Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D76812
Y/sa

_____AD3d_____ Argued - October 28, 2024

ROBERT J. MILLER, J.P.
WILLIAM G. FORD
LAURENCE L. LOVE
DONNA-MARIE E. GOLIA, JJ.

2022-06268 DECISION & ORDER

Wells Fargo Bank N.A., respondent, v Rifky Kahan, appellant, et al., defendants.

(Index No. 26799/09)

Petroff Amshen LLP, Brooklyn, NY (Steven Amshen and James Tierney of counsel), for appellant.

Gross Polowy LLC (Reed Smith LLP, New York, NY [James N. Faller and Andrew B. Messite], of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Rifky Kahan appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated June 2, 2022. The order, insofar as appealed from, denied that branch of that defendant's motion which was to dismiss the complaint insofar as asserted against her for failure to comply with a court rule.

ORDERED that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, with costs, and that branch of the motion of the defendant Rifky Kahan which was to dismiss the complaint insofar as asserted against her for failure to comply with a court rule is granted.

Wachovia Bank, National Association (hereinafter Wachovia), commenced this action against the defendant Rifky Kahan (hereinafter the defendant), among others, to foreclose a mortgage on certain real property located in Brooklyn. The defendant did not timely answer the complaint, and Wachovia moved for leave to enter a default judgment and for an order of reference. During the pendency of the motion, the defendant interposed an answer with counterclaims, but did not oppose Wachovia's motion for leave to enter a default judgment and for an order of reference. The Supreme Court issued an order of reference on July 2, 2012, which was entered on August 28,

2012.

On July 16, 2013, the Supreme Court held a status conference and issued a self-executing conditional order of dismissal pursuant to CPLR 3216 (hereinafter the conditional order), determining that more than one year had elapsed since the joinder of issue and that Wachovia had unreasonably neglected to prosecute the action. The conditional order was to go into effect if Wachovia failed to file a note of issue or otherwise proceed by motion for entry of judgment within 90 days. Wachovia did not file a note of issue or otherwise proceed within 90 days.

In March 2018, Wachovia moved to vacate the conditional order. In August 2018, the Supreme Court granted Wachovia's motion, concluding that its prior determination in the conditional order that issue had been joined was made in error. The defendant moved for leave to renew and reargue her opposition to Wachovia's motion to vacate the conditional order. In an order dated November 15, 2018, the court denied the defendant's motion, determining that issue had not joined by the defendant's untimely answer. In January 2020, Wells Fargo Bank N.A. was substituted as the plaintiff.

In November 2020, the defendant moved, inter alia, to dismiss the complaint insofar as asserted against her for failure to comply with Kings County Supreme Court Uniform Civil Term Rules, Part F, rule 8, which has since been re-designated as rule 7 (hereinafter Rule 8). In an order dated June 2, 2022, the Supreme Court, among other things, denied that branch of the defendant's motion, noting that the "failure to strictly comply with local rule 8 is insufficient herein to dismiss this case." The defendant appeals.

"Rule 8 requires a plaintiff in a foreclosure action to file a motion for a judgment of foreclosure within one year of entry of the order of reference" (*Retained Realty, Inc. v Koenig*, 166 AD3d 691, 691). "Where the plaintiff offers an excuse for its failure to comply with Rule 8, '[t]he determination of whether [the] excuse is reasonable is committed to the sound discretion of the motion court'" (*U.S. Bank, N.A. v Cabrera*, 192 AD3d 1176, 1177, quoting *U.S. Bank, N.A. v Dorvelus*, 140 AD3d 850, 852). "Reversal is warranted 'if that discretion is improvidently exercised'" (*OneWest Bank, FSB v Rodriguez*, 171 AD3d 772, 773, quoting *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 752).

Here, the Supreme Court improvidently exercised its discretion in denying that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against her for failure to comply with Rule 8. The order of reference was entered on August 28, 2012, and the conditional order did not go into effect until October 2013. The fact that the conditional order was improper did not shield Wachovia from its obligation to comply with Rule 8, as the conditional order did not go into effect until more than one year after the order of reference was entered, and the plaintiff failed to provide a reasonable excuse as to why Wachovia did not move for a judgment of foreclosure and sale prior to August 28, 2013. Contrary to the court's determination, the failure to comply with Rule 8 is a sufficient ground upon which to dismiss a foreclosure action (*see generally U.S. Bank, N.A. v Cabrera*, 192 AD3d 1176; *Bank of Am., N.A. v McAlpin*, 171 AD3d 999; *OneWest Bank, FSB v Rodriguez*, 171 AD3d 772), and the subject branch of the defendant's motion should have been granted for the plaintiff's failure to provide a reasonable excuse as to why Wachovia did

not comply with this court rule.

The defendant's remaining contention need not be reached in light of our determination.

MILLER, J.P., FORD, LOVE and GOLIA, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D77269
O/sa

_____AD3d_____ Submitted - October 24, 2024

VALERIE BRATHWAITE NELSON, J.P.
LINDA CHRISTOPHER
HELEN VOUTSINAS
PHILLIP HOM, JJ.

2023-00274 DECISION & ORDER

Nationstar Mortgage, LLC, respondent,
v Ian O. Lewis, appellant, et al., defendants.

(Index No. 508130/15)

Petroff Amshen LLP, Brooklyn, NY (Steven Amshen and James Tierney of counsel), for appellant.

Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, Bay Shore, NY (Ruth O'Connor of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Ian O. Lewis appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Kings County (Larry D. Martin, J.), dated October 7, 2022. The order and judgment of foreclosure and sale, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm a referee's report and for a judgment of foreclosure and sale and directed the sale of the subject property.

ORDERED that the order and judgment of foreclosure and sale is reversed insofar as appealed from, on the law, with costs, and those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale are denied.

In June 2015, the plaintiff commenced this action against, among others, the defendant Ian O. Lewis (hereinafter the defendant) to foreclose a mortgage on certain real property located in Brooklyn. In an order dated April 20, 2017, the Supreme Court granted the plaintiff's unopposed motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and to appoint a referee to compute the amount due to the plaintiff. Thereafter, the referee issued a report, and the plaintiff moved, among other things, to confirm the referee's report and for a judgment of foreclosure and sale. The defendant opposed the motion, and cross-moved, inter alia,

pursuant to CPLR 5015(a) to vacate portions of the order dated April 20, 2017. In an order dated October 7, 2022, the court, among other things, denied the defendant's cross-motion. In an order and judgment of foreclosure and sale dated October 7, 2022, the court, inter alia, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale and directed the sale of the subject property. The defendant appeals.

Generally, the report of a referee should be confirmed whenever the findings are substantially supported by the record (*see HSBC Mtge. Corp. USA v Tehrani*, 229 AD3d 772, 777; *U.S. Bank N.A. v Tenenbaum*, 228 AD3d 694, 696). Here, the referee computed the amount due to the plaintiff based upon the affidavit of an employee of the plaintiff and certain business records. Although the affiant purported to have personal knowledge of the amounts due and owing on the loan, she averred that this was based upon her review of the plaintiff's records. "[A] review of records maintained in the normal course of business does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517; *see U.S. Bank N.A. v Zakarin*, 208 AD3d 1275, 1277). The affiant also failed to establish a proper foundation for the admission of all of the business records relied upon (*see* CPLR 4518[a]). "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" (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861; *see U.S. Bank N.A. v Zakarin*, 208 AD3d at 1277). Here, the referee's findings with respect to the total amount due on the note were premised upon a payment history beginning in 2009. The plaintiff, however, did not acquire the note until 2013. The plaintiff's affiant failed to establish a proper foundation for the admission of the records from 2009 to 2013 (*see US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718, 721; *Citibank, N.A. v Cabrera*, 130 AD3d at 861-862), and, therefore, the referee's report was not substantially supported by the record.

Accordingly, the Supreme Court should have denied those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale.

Since the defendant failed to oppose the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against him, did not obtain vacatur of so much of the order dated April 20, 2017, as granted that branch of the plaintiff's motion, and does not seek such vacatur on this appeal, the defendant cannot raise on this appeal the plaintiff's alleged failure to comply with RPAPL 1303 and 1304 (*see Deutsche Bank Natl. Trust Co. v O'Connor*, 223 AD3d 872, 877; *JPMorgan Chase Bank, N.A. v Bracco*, 200 AD3d 765, 766; *HSBC Bank USA, N.A. v Perry*, 178 AD3d 685, 686).

