Well Fargo Bank N.A. v Bedell
2019 NY Slip Op 30276(U)
February 6, 2019
Supreme Court, Suffolk County
Docket Number: 4330/2014
Judge: Howard H. Heckman
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 4330/2014
MOTION DATE: 12/3/2018
MOTION SEQ. NO.: #002 MD
#003 MG
#004 MD

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WELL FARGO BANK N.A.,

Plaintiff,

-against-

JIM BEDELL, et al.,

Defendants.
----------X

PLAINTIFF'S ATTORNEY:
MCCALLA RAYMER LEIBERT PIERCE
420 LEXINGTON AVE, STE 420
NEW YORK, NY 10170

DEFENDANT'S ATTORNEY:
R. DAVID MARQUEZ, P.C.
170 OLD COUNTRY RD, STE 505
MINEOLA, NY 11501

Upon the following papers numbered 1 to 56 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-7 (#002), 8-32 (#003) ; Notice of Cross Motion and supporting papers 33-41 (#004) ; Answering Affidavits and supporting papers 42-49 ; Replying Affidavits and supporting papers 50-54, 55-56 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Jim Bedell and Penelope Bedell ; 2) substituting Kevin Bedell as a named party defendant in place and stead of a defendant designated as "John Doe" and discontinuing the action against any remaining defendants designated as "John Does" and "Jane Does"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the motions by defendants' (Jim Bedell and Penelope Bedell) seeking an order pursuant to CPLR 3025 granting leave to serve an amended answer, and pursuant to CPLR 3212 & RPAPL 1304 dismissing plaintiff's complaint, are denied.

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $500,000.00 executed by defendants Jim Bedell and Penelope Bedell on January 28, 2005 in favor of Shamrock Financial Corporation. On the same date both mortgagors executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendants/mortgagors subsequently executed a consolidated mortgage agreement and promissory note dated October 20, 2006 creating a

single lien in the sum of $614,000.00 in favor of Fremont Investment & Loan. Both mortgagors thereafter executed a Home Affordable Modification Mortgage Agreement (HAMP) signed by the borrowers on February 16, 2013 which became effective February 1, 2013. The HAMP created a new principal balance of the sum of $755,681.53. The first modified payment under the terms of the HAMP became due February 1, 2013. Plaintiff claims that defendants made one payment under the terms of the HAMP and thereafter immediately defaulted within twelve days of signing the agreement by failing to make timely monthly mortgage payments March 1, 2013 and continuing to date. One year later, plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on February 28, 2014, . Defendants Bedells' served a pro se answer dated March 17, 2014 asserting twenty three (23) affirmative defenses.

By motion dated August 20, 2015 and made originally returnable on October 7, 2015 in IAS Part 37, defendants sought leave to amend their answer. That motion remained sub judice for more than three years. Plaintiff's subsequent motion seeking an order granting summary judgment striking defendants' answer and for the appointment of a referee was submitted on January 11, 2017 and made returnable on March 3, 2017 in IAS Part 37. Defendants' cross motion seeking an order dismissing plaintiff's complaint for failure to prove service of pre-foreclosure statutorily compliant mortgage default 90-day notices required pursuant to RPAPL 1304 was served on May 17, 2017 and made originally returnable on May 25, 2017 in IAS Part 37. All three motions remained sub judice until by Administrative Order 108-18 (Hinrichs, J.) dated November 29, 2018 the action and motions were reassigned to this IAS part. The motions were thereafter marked submitted on December 3, 2018.

With respect to the defendants' motion seeking leave to amend their answer, a review of the affirmative defenses/counterclaims set forth in the proposed answer reveals that the majority of the proposed defenses and counterclaims are merely duplicate claims previously set forth in the defendants' original answer and, in view of the fact that the only defenses and claims that remain in issue are those set forth in the summary judgment motions submitted by the parties which concern defenses previously pled by the defendants in their original answer (namely: standing and RPAPL 1304), no legal basis exists to grant defendants' leave to amend the answer.

