Bank of Am., N.A. v Purita
2015 NY Slip Op 32481(U)
December 4, 2015
Supreme Court, Suffolk County
Docket Number: 14021-2011
Judge: C. Randall Hinrichs

[* 1]

SHORT FORM ORDER

INDEX
NO.: 14021-2011

SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

x

BANK OF AMERICA, NATIONAL ASSOCIATION

Plaintiff,

-against-

FRANCO G. PURITA, CLAUDIA PURITA, WELLS FARGO BANK, N.A., JOHN DOE (Said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.)

Defendants.

x

MOTION DATE: 1-23-14 (001)
1-23-14 (002)

ADJ. DATE: _____

Mot Seq. #: 001-MD
Mot Seq. #: 002-XMotD

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 13; Answering Affidavits and supporting papers 14 - 17; Replying Affidavits and supporting papers 18 - 20; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Franco Purita and Claudia Purita, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied; and it is

ORDERED that this cross motion (002) by the defendants Franco Purita and Claudia Purita for an order (1) denying the plaintiff's motion; and (2) granting them summary judgment dismissing the complaint insofar as asserted against them pursuant to CPLR 3212 on the grounds, inter alia, that the plaintiff failed to furnish proof of compliance with the 30-day notice requirements in the loan instruments, and the plaintiff's failure to comply with the 90-day notice requirements of RPAPL §1304 is granted, solely to extent that the compliant is dismissed insofar as asserted against them, without prejudice to the plaintiff's commencement of a new foreclosure action against answering defendants; and it is

ORDERED that the County Clerk of Suffolk County is directed, upon payment of proper fees, if any, to cancel and discharge the notice of pendency filed in this action on April 22, 2011 against the property 19995 Soundview Avenue, Southold, New York 11971. The Clerk shall enter upon the margin of the record a notice of cancellation referring to this order; and it if further

ORDERED that the Clerk of the County of Suffolk County be served with a copy of this order with notice of entry; and it is further

ORDERED that the moving parties are directed to serve a copy of this order with notice of entry upon opposing counsel and upon all defendants herein by first class mail within thirty (30) days of the date herein and to file the affidavit of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential property known as 19995 Soundview Avenue, Southold, NY 11971 ("the property"). On April 13, 2006, the defendant Franco Purita executed a note in favor of Wells Fargo Bank, N.A. ("the lender") in the principal sum of $1,350,000.00. To secure said note, Franco Purita and his wife Claudia Purita ("the defendant mortgagors") gave the lender a mortgage also dated April 13, 2006 on the property. By way of a undated endorsement, the note was allegedly transferred to Bank of America, National Association ("the plaintiff"), and memorialized by an assignment of the mortgage and the note executed on March 24, 2011. Thereafter, the assignment was duly recorded in the Suffolk County Clerk's Office on April 13, 2011.

Mr. Purita allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on April 1, 2010, and each month thereafter. After Mr. Purita allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on April 22, 2011. In response to the complaint, the defendant mortgagors interposed a verified answer sworn to on May 23, 2011. By their answer, the defendant mortgagors generally deny all of the allegations set forth in the complaint, and assert seven affirmative defenses, including, inter alia, the plaintiff's lack of standing; the lack of personal jurisdiction; promissory estoppel in connection with alleged representations by the plaintiff or its agents in connection with a purported short sale; and the plaintiff's failure to: state a cause of action; properly comply with the notice requirements in the loan instruments; and notify the defendants of the transfer of the loan instruments. The remaining defendants have neither answered nor appeared herein, and thus are in default.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on October 6, 2011 and continuing through to October 16, 2012. On the last date, this action was dismissed from the conference program and referred as an IAS case because the parties were unable to modify the loan or otherwise reach a settlement. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagors, striking their answer and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; (4) amending the caption; and (5) awarding

to it the costs of this motion.

In support of the motion, the plaintiff submits, among other things, the note, mortgage, adjustable rate rider, and an assignment of the mortgage and note; the pleadings; an affirmation from counsel; an affidavit from Angela Bribiesca-Mory, a Vice President of the lender, the plaintiff's servicer; affidavits of service; a copy of a 30-day default notice dated May 16, 2010 from Wells Fargo Home Mortgage (Wells Fargo) and addressed to Mr. Purita; and two copies of a 90-day notice dated May 16, 2010 from Wells Fargo and addressed to Mr. Purita pursuant to RPAPL 1304.

