

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND

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WILMINGTON SAVINGS FUND SOCIETY,
FSB,d/b/a CHRISTIANA TRUST, NOT
INDIVIDUALLY BUT AS TRUSTEE FOR
PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiff,

-against-

GERALD BEAUVAIS; SHIRLEY BEAUVAIS
a/k/a SHIRLEY B. BEAUVAIS; CAPITAL
ONE BANK (USA) NA; "JOHN DOES NUMBERS
1-10" The names of these defendants
being fictitious and unknown to
plaintiff, the persons or parties
intended being the tenants,
occupants, persons or corporations,
if any, having or claiming an
interest in or lien upon the premises
described in the complaint,

Defendants.
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HON. ROLF M. THORSEN, A.J.S.C.

Plaintiff Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee For Pretium Mortgage Acquisition Trust (hereinafter "Plaintiff") moved for an order seeking the following relief: (1) pursuant to RPAPL §1321 and CPLR §3212 granting summary judgment in favor of Plaintiff and striking the answer of Defendants Gerald Beauvais and Shirley Beauvais (hereinafter "Defendants"); (2) granting default judgment in favor of Plaintiff and against all non-appearing Defendants; (3) striking the fictitiously named Defendants and amending the caption to reflect same; (4) appointing a referee to compute the amounts due and owing to Plaintiff; and (5) granting such other and further relief as demanded in the complaint and as may be just and proper and equitable. The Court has considered the following papers on the motion:

1. Notice of Motion; Affirmation of Mark Golab, Esq., in Support of Plaintiff's Motion for Summary Judgment, Affidavit of Selena Mitcherson, Memorandum of Law;

To commence the statutory time period 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.

DECISION & ORDER

Index No: 035574/2014 E

Motion Seq. No. 002

- Supporting Papers to Motion, Exhibits A-K; Proposed Order; Affidavit of Service;
2. Affirmation of Michael B. Specht, Esq., in Opposition; and
 3. Plaintiff's Reply Affirmation of Oxana Lukina, Esq. and Affidavit of Service.

Upon reading the foregoing papers, it is hereby

ORDERED that Plaintiff's motion for summary judgment is DENIED for the reasons set forth below.

BACKGROUND:

On September 25, 2007, Defendants executed and delivered to Wells Fargo Bank, N.A, a note in the amount of \$415,150.00, and a mortgage on the premises located at 8 Trinity Place, Hillcrest, NY 10977 (Plaintiff's Exhibit A). In July 2010, Defendants entered into a loan modification agreement (Plaintiff's Exhibit B). According to Plaintiff, on November 1, 2013, Defendants defaulted in making the monthly payment due pursuant to the terms of the note and mortgage as modified, which default has not been cured. On August 12, 2014, the note and mortgage as modified were transferred and assigned to prior Plaintiff Citibank, N.A., as trustee for CMLTI Asset Trust ("Citibank") (Plaintiff's Exhibit C).

According to Plaintiff, on July 2, 2014, prior Plaintiff Citibank sent Defendants, separately, a notice of default to Defendants and 90-day pre-foreclosure notices (Plaintiff's Exhibit D). Prior Plaintiff Citibank thereafter filed the instant mortgage foreclosure action on December 10, 2014. On January 12, 2015, Defendants Gerald Beauvais and Shirley Beauvais filed their answer, asserting ten affirmative defenses, including "fail[ure] to provide all predicate notices in violation of the applicable statute(s), including but not limited to RPAPL 1304 and RPAPL 1306" and lack of standing.

Plaintiff previously moved for summary judgment, which motion was denied by Decision and Order of this Court (Thorsen, J.), filed and entered on July 25, 2017. See, Plaintiff's Exhibit I. In denying the prior motion, this Court cited Deutsche Bank Nat. Trust Co. v. Carlin, 152 A.D.3d 491 (2d Dept. 2017), wherein the Court found that Plaintiff had failed to demonstrate the admissibility of the records relied upon by the employee of the current loan servicer under the business records exception to the hearsay rule since the employee did not aver that he was personally familiar with the record keeping practices and procedures of the prior loan

servicer, who was the loan servicer at the time the notices were sent out and the action commenced. Id. at 493.

On February 3, 2018, Plaintiff filed the instant motion. Defendants have opposed the motion on the grounds that: (1) Plaintiff has failed to offer admissible evidence; (2) the RPAPL §1304 notice was a nullity; and (3) Plaintiff failed to comply with a condition precedent and to establish that it properly mailed the notice required by RPAPL §1304. In reply, Plaintiff argues, inter alia, that the evidence presented is admissible and established sufficient proof of the facts and that it complied with RPAPL §1304 and condition precedent requirements.

