To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
FORECLOSURE SETTLEMENT CONFERENCE PART
COUNTY OF WESTCHESTER

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BANK OF AMERICA, N.A.,

Plaintiff,

-against-

ANDREW KESSLER, REIKO KESSLER, et al,

Defendants.

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DECISION AND ORDER
Index No.: 54780 /2014
Motion Date: 9/8/17
Motion Sequence: 3 and 4

SCHEINKMAN, J.

The following documents were read on (1) plaintiff's motion for an order pursuant to rule 3212 of the Civil Practice Law and Rules for summary judgment as against the Kesslers, for an order pursuant to CPLR 3211(b) and 3212 dismissing the Kesslers' affirmative defenses, for an order pursuant to RPAPL 1321 appointing a referee to compute the amount due and owing, and for an order amending the caption of the above-captioned action and (2) this motion by Defendant, Andrew Kessler for an order dismissing the complaint based upon plaintiff's failure to comply with section 1304 of the Real Property Actions and Proceedings Law (hereafter RPAPL):

Notice of Motion - Affirmation in Support - Exhibits 1-8- Affidavit in Support - Exhibits 1-12 - Memorandum of Law - Proposed Order -

Notice of Cross-Motion - Affirmation in Opposition/Support - Affidavit in Support Exhibits - Memorandum of Law

Affirmation in Opposition/Reply - Exhibits
Affirmation in Reply - Affidavit in Reply - Exhibits -
Memorandum of Law in Reply

Upon consideration of all of the foregoing, these motions are decided as follows:

Factual and Procedural Background

This action to foreclose on a mortgage, was commenced by filing with the Westchester County Clerk via the New York State Courts E-Filing system (hereafter, "NYSCEF") a summons and complaint on March 31, 2014. According to the complaint, and the exhibits annexed thereto, the subject mortgage on real property located at 36 Colabaugh Pond Road, Croton On Hudson, New York, and dated September 11, 2009 (hereafter, "the Mortgage"), was given by "Andrew Kessler" and "Reiko Kessler" to secure an Adjustable Rate Note (hereafter, "the Note") signed by "Andrew Kessler" for the amount of $590,302.00, and also dated September 11, 2009, to "MLD Mortgage, Inc.".

In the complaint, plaintiff alleged, inter alia, that it was the owner and holder of the note and the mortgage, that the Kesslers defaulted in the payment of the mortgage as of September 1, 2013, and that $549,594.55 in principal remained unpaid.

The Kesslers appeared in the above-captioned action by service of an answer, which was filed via NYSCEF on April 21, 2014. The answer pled 13 affirmative defenses – including that plaintiff lacks standing to maintain the above-captioned action – and one counterclaim. Plaintiff filed via NYSCEF its reply to counterclaim with affirmative defenses on May 12, 2014.

On October 16, 2015, the Kesslers filed via NYSCEF their Request For Preliminary Conference. On that same date, the clerk for this Court filed via NYSCEF a Preliminary Conference Notice directing counsel for plaintiff and the Kesslers to appear on December 9, 2015 for a preliminary conference or, alternatively, to file a Preliminary Conference Stipulation to be So Ordered by the Court.

A Preliminary Conference Stipulation was submitted to the Court on November 20, 2015, So Ordered on November 25, 2015, and filed via NYSCEF on November 27, 2015. Pursuant to the So Ordered Preliminary Conference Stipulation, discovery was to be completed by March 1, 2016 and counsel for the parties were directed to appear for a Trial Readiness Conference on March 21, 2016.

On March 21, 2016, counsel for both parties advised the presiding Court Attorney-Referee (hereafter, "CAR") that discovery was not complete and jointly requested that the deadline for discovery be extended. Counsel were directed that discovery must be complete by June 10, 2016, and that the Trial Readiness Conference was continued to June 14, 2016.

On June 14, 2016, counsel for both parties advised the presiding CAR that discovery was not complete. Counsel for the Kesslers requested permission to make a motion for leave to serve and file an amended answer. The presiding CAR granted the request and set a motion schedule. The Trial Readiness Conference was continued to September 7, 2016.

The Kesslers moved for leave to amend the Answer via NYSCEF on July 13, 2016. By Court Notice filed via NYSCEF on July 18, 2016, the presiding CAR directed counsel for the parties to appear on August 3, 2016, and held the Kesslers' motion in abeyance pending that appearance.

On August 3, 2016, counsel for both parties appeared. The presiding CAR denied plaintiffs's request that the Kesslers' motion not be considered and set a schedule for the submission of plaintiff's opposition and its own cross-motion for summary judgment. The return date for both motions was set for November 29, 2016.

On November 1, 2016, plaintiff filed opposition to the Kesslers' motion and made cross-motions for summary judgment and ancillary relief. On November 18, 2016, the Kesslers filed reply papers in further support of their motion and in opposition to plaintiff's cross-motions. On December 2, 2016, plaintiff filed reply papers in further support of its cross-motions. The motions were deemed fully submitted on December 6, 2016, the date to which the original return date had been adjourned by the parties.

Pursuant to Decision and Order of this Court dated March 8, 2017 and filed on March 9, 2017, the Kesslers' motion to amend their answer was granted. Plaintiff's motion for summary judgment, the appointment of a referee and to amend the caption was denied. Plaintiff's motion to dismiss the affirmative defenses was granted to the extent that the first affirmative defense (standing) was granted and otherwise denied. The parties were directed to appear for a trial readiness conference on April 7, 2017.

The trial readiness conference was adjourned until April 10, 2017, both parties appeared and the matter was adjourned to May 11, 2017. On May 11, 2017, the trial readiness conference was adjourned until May 23, 2017. Both parties appeared on the FSCP on that date and confirmed that discovery was complete. By Order of this Court dated and entered on May 24, 2017, the matter was certified ready for trial and a trial was scheduled for August 10, 2017.

On August 7, 2017 plaintiff filed the instant motion for an order awarding plaintiff summary

judgment as against the Kesslers, dismissing the Kesslers' remaining affirmative defenses, the appointment of a referee and to amend the caption. On September 1, 2017, defendant Andrew Kessler (hereafter "defendant") filed opposition to plaintiff's motion and a cross-motion to dismiss the complaint on the basis that plaintiff failed to comply with RPAPL §1304. Plaintiff filed opposition to the cross motion and reply papers to defendant's opposition on September 7, 2017. The motion was deemed fully submitted on September 8, 2017.[1]

Discussion

To prevail on a summary judgment motion, movant must submit evidentiary proof in admissible form which establishes that he is entitled to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default." *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 1159 (2d Dept 2012); *see also Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602, 603 (2d Dept 2013). "Once the plaintiff has made such a showing, it is then incumbent upon the defendant to assert any defenses which could properly raise a triable issue of fact regarding the default" (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 755 [2d Dept 2011]), and to do so by producing evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff has produced the mortgage and the note. Plaintiff submitted admissible evidence of borrower's default in the form of an affidavit from Jamie Cooper (hereafter "Cooper Affidavit"), who identifies herself as an Assistant Vice President of plaintiff, Bank of America, N.A. (*see* Cooper Affidavit at ¶1). Ms. Cooper states in her affidavit that borrowers defaulted on the monthly payments due December 1, 2013 and thereafter (*id* at ¶ 8). Together with the submission of the note

[1]The Court notes subsequent to the motion having been fully submitted, plaintiff submitted correspondence in the form of a letter regarding its application on September 13, 2017 and that defendant responded in kind on September 14, 2017. Neither of these submissions were considered, but had they been considered, neither correspondence would have affected the outcome of this decision.

and the mortgage, the Cooper Affidavit constitutes competent evidence of borrower's default (*see, HSBC Bank USA, N.A. v Betts*, 67 AD3d 735 [2d Dept 2009], *see also, Wells Fargo Bank, N.A. v Parker,* 125AD3D 845 [2d Dept 2015]).