The note provides, inter alia, that "the [n]ote [h]older may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the [n]ote [h]older may require me to pay immediately the full amount of [p]rincipal which has not been paid and all interest that I owe on that amount" (*see*, Note § 7 [C]). With respect to giving of notices, the note provides, in part, that notices that must be given, "will be given by delivering it or by mailing it by first class mail to me at the [p]roperty [a]ddress" (*see*, Note § 8). Concerning obligations of the signatories to the note, section "9" therein provides, in part, that "[i]f more than one person signs the [n]ote, each person is fully and personally obligated to keep all of the promises made in [the] [n]ote, including the promise to pay the full amount owned."

In the mortgage, the defendant mortgagors are collectively described therein as "borrower." In an initial introductory paragraph, the mortgage includes a "promise" that the "borrower" thereof lawfully owns the property. In a second introductory paragraph, the mortgage provides, in alia, that promises and agreements are in "plain language." In the mortgage, the "borrower" promises to pay the [lender] on time principal and interest due under the note and any prepayment, late charges and other amounts due under the [n]ote" (*see*, Mtge. § 1). Section "15" of the mortgage provides, in part, that "[n]otice to any one [b]orrower will be notice to all [b]orrowers unless [a]pplicable [l]aw expressly provides otherwise." Section "15" further provides that the notice address is the address of the property unless a different address is given to the lender (*see*, Mtge. § 15). The words "[b]orrower" are printed next to each signature placed on the mortgage with Mrs. Purita's signature placed at the last signature line, with three empty lines below her husband's. The notice address in the mortgage (*see*, Mtge. § B) is the same as the property address (*see*, Mtge. § A).

The adjustable rate rider, executed by the defendants mortgagors on April 13, 2006, provides, inter alia, that it was given by the "[b]orrower" to secure the "[b]orrower's adjustable rate note to the lender. The last page of the document specifies that the "[b]orrower" accepts and agrees to the terms and covenants contained in therein. Next to each printed name are the words "[b]orrower." Mrs. Purita's name and signature is placed two lines beneath her husband's, with one empty space between them.

In the complaint, the plaintiff alleges that Mr. Purita allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on April 1, 2010, and each month thereafter. The plaintiff also alleges, in part, that it complied with section 1304 and 1306 of the Real Property Actions and Proceedings Law, "if applicable." In the "wherefore clause" of the complaint, the plaintiff seeks, among other things, a deficiency against "any original or subsequent obligors so named in this action." In "Schedule B-Defendants" of the complaint, Mr. Purita is listed as "original mortgagor," and the defendants mortgagors as record owners.

In her affidavit of merit, Ms. Bribiesca-Mory alleges that she is familiar with the business records maintained by the plaintiff for the purposes of servicing mortgage loans in the regular performance of her job functions. These records are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by the plaintiff. It is the regular practice of the plaintiff to make these records, and she has acquired personal knowledge of the matters stated by examining these business records. According to Ms. Bribiesca-Mory, there was a default in payment under the terms and conditions of the promissory note and mortgage, because the April 1, 2010 and subsequent payments were delinquent. She confirms that a notice of default was mailed to the "mortgagor(s)" at the last known address provided by them, and that a 90-day pre-foreclosure notice was sent to the "borrower(s)" by certified mail and also by first-class mail to the last known address of the "borrower(s)," and, if different, to the residence that is the subject of the mortgage. Ms. Bribiesca-Mory further alleges that the plaintiff was in possession of the note prior to April 22, 2011, and that it elected to call due the entire unpaid principal balance together with interest and disbursements, including reasonable attorney fees and costs, allowable under the terms of the note and mortgage based upon the default.

In his affirmation, counsel avers, inter alia, that the sixth affirmative defense is without merit because the plaintiff submitted uncontroverted proof that the default and demand letters were mailed "to the defendant" on May 16, 2010. He further avers that these letters contain all of the information and notification required under the terms of the mortgage.

In opposition to the motion and in support of the cross motion, the defendant mortgagors submit, inter alia, an affidavit from Mr. Purita and an affidavit from Mrs. Purita. The defendant mortgagors oppose the motion and cross move for, among other things, an order: (1) denying the plaintiff's motion; and (2) granting them summary judgment dismissing the complaint insofar as asserted against them pursuant to CPLR 3212 on the grounds, inter alia, that the plaintiff failed to furnish proof of compliance with the 30-day notice requirements in the loan instruments, and the plaintiff's failure to comply with the 90-day notice requirements of RPAPL § 1304 with respect to the defendant Claudia Purita. In response, the plaintiff has filed opposition papers, and the defendant mortgagors have filed reply papers.

