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| <b>HSBC Bank USA, N.A. v Schneider</b>   |
| 2020 NY Slip Op 30182(U)   |
| January 22, 2020   |
| Supreme Court, Suffolk County  |
| Docket Number: 0003282/2013  |
| Judge: C. Randall Hinrichs   |
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**SUPREME COURT - STATE OF NEW YORK  
IAS PART 49 - SUFFOLK COUNTY**

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

Motion Date: 001: 5-24-2018; 002: 6-21-2018  
Adjourned Date: 7-26-2018  
Motion Sequence: 001: MotD; 002: MD

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HSBC BANK USA, N.A.,

Plaintiff,

-against-

PAUL SCHNEIDER; MARCI SCHNEIDER;  
MANUFACTURERS AND TRADERS TRUST  
COMPANY; M&T BANK S/B/M MANUFACTURERS  
AND TRADERS TRUST COMPANY; JOHN DOE  
(Unknown Tenants/Occupants of the subject property  
being set forth to represent any and all occupants of the  
subject property being foreclosed herein, and any parties;  
entities of any kind, if any, having or claiming an interest  
or lien upon the mortgaged property),

Defendants.

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Upon the following papers: Notice of Motion by Plaintiff, dated April 17, 2018, with supporting papers; Notice of Cross-Motion by Defendants Paul schneider and Marci Schneider, dated June 6, 2018, with supporting papers; Plaintiff's Affirmation in Opposition to Cross Motion, dated July 16, 2018; and upon due consideration; it is

**ORDERED** that this motion (001) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendants Paul Schneider and Marci Schneider, 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) substituting "MTGLQ Investors, LP" as plaintiff herein; and (5) amending the caption, is granted in part and denied in part; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order striking the First through Sixth and Eighth through Eleventh affirmative defenses is granted, and the motion for summary judgment and an order of reference is otherwise denied, with leave to renew within 120 days of entry of this order, not to be extended without leave of Court; and it is further

**ORDERED** that so much of plaintiff's motion that seeks an order substituting "MTGLQ Investors, LP" as plaintiff herein, is granted; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks to substitute "BRETT SCHNEIDER" and "ELLA DOE" in place and stead of "JOHN DOE" as defendants, and to amend the caption accordingly, is granted; and it is further

**ORDERED** that the caption of this action is hereby amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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MTGLQ INVESTORS, LP,

Plaintiff,

-against-

Index Number: 003282/2013

PAUL SCHNEIDER; MARCI SCHNEIDER;  
MANUFACTURERS AND TRADERS TRUST  
COMPANY; M&T BANK S/B/M MANUFACTURERS  
AND TRADERS TRUST COMPANY; BRETT  
SCHNEIDER; ELLA DOE,

Defendants.

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**ORDERED** that so much of plaintiff's motion that seeks an order fixing the defaults of all non-answering defendants is granted; and it is further

**ORDERED** that this cross motion (002) by the answering defendants for dismissal of the complaint pursuant to RPAPL 1304, is denied; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein within thirty (30) days of the date of this order, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On June 23, 2004, defendant-mortgagors Paul Schneider and Marci Schneider executed a note in favor of plaintiff's predecessor in the principal amount of \$725,000. To secure said note, on the same date, defendant-mortgagors gave the lender a mortgage on the property. By way of a blank endorsement with physical delivery, the note was transferred to plaintiff prior to commencement of this action. Transfer

of the note to the plaintiff was memorialized by an assignment of the mortgage, duly recorded in the Office of the Suffolk County Clerk. Defendant-mortgagors allegedly defaulted on the note and mortgage by failing to make monthly payments of principal and interest which had come due on January 1, 2011. After defendant-mortgagors failed to cure the default in payment, plaintiff commenced the instant action by the filing of a *lis pendens*, summons and complaint on January 30, 2013. Issue was joined by the interposition of defendant-mortgagors' answer dated March 23, 2013. The remaining defendants have not answered the complaint. Following commencement of the action, the note was transferred to "MTGLQ Investors, LP" ("MTGLQ"), the proposed substituted plaintiff. Two foreclosure settlement conferences were held on January 11, and March 28, 2017.

By their answer, the defendant-mortgagors generally deny the material allegations set forth in the complaint, and assert eleven affirmative defenses. The grounds for defendants' opposition to the present motion and in support of their cross motion are limited to plaintiff's alleged failure to demonstrate strict compliance with the pre-foreclosure notice requirements of RPAPL 1304.

A plaintiff seeking summary judgment in a foreclosure action is required to produce the mortgage, the unpaid note, and evidence of default (*see DLJ Mtg. Capital, Inc. v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]). Further, when a defendant serves an answer which includes the affirmative defense of standing, the plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Here, plaintiff produced, *inter alia*, the note, the mortgage, and evidence of nonpayment. Plaintiff established its standing as the holder of the note by attaching it to the summons and complaint, demonstrating that the note was in its possession prior to the commencement of the action (*see Wells Fargo Bank v Thomas*, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; *U.S. Bank, N.A. v Saravanan*, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 1152, 9 NYS3d 315 [2d Dept 2015]). Transfer of the note and mortgage to MTGLQ Investors, LP following commencement of the action is demonstrated by a written assignment of the note and mortgage, duly recorded in the Office of the Suffolk County Clerk. It is additionally demonstrated by an affidavit, dated January 29, 2018, from Diana L. Shaner, an officer of Rushmore Loan Management Services, LLC, MTGLQ's loan servicer, which attests to its current possession of the note (*see Bethpage Federal Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 48 NYS3d 706 [2d Dept 2017]; *U.S. Bank N.A. v Guy*, 125 AD3d 845, 5 NYS3d 116 [2d Dept 2015]).

Plaintiff however failed to establish its *prima facie* entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the pre-foreclosure notice provisions of RPAPL § 1304 (*see Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). The plaintiff submitted neither affidavits of service, nor an affidavit from one with personal knowledge of the practices and procedures customarily used in the ordinary course of business for mailing of statutory notices (*see Citibank v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]);

*Citimortgage v Papas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *JPMorgan Chase Bank, Nat. Ass'n v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235, 236 [2d Dept 2016]). The Shaner affidavit, referenced above, avers in conclusory fashion that the notices were sent by regular and certified mail. Such conclusory statements are insufficient (*see Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). The affidavit does not establish that the requisite notices were sent because the affiant did not aver that she was familiar with the mailing practices and procedures for mailing the notices, “and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (citations omitted)” (*Citimortgage v Papas, supra.* 147 AD3d at 901; *see also Wells Fargo Bank, N.A. v Moran*, 2019 NY Slip Op 00637 [2d Dept]; *Bank of America v Guillaume*, 169 AD3d 625, 94 NYS3d 114 [2d Dept 2019]; *Wells Fargo Bank N.A. v Heiney*, 168 AD3d 1126, 93 NYS3d 84 [2d Dept 2019]; *Bank of America N.A. v Wheatley*, 158 AD3d 736 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890, 61 NYS3d 244 [2d Dept 2017]). Therefore, the seventh affirmative defense remains viable.

In their affirmation in opposition and in support of cross motion, defendants’ primary argument is with respect to plaintiff’s alleged non-compliance with the form and content requirements of RPAPL 1304. First, defendants argue that the plaintiff’s 1304 mailing “is unlawful because the mailing was made to and addressed to both Paul and Marci collectively in one letter.” Further, defendant Paul Schneider, in an affidavit dated June 6, 2018, attests that at no point in time did he receive the notice by certified and regular mail. Contrary to defendants’ contention, there is no authority for the proposition that the notice is facially defective just because both Paul Schneider and Marci Schneider are listed jointly as addressees. That contention is therefore rejected. However, as both Paul and Marci were borrowers, they are both entitled to notice under RPAPL 1304 (*see Aurora Loan Servs., LLC v. Komarovsky*, 151 AD3d 924, 58 NYS3d 96 [2d Dept 2017]). The *Komarovsky* decision left open the question of whether separate mailings to each borrower are required. In any event, as described above, the plaintiff’s proof here does not sufficiently demonstrate that the mailings were made, either jointly or separately.

Secondly, defendants argue that the 1304 notice they received included additional language prohibited by RPAPL 1304(2). RPAPL(1) requires that a plaintiff give borrowers a pre-foreclosure notice which shall include certain prescribed language explicitly set forth in the statute. RPAPL 1304(2) provides that the requisite notice be sent “in a separate envelope from any other mailing or notice.” Here the 1304 notice, in addition to the prescribed language, included additional language advising defendants that in the event they had filed a bankruptcy petition, which in this case defendants had not done, then plaintiff did not intend to take any action inconsistent with bankruptcy protections. According to defendants, the inclusion of this language constituted a further notice which was not permitted to be included with the pre-foreclosure notice, and therefore a failure on plaintiff’s part to demonstrate strict compliance with RPAPL 1304. Defendants’ characterization of the additional language as a prohibited notice, is unfounded. The mandatory language of 1304(1) provides that the pre-foreclosure notice “shall include” (emphasis added) certain prescribed language. The statute does not provide that such language be exclusive of any other particular language. To the contrary, it is clear that “the notices may include more language than that which is set forth in the statute” (*Citimortgage, Inc. Sbm ABN Amro Mortgage*

*Group, Inc. v Bunger*, 58 Misc.3d 333,341, 66 NYS3d 788 [Sup Ct, Suffolk County 2017]; *Citibank, N.A. v Feustel*, 59 Misc3d 1223(A), 2018 NY Slip Op 50673(U) [Sup Ct, Suffolk County 2018]; *HSBC Bank USA, N.A. v Bluestein*, 62 Misc3d 1215(A), 2019 NY Slip Op 50139(U) [Sup Ct, Suffolk County 2019]; *Deutsche Bank Nat'l. Trust Co. v Jimenez*, 93 NYS3d 532, 2018 NY Slip Op 28373 [Sup Ct, Suffolk County 2018]). The advisory included in the notice here simply provided important qualifying information to the borrowers in conjunction with the prescribed portion of the notice, and is consistent with the legislative intent behind the statute (see *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). It does not constitute a separate notice under 1304(2), nor grounds to conclude that plaintiff was non-compliant with the strict mandates of the statute.

Notwithstanding plaintiff's deficiencies of proof, as moving party on the cross motion, defendants failed to affirmatively demonstrate that the requisite pre-foreclosure notices were not sent or that plaintiff is otherwise non-compliant with RPAPL 1304 (see *U.S. Bank N.A. v Sabloff*, 153 AD3d 879, 60 NYS3d 343 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Spanos*, 102 Ad3d 909, 961 NYS2d 200 [2d Dept 2013]).

Accordingly, plaintiff's motion is granted in part and denied in part as set forth herein, and defendants' cross motion is denied.

Dated: Jan. 22, 2020

  
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HON. C. RANDALL HINRICHS, J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION