of "JOHN DOE #1" and striking the names "JOHN DOE #2" through "JOHN DOE #12", inclusive; and on this cross-motion by defendant NARHARRY GHANESS (defendant) for an order dismissing the action pursuant to CPLR 3211(a)(3) and (8); dismissing the action pursuant to CPLR 3217(c); or in the alternative, pursuant to CPLR 3012(d), compelling the acceptance of defendant's proposed answer:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	EF 18 - 39
Notice of Cross-Motion-Affidavits-Exhibits	EF 40 - 50
Affirmation in Opposition to Cross-Motion and in Support of Motion-Exhibits	EF 51 - 57
Reply Affirmation in Support of Cross-Motion	EF 58

This foreclosure action pertains to the property located at 183-17 Jamaica Avenue, Hollis, New York 11423-2301.

Based on the record before the Court, defendant obtained a loan in the principal amount of $567,000.00 from Option One Mortgage Corporation on June 29, 2007, secured by a mortgage encumbering the subject premises. A Loan Modification Agreement was executed by defendant on October 1, 2008. Plaintiff alleges that it is the holder of the mortgage and underlying obligation and that defendants defaulted under the terms of the note and mortgage as the last payment was applied to the installment due for November 1, 2008, and thereafter, defendant failed to tender the required payments when due. As a consequence, plaintiff elected to accelerate the entire mortgage debt.

On May 7, 2015, plaintiff commenced this action by filing and serving a summons and complaint and notice of pendency. All defendants were duly served, including occupant Victor Harry, but have failed to appear or otherwise move and their time to do so has expired. Defendant borrower served an untimely answer, which was rejected by plaintiff. This matter was released from the residential foreclosure part on September 8, 2015. Plaintiff now seeks an Order of Reference.

In support of this motion, plaintiff submits an affirmation from counsel, Elan Millhauser, Esq.; an affidavit from Richard Work, a contract management coordinator for Ocwen Loan Servicing, LLC, the servicer for plaintiff; copies of the note, mortgage, loan modification agreement, and assignments; copies of the 90-day pre-foreclosure notices and notices of default; copies of the summons, complaint and notice of pendency; copies of the affidavits of service; a copy of defendant's rejected answer; a copy of the certificate of merit pursuant to CPLR 3012-b; a copy of the Residential Foreclosure Conference Order; and a copy of the military service affidavits.

In his affidavit, Mr. Work states that based upon his personal review of the servicer's business records, plaintiff was in possession of the note at the time the action was commenced. He acknowledges that the last payment pursuant to the note and mortgage was applied to the installment due for November 1, 2008. He also affirms that a notice of default and a 90-day pre-foreclosure notice were sent to defendant.

In opposition, counsel for defendant, Christopher Thompson, Esq., contends that plaintiff's motion should be denied and cross-moves to dismiss this action in its entirety on the grounds that plaintiff lacks standing and this Court lacks jurisdiction over defendant. Counsel also seeks dismissal on the ground that this is plaintiff's third foreclosure action regarding the same note and mortgage. In the alternative, counsel seeks an order

directing plaintiff to accept defendant's late answer.

In an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through production of the mortgage, the note, and evidence of default (see Emigrant Mtge. Co., Inc. v Beckerman, 105 AD3d 895 [2d Dept. 2013]; Solomon v Burden, 104 AD3d 839 [2d Dept. 2013]; Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]). "Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014][internal citations omitted]; see Midfirst Bank v. Agho, 121 A.D.3d 343 [2d Dept. 2014]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]).

As defendant is in default in answering, this Court must first address defendant's branch of the cross-motion seeking to serve a late answer. "A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when opposing a motion for leave to enter a default judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer." Moriano v Provident New York Bancorp, 71 AD3d 747, 899 [2d Dept. 2010] quoting Lipp v Port Auth. of NY and NJ, 34 AD3d 649 [2d Dept. 2006].

As a reasonable excuse, defendant affirms that he was never served with process. The process server's affidavit of service states that plaintiff was served on May 20, 2015 by delivering a copy of the summons and complaint to "Jack Smith", Son, a person of suitable age and discretion, at defendant's actual residence. Defendant affirms that he does have two adult sons, but that neither of them live with him and his wife. He also states that he has spoken to each of them and neither of them were served with a summons and complaint. Defendant also affirms that he never received a copy of the summons and complaint in the mail.