In his affidavit in opposition to the motion and in support of the cross motion, the defendant mortgagors re-assert the previously plead sixth affirmative defense that the plaintiff did not comply with the notice requirements in the mortgage. They also now assert that the plaintiff failed to comply with the 90-day notice requirements of RPAPL §1304. Mr. Purita argues that the plaintiff failed to demonstrate compliance with RPAPL §1304 by submitting proof of service of the 90-day notice upon him by registered or certified mail and ordinary mail. In support of his position, Mr. Purita alleges that he did not receive a 90-day notice by ordinary mail and that he "does not recall receiving same by any other means." He also alleges that he has "no recollection of receiving the 30-day [default] letter" submitted by the plaintiff with its moving papers. Mr. Purita argues, in the alternative, that the plaintiff should be precluded from foreclosing based upon equity and the doctrine of estoppel because he "could have paid" the amount alleged to be due and owing, had the lender and/or its agents not have instructed him not to pay as a pre-condition to a possible refinance. Mr. Purita alleges, in sum and substance, that he pursued a refinance by submitting "required documents and information" at least five times, but each time he either received no response, or was informed that the information that he had provided was outdated. He further alleges that "a short sale opportunity did not materialize."

In her affidavit, Mrs. Purita argues that the plaintiff failed to demonstrate compliance with the a 90-day notice pursuant to RPAPL §1304. She also asserts that she is a "borrower" within the meaning of RPAPL § 1304, alleging that she is a co-owner of the property and is named as a borrower within the mortgage. Mrs. Purita asserts that the cross motion must be granted because the plaintiff cannot prove compliance with the 90-day notice requirements of RPAPL §1304 with respect to her. In support of these contentions, Mrs. Purita alleges, inter alia, that she never received any of the default notices attached to the plaintiff's moving papers that were addressed solely to her husband.

In opposition to the cross motion, the plaintiff has submitted, inter alia, an affirmation from its counsel and correspondence from the defendant mortgagors' attorneys dated November 21, 2012 as well as January 2 and March 29, 2013. In his affirmation, counsel now argues that pursuant to RPAPL § 1304 (3) the plaintiff was relieved of the obligation to supply a 90-day notice to the defendant mortgagors because they applied for a loan modification after the commencement of this action. Counsel points to the procedural his history of this case with respect to the settlement conferences, statements made by Mr. Purita in his affidavit submitted herein and correspondence from opposing counsel transmitting certain documentation relating to a past application for a loan modification. Concerning the default notice, counsel avers that the mortgage provides that notice to any one borrower is notice to all borrowers, thus, inferring that notice was not required to be given to Mrs. Purita. Counsel also asserts that the presumption of regularity applies herein, thus inferring that the notices should be deemed properly served.

In reply, the defendant mortgagors have submitted the affirmation of counsel, whereby he asserts that the plaintiff only provided the 90-day default notice to Mr. Purita by incorrectly relying upon the mortgage provisions instead of RPAPL § 1304. He also contends that the defendant mortgagors applied for a mortgage modification long after commencement. Counsel argues that this action must be dismissed because the plaintiff failed to comply with RPAPL § 1304.

It is well settled that the proponent of a summary judgment motion bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Norwest Bank Minn. v Sabloff***, 297 AD2d 722, 723 [2d Dept 2002]). Failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposition papers (***De Santis v Romeo***, 177 AD2d 616, 616 [2d Dept 1991]).

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as

waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883 [2d Dept 2010], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467 [2d Dept 1997]).

In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105 [2d Dept 2011]).

It has been established that the Home Equity Theft Protection Act is remedial in nature and "designed to stem the anticipated rise in so-called *mortgage rescue schemes*, and its provisions should be liberally construed in favor of equity sellers" (***Lucia v Goldman***, 68 AD3d 1064, 1066 [2d Dept 2009] [emphasis supplied]). Further, the legislative intent was to provide a homeowner with information necessary to preserve and protect home equity (*see*, Real Property Law 265-a[1][d]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra at* 107; ***Cadelrock Joint Venture, L.P. v Callender***, 41 Misc3d 903, 906 [Sup Ct, Kings County 2013]). Nevertheless, "[t]he starting point in any case of statutory interpretation must, of course, always be the language itself, giving effect to its plain meaning. A court cannot amend a statute by adding words that are not there" (***Am. Transit Ins. Co. v Sartor***, 3 NY3d 71, 76 [2004]).