With respects to plaintiff's motion, 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 eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015);

Wells Fargo Bank, N.A. v. Ali, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Mandrin,* 160 AD3d 1014 (2nd Dept., 2018) *Tribeca Lending Corp. v. Lawson,* 159 AD3d 936 (2nd Dept., 2018); *Deutsche Bank National Trust Co. v. Iarrobino,* 159 AD3d 670 (2nd Dept., 2018); *Central Mortgage Company v. Davis,* 149 AD3d 898 (2nd Dept., 2017); *U.S. Bank, N.A. v. Ehrenfeld,* 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *JPMorgan Chase Bank v. Weinberger,* 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *CitiMortgage, Inc. v. Klein,* 140 AD3d 913, 33 NYS3d 432 (2nd Dept., 2016); *U.S. Bank, N.A. v. Godwin,* 137 AD3d 1260, 28 NYS3d 450 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph,* 137 AD3d 896, 26 NYS3d 583 (2nd Dept., 2016); *Emigrant Bank v. Larizza, supra.; Deutsche Bank National Trust Co. v. Whalen,* 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Parker,* 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy,* 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*Nationstar Mortgage, LLC v. LaPorte,* 162 AD3d 784, 75 NYS3d 432 (2nd Dept., 2018); *Bank of New York Mellon v. Theobalds,* 161 AD3d 1137 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Oscar,* 161 AD3d 1055, 78 NYS3d 428 (2nd Dept., 2018); *CitiMortgage, Inc. v. McKenzie,* 161 AD3d 1040, 78 NYS3d 200 (2nd Dept., 2018); *U.S. Bank, N.A. v. Duthie,* 161 AD3d 809, 76 NYS3d 226 (2nd Dept., 2018); *Bank of New York Mellon v. Genova,* 159 AD3d 1009, 74 NYS3d 64 (2nd Dept., 2018); *Mariners Atl. Portfolio, LLC v. Hector,* 159 AD3d 686, 69 NYS3d 502 (2nd Dept., 2018); *Bank of New York Mellon v. Burke,* 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger,* 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.,* 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh,* 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone,* 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

Proper service of RPAPL 1304 notices on borrower(s) are conditions precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and 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. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendants do not contest their failure to make timely payments due under the terms of the promissory note and mortgage agreement since March 1, 2013. Rather, the issues raised by the defendants concern whether the proof submitted by the mortgage lender provides sufficient

admissible evidence to prove its entitlement to summary judgment based upon defendants' continuing default and plaintiff's compliance with statutory pre-foreclosure notice, and form and content of notice, requirements.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice,* 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of 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 purposes of the conduct of the enterprise." (quoting *People v. Kennedy,* 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan,* 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records– (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*see People v. Kennedy, supra* @ pp. 579-580)). The "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records." (*People v. Cratsley,* 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business." (*State of New York v. 158th Street & Riverside Drive Housing Company, Inc.,* 100AD3d 1293, 1296, 956 NYS2d 196 (2012); *leave denied,* 20 NY3d 858 (2013); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company,* 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica,* 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo,* 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO,* 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*see Citibank N.A. v. Abrams,* 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage,* 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang, supra.*)). As the Appellate Division, Second Department stated in *Citigroup v. Kopelowitz,* 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a foreclosure action rely on a particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a) and the records themselves actually evince the facts for which they are relied upon." Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business; 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the time the transaction occurred. – if demonstrated, make the records admissible since such records are considered trustworthy and reliable. Moreover, the language contained in the statute specifically authorizes the court discretion to determine admissibility by stating "*if the judge finds*" that the three foundational requirements are satisfied the evidence shall be admissible.

The four affidavits submitted from the mortgage servicer's (JPMorgan Chase Bank, N.A.'s) employees including: 1) an affidavit from Chase's legal specialist III dated December 8, 2016; 2) an "affidavit of note possession" from Chase's assistant secretary dated November 15, 2016 3) an "affidavit of mailing" from Chase's authorized signer dated Novmber 17, 2016; and 4) an affidavit from Chase's legal specialist III dated October 16, 2017-- provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavits set forth each employee's review of the business records maintained by the mortgage servicer; the fact that the books and records are made in the regular course of Chase's business; that it was Chase's regular course of business to maintain such records; that the records were made at or near the time the underlying transactions took place; that the records were created by an individual with personal knowledge of the underlying transactions; and that to the extent that the records were obtained from a prior servicer those records were integrated and incorporated into Chase's business records, were relied upon in Chase's day-to-day business operations and were kept and maintained during the ordinary course of Chase's business. Based upon the submission of these four affidavits, plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to the issues raised in this summary judgment application.