BRATHWAITE NELSON, J.P., CHRISTOPHER, VOUTSINAS and HOM, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D77221
Q/htr

_____AD3d_____ Submitted - December 3, 2024

FRANCESCA E. CONNOLLY, J.P.
ROBERT J. MILLER
LOURDES M. VENTURA
PHILLIP HOM, JJ.

2023-12428 DECISION & ORDER

Wells Fargo Bank, N.A., appellant, v
Francklin Etienne, respondent, et al., defendants.

(Index No. 757/10)

Friedman Vartolo LLP, Garden City, NY (Stephen J. Vargas of counsel), for appellant.

Petroff Amshen LLP, Brooklyn, NY (Steven Amshen and James Tierney of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated October 5, 2023. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were to vacate an order of the same court (Noach Dear, J.) dated November 6, 2017, directing dismissal of the action pursuant to CPLR 3216 and to restore the action to the active calendar.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In January 2010, the plaintiff commenced this action to foreclose a mortgage on certain real property located in Brooklyn. In an order dated July 19, 2017, the Supreme Court stated that, at a status conference held one day prior, the plaintiff's counsel had appeared and updates were provided to the court. Based on these updates and the case history, the court found "that more than one year has passed since the joinder of issue and [the p]laintiff has unreasonably neglected to prosecute this action," and the court directed the plaintiff to "resume prosecution of the action by [either moving] for entry of judgment or [filing] a note of issue within [90] days after receipt of this order." This order further provided that, if the plaintiff "fails to do so within the specified time period, this Court will issue a subsequent order dismissing this case pursuant to CPLR 3216 without notice to the parties."

The plaintiff did not comply with the order dated July 19, 2017.

In an order dated November 6, 2017, the Supreme Court directed dismissal of the action pursuant to CPLR 3216, finding, inter alia, that the court "served a [CPLR] 3216 notice ('the Order') upon [the p]laintiff's counsel by Certified Mail Return Receipt Requested" and that the postal service records reflected that the notice was "successfully delivered and signed for" on July 27, 2017.

On June 30, 2023, the plaintiff moved, inter alia, to vacate the order dated November 6, 2017, directing dismissal of the action pursuant to CPLR 3216 and to restore the action to the active calendar, arguing, among other things, that the order dated July 19, 2017, did not comply with CPLR 3216. By order dated October 5, 2023, the Supreme Court, inter alia, denied those branches of the motion. The plaintiff appeals.

CPLR 3216 "permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with" (*Deutsche Bank Natl. Trust Co. v Beckford*, 202 AD3d 1049, 1050 [internal quotation marks omitted]; *see* CPLR 3216[b][3]; *Bank of N.Y. Mellon v Buxbaum*, 231 AD3d 784). "An action cannot be dismissed pursuant to CPLR 3216(a) unless a written demand is served upon the party against whom such relief is sought in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said 90-day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed" (*Deutsche Bank Natl. Trust Co. v Beckford*, 202 AD3d at 1050; *see* CPLR 3216[b][3]; *Nationstar Mtge., LLC v Retemiah*, 195 AD3d 628, 629). Further, where a written demand to resume prosecution of the action is served by the court, "the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (CPLR 3216[b][3]; *see Rhodehouse v CVS Pharm., Inc.*, 151 AD3d 771, 773). "[A] conditional order of dismissal may have the same effect as a valid 90-day notice pursuant to CPLR 3216" (*Bank of N.Y. Mellon v Buxbaum*, 231 AD3d at 785; *see Deutsche Bank Natl. Trust Co. v Henry*, 189 AD3d 1357, 1358).

Contrary to the plaintiff's contention, the language of the order dated July 19, 2017, clearly advised the plaintiff that its failure to comply with the demand to resume prosecution would serve as a basis for dismissal of the action for failure to prosecute (*see* CPLR 3216[b][3]; *cf. Deutsche Bank Natl. Trust Co. v Beckford*, 202 AD3d at 1050). Contrary to the plaintiff's further contention, the Supreme Court properly determined that, under the circumstances, the court provided sufficiently detailed notice of the specific conduct constituting the plaintiff's neglect.

CONNOLLY, J.P., MILLER, VENTURA and HOM, JJ., concur.

