

<b>Beneficial Homeowner Serv. Corp. v Gastaldo</b>
2013 NY Slip Op 33027(U)
December 3, 2013
Supreme Court, Richmond County
Docket Number: 131124/10
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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BENEFICIAL HOMEOWNER SERVICE CORPORATION, Part C-2

Plaintiff,

Present:

-against-

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

JAYNE GASTALDO, BENEFICIAL HOMEOWNER  
SERVICE CORPORATION, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK  
CITY PARKING VIOLATIONS BUREAU, NEW  
YORK CITY TRANSIT ADJUDICATION BUREAU,  
JOHN DOE (said names being fictitious,  
it being the intention of the Plaintiff  
to designate any and all occupants of  
the premises being foreclosed herein,  
and any parties, corporations or entities,  
if any, having or claiming an interest  
or lien upon the mortgaged premises.

Index No. 131124/10

Motion Nos: 1282-001  
2416-002

Defendants.

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The following papers numbered 1 to 2<sup>1</sup> were fully submitted on  
the 25<sup>th</sup> day of September, 2013:

	Papers Numbered
Plaintiff's Motion for Summary Judgment and Order of Reference (Affidavit in Support of Motion for Summary Judgment and Order of Reference in Mortgage Foreclosure, Affidavit of Amount Due) (Dated: April 11, 2013).....	1
Defendant Jayne Gastaldo's Notice of Cross Motion to Dismiss Complaint (Affirmation, Affidavit in Support) (Dated: July 15, 2013).....	2

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<sup>1</sup>An undated partial photocopy of a document entitled "Attorney's Affirmation in Response to Defendant's Cross Motion" has not been considered for disposition of these motions.

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Upon the foregoing papers, plaintiff's motion for summary judgment (Motion Seq. No. 1282-001) is denied, and defendant's cross-motion (Motion Seq. No. 2416-002) for dismissal of the complaint is granted.

This is an action by plaintiff to foreclose a mortgage on residential property located at 383 Green Valley Road, Staten Island, New York.

It appears undisputed that on August 23, 2003, defendant, Jayne Gastaldo (hereinafter "defendant"), executed a mortgage in favor of plaintiff to secure the principal sum of \$15,598.18. Thereafter, on April 25, 2005, defendant executed a second mortgage in favor of plaintiff to secure a further loan in the amount of \$395,304.60. Both mortgages were consolidated to form a single mortgage lien in the amount of \$410,541.29 (see "Mortgage and Consolidation Agreement" dated April 25, 2005, Defendant's Exhibit C). On September 30, 2009 defendant defaulted under the terms of the agreement.

Plaintiff, through its predecessor counsel, Steven J. Baum, P.C., commenced this foreclosure action on July 19, 2010 by the filing of a summons and complaint (see Plaintiff's Exhibit D). Defendant served her answer on August 5, 2010 (see Defendant's Exhibit B). On or about December 16, 2011, plaintiff's present counsel entered the case and was substituted for the law firm of Steven J. Baum, P.C. (see Plaintiff's Exhibit M). Current counsel

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avers that on March 17, 2011, nine months before it took the case, a "final mandatory settlement conference" was held, at which time plaintiff was "authorized to continue the instant foreclosure proceeding" (see April 11, 2013 affidavit of Jonathan D. Pincus, Esq., para 22).

Plaintiff now moves for summary judgment striking defendant's August 5, 2010 answer (see Defendant's Exhibit B), and appointing a Referee to compute the amounts it is allegedly owed. In support, plaintiff claims, *inter alia*, through the November 2, 2012 "Affidavit of Amount Due" executed by Kimberly Vyfhuis, its Vice President of Administrative Services, that a "notice of default"<sup>2</sup> was mailed to defendant's home by regular mail on February 3, 2010 (see Vyfhuis affidavit, para 8), and that the statutory 90 day notice required under RPAPL 1304 was mailed to defendant's home by certified mail on April 9, 2010, and by first class mail on April 12, 2010 (see Vyfhuis affidavit, para 6).

In opposition to plaintiff's motion, defendant argues that plaintiff failed to provide defendant with a demand letter and written notice of default - conditions precedent to accelerating the subject mortgage. Defendant unequivocally denies receiving either the February 3, 2010 default letter or the RPAPL 1304 notice

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<sup>2</sup>By its own terms, the default notice serves as a condition precedent to foreclosure: "This document is being sent only because it is required to accelerate your loan under the terms of the security instrument you gave to HFC" (see Plaintiff's February 3, 2010 correspondence to defendant).

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(see affidavit of Jayne Gastaldo, para 14, 16). She points to plaintiff's failure to submit a return receipt or an affidavit of service in connection with the mailing of the RPAPL 1304 notice. Moreover, defendant informs that when the purported return receipt serial number<sup>3</sup> is entered in the United States Postal Service online "Track & Confirm" database, the response thereto fails to indicate delivery to defendant.

As previously indicated, plaintiff's motion is denied and defendant's cross-motion is granted.

Plaintiff has failed to establish the proper mailing of the requisite February 3, 2010 acceleration notice. The copy of the notice addressed to defendant is insufficient absent evidence that the notice was properly posted. In the absence of any proof of proper mailing, plaintiff may not rely on the rebuttable presumption of receipt generated thereby (see NYU-Hospital for Joint Diseases v. Esurance Ins Co., 84 AD3d 1190, 1191; Grogg v. South Rd Assoc, LP, 74 AD3d 1021). In this case, plaintiff has presented no proof to rebut defendant's claim that she did not receive the notice. Likewise, no evidence has been submitted indicating that the acceleration notice was properly posted before the action was commenced.

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<sup>3</sup>Separate from plaintiff's notice letter is a blank paper bearing a bar code and the serial number 7118 9042 9550 9902 4740.

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With respect to whether the statutory notice required by RPAPL 1304 was given to defendant, the Court notes that pursuant to RPAPL 1304(2), such notice **must** be sent by the lender, assignee or mortgage loan servicer to the borrower by **registered or certified mail and also by first-class mail** (see Aurora Loan Servs LLC v. Weisblum, 85 AD3d 95, 103-104; *emphasis added*). Here, the absence of proof of such mailing (*i.e.*, a return receipt, an affidavit of service, proof of delivery via United States Postal Service "Track & Control" database) indicates that plaintiff's RPAPL 1304 notice was not served in accordance with the statutory requirements. This paucity of proof is sufficient for dismissal of the complaint.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that the cross-motion of defendant Jayne Gastaldo is granted to the extent that the complaint is dismissed, without prejudice, and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

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/s/  
HON. THOMAS P. ALIOTTA  
J.S.C.

Dated: December 3, 2013