

SHORT FORM ORDER

INDEX NO. 619731/2020

**SUPREME COURT - STATE OF NEW YORK
IAS PART 27 - SUFFOLK COUNTY**

MOTION DATE: 4/6/22

ADJ. DATE: 5/10/22

Mot. Seq. 01/MG

**PRESENT: Hon. ROBERT F. QUINLAN
Supreme Court Justice**

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

ADAM LEITMAN BAILEY, P.C.
Attorneys for Plaintiff
One Battery Park Plaza, 18th Floor
New York, New York 10004

Plaintiff,

-against-

**DB AUSTIN REALTY, INC., CHRISTY JEWELL
CANTERBERRY, PERRY N. BOATSWAIN, TOWN OF
BROOKHAVEN – TOWN SUPERVISOR, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
and JOHN AND JANE DOE, the names of the last two
defendants being fictitious, the true names unknown to the
Plaintiff and are intended to be parties in possession of any
part of the mortgaged premises, if any,**

CLAIR GJERTSEN & WEATHERS PLLC
Attorneys for Defendants
4 New King Street, Suite 140
White Plains, New York 10604

Defendants.

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Upon the papers submitted (notice of motion with supporting papers including statement of material facts, opposition including statement of material facts and reply) it is

ORDERED that the plaintiff's motion for summary judgment is granted, and it is further ORDERED that an order is signed this date.

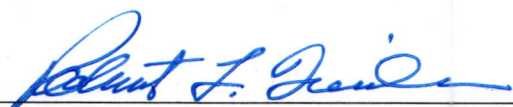
This foreclosure action is based upon a note and mortgage executed on January 31, 2018 in the principal amount of \$148,350.00 in favor of Visio Financial Services Inc. ("Visio"), plaintiff's predecessor in interest, said mortgage securing the note on premises located at 128 Longfellow Drive, Mastic Beach, New York 11951. The borrower was defendant, DB Austin Realty, Inc., and defendants, Christy Jewell Canterbury and Perry Nelson Boatswain were guarantors of the loan. As of April 1, 2020, the loan was in default. The plaintiff commenced this foreclosure action and has moved for summary judgment. In opposition the defendants raise several issues.

Initially, the defendants claim that the affidavit of an employee of the servicer and attorney-in-fact for plaintiff is improper as the attorney-in-fact does not have the authority to submit the affidavit. Moreover, the defendant claims that the plaintiff failed to establish that it complied with the condition precedent of the default notice and the notice required pursuant to RPAPL §§1304 and 1306. Finally, the defendants argue that the motion is premature as the plaintiff has not responded to the discovery demanded in February 2021.

Initially, the defendants' argument that the attorney-in-fact does not have the authority must be rejected. The plain language of the power of attorney document provides that the attorney-in-fact has the authority in a judicial foreclosure action to prepare the documents necessary. This is sufficient basis to establish that the servicer, AVP at Servis One, Inc. D/b/a BSI Financial Services, has the authority to provide the documents for the action and the motion (see Bank of New York Mellon v. Hoshmand, 158 A.D.3d 600, [2nd Dept. 2018]). Moreover, as the plaintiff correctly notes, the borrower is not a natural person nor reside at the residential property (RPAPL §1304(6)(a)(1)). Therefore, RPAPL §1304 and §1306 do not apply (RPAPL §1304(2); see Hartford Funding, Ltd. v. Harris, 193 A.D.3d 1035[2nd Dept. 2021]). As to service of the notice of 30 day notice of default, the plaintiff includes the affidavit of Cheryl Mallory, an AVP of BSI, who indicates that the notice was mail. Furthermore there is an affidavit of William Pappoe, Production Assistant for Covius Document Services, LLC., who indicates that he personally mailed the 30 day notice of default by regular and certified mail (NYSCEF doc. no. 31).¹ This is sufficient to establish compliance with the condition precedent under the loan. Finally, the defendants have not established that the motion should be denied as premature. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (Liddell v. Morrison, _ A.D.3d _, 2022 N.Y. Slip Op. 02786 [2nd Dept. Apr. 27, 2022](cite omitted)). The defendants have not established that the outstanding discovery demands would lead to relevant evidence, as the only issue noted is that the discovery would assist on the issue of notice. Consequently, the motion for summary judgment is granted and an order is signed this date.

The foregoing constitutes the decision and order of the Court.

Dated: May 12, 2022



Hon. ROBERT F. QUINLAN, J..S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

¹. The Walz Group LLC was used. An affidavit of service is allowed to establish proper service (see Bank of NY Mellon v. Aquino, 131 AD3d 1186 [2d Dept 2015]). It is noted that if a notice under RPAPL §1304 was required there are two affidavits of service establishing compliance.