

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 27<sup>th</sup> day of April, 2015.

**PRESENT:**

Hon. LARRY D. MARTIN, J.S.C.

\_\_\_\_\_  
VW BED STUY LLC,  
PLAINTIFF,

-VS-

DEFENDANTS.

_____	_____
The following papers numbered 1 to 11 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	1-3, 8-9 _____
Answering Affidavit (Affirmation) _____	5-6, 10 _____
Reply Affidavit (Affirmation) _____	7, 11 _____
Memorandum of Law _____	_____
Other Papers _____	4 _____

In the instant action to foreclose upon the mortgage encumbering the property located at \_\_\_\_\_ (the "property"), plaintiff VW Bed Stuy LLC ("plaintiff") moves for an order: (1) pursuant to CPLR 3212, granting summary judgment in its favor; (2) pursuant to CPLR 3211, dismissing the affirmative defenses asserted by defendant ("defendant"); (3) pursuant to RPAPL § 1321, appointing a referee to compute and ascertain the amounts due and owing to plaintiff; (4) deleting certain fictitious names; (5) granting a default judgment against the defendants who have neither appeared nor filed a notice of appearance herein; and (6) awarding interest, costs, disbursements and attorneys' fees to plaintiff. Defendant cross-moves for an order: (1) pursuant to CPLR 3001, granting a declaratory judgment determining the identity of the true owner of the mortgage and note that is the subject of the instant foreclosure action; (2) pursuant to CPLR 3211 (a) (5), dismissing the complaint on the grounds that the applicable statute of limitations has expired; (3) pursuant to Real Property Law § 1501 (4), quieting

title to the property and discharging the subject note and mortgage.

On or about June 7, 2013, plaintiff commenced the instant action<sup>1</sup>. The subject mortgage, along with an adjustable rate rider, were executed by defendant on September 13, 2006 in favor of First United Mortgage Banking Corp. (“First United”) to secure a note in the amount of \$514,400. By assignment dated September 21, 2007, MERS as nominee for First United assigned the mortgage to DLJ Mortgage Capital Inc. (“DLJ”). By assignment dated February 1, 2011, DLJ assigned the mortgage to Beltway Capital, LLC (“Beltway”). By assignment dated February 3, 2011, Beltway assigned the subject mortgage to plaintiff. In its purported RPAPL 1304 notice dated March 7, 2013, plaintiff states that as of March 6, 2013, defendant was 2107 days in default in making a payment under the terms of the subject note and mortgage. In the complaint herein, plaintiff alleges, among other things, that defendant defaulted in making the payment due on June 1, 2007 (Complaint, ¶¶ 8, 9) and the subsequent instalments thereafter.

The parties now move for the relief requested herein.

“[I]n action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default’ ” (*Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895 [2d Dept 2013] quoting *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 1080 [2d Dept 2010], internal quotation marks omitted). “Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief. In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. Where a mortgage is represented by a bond or other instrument, an assignment of the

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<sup>1</sup>Defendant points out that, on or about September 17, 2007, First United commenced a prior action (the “prior action”), entitled *First United Mortgage Banking Corp LLC v* , to foreclose on the same mortgage that is the subject of this action, based upon defendant’s default in making payments on June 1, 2007 and the subsequent payments thereafter. By Order (Silber, J.) dated May 24, 2011, defendant’s motion, by order to show cause, for among other things, dismissal of the prior action was “granted based upon numerous defects in the papers as enumerated in the motion, in particular the assignment to DLJ; and for lack of personal jurisdiction over the defendant, based upon defective service of process due to plaintiff’s mailings to an address with the wrong zip code ...” Nowhere in its papers does plaintiff address the prior action.

mortgage without assignment of the underlying note or bond is a nullity. Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident” (*US Bank, NA v Collymore*, 68 AD3d 752, 754 [2d Dept 2009], internal citation marks omitted; *see also HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2d Dept 2012]; *US Bank N.A. v Madero*, 80 AD3d 751, 752-53 [2d Dept 2011]).

Based upon a review of the record submitted by the parties, the Court finds that plaintiff has demonstrated as a matter of law that it has standing to prosecute the instant action (*see Wells Fargo Bank, N.A. v Parker*, 125 AD3d 848, 850 [2d Dept 2015]). In their initial submissions, both plaintiff’s counsel, Richard A. Rosenzweig, Esq. (“Mr. Rosenzweig”), and Mordechai Getz (“Mr. Getz”), one of plaintiff’s managing members, affirm that the original note is in the possession of plaintiff’s counsel, but neither one of them gives “any factual details concerning when the plaintiff received physical possession of the note” (*Deutsche Bank Natl. Trust Co v Barnett*, 88 AD3d 636, 638 [2d Dept 2011]; *see HSBC Bank USA [Hernandez]*, 92 AD3d at 844). In his affirmation, Mr. Getz states that “[p]laintiff is the owner and holder of the original Note via negotiation ie endorsement and deliver [sic] and is the owner and holder of said [m]ortgage via assignment. First United assigned the mortgage to [DLJ]. DLJ assigned the mortgage to [Beltway]. Each assignor endorsed and delivered the original [n]ote as well. Plaintiff received the original endorsed [n]ote which [it] delivered to [its] attorneys. See affirmation of [Mr. Rosenzweig.]” (Notice of Motion for Summary Judgment, Appointment of Referee to Compute and Other Relief, Affirmation of Mr. Getz, ¶ 9). In his affirmation, Mr. Rosenzweig states that “First United (via MERS) assigned the mortgage on September 21, 2007 to [DLJ] ... First United also endorsed and delivered the [n]ote to DLJ ... The mortgage was assigned for the second time on February 1, 2011, to [Beltway] ... DLJ also endorsed and delivered the [n]ote to [Beltway] ... Two days later on February 3, 2011 the mortgage was assigned for a third and final time to [plaintiff] ...” (Affirmation in Support of Motion by Mr. Rosenzweig, ¶ 3). A review of the record indicates that the subject note is endorsed by First United

to Beltway. Plaintiff also submits two differing undated allonges to the note which were both endorsed by Beltway to plaintiff. One is signed by an individual identified by Steven V. Reiger, but the other is signed by an unidentified individual (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2011]).

However, the Court notes that later in his Reply Affirmation to plaintiff's motion, Mr. Rosenzenweig states in a footnote to paragraph 10 that he "was (and is) in possession of the original endorsed note on behalf of [p]laintiff at the time of commencement ... [of the instant action]" (Reply Affirmation by Mr. Rosenzweig, ¶ 10, footnote 5). Also, in his Affirmation in Opposition to defendant's cross-motion, Mr. Rosenzweig states in a footnote to paragraph 7 that he "inspected the original [n]ote prior to commencement of this action and compared it to the copy. The copy is a true copy of the original [n]ote delivered to [p]laintiff prior to commencement of this action" (Affirmation in Opposition of Mr. Rosenzweig, ¶ 7, footnote 2). As such, the Court finds that plaintiff has demonstrated as a matter of law that it had physical possession of the note prior to the commencement of this action (*see Wells Fargo Bank, N.A. [Parker]*, 125 AD3d at 850).

Nevertheless, the Court finds that plaintiff has failed to demonstrate as a matter of law that it has complied with RPAPL 1304 and 1306. As a result, the Court declines to dismiss defendant's affirmative defense that plaintiff failed to comply with the service provisions of RPAPL 1304 and 1306. Notably, RPAPL 1304 "requires a lender [or assignee] to notify a borrower of an impending legal action at least 90 days before a foreclosure action is commenced, using specific statutory language printed in 14-point type (*see* RPAPL 1304 [1]). The notice must be sent to the borrower by first-class mail as well as registered or certified mail (*see* RPAPL 1304 [2])" (*TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1257 [2d Dept 2014]). It is well settled that proper service of notice pursuant to RPAPL 1304 is a condition precedent to the commencement of a foreclosure action (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102-103). Contrary to plaintiff's contentions, the provisions of RPAPL 1304 apply to an assignee as well as a lender (*see* RPAPL §1304 [1]; *see Cadlerock Joint Venture, LP v Callender*, 41 Misc3d 903, 905-06 [Supreme Court, Kings County

2013]). Also, “RPAPL 1304 currently applies to any ‘home loan,’ as defined in RPAPL 1304 (5) (a)” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 910 [2d Dept 2013]). A plaintiff’s failure to show strict compliance requires dismissal (*id.*) “Generally, proof of proper mailing gives rise to the assumption that the item was received by the addressee. The presumption may be created by 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 [2 Dept 2001], internal citation marks omitted; *see Kearney v Kearney*, 42 Misc3d 360, 369-70 [Supreme Court, Monroe County 2013]).

Here, Mr. Rosenzweig merely avers that “[t]he statutory notices, [s]ummons, [c]omplaint and [n]otice of [p]endency of this action (containing all the particulars required by law) were all filed in the Office of the Clerk of Kings County ...” (Affirmation in Support of Motion by Mr. Rosenzweig, ¶ 6). Mr. Rosenzweig’s statements fail to demonstrate how actual compliance with the requirements of the provisions of RPAPL 1304 was achieved (*see TD Bank [Leroy]*, 121 AD3d at 1257-58) and, as such, are insufficient to establish proper mailing of the statutory notices. Moreover, plaintiff failed to submit an “affidavit of service evincing that it properly served [defendant] pursuant to RPAPL 1304” (*Deutsche Bank Natl. Trust Co. [Spanos]*, 102 AD3d at 910) or a certified mailing receipt (*compare Residential Holding Corp. [Scottsdale Ins. Co.]*, 286 AD2d at 680).

Finally, plaintiff has failed to submit any evidence demonstrating its compliance with RPAPL 1306, a condition precedent to commencing a foreclosure action (*see TD Bank [Leroy]*, 121 AD3d at 1258). RPAPL 1306 provides that lenders, assignees or mortgage loan servicers “shall file with the superintendent of financial services (superintendent) within three business days of the mailing of the notice required by [RPAPL 1304]’ a form containing certain information regarding the borrower and mortgage (RPAPL 1306 [1]; *see* RPAPL 1306 [2]). The statute further states that ‘[a]ny complaint served in [an action] initiated pursuant to [RPAPL article 13] shall contain, as a condition precedent to such [action], an affirmative allegation that at the time the [action] is commenced, the plaintiff has complied with the provisions of this section’ (RPAPL 1306 [1])” (*see TD Bank [Leroy]*,

121 AD3d at 1258-59). In paragraph 17 of the complaint, plaintiff alleges that "... [u]pon information and belief, [it] has complied with the provisions of [RPAPL 1304] and [1306] unless exempt from doing so. This allegation, by itself, is insufficient to demonstrate compliance with the requirements of RPAPL 1306.

Accordingly, plaintiff's motion is denied and the complaint herein is dismissed. Defendant's cross-motion is denied as moot.

The foregoing constitutes the decision, order and judgment of the court.

APR 27 2015

ENTER,



HON. LARRY D. MARTIN  
J.S.C.

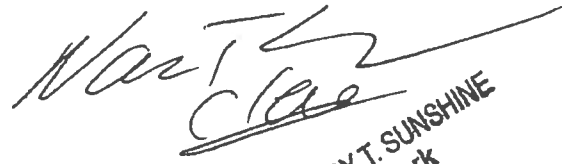
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