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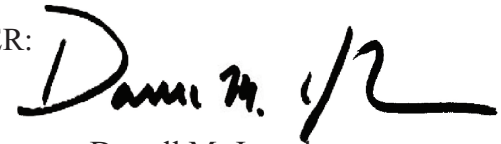

Darrell M. Joseph
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D77313
Y/htr

_____AD3d_____ Submitted - February 10, 2025

FRANCESCA E. CONNOLLY, J.P.
VALERIE BRATHWAITE NELSON
CARL J. LANDICINO
DONNA-MARIE E. GOLIA, JJ.

2023-08056 DECISION & ORDER

U.S. Bank National Association, etc., plaintiff-respondent, v Victoriano Bravo, appellant, et al., defendants; Bank of America, N.A., nonparty-respondent.

(Index No. 510174/15)

Petroff Amshen LLP, Brooklyn, NY (James Tierney and Steven Amshen of counsel), for appellant.

Knuckles & Manfro, LLP, Tarrytown, NY (Louis A. Levithan of counsel), for nonparty-respondent.

In an action to foreclose a mortgage, the defendant Victoriano Bravo appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Kings County (Larry D. Martin, J.), dated May 10, 2023. The order and judgment of foreclosure and sale, upon an order of the same court (Noach Dear, J.) dated February 11, 2019, inter alia, granting those branches of the motion of Bank of America, N.A., which were for summary judgment on the complaint insofar as asserted against the defendant Victoriano Bravo and for an order of reference, granted the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale, and directed the sale of the subject property.

ORDERED that the order and judgment of foreclosure and sale is reversed, on the law, with costs, those branches of the motion of Bank of America, N.A., which were for summary judgment on the complaint insofar as asserted against the defendant Victoriano Bravo and for an order of reference are denied, the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale is denied, and the order dated February 11, 2019, is modified accordingly.

In June 2003, the defendant Victoriano Bravo (hereinafter the defendant) executed a note in favor of Countrywide Home Loans, Inc., which was secured by a mortgage on certain real property located in Brooklyn (hereinafter the property). The defendant allegedly defaulted on the monthly payments due under the note and mortgage on October 1, 2011, and thereafter. The mortgage was subsequently assigned to Bank of America, N.A. (hereinafter Bank of America), on October 3, 2011. RPAPL 1304 notices allegedly were sent to the defendant at the property via first-class mail and certified mail on January 2, 2015. Bank of America thereafter commenced this action to foreclose the mortgage on August 18, 2015.

On August 23, 2017, Bank of America moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. In an order dated January 17, 2018, the Supreme Court, among other things, denied Bank of America's motion without prejudice. The court determined that Bank of America failed to establish that the RPAPL 1304 notices were properly sent to the defendant.

On August 30, 2018, Bank of America made a second motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, for an order of reference, and to amend the caption to substitute U.S. Bank National Association (hereinafter U.S. Bank) as the plaintiff. In an order dated February 11, 2019, the Supreme Court granted Bank of America's motion and amended the caption to substitute U.S. Bank as the plaintiff. On May 10, 2023, the court entered an order and judgment of foreclosure and sale, upon the order dated February 11, 2019, granting U.S. Bank's motion to confirm the referee's report and for a judgment of foreclosure and sale, and directing the sale of the property. The defendant appeals.

Contrary to the defendant's contention, the Supreme Court properly entertained Bank of America's second motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant. Since the order dated January 17, 2018, denied Bank of America's prior motion, among other things, for summary judgment without prejudice, Bank of America's second motion "did not offend the rule against successive motions for summary judgment" (*Wilimington Sav. Fund Socy., FSB v Novis*, 200 AD3d 739, 741; *see Greene v Sager*, 78 AD3d 777, 778).

The Supreme Court, however, should have denied those branches of Bank of America's second motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. "RPAPL 1304(1) provides that at least 90 days before a lender, an assignee, or a mortgage loan servicer commences an action to foreclose the mortgage on a home loan," the borrower must be given notice (*Bank of Am., N.A. v Palacio*, 187 AD3d 693, 696). "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*Bank of Am., N.A. v Palacio*, 187 AD3d at 696 [internal quotation marks omitted]). Strict compliance with RPAPL 1304 is required (*see U.S. Bank N.A. v Jeffrey*, 222 AD3d 802, 804).

Here, the affidavits submitted in support of Bank of America's second motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant did not establish the affiants' personal knowledge of the standard office mailing procedures of LenderLive,

the third-party vendor that apparently sent the RPAPL 1304 notices on behalf of Bank of America (*see U.S. Bank N.A. v Nahum*, 232 AD3d 715, 717; *U.S. Bank N.A. v Okoye-Oyibo*, 213 AD3d 718, 720-722). The affidavits also "failed to address the nature of [Bank of America's] relationship with LenderLive and whether LenderLive's records were incorporated into [Bank of America's] own records or routinely relied upon in its business" (*U.S. Bank N.A. v Okoye-Oyibo*, 213 AD3d at 721; *see U.S. Bank N.A. v Nahum*, 232 AD3d at 717). Bank of America thus "failed to lay a foundation for the admission of the transaction report generated by LenderLive" (*U.S. Bank N.A. v Okoye-Oyibo*, 213 AD3d at 721; *see U.S. Bank N.A. v Nahum*, 232 AD3d at 717). Accordingly, Bank of America failed to establish its strict compliance with RPAPL 1304 (*see U.S. Bank N.A. v Nahum*, 232 AD3d at 717; *U.S. Bank N.A. v Okoye-Oyibo*, 213 AD3d at 721). Therefore, the Supreme Court should have denied those branches of Bank of America's second motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference.

Accordingly, we reverse the order and judgment of foreclosure and sale, deny U.S. Bank's motion to confirm the referee's report and for a judgment of foreclosure and sale, and deny those branches of Bank of America's motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference.

CONNOLLY, J.P., BRATHWAITE NELSON, LANDICINO and GOLIA, JJ., concur.

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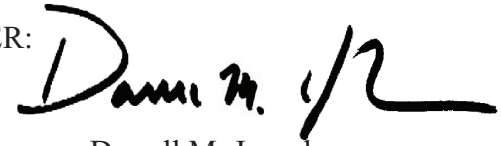

Darrell M. Joseph
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D77332
G/htr

_____AD3d_____ Submitted - March 6, 2025

FRANCESCA E. CONNOLLY, J.P.
LARA J. GENOVESI
DEBORAH A. DOWLING
LAURENCE L. LOVE, JJ.

2023-07898 DECISION & ORDER

Deutsche Bank Trust Company Americas, etc.,
respondent, v Mohammad Tagor, appellant, et al.,
defendants.

(Index No. 707565/15)

Petroff Amshen LLP, Brooklyn, NY (James Tierney and Steven Amshen of counsel), for appellant.

McCalla Raymer Leibert Pierce, LLC, New York, NY (Adam D. Weiss of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Mohammad Tagor appeals from an order of the Supreme Court, Queens County (Lance P. Evans, J.), dated May 24, 2023. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Mohammad Tagor, to strike that defendant's answer, and for an order of reference, and, in effect, denied that defendant's cross-motion pursuant to CPLR 3025 for leave to amend his answer to assert affirmative defenses alleging that the plaintiff failed to comply with RPAPL 1304 and the notice of default provisions of the mortgage agreement.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Mohammad Tagor, to strike that defendant's answer, and for an order of reference, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In July 2015, the plaintiff commenced this action against the defendant Mohammad

Tagor (hereinafter the defendant), among others, to foreclose a mortgage encumbering certain real property located in Floral Park. The defendant interposed an answer asserting various affirmative defenses. In December 2019, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference. The defendant opposed the motion, arguing, among other things, that the plaintiff failed to comply with RPAPL 1304 and the notice of default provisions of the mortgage agreement, and cross-moved pursuant to CPLR 3025 for leave to amend his answer to assert those affirmative defenses. In an order dated May 24, 2023, the Supreme Court granted those branches of the plaintiff's motion and, in effect, denied the defendant's cross-motion. The defendant appeals.

"Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20; *see U.S. Bank N.A. v Valencia*, 219 AD3d 890, 892). "RPAPL 1304 requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower" (*Bank of N.Y. Mellon v Stewart*, 216 AD3d 720, 723; *see* RPAPL 1304[2]). "'A plaintiff demonstrates its compliance with the statute by proof of the requisite mailing, which can be established [by] proof of the actual mailings . . . or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure'" (*U.S. Bank N.A. v Nahum*, 232 AD3d 715, 716 [internal quotation marks omitted], quoting *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757, 759; *see CIT Bank N.A. v Schiffman*, 36 NY3d 550, 556). Paragraphs 15 and 22 of the mortgage agreement additionally required service of a notice of default upon the defendant, by first-class mail or by actual delivery, to the address of the mortgaged property or to different address specified by the defendant as a condition precedent to acceleration of the loan.

Here, the plaintiff established, prima facie, its strict compliance with RPAPL 1304 and the notice of default provisions of the mortgage agreement by proof of actual mailing of the RPAPL 1304 notices and the notice of default (*see U.S. Bank N.A. v Romano*, 231 AD3d 1079, 1081-1082; *U.S. Bank NA v Warshaw*, 208 AD3d 919, 921). In support of its motion, the plaintiff submitted, inter alia, a copy of the 90-day notices and envelopes that were sent to the defendant containing 10- and 20-digit United Sates Postal Service (hereinafter USPS) certified and first-class mail tracking numbers, as well as a transaction report from Walz Group, LLC (hereinafter Walz), the company that performed the mailings. The transaction report listed the certified and first-class mailings that were made and included the certified and first-class tracking numbers matching those appearing on the notices that were sent to the defendant, as well as the date of mailing, the postage fees paid, and the reported USPS status. The plaintiff also submitted an affidavit of Christy Vieau, a document execution associate for the plaintiff's servicing agent, in which Vieau averred, among other things, that the transaction report had been "integrated" into the servicer's business records and routinely relied upon by the servicer in its business (*see U.S. Bank N.A. v Romano*, 231 AD3d at 1081-1082; *U.S. Bank N.A. v Maher*, 219 AD3d 1372, 1375). Given the plaintiff's prima facie proof of the actual mailing, "the plaintiff was not required to submit proof of [Walz's] standard office mailing procedures, sworn to by someone with personal knowledge of those procedures" (*U.S. Bank N.A. v Romano*, 231 AD3d at 1082). In opposition, the defendant failed to raise a triable issue of fact (*see U.S. Bank NA v Warshaw*, 208 AD3d at 921; *Deutsche Bank Natl. Trust Co. v Mangi*, 222 AD3d 942, 945).

Moreover, the Supreme Court, in effect, properly denied the defendant's cross-motion pursuant to CPLR 3025 for leave to amend his answer to assert affirmative defenses that the plaintiff failed to comply with RPAPL 1304 and the notice of default provisions of the mortgage agreement, as the proposed amendments were patently devoid of merit (*see Bank of Am., N.A. v Anderson*, 216 AD3d 890, 891-892).

However, the plaintiff failed to establish, prima facie, the defendant's default in payment of the mortgage loan. "Among other things, a plaintiff can establish a default by submission of an affidavit from a person having personal knowledge of the facts, or other evidence in admissible form" (*U.S. Bank Trust, N.A. v Smith*, 217 AD3d 899, 900; *see BNH Milf, LLC v Milford St. Props., LLC*, 192 AD3d 961, 962; *US Bank N.A. v Hunte*, 176 AD3d 894, 896). Here, the affidavit of Trey Cook, a document execution specialist for the plaintiff's servicing agent, failed to provide proof of the defendant's default in payment of the note in admissible form. Although Cook averred that he had personal knowledge of how the servicing agent's business records were kept and maintained and that, based on his review of those business records, the defendant "failed to make the payment that was due for July 1, 2014 under the Loan Documents and . . . failed to make subsequent payments to bring the loan current," the business records on which Cook relied were not annexed to his affidavit. Thus, Cook's assertions regarding the defendant's alleged default constituted inadmissible hearsay (*see U.S. Bank N.A. v Medina*, 230 AD3d 1371, 1376; *Deutsche Bank Natl. Trust Co. v Pirozzi*, 230 AD3d 736, 737-738; *U.S. Bank Trust, N.A. v Smith*, 217 AD3d at 900; *MTGLQ Invs., L.P. v Rashid*, 213 AD3d 839, 840). Contrary to the plaintiff's contention, the 90-day notices and notices of default otherwise submitted in support of its motion were insufficient to establish the defendant's alleged default in payment (*see Wilmington Sav. Fund Socy., FSB v E39 St., LLC*, 230 AD3d 1191, 1192; *Bank of N.Y. Mellon v Mannino*, 209 AD3d 707, 708-709; *U.S. Bank N.A. v Rowe*, 194 AD3d 978, 980).

Accordingly, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference.

CONNOLLY, J.P., GENOVESI, DOWLING and LOVE, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D77269
O/sa

_____AD3d_____ Submitted - October 24, 2024

VALERIE BRATHWAITE NELSON, J.P.
LINDA CHRISTOPHER
HELEN VOUTSINAS
PHILLIP HOM, JJ.

2023-00274 DECISION & ORDER

Nationstar Mortgage, LLC, respondent,
v Ian O. Lewis, appellant, et al., defendants.

(Index No. 508130/15)

Petroff Amshen LLP, Brooklyn, NY (Steven Amshen and James Tierney of counsel), for appellant.

Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, Bay Shore, NY (Ruth O'Connor of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Ian O. Lewis appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Kings County (Larry D. Martin, J.), dated October 7, 2022. The order and judgment of foreclosure and sale, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm a referee's report and for a judgment of foreclosure and sale and directed the sale of the subject property.

ORDERED that the order and judgment of foreclosure and sale is reversed insofar as appealed from, on the law, with costs, and those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale are denied.

In June 2015, the plaintiff commenced this action against, among others, the defendant Ian O. Lewis (hereinafter the defendant) to foreclose a mortgage on certain real property located in Brooklyn. In an order dated April 20, 2017, the Supreme Court granted the plaintiff's unopposed motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and to appoint a referee to compute the amount due to the plaintiff. Thereafter, the referee issued a report, and the plaintiff moved, among other things, to confirm the referee's report and for a judgment of foreclosure and sale. The defendant opposed the motion, and cross-moved, inter alia,

pursuant to CPLR 5015(a) to vacate portions of the order dated April 20, 2017. In an order dated October 7, 2022, the court, among other things, denied the defendant's cross-motion. In an order and judgment of foreclosure and sale dated October 7, 2022, the court, inter alia, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale and directed the sale of the subject property. The defendant appeals.

Generally, the report of a referee should be confirmed whenever the findings are substantially supported by the record (*see HSBC Mtge. Corp. USA v Tehrani*, 229 AD3d 772, 777; *U.S. Bank N.A. v Tenenbaum*, 228 AD3d 694, 696). Here, the referee computed the amount due to the plaintiff based upon the affidavit of an employee of the plaintiff and certain business records. Although the affiant purported to have personal knowledge of the amounts due and owing on the loan, she averred that this was based upon her review of the plaintiff's records. "[A] review of records maintained in the normal course of business does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517; *see U.S. Bank N.A. v Zakarin*, 208 AD3d 1275, 1277). The affiant also failed to establish a proper foundation for the admission of all of the business records relied upon (*see* CPLR 4518[a]). "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" (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861; *see U.S. Bank N.A. v Zakarin*, 208 AD3d at 1277). Here, the referee's findings with respect to the total amount due on the note were premised upon a payment history beginning in 2009. The plaintiff, however, did not acquire the note until 2013. The plaintiff's affiant failed to establish a proper foundation for the admission of the records from 2009 to 2013 (*see US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718, 721; *Citibank, N.A. v Cabrera*, 130 AD3d at 861-862), and, therefore, the referee's report was not substantially supported by the record.

Accordingly, the Supreme Court should have denied those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale.

Since the defendant failed to oppose the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against him, did not obtain vacatur of so much of the order dated April 20, 2017, as granted that branch of the plaintiff's motion, and does not seek such vacatur on this appeal, the defendant cannot raise on this appeal the plaintiff's alleged failure to comply with RPAPL 1303 and 1304 (*see Deutsche Bank Natl. Trust Co. v O'Connor*, 223 AD3d 872, 877; *JPMorgan Chase Bank, N.A. v Bracco*, 200 AD3d 765, 766; *HSBC Bank USA, N.A. v Perry*, 178 AD3d 685, 686).

BRATHWAITE NELSON, J.P., CHRISTOPHER, VOUTSINAS and HOM, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court