The affidavit of service submitted by plaintiff constitutes prima facie evidence of proper service (see Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896 [2d Dept. [2d Dept. 2013]; Matter of Nieto, 70 AD3d 831 [2d Dept. 2010]; Argent Mtge. Co., LLC v Vlahos, 66 AD3d 721 [2d Dept. 2009]). Although a defendant's sworn denial of receipt of service generally rebuts the

presumption of proper service, a defendant's bare denial of receipt is insufficient to rebut the presumption of proper service (see Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner, 57 AD3d 732 [2d Dept. 2008]); Bankers Trust Co. Of California, N.A. v Tsoukas, 303 AD2d 343 [2d Dept. 2003]; De La Barrera v Handler, 290 AD2d 476 [2d Dept. 2002]).

Here, this Court finds defendant's conclusory denial of service lacks the factual specificity and detail required to rebut the prima facie proof of proper service set forth in the process server's affidavits of service (see ACT Props., LLC v Garcia, 102 AD3d 712 [2d Dept. 2013]; Bank of N.Y. v Espejo, 92 AD2d 707 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]). This Court notes that defendant has not submitted an affidavit from either son affirming that he was never served.

As defendant failed to offer a reasonable excuse for the default, this Court need not address whether defendant have demonstrated a meritorious defense (see Tribeca Lending Corp. v Correa, 92 AD3d 770 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732 [2d Dept. 2011]; American Shoring, Inc. v D.C.A. Constr. Ltd., 15 AD3d 431 [2d Dept. 2005]).

In any event, this Court finds that plaintiff has made a prima facie showing that it is entitled to judgment based upon its submission of the process server's affidavits of service, note, mortgage, and affidavit of Mr. Work evidencing defendant's failure to make the contractually required loan payments. This Court also finds that the evidence submitted by plaintiff, including a copy of the note which was provided at the commencement of this action, and the affidavit from Mr. Work stating that based upon a personal review of the records, plaintiff was in possession of the note at the time of commencement of this action, is sufficient to establish plaintiff's standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]).

An affidavit by an employee of the loan servicer stating that the note was physically delivered to plaintiff on a date specific prior to commencement of the action is sufficient to establish standing (see HSBC Bank USA, Nat. Ass'n v Spitzer, 131 AD3d 1206 [2d Dept. 2015]; Wells Fargo Bank, N.A. v Rooney, 132 AD3d 980 [2d Dept. 2015]; Aurora Loan Servs., LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept.

2013]). Therefore, "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" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]). Although Mr. Work does not state the exact delivery date of the note to plaintiff, his affidavit is sufficient to establish plaintiff's standing (see Aurora Loan Servs., LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]).

Regarding defendant's allegation that he never was served with the RPAPL 1304 notice, RPAPL 1304 provides that at least 90 days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). "[P]roper service of the RPAPL § 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (id. at 107). The presumption of receipt by the addressee "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 AD2d 679 [2d Dept. 2001]).

Mr. Work affirms that a 90-day pre-foreclosure notice was sent to defendant by certified mail and also by first-class mail. A copy of the notice dated July 15, 2014 is attached to the motion papers and is addressed to defendant at the mortgaged premises. As Mr. Work has identified that the servicer's business records were personally reviewed and that the notice was sent to defendant, plaintiff presented sufficient proof that it complied with RPAPL 1304. Although defendant contends that he did not actually live at the mortgaged premises, and thus he was not served with proper RPAPL 1304 notice, defendant submits no evidence to support that he did not reside at the mortgaged premises or that plaintiff knew defendant did not reside there at the time the RPAPL 1304 notice was served. Defendant points out that the plaintiff purportedly served defendant with the summons and complaint elsewhere. However, plaintiff submits two process server's affidavits of attempted service from May 2015 attempting service of the summons and complaint on defendant at the mortgaged premises. Thus, defendant has failed to provide evidence that at the time the RPAPL 1304 notice was served in July 2014, plaintiff knew defendant did not live at the mortgaged

premises.

Lastly, to be entitled to dismiss an action pursuant to CPLR 3217, defendant must demonstrate that the action was voluntarily discontinued on two prior occasions. Here, there has only been one voluntary discontinuance. The 2012 action was dismissed by Order dated January 14, 2014 for plaintiff's failure to file an Order of Reference as previously directed by the Court.

Based on the foregoing, plaintiff's motion is granted and defendant's cross-motion is denied.

Order of Reference signed contemporaneously herewith.

Dated: April 26, 2016
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.