In opposition to plaintiff's prima facie showing, and in support of its motion to dismiss defendant Andrew Kessler argues that plaintiff did not comply with a condition precedent to the commencement of a foreclosure action. Specifically, defendant asserts that plaintiff failed to comply with the requirements of RPAPL §1304. "RPAPL 1304, like RPAPL 1303, contains specific, mandatory language in keeping with the underlying purpose of HEPTA[2] to afford greater protections to homeowners confronted with foreclosure....content, timing and service provision of RPAPL 1304 are very specific and couched in mandatory language. '[A]t least ninety days before a lender, an assignee or a mortgage loan servicer commences legal against the borrower, including mortgage foreclosure such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen point type' of certain statutory specific information" *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 (2d Dept 2011) *(internal citations omitted)*. The notice required by RPAPL §1304 is commonly known as a "90 Day Notice". Proper service of an 90 Day Notice is a condition precedent to the commencement of an action and a plaintiff's failure to comply requires dismissal of the complaint (*id).*

Defendant's first argument is that plaintiff has not demonstrated that it complied with the mailing requirements of RPAPL§1304 because the evidence plaintiff proffered to demonstrate compliance is inadmissable hearsay. Defendant alleges that "...the Bank's affiant cannot lay a proper foundation for the documents relied upon to prove mailing by regular and certified mail" (Defendant's Affirmation in Opposition to Motion and in Support of Cross-Motion at ¶13-34). Defendant claims that "[t]he plaintiff has made no attempt to offer proof of actual mailing by the Plaintiff in any form, other than the conclusory allegation found in the Cooper affidavit and this unidentified, unauthenticated document created by another entity, to wit, the WALZ group" (*id* at 43).

The Court finds that contrary to defendant's contentions, plaintiff did demonstrate that it

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[2]"HEPTA" is the acronym for the Home Equity Theft Protection Act", passed by the New York State Legislature in 2006, Real Property Law §265-a.

complied with the mailing requirements of RPAPL §1304. Ms. Cooper, as an employee of plaintiff, avers that she is familiar with plaintiff's business practices as they relate to mailing 90-day Notices, she states that she reviewed the business records relating to this loan and confirmed that the business procedures for mailing out the notices were followed in this case (*see* Cooper Affidavit at ¶15-18). Furthermore, annexed to her affidavit, plaintiff included copies of the notices sent to defendants, the computer print-outs of the "Track-Right" shipping information, a copy of the proof of filing of the 90 Day Notice and copies of the certified mailing receipts.

Defendant's contention that the records are inadmissable hearsay because plaintiff may have used a third party vendor to mail the 90-Day Notice is unpersuasive. In her affidavit, Ms. Cooper states that she is employed by the plaintiff and establishes that the records upon which she relied in creating the affidavit fall within the business records exception to the hearsay rule. As the court held in *People v. Kennedy* "[t]he essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposed of the conduct of the enterprise" (*People v Kennedy*, 68 NY2d 569). In the instant matter, the type of inherently trustworthy records are precisely the type of records upon which Ms. Cooper relies. The Cooper Affidavit, unlike the testimony of the expert witness in the Kennedy matter, establishes the trustworthiness of the records and therefore, her reliance on those records and the records themselves fall within the business record exception to the hearsay rule. This is unlike the matter to which defendant cites such as *Citimortgage, Inc. v Pappas*, 174 AD3d 900 (2d Dept 2017), in which the affiant failed to allege familiarity with plaintiff's standard office procedures for mailing such notices. Therefore, plaintiff established that it compliance with the mailing requirement of RPAPL §3404 (*see HSBC Bank USA, Nat. Ass'n v Ozcan,* 2017 WL 4657992 [2d Dept 2017]; *Citimortgage, Inc. v Espinal,* 134 AD3d 876 [2d Dept 2015]).

However, defendant also alleges that regardless of whether properly served, the 90 Day Notice itself was defective and therefore, not only does plaintiff's motion for summary judgment fail, the complaint must be dismissed. Defendant avers, "the Court's only decision to make here is whether Plaintiff's §1304 Notice violates §1304(2), specifically, the provision where the language

states 'in a separate envelope from any other mailing or notice'" (Defendant's Affirmation in Opposition and in Support of Cross-Motion at ¶5). Defendant argues that the 90 Day Notice that was served in this case is defective as it contains additional notices that were made part of the mailing. There is no factual dispute that in addition to the statutorily required information, the envelope including the 90 Day Notice also contained a page, numbered "7", with the heading "Additional Disclosures", which provided information for borrowers regarding bankruptcy and military service.

The question of law presented is whether the additional notices and/or disclosures included with the RPAPL §1304 Notice is tantamount to non-compliance with the statute and if so, whether such non-compliance mandates dismissal of the complaint. Effective as of January 2010 and until January 14, 2020, the relevant portion of the statute is as follows, "Such notice shall be sent by the lender , assignee or mortgage loan servicer in a separate envelope from any other mailing or notice". (RPAPL§1304) Therefore, RPAPL §1304, in its current iteration, mandates that its required notices be sent in a separate envelope from other notices. "When the plain language of the statute is precise and unambiguous, it is determinative" *Washington Post Co. v New York State Ins. Dept.* (1984); *see also, eg, Loehr v New York State Unified Court System*, 150 AD3d 716 (2d Dept 2017). The language of the statute at issue is clear, precise and unambiguous. Additionally, "...proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of a foreclosure action. A plaintiff's failure to show strict compliance requires dismissal" *Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95.

Plaintiff argues that the additional information contained in the envelope with the information mandated by RPAPL §1304 are not "other notices" prohibited by the statute because, inter alia, they are federally mandated notices and are meant to protect borrowers (*see* Plaintiff's Memorandum of Law in Reply, II[i]). Plaintiff argues, "...the Court should not entertain Defendant's invitation to judicially amend the state to prohibit federally required and protective disclosure paragraphs" (Plaintiff's Memorandum of Law in Reply, II[i]). Plaintiff's argument is misguided. RPAPL §1304 certainly does not prohibit plaintiff from mailing a borrower notices required by federal law. RPAPL §1304 simply and clearly mandates that the particular notices required by that particular statute be placed in a separate envelope from other notices. Plaintiff's argument is predicated on the idea that

since the additional notices were for the protection of certain borrowers, ie, service members and those in bankruptcy, that the inclusion of such additional information did not prejudice borrowers.

To support its argument, plaintiff relies on and annexes two decisions emanating from Suffolk County , *JP Morgan Chase Bank N.A. v Growney*, Index No. 2210/2013, Rouse, J (Sup. Court Suffolk County, June 12, 2017) and *Bank of Am., N.A. v Maeder*, Index No. 60078/2013, Whelan, J. (Sup. Court Suffolk County, April 27, 2015). In the Growney matter, the Court held that while complete failure to serve the 90-day notice would require dismissal, "...the Court can not go so far as to conclude that the inclusion of additional notice similarly mandates dismissal in the absence of express legislative intention that dismissal be the consequence of including more notices in a single mailing. This is particularly the case when the Legislature has now expressly removed the single mailing requirement". First, if a condition precedent is not met, as it has not been met in this case, dismissal IS mandated. Furthermore, the legislature did not eliminate the separate mailing provision until 2020, so even if the legislature's intention is that the separate envelope requirement will not be effective as of 2020, that provision of the statute is controlling in this matter *(see Emigrant Mort. Co., Inc. V Persad*, 118 AD3d 676 [2d Dept 2014]). Finally, it is neither for plaintiff nor the Court to decide what other "additional notices" might or might not be permissible based on content given the clear and explicit language of the statute, no matter how beneficial plaintiff argues those additional notices might be.

In sum, neither of the matters to which plaintiff cites are binding precedent on this Court. Furthermore, is well settled law in the Second Department that RPAPL §1304 is to be strictly construed (*see Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95; *Flagstar Bank, FSB v Damaro*, 145 AD3d 858 [2d Dept 2016]). In this instance, as it is undisputed that plaintiff provided additional information in the envelope along with the statutorily required information, this Court finds that plaintiff did not strictly comply with RPAPL §1304 and thus, a condition precedent to the foreclosure action was not met. Therefore, the complaint must be dismissed (*id*).

Other issues raised by defendant that were not addressed herein are moot based on the dismissal of the complaint.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Plaintiff, Bank Of America, N.A., motion is denied in its entirety; and it is

further

ORDERED that the motion of defendant Andrew Kessler to dismiss the complaint is granted: and it is further

ORDERED that the County Clerk of the County of Westchester be and is hereby directed to cancel and discharge of record, all Notices of Pendency filed in this action on, against the premises known commonly as 36 Colabaugh Pond Road, Croton On Hudson, County of Westchester, and said Clerk is hereby directed to enter upon the margin of the record of the same, a notice of cancellation referring to this Order.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
November 30, 2017

ENTER:

HON. ALAN D. SCHEINKMAN
Justice of the Supreme Court

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FILED VIA NYSCEF