

At a Term of the Supreme Court, in
and for the County of Monroe, Hall
of Justice, Rochester, New York.

PRESENT: HON. SAM L. VALLERIANI
Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

WILMINGTON SAVINGS FUND SOCIETY, FSB D/B/A
CHRISTINA TRUST, NOT IN ITS INDIVIDUAL
CAPACITY BY SOLELY AS OWNER TRUSTEE OF
RESIDENTIAL CREDIT OPPORTUNITIES II,

Plaintiff,

-vs-

DECISION

INDEX No.: E2020004207

JAMES L KENDRICK, IPLANGROUP AGENT FOR
CUSTODIAN FBO ROBERT FISCHMANN IRA, MAIN
STREET ACQUISITION CORP., ARROW FINANCIAL
SERVICES LLC A/P/O FIA CARD SERVICES, N.A.,
COMMISSIONERS OF THE STATE INSURANCE FUND,
WORKERS COMPENSATION BOARD OF THE STATE
OF NEW YORK, CAPITAL ONE BANK (USA), N.A.,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, UNITED STATES ATTORNEY'S OFFICE,
UNITED STATES OF AMERICA, and JOHN AND JANE
DOE, the names of the last two defendants being fictitious, the
true names unknown to the Plaintiff and intended to be parties
in possession of any part of the mortgages premises, if any,

Defendants.

APPEARANCES:

Attorney for Plaintiff : *Danny Ranrattan, Esq.*
One Battery Park Plaza, 18th Fl.
New York, NY 10004

Attorney for Defendant Kendrick: *Richard A. Kaul, Esq.*
290 Linden Oaks, Suite 200
Rochester, NY 14625

Sam L. Valleriani, J.

Plaintiff filed a motion in this foreclosure action on or about July 1, 2021 requesting an order granting summary judgment pursuant to CPLR § 3212 in favor of plaintiff; an order granting a default judgment pursuant to CPLR § 3215 against all non-appearing defendants; appointment of a referee pursuant to RPAPL §1321; and an order amending the caption to substitute Jessica Valzquez, Mike Salsedo, Kristen Salsedo, Shannon Geathers, Shayla Geathers, Geanna Parsell and Anthony Gingello as defendants in place and stead of the John Doe and Jane Does.

Defendant Kendrick filed opposition to the motion on July 19, 2021.

The motion and foreclosure were stayed due to COVID protocols, until an order to show cause was filed and signed on December 7, 2021 for the sole purpose of lifting the stay and permitting the matter to progress. Visio Financial Services, Inc. (“Visio”) entered into a business purpose note secured by a mortgage in the principal sum of \$262,010.00 recorded on or about February 6, 2017 (plaintiff’s motion Ex. 1 and 2). The loan was secured by four properties known as 119 Lydia Street, 115 Lydia Street, 119 Benjamin Street, 156 East Henrietta Road, Rochester, New York. The note and mortgage were assigned from Visio to plaintiff on August 16, 2017 (plaintiff’s motion Ex. 3). The borrower defaulted on the loan by failing to timely pay the mortgage payment on August 1, 2019. Plaintiff commenced the foreclosure action by filing the summons and complaint and related required documents on June 30, 2020 (plaintiff’s motion Ex. 4). Defendant Kendrick appeared and answered on July 28, 2020 (plaintiff’s motion Ex. 5). Defendant United States of America appeared by Notice of Appearance dated July 15, 2020, and other defendants failed to answer or appear.

Subsequent to the motion for summary judgment being filed on July 1, 2021, defendant

Kendrick filed a Hardship Declaration which plaintiff requested a hearing thereon based upon defendant's failure to provide any information to support the alleged hardship. Residential foreclosure matters stayed due to hardship declarations were immediately restored to the active calendars by Administrative Order 35/22 signed January 16, 2022.

The parties were unable to resolve the matter through a conference with Luis Ormaechea, Esq., Foreclosure Referee, held on March 29, 2022. Plaintiff's counsel requested that this motion be restored to the calendar and decision issued. The court sent email correspondence advising the parties that the motion would be accepted on papers, and a decision would be issued within a month.

To meet its initial burden on a motion for summary judgment, the plaintiff in a mortgage foreclosure action must submit the mortgage and unpaid note, with evidence of borrower's default (*see Bank of America, N.A. v Huertas*, 195 AD3d 891 [2d Dept. 2021]). For home loans under RPAPL § 1304, plaintiff must also submit proof of compliance with the RPAPL § 1304 notice, which is a condition precedent to commencement of the foreclosure action (*Citibank v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]; *HSBC Bank USA v Bermudez*, 175 AD3d 667 [2d Dept 2019]).

Plaintiff has submitted the affidavit and reply affidavit of Cheryl Mallory, Assistant Vice President for Servis One, Inc., d/b/a BSI Financial Services, the loan servicer and Attorney-In-Fact for plaintiff, setting forth personal knowledge of the records in this proceeding, the record keeping practices of plaintiff, the borrower's default, and that proper notice pursuant to RPAPL § 1304 was provided to the borrower on or about October 18, 2018. Although RPAPL § 1304 is not applicable here because borrower/defendant does not reside in any of the mortgaged

properties, plaintiff provided the RPAPL § 1304 90-day notice to borrower/defendant “whether required or not” (affidavits of C. Mallory dated June 15, 2021 and January 13, 2022 with attached supporting exhibits). The amount due stated in the Mallory affidavit dated June 15, 2021 was \$368,578.02 (*see id.*).

Once plaintiff has met its initial burden, it is incumbent upon defendant to raise a triable issue of fact. Defendant Kendrick admits that he mortgaged the properties with a wrap-around mortgage on the four properties on December 30, 2016 (affidavit J. Kendrick dated July 19, 2021). He further admits that he defaulted on the mortgage not once but twice (*see id.*). Defendant Kendrick submits that he defaulted on or about October 18, 2018, but made a reinstatement payment and the mortgage was reinstated (*see id.*). Defendant admits that he defaulted again in December 2019 citing health related issues, but has not submitted medical proof thereof (*see id.*). Notably both defaults were prior to the COVID-2019 pandemic. Plaintiff claims that through conversations with the bank, which have been affirmatively denied by Ms. Mallory, that defendant Kendrick believed the bank would again reinstate the mortgage if he were to make a \$4,300.00 payment (*see id.*; *see also* Mallory aff’d dated January 13, 2022). Defendant attempted to make a payment of \$4,500.00, but the payment was rejected and the bank declined to reinstate the mortgage (*see id.*). Defendant then retained the services of Cole Residential Services, but the bank declined to reinstate the mortgage and required defendant to pay the full amount due (*see id.*). Defendant, in his affidavit, also disputes the amount due and complains that the foreclosure relief legislation staying evictions has violated his equal rights and affected his ability to rectify this situation (*see id.*).

Defendant’s affidavit accepting all averments as true and providing all favorable

inferences fails to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Dix v Pines Hotel, Inc.*, 188 AD2d 1007 [4th Dept 1992]). Contrary to defendant's assertions, once the mortgage debt has been accelerated the bank is not required to accept payments or a tender of less than full repayment (*see SEFCU v Allegra Holdings, LLC*, 148 AD3d 1241, 1242 [3rd Dept 2017]; *Home Sav. Of Am., FSB v Isaacson*, 240 AD2d 633 [3rd Dept, 1997]). Defendant has failed to submit any proof that he offered to pay off the mortgage. Although defendant has questioned the amount owed, a dispute as to the total amount of indebtedness is not a defense to an award of summary judgment, but is properly raised before the referee (*see Mishal v Fiduciary Holding, LLC*, 109 AD3d 885, 886 [2d Dept 2013]).

Lastly, defendant's contention that he does "not believe [he] ever received any other notices of default, prior to being advised that a Summons and Complaint was filed in the Monroe County Clerk's Office on or about June 20, 2020" is insufficient to raise an issue fact regarding notice pursuant to RPAPL §1304 (affidavit of defendant ¶29; *Nationstar Mortgage v LaPorte*, 162 AD3d 784 [2d Dept 2018]). Plaintiff has submitted the affidavit of mailing which creates a presumption of proper mailing and receipt (*US Bank Nat'l v Brown*, 186 AD3d 1038, 1040 [4th Dept 2020]). Defendant was required to rebut the presumption and his vague denial is insufficient to raise an issue of fact on that issue (*see id.*; *CIT Bank NA v Schiffman*, 36 NY3d 550, 557 [2021]; *Emigrant Mortgage v Persad* 117 AD3d 676, 677 [2d Dept 2014]).

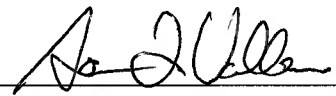
The referee should be advised that there are multiple properties and consideration should be made regarding selling those properties separately, if as defendant has claimed, the sale of less than all would be sufficient to cover the mortgage. The court encourages the parties to continue to work toward resolution of the matter either through reinstatement or defendant finding a

lender willing to refinance the properties.

Accordingly, plaintiff's motion for summary judgment is granted. This constitutes the decision of the court. Any relief not specifically granted is denied. The court will review the proposed order previously submitted.

Dated:

4/25/22



HON. SAM L. VALLERIANI
Supreme Court Justice