With respect to the issue of standing, plaintiff's submission of documentary evidence in the form of a copy of the original consolidated indorsed in blank promissory note, which plaintiff has attached to the complaint, together with the certificate of merit (CPLR 3012-b), provides sufficient evidence of possession of the underlying note to establish the plaintiff's standing to prosecute this foreclosure action (*see Bank of New York Mellon v. Theobalds,* 161 AD3d 1137, 79 NYS3d 50 (2nd Dept., 2018); *Bank of New York Mellonv v. Burke,* 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Thomas,* 150 AD3d 1312, 521 NYS3d 894 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Garrison,* 147 AD3d 725, 46 NYS3d 185 (2nd Dept., 2017); *U.S. Bank, N.A. v. Saravanan,* 146 AD3d 1010, 45 NYS3d 547 (2nd Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*) In addition, plaintiff has proven standing by submission of two affidavits from the mortgage servicer's assistant secretary and legal specialist III, each attesting to Chase's physical possession of the indorsed in blank consolidated note, beginning April 3, 2012 and continuously thereafter (with exceptions for limited time periods when the note was transferred to the two law firms which represented plaintiff) which

was prior to the date this action was commenced on February 28, 2014(*Aurora Loan Services v. Taylor, supra.; Wells Fargo Bank, N.A v. Parker, supra.; U.S. Bank, N.A. v. Ehrenfeld,* 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *GMAC v. Sidberry,* 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016); *U.S. Bank, N.A. v. Carnivale,* 138 AD3d 1220 (3rd Dept., 2016)). Any alleged issues concerning the mortgage assignments are therefore irrelevant to the issue of standing since plaintiff has established possession of the promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.,* 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Company v. Leigh,* 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)) and the loss of prior promissory notes is irrelevant since plaintiff has provided ample evidence to establish its possession of the consolidated note which proves plaintiff's standing to maintain this action.

With respect to the issue of the defendants' default in making payments, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see Property Asset Management, Inc. v. Souffrant et al.,* 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018); *PennyMac Holdings, Inc. V. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk,* 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and two affidavits attesting to the mortgagors undisputed default in making timely mortgage payments sufficient to sustain its burden to prove the Bedell defendants have defaulted under the terms of the parties agreement by failing to make timely payments since March 1, 2013 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning the defendants' continuing default, plaintiff's application for summary judgment based upon defendants' breach of the mortgage agreement and promissory note must be granted.

With respect to service of the pre-foreclosure RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute (RPAPL 1304) can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (*see Nationstar Mortgage, LLC v. LaPorte,* 162 AD3d 784, 79 NYS3d 70 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Ozcan,* 154 AD3d 822. 64 NYS3d 38 (2nd Dept., 2017); *CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia,* 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza,* 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.,* 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

In this case defendants have submitted a total of four affidavits– two in support of their cross motion and two in opposition to plaintiff's summary judgment motion. None of the affidavits assert that the 90-day notices were not delivered to the defaulting mortgagors; the only assertions set forth in the four affidavits is the claim that plaintiff failed to strictly comply with the statutory requirements by including an additional notice in the mailing and by providing erroneous information in the notice itself. Although not contested (except with respect to the issue of the