DISCUSSION:

When a plaintiff in a mortgage foreclosure action alleges in its complaint that it has served a notice pursuant to RPAPL §1304, the plaintiff must, in its motion for summary judgment, "prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" to meet its prima facie burden. JP Morgan Chase Bank, N.A. v. Kutch, 142 A.D.3d 536, 537 (2d Dept. 2016). In order to do so, plaintiff must demonstrate proper service of the RPAPL §1304 notice containing the statutorily-mandated content as a condition precedent to the commencement of the foreclosure action. See, Aurora Loan Services, LLC v. Weisblum, 85 A.D.3d 95, 103-107 (2d Dept. 2011).

Plaintiff's complaint, filed on December 10, 2014, reveals that Plaintiff alleged compliance with RPAPL §1304. See, Complaint at ¶ FOURTH. Thus, Plaintiff is required to prove this allegation in its motion for summary judgment in order to meet its prima facie burden.

To establish its compliance with RPAPL §1304, Plaintiff submitted the Affidavit of Ms. Selena Mitcherson, in which she states: "[a]ccording to the business records that I have reviewed, which were transferred in the ordinary course of business by Citibank, the prior servicer of the Subject Loan, and which records have been incorporated into Rushmore's records 'for the Subject Loan, my review of such records reveals the following regarding the sending of the RPAPL §1304 required notice (preforeclosure 90-day notice): On July 2, 2014, which was at least ninety (90) days prior to commencement of this action and in accordance with RPAPL §1304, 90-day pre-foreclosure notices were forwarded separately by certified mail and also by first-class mail to the Defendants, in separate envelopes, at 8 Trinity Place, Hillcrest, NY 10977, the Premises which is the subject of this action.'" Mitcherson Affidavit

at ¶¶ 15-16. Notably, Ms. Mitcherson did not allege that she was personally familiar with the prior servicer Citibank's record keeping practices and procedures or its procedures for mailing out default notices. As such, her assertions based on those records are not admissible and cannot establish Plaintiff's compliance with RPAPL §1304. See, HSBC Mortgage Services, Inc. v. Royal, 142 A.D.3d 952, 954 (2d Dept. 2016) ("[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures"); see also, Bank of America, Natl. Assn. v. Wheatley, 158 A.D.3d 736, 738 (2d Dept 2018) (citations omitted) (Assignee failed to establish, prima facie, its compliance with statute requiring prior notices where affiant "did not aver that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed"); J.P. Morgan Mtge. Acquisition Corp. v. Kagan, 157 A.D.3d 875 (2d Dept. 2018); Deutsche Bank Natl. Trust Co. v. Carlin, 152 A.D.3d at 491.

Additionally, the RPAPL §1304 notices, dated July 2, 2014, provided with Plaintiff's motion papers (see Plaintiff's Exhibit D) do not include "a list of at least five housing counseling agencies" with their "last known addresses and telephone numbers" (RPAPL § 1304[2]). Consequently, Plaintiff has failed to establish that the notices sent were in compliance with the strict statutory requirements of RPAPL §1304. See, Aurora Loan Services, LLC v. Weisblum, 85 A.D.3d at 95 (holding that plaintiff failed to meet its prima facie burden as the notice did not contain the statutorily-required list of counseling agencies and plaintiff did not submit an affidavit of service to establish proper service of the notice on the borrowers); see also, Bank of America, Natl. Assn. v. Wheatley, 158 A.D.3d at 738 (plaintiff failed to demonstrate, prima facie, that the notices included a list of five housing counseling agencies, as required by the statute).

Since Plaintiff has failed to establish compliance with the notice requirements of RPAPL §1304, its application for summary judgment, a default judgment and an order of reference must be denied.

SUMMARY:

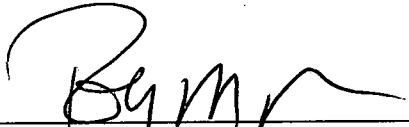
Accordingly, Plaintiff's motion is DENIED in its entirety without prejudice to renewal upon proper papers within ninety (90) days of the date hereof. This matter is scheduled for a conference on **January 28, 2019 at 9:30 a.m.** for the Court to confirm that a

renewed motion has been made. Appearances are not required if the motion has been made.

The foregoing constitutes the Decision and Order of this Court.

E N T E R

Dated: October 16, 2018
New City, New York



HON. ROLF M. THORSEN
Acting Supreme Court Justice

TO: (Via NYSCEF)

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