RPAPL § 1304 plainly read, requires service of the 90-day notice on a "borrower," not a homeowner or mortgagor (*see*, RPAPL § 1304). Furthermore, "[l]ogic dictates that a borrower is someone who, at a minimum, either received something and/or is responsible to return it" (***U.S. Bank v Hasan***, 42 Misc3d 1221 [A] [Sup Ct, Kings County 2014, slip op, at 2]) [non-obligor spouse who only signed the mortgage not deemed a "borrower" for the purposes of RPAPL § 1304]; *see*, ***Bank of N.Y. Mellon v Roman***, 2012 NY Slip Op 31687 [U] [Sup Ct, Queens County 2012] [notice provisions of RPAPL 1304 were deemed inapplicable to the co-executors of borrower's estate, holding an interest in the property after his death by deed and life estate, neither of whom assumed the mortgage or obtained a new mortgage in their own names]; *contra,* ***Indymac Federal Bank FSB v Black***, 22 Misc3d 1115 [A] [Sup Ct, Rensselaer County 2009] [non-obligor signatory to the mortgage deemed a "borrower" for the purposes of RPAPL § 1304 and CPLR 3408 based upon a liberal construction "to carry out the reforms intended and to promote justice," slip op, at 1]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103 [2d Dept 2011]; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504 [3d Dept 2012]). Since this action was commenced on April 22, 2011, the 90-day notice requirement set forth in the statute is applicable. Thus, in support of its motion for summary judgment on the complaint, the plaintiff

was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL § 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369 [Sup Ct, Monroe County 2013]). 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" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680 [2d Dept 2001]). CPLR 2103(f)(1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478 [2004]).

Unlike the defense of a failure to satisfy a contractual condition precedent which must be pleaded (*see*, CPLR 3015[a]; 3018), a party who has timely appeared may raise the absence or defective notice defense on motion, even though it was not included in an answer nor made the subject of a pre-answer to dismiss (***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 462 [Sup Ct, Suffolk County 2013] [finding that the failure to comply with RPAPL § 1304 gives rise to a heightened or "super" defense to the plaintiff's claim that is not subject to waiver]). Since, the notice defense remains viable during the pendency of the action it may be raised by a non-defaulting party any time prior to judgment (***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, *supra* at 462).

The Court will first address the cross motion by the defendant mortgagors because that determination may render the plaintiff's motion-in-chief academic. The defendant mortgagors established prima facie that the plaintiff failed to satisfy a condition precedent by failing to provide them with notice of default prior to demanding payment of the loan in full (*see*, ***GMAC Mtge. LLC v Bell***, 128 AD3d 772 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Eisler***, 118 AD3d 982 [2d Dept 2014]; *cf.*, ***JPMorgan Chase Bank v Kang***, 2015 NY Slip Op 30955 [U] [Sup Ct, Queens County 2015] [affidavit of merit of plaintiff's "Legal Specialist III" sufficiently detailed proof of mailing of the default notice, by indicating that she had knowledge of and has reviewed business records, which were maintained in the course of the plaintiff's regularly conducted business activities, and said records included proof of mailing documentation obtained from the United States Post Office at or near the time of mailing was made]). In support of their cross motion, the defendant mortgagors rely upon, inter alia, the affidavit of the plaintiff's representative and their own affidavits. In her affidavit, the plaintiff's representative provided a summary of relevant events, including the date that the default in payments, and the amounts due as well as the sending of default notices pursuant to the mortgage. The plaintiff's representative, however, did not allege sufficient facts as to how compliance with the default notice provisions in the mortgage were accomplished; nor did she identify the individual who allegedly did so (*see*, ***Wells Fargo Bank, N.A. v Eisler***,

118 AD3d 982, *supra*; ***U.S Bank Natl. Assn. v Liang***, 2015 NY Slip Op 31096 [U] [Sup Ct, Queens County 2015]; *see also*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242 [4th Dept 2013]). More specifically, the representative did not give any indication that she is familiar with the standard mailing practices or procedures of the entity alleged to have sent the notices, and that those practices or procedures were followed in this instance. The representative also made no attempt to explain the significance of the certain documentation submitted herein, which was addressed solely to Mr. Purita.

Additionally, the plaintiff's affiant neither specified the exact business records upon which she relies in her affidavit; nor did she allege that she is familiar with the plaintiff's record keeping practices and procedures to insure that items are properly addressed and mailed and, thus, she did not attempt to lay a foundation for their admissibility (*see*, CPLR 4518[a]; ***US Bank N.A. v Madero***, 125 AD3d 757 [2d Dept 2015]; ***Palisades Collection, LLC v Kedik***, 67 AD3d 1329 [2d Dept 2009]; *see also*, ***Cadle Co. v Gregory***, 293 AD2d 335 [1st Dept 2002] [finding that the affidavit of the plaintiff's employee that was submitted in support of the motion did not identify how he was familiar with the facts and circumstances stated therein, and that his assertions of a default and of certain amounts due were made without evidentiary support and were conclusory]). Furthermore, the affiant did not assert that she has personal knowledge of the defendant mortgagors' payment history since the time of the default (*see*, ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766 [2d Dept 2011]).

In any event, to the extent that the statements made by the affiant are based documents that were in the possession of Wells Fargo prior to the alleged transfer of the note and the mortgage to the plaintiff, these records constituted hearsay (*see generally*, ***People v Goldstein***, 6 NY3d 119 [2005]). The mere filing of papers received from other entities, "even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, because such papers simply are not made in the regular course of the recipient, who is in no position to provide the necessary foundation testimony" (***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 494, 495 [2d Dept 2007] [internal quotation marks omitted]). Since the plaintiff's representative failed to lay a proper foundation for the admission of the records relating to the default notice allegedly served in this case, under the business records exception to the hearsay rule (*see*, CPLR 4518[a]), those of her assertions that were based on these records are inadmissible (*see*, ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*). Moreover, the defendant mortgagors submit their personal affidavits in which they indicate that they indicate, among other things, that they did not receive the default notice as required by the terms of the mortgage.

In opposition, the plaintiff relied upon the same affidavit of its representative, which is insufficient to raise a triable issue of fact as to the defendant mortgagors' cross motion, thereby warranting denial of the motion and the granting of the cross motion (*see*, ***GMAC Mtge. LLC v Bell***, 128 AD3d 772, *supra*; ***Wells Fargo Bank, N.A. v Eisler***, 118 AD3d 982, *supra*). Counsel argument, made in the reply papers, that the plaintiff was only required to send one notice pursuant to the mortgage is to no avail, because the plaintiff failed to demonstrate compliance as to either of the defendant mortgagors.

While compliance with the 90-day notice requirements of RPAPL § 1304 satisfies the 30-day default notice requirements in a mortgage document (*see*, ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724 [2d Dept 2013]), the defendant mortgagors also established prima facie that the plaintiff failed to satisfy a condition precedent by failing to provide Mr. Purita with a 90-day notice for the same reasons articulated above (*see*, ***US Bank N.A. v Madero***, 125 AD3d 757, *supra; see also*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595

[2d Dept 2014]; *cf.*, ***TD Bank, N.A. v Leroy***, 121 AD3d 1256 [3d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***US Bank N.A. v Caronna***, 92 AD3d 865 [2d Dept 2012]). In any event, the conclusory statements set forth in the affidavit of merit that a 90-day notice has been given "to borrower(s)," even when combined with copies of certain documentation submitted herein, is insufficient to meet the requirements of the statute as to Mr. Purita, as the borrower (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank Natl. Assn. v Lampley***, 46 Misc3d 630 [Sup Ct, Kings County 2014]). The plaintiff's representative did not allege sufficient facts as to how compliance was accomplished. She also does not state that she served the notice; nor does she identify the individual who allegedly did so. Additionally, the plaintiff submitted neither an affidavit of service of the 90-day notice upon Mr. Purita, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

The plaintiff's reliance upon certain findings made in a certain unreported case, ***Bank of N.Y. Mellon v Aquino***, 2012 NY Slip Op 33143 [U] (Sup Ct, Queens County 2012), is misplaced. In ***Aquino***, the Supreme Court, Queens County (Kerrigan, J.) determined, inter alia, that the 90-day notice requirement ceased to apply where the defendants in that case, Alberto and Elizabeth Aquino, had applied for and received a loan modification in 2008, subsequently defaulted under the loan modification agreement and, after commencement of the action, applied for another modification with the plaintiff in that action. ***Aquino*** is clearly inapposite to the facts of this case. Unlike ***Aquino***, the plaintiff's submissions concerning this issue merely show that the defendant mortgagors applied for a loan modification after commencement. Thus, the plaintiff failed to raise a triable issue of fact in opposition to the cross motion (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*). Accordingly, the complaint is dismissed insofar as asserted against to the defendant mortgagors.

In light of the above, this court need not consider, as academic, the defendants mortgagors remaining arguments in support of their cross motion. Moreover, to the extent plaintiff seeks summary judgment, the appointment of a referee to compute and certain incidental relief, the same is denied as academic.

Accordingly, the defendant mortgagors' cross motion for an order granting them summary judgment dismissing the complaint insofar as asserted against them is granted, and the plaintiff's motion for summary judgment and other incidental relief is denied. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: Dec. 4, 2015

C RM Hinrichs

Hon. C. RANDALL HINRICHS, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**