SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 - SUFFOLK COUNTY

INDEX NO.: 39134-11

PRESENT:
Hon. DANIEL MARTIN

MOTION DATE: 10-29-14
ADJ. DATE: _____
Mot. Seq. #001-MD

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BANC OF AMERICA FUNDING 2007-6 TRUST

PLAINTIFF'S ATTY:

McCABE, WEISBERG AND CONWAY, P.C.
145 Huguenot, Suite 210
New Rochelle, N. Y. 10801

Plaintiff,

-against-

MICHAEL NEVERS A/K/A MICHAEL G. NEVERS MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR MORTGAGEIT INC. and "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises, described in the verified complaint,

DEFENDANT'S ATTY:

MICHAEL KENNEDY KARLSON
Attorney for Michael Nevers
60 Seaman Avenue, 4 E
New York, N. Y. 10034

Defendants.

The following named papers have been read on this motion:

Notice of Motion for Summary Judgment and an Order of Reference	X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	X

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Michael Nevers, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied in its entirety; 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 and not waived further notice within thirty (30) days of the date herein, 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 known as 501 Fulton Place, West Babylon, New York 11704 ("the property"). On March 28, 2007, the defendant Michael Nevers ("the answering defendant") executed a fixed-rate note in favor of Mortgageit, Inc. ("the lender") in the principal sum of $363,250.00. To secure said note, the answering defendant gave the lender a mortgage also dated March 28, 2007 on the property. The mortgage, which was recorded on September 10, 2007, indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an undated endorsement and an allonge, the note was allegedly transferred to US Bank National Association, as Trustee for Banc of America Funding 2007-6 Trust ("the plaintiff"). The transfer of the note to the plaintiff was memorialized by an assignment of the mortgage, which was subsequently duly recorded in the Suffolk County Clerk's Office. Thereafter, another assignment of the mortgage was executed in favor of the plaintiff, whereby the plaintiff's address set forth therein was corrected. This assignment was also duly recorded in the Suffolk County Clerk's Office.

The answering defendant allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on November 1, 2009, and each month thereafter. The plaintiff allegedly provided the answering defendant with notice of his default by two separate documents each dated August 14, 2011. After the answering defendant allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on December 27, 2011. Thereafter, the answering defendant interposed an answer with affirmative defenses. The remaining defendants have neither answered nor appeared herein, and thus are in default.

By way of background, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned beginning on June 1, 2012 and lasting until August 6, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program as the parties were unable to modify the loan or otherwise reach a settlement. Accordingly, there has been compliance with CPLR 3408; 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 answering defendant, striking his answer and dismissing the affirmative defenses set forth therein; (2) fixing the defaults of the non-answering defendants; (3) 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; and (4) amending the caption. In opposition, the answering defendant has filed, inter alia, an affirmation from his counsel, and, in response, the plaintiff has a filed a reply.

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, 923 NYS2d 609 [2d Dept 2011]).

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, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [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, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on December 27, 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, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [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, 729 NYS2d 776 [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, 2015 NY Slip Op 04819 [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, 779 NYS2d 808 [2004]).

The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law because it did not demonstrate that it complied with the condition precedent contained in the subject mortgage agreement, which required that it provide the answering defendant with notice of default prior to demanding payment of the loan in full (*see*, ***Nationstar Mtge., LLC v Dimura***, 127 AD3d 1152, 7 NYS3d 573 [2d Dept 2015]; ***HSBC Mtge. Corporation (USA) v Gerber***, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v MacPherson***, 122 AD3d 896, 998 NYS2d 394 [2d Dept 2014]; ***Indymac Bank, F.S.B. v Kamen***, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]). The unsubstantiated and conclusory statements in the affidavit of the plaintiff's officer that "[o]n August 14,

2011 a demand letter was sent to the defendant[] ... [which] identifies the amount due, and notifies defendant that a foreclosure action could be commenced if the default was not cured within 30 days[]", even when combined with a copies of the notice of default, did not establish that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage agreement (*see*, ***GMAC Mtge. LLC v Bell***, 128 AD3d 772, 11 NYS3d 73 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Eisler***, 118 AD3d 982, 988 NYS2d 682 [2d Dept 2014]; *cf.*, ***JPMorgan Chase Bank v Kang***, 2015 NY Misc LEXIS 1953, 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 her affidavit, the plaintiff's officer provided a summary of relevant events, including the default in payments and the amounts due. The plaintiff's officer, 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*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]). More specifically, the affiant 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 affiant also made no attempt to explain the significance of the certain documentation submitted herein and allegedly addressed to the answering defendant, in which the default notices were allegedly mailed.

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, 965 NYS2d 516 [2d Dept 2013]), the plaintiff also failed to supply adequate evidentiary proof of compliance with RPAPL § 1304 for the same reasons articulated above (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]; *cf.*, ***TD Bank, N.A. v Leroy***, 121 AD3d 1256, 995 NYS2d 625 [3d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]). In any event, the conclusory statements set forth in the affidavit of the plaintiff's officer that "[a]t least 90 days prior to the commencement of this action, [p]laintiff provided RPAPL § 1304 notice to the borrower[] ... by first class and certified mail, to the borrower's last known address located at 501 Fulton Place, West Babylon, NY 11704, and to the mortgaged premises," even when combined with copies of certain documentation submitted herein, is insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank Natl. Assn. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). The affiant 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 the answering defendant, 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*).

Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law with respect to the answering defendant. The plaintiff's failure to make a prima facie showing requires the

denial of the motion, regardless of the sufficiency of the defendant mortgagors' opposing papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

In view of the open question of whether the plaintiff has complied with the default notice provisions in the mortgage and whether the plaintiff strictly complied with the 90-day notice requirement of RPAPL §1304, the remaining branches of the plaintiff's motion are denied at this juncture.

In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: August 12, 2015
Riverhead, NY

Hon. DANIEL MARTIN, A.J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**