admissibility of plaintiff's affidavit) the record shows that there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office proving strict compliance with RPAPL 1304 mailing requirements. Plaintiff has submitted proof in the form of two affidavits from Chase representatives attesting to compliance with RPAPL 1304 mailing requirements– the second "affidavit of mailing" sets forth the testator's personal knowledge and familiarity with the mortgage servicer's mailing practices and confirms that the mailings were done on March 8, 2013, which was more than 90 days prior to commencing this action on February 28, 2014; together with four (4) copies of the 90-day notices which were addressed to mortgagors Jim Bedell and Penelope Bedell at the mortgaged premises residential address: the first two notices are evidence of the notices mailed by first class mailing; the second two notices are evidence of the certified mailings and contains twenty digit article tracking numbers (7190 1075 4460 1968 1571 & 7190 1075 4460 1968 1564). In addition, plaintiff's authorized signer testifies concerning Chase's imaging practice to confirm proof of mailing with copies of Chase's business records sheet entitled "First Class Proof of Mailing Report" which lists the mailing to Jim Bedell and Penelope Bedell at 1 Old Brookville Court Manorville, New York and Chase's business records sheet entitled "Certified Regulatory Mail Register" which lists and confirms certified mailings of the 90-day notices to the Bedells' with matching certified article tracking numbers dated March 8, 2013; together with a copy of the USPS bulk mailing receipt for the notices mailed by Chase on March 8, 2013; together with the RPAPL 1306 proof of filing statements with the New York State Department of Financial Services also confirming mailing of the notices to the defendant/mortgagor. Such proof provides a sufficient showing of strict compliance with the mailing requirements of RPAPL 1304 (*Nationstar Mortgage, LLC v. LaPorte, supra.; HSBC Bank USA, N.A. v. Ozcan supra.; see also Bank of America, N.A. v. Brannon,* 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). Defendant and defense counsel's conclusory denial of strict compliance, is not supported by any relevant, admissible evidence sufficient to raise a genuine issue of fact which would defeat plaintiff's summary judgment motion (*see PHH Mortgage Corp., v. Muricy,* 135 AD3d 725, 24 NYS3d 137 (2nd Dept., 2016); *HSBC Bank v. Espinal,* 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to defendants' remaining arguments concerning the form and content of the 90-day notices served by the plaintiff, defendants claim that plaintiff's inclusion of one additional page to the notice containing information for borrowers who are military members, or have filed for bankruptcy, violates RPAPL 1304(2) separate mailing requirements, and that the notice itself contained erroneous information related to the amount necessary to cure their default. Neither contention has merit.

1) As to the claim of an *error* in the amount due to cure the default which was then due the mortgage lender as set forth in the 90-day notice— plaintiff has submitted an affidavit from a Chase legal specialist III/authorized signer dated October 16, 2017 which is admissible as evidence pursuant to CPLR 4518, and which provides proof that the cure amount listed in the March 8, 2013 90-day notice mailed to the Bedells' in the sum of $9,911.32 was accurate.

2) As to the claim that plaintiff's inclusion of an informational page with the 90-day notice constitutes a violation of "strict compliance"— a fair reading of the language recited in the statute reveals that there is no prohibition of the additional information provided by the SCRA/FDCPA/Bankruptcy notice as long as the 90-day notice itself contains specific language required by the statute— which in this case it clearly does.

> Plaintiff's 90-day notice complies with the statute by setting forth the number of days the borrowers' home loan is in default (35 days); the payment amount required to cure the default ($9,911.32); and the date by which payment must be made to cure the default (April 7, 2013). The content of plaintiff's 90-day notice therefore strictly complies with statutory requirements and no legal grounds exist to dismiss the complaint by the de minimis inclusion of the federally mandated notices. The one page notice is neither deceptive nor prejudicial, and merely amplifies the debtor's rights, responsibilities, and opportunities with respect to the underlying default

Moreover, with respect to both arguments, even were this court to determine that there was a defect or irregularity in the content of the RPAPL 1304 notices mailed by the plaintiff in this action or in the additional one page of information included in the mailing as argued by the defendants (which in this instance this court does not so find), such a "defect" or "irregularity" would be considered so minimal as to warrant the exercise of the court's discretion pursuant to CPLR 2001 to avoid dismissal of the action and to therefore consider the notice as compliant with the statute (CPLR 2001; *see Aurora Loan Services, LLC v. Weisblum,* 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011). As the appellate court observed and predicted in the *Weisblum* case in defining "strict compliance:– "there may be some instances where (such) an error would be so minimal as to warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of the action"(*Weisblum at page 108*)).

Finally, defendants have failed to submit any admissible evidence to support their remaining affirmative defenses and counterclaims in opposition to plaintiff's motion. Accordingly, those defenses and counterclaims must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.,* 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A, v. Van Brunt Properties, LLC,* 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore,* 94 AD3d 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, defendant's motion and cross motion are denied and plaintiff's motion seeking an order granting summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

HON. HOWARD H. HECKMAN, JR.

Dated: February 6, 2019

J.S.C.