# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. FRANCIS KAHN, III** **PART** **32**

***Justice***

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**INDEX NO.** 850261/2018

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR HILLDALE TRUST,

**MOTION DATE**

**MOTION SEQ. NO.** 003

Plaintiff,

- v -

SABRINA BALSKY, BOARD OF MANAGERS OF 188 EAST 70TH STREET, MEMBERS CREDIT UNION, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

Upon the foregoing documents, the motion is determined as follows:

In this residential mortgage foreclosure action, Plaintiff moves to confirm the April 14, 2022, report of Referee Edward H. Lehner, Esq. and for the issuance of a judgment of foreclosure and sale. Defendant Sabrina Balsky ("Balsky"), the Mortgagor, opposes the motion.

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*Citimortgage, Inc. v Kidd,* 148 AD3d 767, 768 [2d Dept 2017]; *see also Bank of N.Y. Mellon v Davis*, 193 AD3d 803 [2d Dept 2021]). In a foreclosure action, a plaintiff is not required to rely on any particular set of business records, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]). A plaintiff may, therefore, rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). After issuance of the Referee's report, the court is authorized to reject the report, in whole or in part, and render its own findings (*see eg Bank of Am., N.A. v Barton,* 199 AD3d 625 [2d Dept 2021]).

As to the evidence relied upon by the Referee, amongst the abstract of evidence, the Referee listed an affidavit of merit and amount due. That document was annexed to the motion as Exhibit G. The affidavit was from Ron McMahon ("McMahon"), the Chief Executive Officer of American Mortgage Investment Partners Management, LLC ("American"), the claimed attorney in fact for Wilmington Savings Fund Society, FSB, as Owner Trustee of Residential Credit Opportunities Trust V-

D, Plaintiff, and loan servicer. McMahon stated he examined and relied on the books and records of FCI Lender Services, LLC, was familiar with its preparation and maintenance of its records, including the loan documents for this action, and that the records were kept in the ordinary course of business.

Although McMahon's affidavit was not based upon his personal knowledge of the loan at issue, it was sufficiently founded by the business records of FCI, which maintained same (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). McMahon laid a proper foundation for the admission of FCI's records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of prior servicers were also admissible since McMahon attested those records were received from prior entities, incorporated into the records FCI kept and were routinely relied on by FCI in its business (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]; *see also U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). The records attached to McMahon's affidavit, including the account ledger for the loan, substantially supported Plaintiff's claims as well as the Referee's findings as to the amount due under the note and other expenses (*see U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2nd Dept. 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2d Dept 2015]). Also annexed to the affidavit was a copy of the power of attorney establishing American's authority to act (*see Deutsche Bank Natl. Trust Co. v Silver*, 178 AD3d 898 [2nd Dept 2020]).

With respect to the notice required under RPAPL §1304, Defendant Balsky's failure to oppose Plaintiff's motion for summary judgment does not preclude her from raising the issue here (*see Wells Fargo Bank, N.A. v Merino*, 173 AD3d 491 [1st Dept 2019]; *see also Citimortgage, Inc. v Dente*, 200 AD3d 1025, 1027 [2d Dept 2021]). By raising the issue for the first time in opposition to the motion to confirm the referee's report, Plaintiff was entitled to submit evidence to support its compliance with RPAPL §1304 in reply (*see Emigrant Mtge. Co., Inc. v Lifshitz*, 143 AD3d 755 [2d Dept 2016]).

Plaintiff was required to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). The Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). An affidavit from the person who performed the actual mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Proof from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

Here, the notice submitted indicates that it was sent by Fay Servicing, LLC ("Fay"). However, McMahon failed to claim personal familiarity with Fay's mailing practices and procedures, and he failed to describe Fay's mailing procedures in any respect (*cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794

[2d Dept 2020]). Also, McMahon did not claim to have personal knowledge of the mailing and did not annex any records reviewed to support his claimed knowledge (*cf. United States Bank Trust, N.A. v. Mehl,* 195 AD3d 1054 [2d Dept 2021]). Mere annexation of copies of the notices and mailing envelopes inscribed with a code number does not constitute proof the notice was actually mailed (*see U.S. Bank N.A. v Hammer,* 192 AD3d 846 [2d Dept 2021]; *U.S. Bank, N.A. v Zientek*, 192 AD3d 1189 [2d Dept 2021]).

Accordingly, Plaintiff failed to establish *prima facie* that it sent pre-foreclosure notices pursuant to RPAPL §1304.

Defendant also opposes an award of interest to Plaintiff and posits that all interest in this matter should be stricken. "In 'an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by particular facts in each case,' including wrongful conduct by either party" (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1st Dept 2021], *citing South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]). "Further, a tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action" (*People's United Bank v Patio Gardens III, LLC*, 189 AD3d 1622, 1623 [2d Dept 2020]).

Here, the delays in prosecuting this matter from its release from the Residential Mortgage Foreclosure Settlement Part on May 15, 2019, to date are not attributable to Plaintiff (*see Bank of Am., N.A. v Montagnese*, 198 AD3d 850 [2d Dept 2021]). Plaintiff's motions for summary judgment and a judgment of foreclosure and sale were both filed before the initial deadlines set by the Court. All the delays thereafter were either pandemic related or resulted from Defendant's filing of a hardship declaration which precluded prosecution of this action through January 15, 2022.

Accordingly, Defendant's request to strike interest in this matter is denied.

Defendant's objection to an award of attorney's fees is unavailing. In assessing a request for legal fees, the Appellate Division, First Department held in *Jordan v Freeman*, 40 AD2d 656 [1st Dept 1972] as follows:

> The relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved . . . [The] court may consider its own knowledge and experience concerning reasonable and proper fees and in the light of such knowledge and experience, the court may form an independent judgment from the facts and evidence before it as to the nature and extent of the services rendered, make an appraisal of such services, and determine the reasonable value thereof [Internal citations omitted].

In the end, all that is required is that "the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (*Bankers Fed. Sav. Bank FSB v. Off W. Broadway Developers*, 224 AD2d 376 [1st Dept 1996]; *see also SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986 [2d Dept 2006]). The fee arrangement between Plaintiff and its counsel is also indicative of a reasonable fee under the circumstances (*see Mfrs. & Traders Trust Co. v. Dougherty*, 11 AD3d 1019, 1020 [4th Dept 2004]). Here, the proffered affirmation of legal services,

as well as this Court's appreciable knowledge and experience, supports the conclusion that the requested fee is reasonable.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion to confirm the Referee's report is granted; and it is

ORDERED that the remaining branches of the motion, including issuance of a judgment of foreclosure and sale are denied for failure to demonstrate compliance with RPAPL §1304.

All parties are to appear for a virtual conference via Microsoft Teams on **November 3, 2022 at 11:20 am.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

9/9/2022
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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| CHECK ONE: | [ ] | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [X] DENIED | [ ] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |