SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present: Hon. THOMAS R. DAVIS, J.S.C.

SUPREME COURT: DUTCHESS COUNTY
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NATIONSTAR MORTGAGE LLC D/B/A CHAMPION MORTGAGE COMPANY,

Plaintiff(s),

-against-

CYNTHIA C. PHILLIPS AKA CYNTHIA LOUISE CASSIDY AS EXECUTRIX OF THE ESTATE OF HAROLD CASSIDY, PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA ACTING THROUGH THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, CENTRAL HUDSON GAS & ELECTRIC CORP., JOHN DOE (Those unknown tenants, occupants, persons or corporations or their heirs, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an interest in the mortgaged premises.),

Defendant(s).
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DECISION AND ORDER
ON TWO MOTIONS
(Motion Seq. No. 2 & 3)
Index No.: 2020-50814

This is an action to foreclose on a reverse mortgage pertaining to residential real property located at 641 Violet Avenue, Hyde Park, New York 12538. By notice of motion dated October 24, 2023, plaintiff moves for summary judgment, dismissal of the affirmative defenses raised in the answer and an order of reference (motion seq. #2). By notice of motion dated December 22, 2023, defendant, Cynthia C. Phillips AKA Cynthia Louise Cassidy as Executrix of the Estate of Harold Cassidy (hereinafter, "Phillips"), cross-moves for summary judgment dismissing the complaint and discharging the subject mortgage (motion seq. #2) or, in the alternative, to strike the plaintiff's note of issue. The following papers were read and considered in determining the motions:

Motion Seq. #2:

Plaintiff's motion papers identified as NYSCEF document numbers 91 through 146;

Defendant, Phillips's, opposition papers identified as NYSCEF document numbers 155 through 182;

Plaintiff's reply papers identified as NYSCEF document numbers 187 through 191.

Motion Seq. #3:

Defendant, Phillips's, cross-motion papers identified as NYSCEF document numbers 155 through 183;

Plaintiff's opposition papers identified as NYSCEF document numbers 187 through 191;

Defendant, Phillips's, reply papers identified as NYSCEF document numbers 192 through 193.

Relevant Factual and Procedural Background

The following facts are undisputed unless otherwise noted: On February 18, 2009, Harold Cassidy ("decedent") executed the following documents in favor of MetLife Home Loans, a Division of MetLife Bank, N.A. ("MetLife"): an "Adjustable Rate Note (Home Equity Conversion)" ("the Note") up to a maximum principal amount of $250,500.00; a "Home Equity Conversion Loan Agreement" ("HECLA") ; and a "Reverse Mortgage (Home Equity Conversion)" (the "Reverse Mortgage") as security for the aforesaid Note and HECLA on property located at 641 Violet Avenue, Hyde Park, New York 12538 (the "Property").

The decedent died on July 11, 2013. On January 10, 2014, the plaintiff herein commenced an action to foreclose the aforesaid Reverse Mortgage ("the Prior Action").[1] Neither the decedent's estate nor any personal representative thereof was named as a defendant. Rather, the decedent's "unknown heirs, distributees" etc. were named as defendants (as were other possible lienors). Phillips had not been appointed as Executrix at that time.[2] Phillips asserts she notified plaintiff, via letter dated August 12, 2013, that she was the appointed Executrix under the decedent's Will. Phillips filed an answer in the Prior Action and actively defended the action, during much of which she was pro se. The Prior Action was ultimately dismissed by decision and order dated August 28, 2017 (Brands, J.), which order denied the plaintiff additional time to resolve "certain deficiencies" and, sua sponte, dismissed the action, as well as by decision and order dated June 29, 2018 (Brands, J.) which denied the plaintiff's motion to vacate the August 28, 2017 order and, again, dismissed the complaint.[3]

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[1] The date of commencement of that action is taken from the Dutchess County Clerk's website. (Dutchess County Clerk Document Search (dutchessny.gov)

[2] Per Phillips's affidavit in support of her instant cross-motion, she was appointed Executrix of decedent's estate on July 18, 2017. (NYSCEF Doc. No. 156, ¶31.)

[3] Prior to the issuance of these two orders, this Court (Brands, J.) had issued prior orders to the following effects: sua sponte conditional order of dismissal based on plaintiff's neglect to proceed (dated July 20, 2015); denial of summary judgment based on there being, inter alia, questions related to plaintiff's standing (dated December 10, 2015); three adjournment orders directing plaintiff to file the "appropriate motion" (March 28, 2017; May 31, 2017; and August 3, 2017).

The instant action was commenced on February 28, 2020. Phillips moved, pre-answer, to dismiss the action based on the expiration of the statute of limitations, plaintiff's lack of standing and plaintiff's failure to comply with RPAPL §1304, and also moved to discharge the mortgage based on RPAPL §1521. By decision and order dated June 8, 2022, this Court (D'Alessio, J.) denied the motion. Phillips thereafter filed an answer and discovery ensued. Plaintiff filed a note of issue on July 21, 2023.

Plaintiff now moves for summary judgment for the relief demanded in the complaint, to strike Phillips's answer (including her affirmative defenses), to grant a default judgment against the remaining defendants, to substitute Mortgage Assets Management, LLC as the plaintiff and remove the "John Does" as defendants (and amend the caption accordingly) and to appoint a referee to compute the amount due.

Phillips cross-moves for summary judgment (in effect, to dismiss the complaint) and for an order discharging the subject mortgage pursuant to RPAPL §1521. The bases for her motion are that this action is barred by the statute of limitations; that the plaintiff lacks standing to foreclose the mortgage; that the plaintiff failed to comply with RPAPL §1304; and that based on the foregoing, the mortgage should be discharged of record.

For the reasons that follow, this Court finds that the plaintiff's motion and Phillips's cross-motion must be denied. Although the statute of limitations does not bar this action, there are material questions of fact as to the plaintiff's standing and as to the plaintiff's compliance with RPAPL §1304. Before discussing each of those issues, the preliminary arguments raised by the parties will be addressed.

Law of the Case Doctrine

Plaintiff asserts that Phillips's arguments pertaining to the statute of limitations, lack of standing and RPAPL §1304 are barred because this Court (D'Alessio, J.) already considered those issues in the context of Phillips's pre-answer motion to dismiss the complaint on those grounds and denied that motion, and because Phillips abandoned her appeal of that denial. The Court disagrees.

The law of the case doctrine is not a statutorily recognized limitation like res judicata and collateral estoppel. (*People v. Evans*, 94 N.Y.2d 499 [2000].) The Court of Appeals has described it as, "'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority." (Id at 503.) "'The law of the case doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision' (*Wolf Props. Assoc., L.P. v. Castle Restoration, LLC*, 174 A.D.3d 838, 842, 106 N.Y.S.3d 313 [internal quotation marks omitted]; *see Brownrigg v. New York City Hous. Auth.*, 29 A.D.3d at 722, 815 N.Y.S.2d 681)." *Matter of Hanlon*, 189 A.D.3d 1405 [2d Dep't 2020]. (*See, also, National Mortg. Consultants v. Elizaitis*, 23 A.D.3d 630 [2d Dep't 2005] ("a court may review a previously-decided matter where there is a need to correct clear error"); *Riddick v. City of New York*, 4 A.D.3d 232 [1st Dep't 2004] (law of the case doctrine inapplicable where a summary judgment motion follows a motion to dismiss).)

The prior decision and order rendered in this action on June 8, 2022 resolved a pre-answer motion to dismiss. It was not a determination on the merits.

Insofar as Phillips abandoned her appeal of that order, her future appellate rights on those issues—whatever they may or may not be—are not the subject of this motion nor for this Court to determine.

Notice to Admit

Plaintiff argues that Phillips has admitted certain facts (e.g., receipt of RPAPL §1304 notice, decedent's default) by virtue of her having failed to deny them in response to a notice to admit under CPLR §3123. Phillips asserts that the notice to admit did not contain any of the questions that plaintiff now asserts. Instead, it only contained certain documents as attachments and a total of three pages containing, inter alia, definitions. This led her counsel to believe it was simply a notice to admit the authenticity of documents. Phillips's counsel's response to the notice to admit stated, inter alia, the following:

> "Defendant **denies and objects** to the Notice to Admit in its entirety including the authenticity of Exhibits "A" through "E", as well as any deny factual statements therein including the definitions and characterizations of the documents. First, it is unclear what facts, if any, Plaintiff is requesting that Defendant admit. Second, the parties have not yet engaged in any discovery. Defendant has no knowledge with respect to the documents, and therefore cannot be expected to admit the authenticity of a document she did not prepare and in relation to which she has no expertise prior to discovery." [Emphasis in original.]

Phillips did not provide a sworn response to the notice to admit. Rather, counsel's response, as described above, was all that was provided.

CPLR §3123 requires, in relevant part, that:

> "Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters."

Although there is no binding precedent on the issue of whether an attorney's verified response to a notice to admit is sufficient (*see, e.g., Elrac, Inc. v. McDonald*, 186 Misc.2d 830 [Supreme Court, Nassau County 2001]; Connors, McKinney's Practice Commentaries 2018, CPLR §3123:5), this Court agrees with the reasoning set forth in *Elrac, Inc. v. McDonald* (*id.*)

and finds that the attorney's response in this case is insufficient to satisfy the requirements of the statute. The attorney's response here is neither verified nor is any reason offered by the attorney as to why a verified response by counsel rather than the party would have been appropriate.

There is no dispute in this case that the notice to admit had, attached to it, several documents and that the content of the notice to admit included the following language:

> "plaintiff... hereby request[s] that defendant Cynthia C. Phillips AKA Cynthia Louise Cassidy As Executrix Of The Estate Of Harold Cassidy ("Defendant" or "Phillips") admit to the truth of the following matters of fact or admit to the genuineness of any documents served with this notice within twenty (20) days of service of this notice".

Therefore, to the extent that the notice to admit required a sworn response by Phillips to the genuineness of the attached documents, and no sworn response was provided, those documents must be deemed to be genuine for purposes of this motion.[4]

However, there is a genuine dispute as to whether the notice to admit contained any questions to which any response from Phillips was required. While plaintiff's counsel asserts that all seven pages of the notice to admit were served on Phillips's counsel and that her counsel's response to same does not make any sense unless all seven pages were received, the Court does not agree.

First, Phillips's counsel affirms that only three pages of the notice to admit were served, and review of those three pages indicates that the end of the third page does not leave an unfinished sentence nor any indication that additional pages were attached (other than the exhibits which followed). For example, the pagination of the notice to admit is in a simple numerical sequence ("1", "2", "3"); it is not in the nature of "page 1 of 7, page 2 of 7" and so on. In other words, there is no indication by the notice's content or its pagination that the notice consisted of seven pages.

Second, the content of Phillips's counsel's response to the notice to admit does suggest that no questions were actually posed in the notice to admit ("it is unclear what facts, if any, Plaintiff is requesting that Defendant admit").

As a result, this Court cannot make a factual determination on this issue. For purposes of this motion, the questions posed in the notice to admit cannot be deemed to have been admitted by Phillips.

Statute of Limitations

> "Pursuant to CPLR 213(4), an action to foreclose a mortgage is subject to a six-year statute of limitations (*see GSR Mtge. Loan Trust v. Epstein,* 205 A.D.3d 891, 892, 169 N.Y.S.3d 334; *MLB Sub I, LLC v. Clark,* 201 A.D.3d 925, 926, 162 N.Y.S.3d 404). Even if the mortgage is payable in

[4] As discussed below, however, the genuineness of those documents does not resolve other legal questions at issue including whether certain of those documents were actually mailed to the defendant.

> installments, once a mortgage debt is accelerated, the entire amount is due and payable, and the statute of limitations begins to run on the entire debt (*see Bank of N.Y. Mellon Corp. v. Alvarado,* 189 A.D.3d 1149, 1150, 134 N.Y.S.3d 245; Deutsche Bank Natl. Trust Co. v. Adrian, 157 A.D.3d 934, 935, 69 N.Y.S.3d 706)" (*GMAT Legal Title Trust 2014-1 v. Kator*, 213 A3d 915 [2d Dept 2023).

Plaintiff argues, inter alia, that despite a prior action having been commenced against the "unknown heirs" etc. of the decedent's estate, this action is timely by virtue of the toll provided by CPLR 210(b). That statute reads:

> "(b) Death of person liable. The period of eighteen months after the death, within or without the state, of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his executor or administrator."

While the parties here dispute the proper accrual date for the statute of limitations, even if the earliest possible accrual date applies—the decedent's July 11, 2013 date of death—the eighteen-month toll under the statute, if applicable, would render this action timely as against Phillips as the executrix of the decedent's estate given that the action was commenced on February 28, 2020 (well within seven and one-half years of July 11, 2013).

Phillips argues that the statute's toll does not apply because its purpose was to protect a plaintiff who may not be able to identify a defendant-decedent's heirs and here, the plaintiff has known who the decedent's heirs were and knew that she was the appointed executrix under the decedent's Will since shortly after he died. Phillips cites *JP Morgan Chase, N.A. v. McDonald*, 46 Misc.3d 315 [Supreme Court, Madison County 2014] in support.

The Second Judicial Department has held that:

> "…application of CPLR 210 (b) does not depend on the circumstances surrounding the actual appointment of a defendant administrator in a particular action, or the time when a plaintiff actually became aware of the defendant's appointment. Rather, where the cause of action exists at the time of the decedent's death, CPLR 210 (b) tolls the statute of limitations from the moment of the decedent's death until 18 months later, at which time the statute of limitations automatically resumes running (*see Glamm v Allen*, 57 NY2d 87, 95 [1982])" (*Szarka v. Paratore*, 179 AD3d 864 [2d Dept 2020]).

As a result, the toll afforded under CPLR 210(b) applies to this action as asserted against Phillips in her representative capacity, rendering it timely. Given this result, the other arguments raised by the parties related to the statute of limitations are academic and need not be considered.

Plaintiff's Standing

> "'Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage the unpaid note, and evidence of default' (*Plaza Equities, LLC v. Lamberti,* 118 A.D.3d 688, 689, 986 N.Y.S.2d 843). 'Where, as in this case, the plaintiff's standing has been placed in issue by reason of the defendant's answer, the plaintiff additionally must prove its standing as part of its prima facie showing' (*HSBC Bank USA, N.A. v. Baptiste,* 128 A.D.3d 773, 774, 10 N.Y.S.3d 255; *see Wells Fargo Bank, N.A. v. Rooney,* 132 A.D.3d 980, 981, 19 N.Y.S.3d 543). 'A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of the underlying note at the time the action is commenced' (*LNV Corp. v. Francois,* 134 A.D.3d 1071, 1072, 22 N.Y.S.3d 543; *see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d 355, 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363). A plaintiff may demonstrate that it is the holder or assignee of the underlying note 'by showing either a written assignment of the underlying note or the physical delivery of the note' (*U.S. Bank N.A. v. Guy,* 125 A.D.3d 845, 846–847, 5 N.Y.S.3d 116; *see Wells Fargo Bank, N.A. v. Gallagher,* 137 A.D.3d 898, 28 N.Y.S.3d 84)" (*Aurora Loan Services, LLC v. Mercius*, 138 AD3d 650 [2d Dept 2016]).

In this action, Phillips raised the plaintiff's lack of standing as a defense. Therefore, the plaintiff, in moving for summary judgment, had to produce evidence not only of the mortgage and unpaid note along with proof of the mortgagor's default but also that it was the holder or assignee of both the mortgage and the note at the time the action was commenced. This can be done by either proof of a written assignment of the underlying note to the plaintiff or proof of the physical delivery of the note prior to the commencement of the foreclosure action.

Here, as evidence in support of its motion, plaintiff offers, as relevant to the issue of standing, the affidavit of Kevin Flannigan. Mr. Flannigan asserts that he is a Senior Loan Analyst employed by Ocwen Financial Corporation ("Ocwen") "whose indirect subsidiary is PHH Mortgage Corporation d/b/a PHH Mortgage Servicess ("PHH"), the current servicer of the Loan" and that "PHH is a wholly owned subsidiary of PHH Coproration, which [Ocwen] acquired on October 4, 2018." (Flannigan Aff., NYSCE Doc. No. 116, ¶ 2.)

Mr. Flannigan asserts that he is authorized to provide his affidavit by virtue of a "Unanimous Written Consent" and a Power of Attorney, both attached to his affidavit, and that he bases his knowledge on the business records kept by PHH. The Limited Power of Attorney to which he refers states, in part:

> "Nationstar Mortgage LLC, dba Champion Mortgage, ("Nationstar")…. does now irrevocably make constitute and appoint…PHH Mortgage Corporation, d/b/a PHH Mortgage Services ("PMC")…its true and lawful attorney-in-fact…*exclusively for the mortgage loans* (collectively, the "Mortgage Loans") *identified on the bills of sale* executed, delivered and conveyed by Nationstar (and/or any Nationstar entity) to Mortgage Assets

> Management, LLC (or an Affiliate or designee thereof)..." [Emphasis added.]

There are no bills of sale attached to the Limited Power of Attorney which identify the mortgage loans for which PHH was appointed attorney-in-fact. Therefore, there has been no showing that Mr. Flannigan has authority to act on behalf of the plaintiff herein (*see, e.g., HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735 [2d Dept 2009]; *U.S. Bank National Association v. Tesoriero*, 204 AD3d 1066 [2d Dept 2022]).

Even if the Court were to consider his affidavit, it is insufficient to satisfy plaintiff's prima facie burden.

Insofar as Mr. Flannigan's affidavit is used to demonstrate that the note was assigned to the plaintiff by a written assignment prior to commencement of this action, it fails. Mr. Flannigan states that MetLife executed a written assignment of the subject mortgage to Champion Mortgage Company on August 28, 2012.[5] (Flannigan Aff., NYSCE Doc. No. 116, ¶ 11.) Notably, that assignment (NYSCEF Doc. No. 126) does not purport to assign the underlying note, only the mortgage. Assignment of the mortgage without the underlying note is a nullity (*Deutsche Bank Trust Co. Americas v. Vitellas*, 131 A.D.3d 52 [2d Dep't 2015]). Further, Mr. Flannigan also states that MetLife executed an assignment of mortgage to Fannie Mae on February 18, 2009 (over three years prior to the purported assignment by MetLife to Champion). That assignment (NYSCEF Doc. No. 129) purports to assign both the mortgage and the underlying note to Fannie Mae. No further assignment from Fannie Mae into Champion or any other entity is provided by the plaintiff. Thus, there is no written assignment of the underlying note to the plaintiff herein.

Insofar as Mr. Flannigan's affidavit is used to demonstrate that the plaintiff was the holder of the note at the time the action was commenced (that is, that the note was physically delivered to the plaintiff prior to commencement of this action), that effort also fails. In this regard, Mr. Flannigan states:

> "The Servicing Records show that, in December 2013, Champion sent the collateral file to its attorney, McCabe, Weisberg & Conway, P.C., which included the original Note endorsed in blank via the Allonge, as evidenced by the following documents in the collateral file: Trailing Original/Corr separator sheet, Bailee Letter Agreement dated December 16, 2013, Verification of Standing document, Note and allonge endorsed in blank by MetLife, legal description of the Property, and 2012 Assignment of Mortgage. In addition, the Files History Tracking Report for the collateral file and a screenshot of PHH's mortgage servicing platform show that Champion (now known as Mr. Cooper) had physical possession of the

[5] Mr. Flannigan also asserts that the subject Note was subsequently assigned (in 2022) from Champion to MAM, then to SHAP Acquisitions Trust HB1 Barclays, then to Cascade Funding Mortgage Trust-HB9, who he asserts is the current holder of the note and mortgage and who is now sought to be substituted as plaintiff herein. These subsequent assignments are not relevant to the underlying issue on these motions which is whether the named plaintiff herein—Nationstar Mortgage LLC d/b/a Champion Mortgage Company—had standing to commence this action. Therefore, they are not considered.

> original Note when this action was commenced on February 28, 2020. A true and correct copy of the above documents and screenshot is attached hereto as Exhibit 22."

The "Bailee Letter Agreement" dated December 16, 2013 states that the collateral files being transferred are described in the "inventory attached hereto". There is no particular document attached to that letter which is expressly identified as the "inventory" identified in the letter. Presuming, without determining, that the "inventory" is the "Verification of Standing" form following the December 16, 2013 letter, the "Note Date" identified therein is "2/23/2009" and the "FHA/VA Case Number" is identified as "[partially redacted] 8788". The underlying note at issue in this action is dated February 18, 2009, and the FHA Case Number on its face is identified as "[partially redacted] 952/255." Thus, these documents do not reflect that the "collateral file" to which Mr. Flannigan attests Nationstar was the holder (and transferred to its then-counsel) contained the underlying note at issue here.

Moreover, the "screenshot of PHH's mortgage servicing platform" which Mr. Flannigan asserts shows that "that Champion (now known as Mr. Cooper) had physical possession of the original Note when this action was commenced on February 28, 2020" do not support his contention. The screenshot (the first substantive page of NYSCEF Doc. No. 138, bearing Bates Stamp "Nationstar-000488") indicates, in the first instance, that it was created on "8/22/2022". The "note text" on that screenshot reads: "Per feedback received from Mr. Cooper as a prior custodian, the original note was in their possession from 6.6.19 to 12/10.21 The current custodian for this loan is US Bank. The original note is on hand. According to the custodian, the date of possession is 6.28.2022"

Even if the hearsay nature of the aforesaid note could be deemed excepted under CPLR 4518, the "Files Tracking History Report" attached to that screenshot, apparently in support of the allegations contained in the screenshot's note, appear to reflect only one named custodian during the timeframe at issue: "Bank of New York Mellon Trust Company – Dallas", not Mr. Cooper. In short, the records relied upon by Mr. Flannigan do not, on their face, support his assertions. Inasmuch as the business records themselves must "evince the facts for which they are relied upon" (Bank of N.Y. Mellon v. Gordon, 171 AD3d 197, 207 [2d Dept 2019]), Mr. Flannigan's statement that the plaintiff was the holder of the underlying note when this action was commenced is hearsay not borne out by the attached records.

To the extent the plaintiff relies on the allonge to the underlying note that Mr. Flannigan asserts was "firmly affixed" to it (NYSCEF Doc. No. 116, ¶7), the Court agrees with Phillips that there are questions of fact on this issue. Phillips attached Mr. Flannigan's EBT transcript to her opposition and cross-motion papers. He testified, inter alia, that he has never seen the original note (NYSCEF Doc. No. 174, pgs. 54, 77) and his knowledge of the allonges is based on copies that he has seen (NYSCEF Doc. No. 174, pgs. 132-133). He now asserts in his affidavit that the staple holes he sees on the copies of the allonges are proof that they were "firmly affixed". Exhibit

22 attached to his affidavit, which is alleged to be a copy of the note that was in plaintiff's possession and transferred to its attorneys in 2013, reflects no staple holes that the Court can see.[6]

Based on the foregoing, the plaintiff has failed to make out a prima facie case that it had standing to commence this action. Even if it had, Phillips has raised triable issues of fact in opposition sufficient to warrant a trial on this issue.

