

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK-COUNTY OF NASSAU  
PRESENT: HON. THOMAS A. ADAMS,  
Supreme Court Justice**

-----X  
**DEUTSCHE BANK NATIONAL TRUST  
COMPANY, as Trustee for FFMLT TRUST  
2005-FF11,**

**Plaintiff,**

**-against-**

**FORECLOSURE PART  
NASSAU COUNTY  
INDEX NO  
Motion Seq. No: 1  
Motion Date: July 11, 2016**

**THE PEOPLE of the STATE of NEW YORK  
and "JOHN DOE,"**

**Defendants.**

-----X

This motion by the plaintiff for an order pursuant to CPLR 3212 granting it summary judgment and an Order of Reference appointing a Referee to ascertain and compute the amount due it pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 1321 and related relief is determined as provided herein.

This is an action to foreclose on real property located at \_\_\_\_\_ in \_\_\_\_\_. The plaintiff seeks, inter alia, summary judgment and an Order of Reference appointing a Referee to ascertain and compute the amount due it.

"To establish a prima facie case in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the note, and evidence of a default" (*Fed. Nat. Mortg. Ass'n v Yakaputz II, Inc.*, 141 AD3d 506, 506 [2d Dept 2016], citing *HSBC Bank USA, N.A. v Spitzer*, 131 AD3d 1206, 1206-1207 [2d Dept 2015]). The plaintiff also has the burden of showing compliance with RPAPL § 1303. If it fails to demonstrate such compliance, the foreclosure action will be dismissed. *First Nat. Bank of Chicago v Silver*, 73 AD3d 162, 166 (2d Dept 2010) (citations omitted); see also, *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 103 (2d Dept 2011). Furthermore, "[w]here ... standing is placed in issue, the plaintiff is required to prove its standing in order to be entitled to relief" (*Fed. Nat. Mortg. Ass'n v Yakaputz II, Inc.*, 141 AD3d 506 [2d Dept 2016], citing *Deutsche Bank Natl. Trust Co., v Weiss*, 133 AD3d 704, 705 [2d Dept 2015]; *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2d Dept 2014]). Similarly,

where a defendant has challenged the plaintiff's compliance with RPAPL § 1304, it must also establish its compliance therewith in order to procure summary judgment. *Cenlar, FSB v Weisz*, 136 AD3d 855, 856 (2d Dept 2016).

“A plaintiff has standing in a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced” (*Fed. Nat. Mortg. Ass'n v Yakaputz II, Inc.*, supra, citing *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). “ ‘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’ ” (*Fed. Nat. Mortg. Ass'n v Yakaputz II, Inc.*, supra, quoting *US Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

The plaintiff has established its standing and the defendant's default. See, *N. Am. Sav. Bank, FSB v Esposito-Como*, 141 AD3d 706 (2d Dept 2016); *Midfirst Bank v Agho*, 121 AD3d 343 (2d Dept 2014). It has established its standing via possession of the note when this action was commenced (*Fed. Nat. Mortg. Ass'n v Yakaputz II, Inc.*, supra, citing *Aurora Loan Servs., LLC v Taylor*, supra at 361; see also, *Emigrant Bank v Larizza*, 129 AD3d 904 [2d Dept 2015]) as well as the assignment of the loan to it long before this action was commenced. The plaintiff has also established that a Notice of Foreclosure was sent to the defendants via the affidavit of Nicholas J. Raab and a copy of the Notice. The plaintiff has also established its compliance with RPAPL § 1303 via affidavits of service establishing proper service on the defendants of the RPAPL § 1303 notice with the statutorily-required content, printed in the required type size on colored paper. *Aurora Loan Services, LLC v Weisblum*, supra, at 102-103, citing RPAPL 1303 (2), (3); CPLR 308 (4).


However, the plaintiff has not established its compliance with RPAPL § 1304. Raab attests in his affidavit that he is an employee of the plaintiff's loan servicer, SLS which maintains plaintiff's records with respect to the subject loan. Based upon his review of those records, he attests that the “plaintiff... sent to Defendant...a separate ninety (90) day pre-foreclosure notice on September 19, 2014 in accordance with RPAPL § 1304, by certified mail and first class mail.” While a copy of that notice is attached, no evidence of mailing has been submitted. “These unsubstantiated and conclusory statements were insufficient to establish that the 90-day notice required by RPAPL 1304 was mailed to the appellants by first class and certified mail” (*Cenlar, FSB v Weisz*, 136 AD3d 855, 856 [2d Dept 2016]; see also, *JPMorgan Chase Bank, N.A. v Kutch*, 2016 WL 4199284 [2d Dept 2016]; *Cenlar, FSB v Censor*, 139 AD3d 781, 783 [2d Dept 2016]). Contrary to the plaintiff's representation in

Reply, he has not submitted a "detailed affidavit testifying to proper service of [the RPAPL 1304 notice]." Cf. *Flagstarr v Mendoza*, 139 AD3d 898 (2d Dept 2016).

Accordingly, the plaintiff's motion pursuant to CPLR 3212 and RPAPL § 1321 for summary judgment and the appointment of a Referee to compute is denied, without prejudice.

The plaintiff's motion is denied.

Dated: 9-22-16

ENTER:  
  
HON. THOMAS A. ADAMS  
Supreme Court Justice

**ENTERED**  
OCT 19 2016  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE