

At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16<sup>th</sup> day of November 2016.

P R E S E N T:

HON. NOACH DEAR,

J.S.C.

Index No.:504305/15

\_\_\_\_\_ x

HSBC BANK USA,

Plaintiff,

**DECISION AND ORDER**

*-against-*

THERESA BURGIN et al,

Defendant,

\_\_\_\_\_ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

<b>Papers</b>	<b>Numbered</b>
Moving Papers and Affidavits Annexed	<u>1</u>
Opposition	<u>2</u>
Cross	<u>3</u>
Reply/Opp to Cross	<u>4</u>
Cross-Reply	<u>5</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for default judgment and an order of reference. Defendants oppose and cross-move for dismissal alleging a lack of personal jurisdiction, that Plaintiff lacks standing, and that Plaintiff failed to send the 1304 notices.

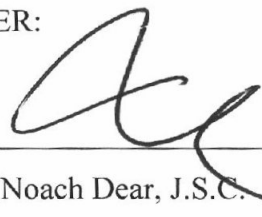
Defendants allege that they were not properly served with the summons and complaint. Nonetheless, their attorney served a notice of appearance and answer in July 2015. Plaintiff rejected the answer as untimely. Defendants then appeared at multiple conferences in the FSCP. It was only in response to Plaintiff's motion that Defendants raised jurisdictional defenses (in July 2016). Such defenses were, however, waived (see, *Wells Fargo Bank, N.A. v. Final Touch Interiors, LLC*, 112 AD3D 813, 814 [2d Dept 2013]).

As Defendants are in default, issues of standing and compliance with RPAPL 1304 are not properly before the Court.

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" (*Chase Home Fin., LLC v. Minott*, 115 A.D.3d 634[2d Dept 2014]). While Defendants waived their jurisdictional defenses via their appearances, the Court finds their affidavits sufficiently credible to excuse a barely two week delay in answering. While the Appellate Division has disallowed the use of standing as a potentially meritorious defense (see, *JP Morgan v. Hayles*, 113 AD3d 821, 822 [2d Dept 2014])[Defaulting defendant waived defense of standing and could not utilize it as a potential meritorious defense under CPLR 5015]; *Deutsche Bank Nat. Trust Co. v Hussain*, 78 A.D.3d 989, 990 [2d Dept. 2010][after stating that standing defense was waived, noting that movant "failed to demonstrate any other potentially meritorious defense" for purposes of §5015(a)(1) ]; *HSBC Bank, USA v. Dammond*, 59 A.D.3d 679, 680 [2d Dept 2009][same]), Defendants have also alleged a failure to comply with RPAPL 1304.

Cross-motion granted to the extent of compelling acceptance of Defendants' previously served answer. Plaintiff's motion denied s moot.

ENTER:



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Hon. Noach Dear, J.S.C.

**HON. NOACH DEAR**

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