It must be noted, too, that Phillips asserts—and plaintiff does not deny—that some of the records and a witness now relied upon by the plaintiff in support of its motion were never disclosed prior to plaintiff filing the note of issue. They have only been produced in support of summary judgment. In particular, it is evident that the screenshot document included with plaintiff's Exhibit 22 to Mr. Flannigan's affidavit was never provided prior to the note of issue and Mr. Blunt was not disclosed as a witness. Plaintiff's motion materially relies on those documents and that witness. Plaintiff's explanations for not disclosing Mr. Blunt, which include that Phillips never complained that the previously-disclosed witnesses or documents were insufficient, falls flat. It not only suggests that Phillips should have suspected that there were additional documents and/or witnesses, which is a disingenuous assertion, it ignores the repeated discovery demands made by Phillips over the course of this very old case. As such, on denial of this motion, the note of issue will be stricken and Phillips will be afforded an opportunity to conduct a further EBT of Mr. Flannigan and, if she chooses, an EBT of Mr. Blunt.

RPAPL §1304

As with the issue of standing, once a mortgagor raises a mortgagee's failure to comply with RPAPL §1304 (as Phillips did here), in order for plaintiff to make out its prima facie case, it is incumbent upon it to produce evidence establishing that it strictly complied with the 90-day notice requirements of the statute. (See, e.g., *Cenlar, FSB v. Weisz*, 136 AD3d 855 [2d Dep't 2016]; *Citibank, N.A. v. Conti-Scheurer*, 172 AD3d 17 [2d Dep't 2019].)

> "Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action (*see Citimortgage, Inc. v. Banks*, 155 A.D.3d 936, 936–937, 64 N.Y.S.3d 121; *HSBC Bank USA, N.A. v. Ozcan*, 154 A.D.3d 822, 825–826, 64 N.Y.S.3d 38; *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 923 N.Y.S.2d 609). By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, " 'the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing,' which can be 'established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, 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' " (*Bank of Am., N.A. v.*

[6] Alleged staples holes on the "current Note and Allonges" which Mr. Flannigan asserts are attached as Exhibit 4 to his affidavit (NYSCEF Doc. No. 116, ¶7, and NYSCEF Doc. No. 120) are both irrelevant and, as with Exhibit 22, not identifiable by the Court.

> *Bittle*, 168 A.D.3d 656, 658, 91 N.Y.S.3d 234, quoting *Wells Fargo Bank, NA v. Mandrin*, 160 A.D.3d 1014, 1016, 76 N.Y.S.3d 182; *see Viviane Etienne Med. Care, P.C. v. Country–Wide Ins. Co.*, 25 N.Y.3d 498, 508–509, 14 N.Y.S.3d 283, 35 N.E.3d 451; *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829–830, 414 N.Y.S.2d 117, 386 N.E.2d 1085)" (*Citibank, N.A. v. Conti-Scheurer*, 172 AD3d 17 [2d Dep't 2019]).

Here, plaintiff provides an affidavit from Alan Blunt to support its assertion that it strictly complied with RPAPL §1304.

Initially, Phillips asserts that Mr. Blunt's affidavit should be disregarded by the Court because he was not disclosed as a witness prior to plaintiff filing the note of issue and making its instant motion. Rather, Mr. Ramos and Mr. Flannigan were produced as plaintiff's witnesses and neither of them had personal knowledge of the mailing of the §1304 notices. In effect, Phillips asserts that Mr. Blunt's testimony is tailor-made to overcome summary judgment against the plaintiff.

As noted above, the plaintiff's explanation for the belated disclosure of Mr. Blunt is not persuasive. Therefore, it is not competent to support plaintiff's motion for summary judgment.

Even if the Court were to consider Mr. Blunt's affidavit, its content is not sufficient to make out a prima facie case that plaintiff strictly complied with the 90-day notice requirements of the statute.

A careful reading of Mr. Blunt's affidavit reveals that he is not personally familiar with the standard mailing procedures of the entity who actually performed the physical mailings of the RPAPL §1304 notices. Mr. Blunt attests to his familiarity with the record-keeping practices of Nationstar as well as the electronic data systems used by Nationstar to record and maintain mortgagors' addresses and to create the 90-day notices. But, as to the actual mailing of the notices, it is clear that Nationstar does not perform that function. Rather, Nationstar outsources that function to Walz, and then Nationstar relies on data reported by Walz through the TrackRight system (a "portal available to Nationstar and internally within Walz"—Blunt Aff., ¶8, NYSCEF Doc. No. 110). Incidentally, this comports with Mr. Ramos's testimony that Walz is a Vendor who performs the actual mailings for Nationstar. (See NYSCEF Doc. No. 176, pgs. 58-59.) To the extent Mr. Blunt's testimony suggests that Nationstar performs the mailings itself, it is directly contradicted by Mr. Ramos.

Mr. Blunt does not purport to have personal knowledge of the standard office mailing procedure designed by Walz to ensure that items are properly addressed and mailed by it. Therefore, his testimony is not sufficient to make out a prima facie case that plaintiff strictly complied with the 90-day notice requirements of the statute (*See e.g., Citibank v. Conti-Scheurer*, 172 AD3d 17 [2d Dep't 2019]; *Citibank, N.A. v. Wood*, 150 AD3d 813 [2d Dep't 2017]; *Citimortgage, Inc. v. Espinal*, 134 AD3d 876 [2d Dep't 2015]; *HSBC Bank USA, National Association v. Gordon*, 210 AD3d 877 [2d Dep't 2022]; *Bank of America, N.A. v. Lauro*, 186 AD3d 659 [2d Dep't 2020]).

Phillips's Remaining Affirmative Defenses

Plaintiff's arguments for dismissing Phillips's remaining affirmative defenses have merit and are not opposed by Phillips. Therefore, those affirmative defenses (the first, second, fourth, seventh, eighth, ninth, tenth, thirteenth, fourteenth, sixteenth, seventeenth, nineteenth, twenty-second, twenty-third, twenty-fourth and twenty-fifth) will be dismissed.

Each of her affirmative defenses related to standing and RPAPL §1304 (though several appear to be duplicative, they are the following: third, fifth, sixth, eleventh, twelfth, fifteenth, eighteenth, twentieth, twenty-first and twenty-sixth affirmative defenses) will not be dismissed.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment insofar as it seeks to strike the defendant Phillips's first, second, fourth, seventh, eighth, ninth, tenth, thirteenth, fourteenth, sixteenth, seventeenth, nineteenth, twenty-second, twenty-third, twenty-fourth and twenty-fifth affirmative defenses in her answer is granted, and the motion is otherwise denied; and it is further

ORDERED that the defendant, Phillips's, cross-motion insofar as it seeks summary judgment is denied; and it is further

ORDERED that the defendant, Phillips's, cross-motion insofar as it seeks to strike the plaintiff's note of issue is granted; and it is further

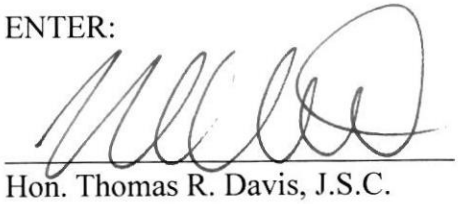
ORDERED that counsel for the parties are directed to appear for a conference on May 20, 2024 at 9:30am to schedule further discovery sought by Phillips; and it is further

ORDERED that no further summary judgments motions are permitted without prior leave of Court; and it is further

ORDERED that any other relief not specifically granted herein is denied.

Dated: April 29, 2024
Poughkeepsie, NY

ENTER:



Hon. Thomas R. Davis, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.