SHORT FORM ORDER

INDEX
NO.: 66298-14

SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT: Hon. JOHN H. ROUSE
Acting Justice Supreme Court

MOTION DATE: 06-30-15 (001)
07-08-15 (002)
07-08-15 (003)

ADJ. DATE
Mot. Seq. # 001-MD
 # 002-MG
 # 003-XMD

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

ROSS R. CALIGURI a/k/a ROSS CALIGURI, PENTAGON FEDERAL CREDIT UNION, AMERICAN EXPRESS CENTURION BANK, BRIDGEHAMPTON NATIONAL BANK, REVCO ELECTRICAL SUPPLY, INC., EMIL NORSIC AND SON, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

and JOHN DOE and JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the plaintiff, the persons or parties intending being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

BUCKLEY & MADOLE, P.C.
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Attorneys for the Defendant
Ross R. Caliguri
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant Ross R. Caliguri, dated June 2, 2015, and supporting papers; (2) Affirmation in Opposition to Motion to Reassign by the plaintiff's counsel, Charles W. Marino, Esq., dated June 15, 2015; (3) Reply affirmation by Jeffrey Herzberg, Esq., dated June 18, 2015; (3) Notice of Motion by the plaintiff, dated June 1, 2015, and supporting papers; (4) Notice of Cross Motion by the defendant Ross R. Caliguri, dated June 18, 2015, and supporting papers; (5) Opposition and Reply affirmation by the plaintiff's counsel Charles W. Marino, Esq., dated June 29, 2015, and supporting papers; (6) Reply affirmation the defendant's counsel, Jeffrey Herzberg, Esq., dated June 18, 2015; ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now it is

ORDERED that these motions (#001, #002, #003) are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#001) (e-filed on June 2, 2015) by the defendant Ross R. Caliguri for, inter alia, an order assigning this mortgage foreclosure action to another IAS Part pursuant to Uniform Rules of Trial Courts (22 NYCRR) § 202.3 (a) is denied; and it is

ORDERED that this motion (#002) (e-filed on June 8, 2015) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Ross R. Caliguri, striking his answer, and dismissing the affirmative defenses asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption is granted; and it is

ORDERED that the caption is amended by excising the fictitious "JOHN DOE" and "JANE DOE" defendants; and it is

ORDERED that the plaintiff shall to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is

ORDERED that the cross motion (#003) (e-filed on June 18, 2015) by the defendant Ross R. Caliguri, for, inter alia, an order: (1) pursuant to CPLR 3212 dismissing the complaint insofar as asserted against him on the grounds that: (a) the plaintiff lacks standing; or, in the alternative, (2) pursuant to CPLR 3124 compelling the production of certain discovery related to the plaintiff's standing is denied; and it is

ORDERED that the moving parties shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date herein, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential property known as 377 Chase Drive, Bridgehampton, New York 11932. On November 2, 2005, the defendant Ross A. Caliguri ("the defendant mortgagor") executed an adjustable-rate note in favor of Washington Mutual Bank, FA ("WaMu") in the principal sum of $945,000.00. To secure said note, the defendant mortgagor gave WaMu a mortgage also dated November 2, 2005 on the property. The mortgage was recorded in the Office of the Suffolk County Clerk's Office on November 18, 2005.

Thereafter, on October 31, 2007, the defendant mortgagor executed a second adjustable-rate note, pursuant to which he agreed to repay WaMu the principal sum of $7,175.28, with interest accruing. In order to secure the second note, the defendant mortgagor gave WaMu a second mortgage which encumbered the property. The mortgage was recorded on November 23, 2007.

Additionally, on October 31, 2007, the defendant mortgagor executed a consolidation, extension and modification agreement ("the CEMA") which consolidated the 2005 and 2007 notes and mortgages to form a single lien in the amount of $1,000,000.00. In connection with the CEMA, the defendant

mortgagor executed a consolidated adjustable rate note ("the consolidated note") dated October 31, 2007, which, among other things, consolidated the indebtedness due under the 2005 and 2007 notes and mortgages for a total principal amount of $1,000,000.00, with interest. Section "II" of the CEMA provides, inter alia, that "all of the promises and agreements stated in the [n]otes and [m]ortgages ... have been combined into on one set of rights and obligations by an earlier agreement which is referred to in Exhibit A." The CEMA/consolidated adjustable note further provides, in relevant part, that it amends and restates in their entirety, and is given in substitution for the notes described in Exhibit A of CEMA dated the same date as the consolidated note.

Additionally, pursuant to section "V" of the CEMA, the defendant mortgagor waived the right of set offs, counterclaims, or any defenses to the obligations of the consolidated note or the consolidated mortgage. The CEMA, with the consolidated note and consolidated mortgage attached as exhibits, was duly recorded in the Suffolk County Clerk's Office on November 23, 2007.

By way of a series of undated endorsements and an assignment, the 2005 and 2007 mortgages and notes were allegedly transferred to the plaintiff, JPMorgan Chase Bank, National Association prior to commencement. Additionally, by assignment executed on June 30, 2009, JPMorgan Chase Bank, National Association, as attorney-in-fact and successor-in-interest to Washington Mutual Bank formerly known as WAMU, assigned the mortgage, "[t]ogether with all moneys now owing or that may hereafter become due and owing in [r]espect thereof ... the [a]ssignor's beneficial interest under the [m]ortgage." It also specifies that it includes the "said [m]ortgage and [n]ote, and also said property unto said [a]ssignee forever, subject to the terms in said [m]ortgage and [n]ote." The assignment further includes a reference to the 2007 mortgages and the CEMA, which formed "a single lien in the sum of [o]ne million dollars ($1,000,000.00) and interest." The assignment was subsequently recorded on August 13, 2009.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on September 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on August 7, 2014.

Issue was joined by the interposition of the defendant mortgagor's answer dated September 15, 2014. By their answer, the defendant mortgagor generally denies all of the allegations in the complaint, and asserts eight affirmative defenses, alleging, among other things, the plaintiff's alleged lack of standing. The remaining defendants have neither appeared nor answered the complaint, and, thus, are in default.

By way of background, a settlement conference was held before the specialized foreclosure conference part on March 11, 2015. At that time, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, the conference requirements imposed by CPLR 3408, if required, have been satisfied; no further conference is required under any statute, law or rule.

By way of further background, the plaintiff commenced a prior foreclosure action ("the first action") filed under Suffolk County Index No.: 25638-2009 on or about July 6, 2009. By order dated

March 7, 2012 (Baisley Jr., J.), the first action was dismissed upon granting the defendant mortgagor's motion for an order pursuant to CPLR 3126 and/or CPLR 3212 on the grounds that the plaintiff failed to raise a triable issue of fact as to its standing. Justice Baisley also found that the defendant mortgagor had established an independent ground for dismissal of the complaint on the ground that the plaintiff willfully failed to comply with discovery orders of the Court.

On or about May 1, 2012, the defendant mortgagor commenced a declaratory action to quiet title to the property entitled, ***Caliguri v JPMorgan Chase Bank, N.A., as successor to Washington Mutual Bank, FSB***, and filed under Suffolk County Index No.: 13522-2012. In that action, the plaintiff moved to dismiss the complaint asserting that the dismissal of the first action was not "on the merits" and that the quiet title action could not be maintained. In response, the defendant mortgagor cross moved for summary judgment on the complaint, arguing that the dismissal of the first foreclosure action was "on the merits." By order dated May 13, 2013 (Gazzillo, J.), the plaintiff's motion to dismiss pursuant to CPLR 3211(a)(7) was granted and the defendant mortgagor's cross motion was denied as moot. The motion court found that the defendant mortgagor failed to state a cause of action because the dismissal of the first action was not "on the merits."

An appeal ensued and by order dated October 29, 2014, the Appellate Division, Second Department affirming the trial court found that the trial court properly granted the plaintiff's motion for dismissal of the complaint for failure to state a cause of action and denied, as academic, the defendant mortgagor's cross motion for summary judgment on the complaint (*see*, ***Caliguri v JPMorgan Chase Bank, N.A.***, 121 AD3d 1030, 996 NYS2d 73 [2014], *lv denied* 25 NY3d 911, 15 NYS3d 288 [2015]). The Second Department also held that the defendant mortgagor failed to establish that the first action was dismissed on the merits and the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations.

In this action, the defendant mortgagor now moves for an order assigning this mortgage foreclosure action to another IAS Part. In support of the motion counsel argues that this action should be referred to the IAS Part Justice who presided over the first foreclosure action in accordance with the provisions of the Uniform Rules of Trial Courts (22 NYCRR) § 202.3(a).

The plaintiff now moves for, inter alia, an order awarding summary judgment in its favor against the defendant mortgagor, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. The defendant mortgagor opposes the plaintiff's motion and cross moves, for, inter alia, an order dismissing the complaint insofar as asserted against him on the grounds that the plaintiff lacks standing; or, in the alternative, compelling the production of certain discovery related to the plaintiff's standing. The plaintiff has submitted opposition papers in response to the defendant mortgagor's motion and cross motion. In response, the defendant mortgagor has filed reply papers.

The court turns first to the motion and cross motion made by the defendant mortgagor. Initially, the branch of the defendant mortgagor's motion for an order re-assigning this action to the IAS Part Justice who presided over the first foreclosure action is denied because it is without merit. The court's records show that this was assigned to this IAS Part 12 from its inception. Further, the Appellate Division rendered its determination concerning the first foreclosure action and the subject quiet title action, and the

defendant mortgagor's motion to reargue its appeal, or in the alternative, for leave to appeal to the Court of Appeals was denied.

The branches of the defendant mortgagor's cross motion for an order pursuant to CPLR 3124 and CPLR 3126 are denied because neither are supported by a separate affirmation evidencing a good-faith effort made by counsel to resolve the issues raised therein (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]; ***Ponce v Miao Ling Liu***, 123 AD3d 787, 996 NYS2d 548 [2d Dept 2014]; ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]; ***Zorn v Bottino***, 18 AD3d 545, 794 NYS2d 659 [2d Dept 2005]); nor has an order been made in this action scheduling discovery (*see*, ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). In any event, the defendant mortgagor's motion and cross motion have each been rendered academic by the determination below and both are denied as moot.

Turning to the motion-in-chief, a plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the endorsed notes, the mortgages, the CEMA, the assignment and evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op,

at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*). "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" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v Sullivan***, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], quoting ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911]).

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201 (5) (*see*, UCC 3-104; ***Franzese v Fidelity N.Y. FSB***, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see*, UCC § 3-202; § 3-204; § 9-203 [g]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Franzese v Fidelity N.Y. FSB***, 214 AD2d 646, *supra*). Furthermore, UCC § 9-203 (g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

Initially, with respect to the plaintiff's standing, the Appellate Divisions of both the First and Second Departments have recognized that, in September 2008, after WaMu had entered receivership by the Federal Deposit Insurance Corporation)("FDIC"), the plaintiff entered into a purchase and assumption

agreement ("the purchase agreement") with the FDIC whereby the plaintiff acquired all of WaMu's loans and loan commitments (*see*, ***Washington Mut. Bank v Nussen***, 138 AD3d 828, 29 NYS3d 522 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***JP Morgan Chase Bank, N.A. v Russo***, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014]; ***JP Morgan Chase Bank, N.A. v Shapiro***, 104 AD3d 411, 959 NYS2d 918 [1st Dept 2013]; ***JP Morgan Chase Bank N.A. v Miodownik***, 91 AD3d 546, 937 NYS2d 192 [1st Dept 2012]; *see also*, ***Deutsche Bank Natl. Trust Co. v Pavlin***, 2015 NY Misc LEXIS 4845, 2015 WL 9917221, 2015 NY Slip Op 32503 [U] [Sup Ct, Suffolk County 2015]; ***JPMorgan Chase Bank v Federman***, 2014 NY Misc. LEXIS 2287, 2014 WL 2195229, 2014 NY Slip Op 31294 [U] [Sup Ct, Suffolk County 2014]). As a result of the purchase agreement, on September 25, 2008, the plaintiff became the owner of the loans and loan commitments of WaMu by operation of law.

By its submissions, the plaintiff demonstrated its standing by way of physical possession of the note prior to commencement (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). In support of the motion, the plaintiff submitted, inter alia, an affidavit in support from Kimberly Jemee, a Vice President of the plaintiff and an affidavit of note possession from Sherry Stafford another Vice President of the plaintiff. In her affidavit, Ms. Jamee alleges that the plaintiff, which is also the servicer for the loan, directly or through its agent, was in possession of the original promissory note dated October 21, 2007 in the principal amount of $1,000,000.00 at time of filing of the complaint, and that she examined a "true and correct copy" which is attached to her affidavit. In connection with her affidavit, Ms. Jemee reviewed and relied upon the plaintiff's business records, including images of the note, the plaintiff's electronic servicing system and images of correspondence to the defendant mortgagor.

In her affidavit, Ms. Stafford alleges that, according to the plaintiff's custodial system of record, emBTrust, the plaintiff as custodian for the collateral loan documents for this loan received the original note in the principal amount of $1,000,000.00 at time of filing of the complaint, and on September 12, 2012, and that it maintains possession of the original note at its storage facility located at 780 Delta Drive, Monroe, Louisiana 71203. She also alleges, inter alia, that it is the plaintiff's regular business practice to store notes secured by mortgages and deeds of trust in collateral files maintained by the plaintiff's agent, JPMorgan Chase Custody Services, Inc. ("JPMCCSI"), in its secure vault system in Monroe LA. Ms. Stafford further alleges that her affidavit is made based upon her review of the records of the plaintiff and JPMCCSI and her knowledge of how they are kept. It is Chase's and JPMCCSI's regular practice to keep such records, made at or near the time of the event, in the ordinary course of its regularly conducted business activity.

The plaintiff also demonstrated its standing by, inter alia, the submission of the written assignment of the mortgage and the note executed prior to commencement (*see*, ***U.S. Bank N.A. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In this case, the assignment, which was executed and recorded prior to commencement, includes a reference to the indebtedness/note/CEMA (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*). The documentary evidence submitted also

includes, among other things, the 2007 consolidated note transferred via a blank endorsement (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Such evidence demonstrates that the plaintiff holds and/or owns the original note and mortgage.

In any event, the record before the court shows that the note was in the plaintiff's possession at the time of commencement, as evidenced by its attachment to the e-filed complaint (*see*, ***Deutsche Bank Trust Co. Ams. v Garrison***, 147 AD3d 725, 46 NYS3d 185 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 45 NYS3d 189 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Umeh***, 145 AD3d 497, 41 NYS3d 882 [1st Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015] [copy of endorsed note attached to the complaint as an exhibit]). In this e-filed action, the endorsed notes, the mortgages, the CEMA/consolidated note and the assignment were attached as exhibits to the complaint on the date of commencement (*see*, ***Perez v New York City Hous. Auth.***, 47 AD3d 505, 850 NYS2d 75 [1st Dept 2008] [judicial notice taken of the court's computerized records]; ***Nationstar Mtge., LLC v MacPherson***, 2017 NY Misc LEXIS 1296, 2017 WL 1369877, 2017 NY Slip Op 27120 [Sup Ct, Suffolk County 2017] [judicial notice of the electronic records of the court maintained by NYSCEF]). Therefore, the plaintiff demonstrated that the note was in its possession at the time of commencement. Thus, the plaintiff demonstrated its prima facie burden as to its standing.

The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Banco Popular N. Am. v Victory Taxi Mgt.***, 1 NY3d 381, 774 NYS2d 480 [2004]; ***HSBC Bank, USA v Hagerman***, 130 AD3d 683, 11 NYS3d 865 [2d Dept 2015]; ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***Beitner v Becker***, 34 AD3d 406, 824 NYS2d 155 [2d Dept 2006] [bald assertion of forgery is insufficient to raise a triable issue of fact]; ***McCarthy v Stanley***, 151 AD 358, 136 NYS 386 [3d Dept 1912] [signature of the assignor of the mortgage need not be proved by the assignee where the assignment has been acknowledged and recorded]). Moreover, non-parties to a lender's pooling and servicing agreement or assignments lack standing to assert noncompliance therewith (*see*, ***Bank of Am. N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Bank of N.Y. Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; *see also*, ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 2007] [those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract]).

In any event, as provided for by section "V" of the CEMA, the defendant mortgagor validly waived any right of set off, counterclaims or defenses to any of the obligations of the consolidated note and mortgage under the express terms of the CEMA (*see*, ***KeyBank N.A. v Chapman Steamer Collective, LLC***, 117 AD3d 991, 986 NYS2d 598 [2d Dept 2014]; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Petra CRE CDO 2007-1, Ltd v 160 Jamaica Owners, LLC***, 73 AD3d 883, 904 NYS2d 699 [2d Dept 2010]; ***Parasram v DeCambre***, 247 AD2d 283, 668 NYS2d 454 [1st Dept 1998]). Such waivers are enforceable as they do not contravene the public policy

of this State (*see*, ***Chemical Bank N.Y. Trust Co. v Batter***, 31 AD2d 802, 297 NYS2d 363 [1st Dept 1969]).

It was thus incumbent upon the defendant mortgagor to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer (*see*, ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

In his opposing and moving papers, the defendant mortgagor reasserts his previously pleaded affirmative defense alleging that the plaintiff lacks standing. In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses asserted in the answer, except those noted above. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses asserted in the answer in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the unsupported affirmative defenses asserted in the answer are thus dismissed.

Contrary to the defendant mortgagor's contentions, the instant motion for summary judgment made by the plaintiff imposed an automatic stay of discovery (*see*, CPLR 3214 [b]; ***Schiff v Sallah Law Firm, P.C.***, 128 AD3d 668, 7 NYS3d 587 [2d Dept 2015]). In any event, the defendant mortgagor failed to demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see*, CPLR 3212 [f]; ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; ***Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (***Lee v T.F. DeMilo Corp.***, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]).

The plaintiff demonstrated its standing, as indicated above. The court finds that none of the defendant mortgagor's assertions give rise to a question of fact as to the plaintiff's standing (*see, **Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]; ***Peak Fin. Partners, Inc. v Brook***, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; ***Bankers Trust Co. v Hoovis***, 263 AD2d 937, 694 NYS2d 245 [3d Dept 1999] *cf.*, ***Countrywide Home Loans, Inc. v Gress***, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). Contrary to the defendant mortgagor's contention, "[t]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into

possession of the instrument in order to be able to enforce it" (***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 645, 37 NYS3d 286 [2d Dept 2016]; *see*, UCC 3-204[2]). Further, where the note is affixed to the complaint, "it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date" (***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 863, 45 NYS3d 189 [2d Dept 2017] [internal quotation marks and citations omitted]).

Even if the plaintiff presently lacked standing, the validity of the subject mortgages would not be thereby vitiated (*see*, ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]). Moreover, the documentary evidence submitted by the plaintiff conclusively establishes the validity of the subject mortgages and notes (*see*, ***Jahan v U.S. Bank Natl. Assn.***, 127 AD3d 926, 9 NYS3d 65 [2d Dept 2015]; ***Acocella v Bank of N.Y. Mellon***, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]).

Further, even if there were no waiver of defenses by the defendant mortgagor, and even when considered in the light most favorable to him, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, ***Retained Realty, Inc. v Syed***, 137 AD3d 1099, 26 NYS3d 889 [2d Dept 2016]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, *supra*). The defendant mortgagor's moving and opposition papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211 [e]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The court has examined the defendant mortgagor's remaining contentions and finds that such lack merit.

Notably, the answering defendant did not deny having received the loan proceeds and having defaulted on the subject loan payments in an affidavit made by him (*see*, ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also*, ***Stern v Stern***, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). In any event, the affirmation of the defendant mortgagor's attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see*, ***Matter of Ziomek***, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; ***Barcov Holding Corp. v Bexin Realty Corp.***, 16 AD3d 282, 792 NYS2d 408 [1st Dept 2005]; *see also*, ***US Natl. Bank Assn. v Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

The plaintiff is therefore awarded summary judgment in its favor against the defendant mortgagor (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*). The answer is stricken, and the affirmative defenses asserted therein are dismissed, all with prejudice. The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the instant motion for an order pursuant to CPLR 1024 amending the caption by excising the fictitious "JOHN DOE" and "JANE DOE" defendants is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Neighborhood Hous. Servs. of N.Y. City, Inc.***

v Meltzer, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the defendants Pentagon Federal Credit Union, American Express Centurion Bank, Bridgehampton National Bank, Revco Electrical Supply, Inc., Emil Norsic and Son, Inc. and Electronic Registration Systems, Inc. (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***U.S. Bank, N.A. v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of all of the non-answering defendants is fixed and determined.

Because the plaintiff has been awarded summary judgment against the defendant mortgagor and has established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

The proposed order of reference, as modified by the court, has been signed with this decision.

Dated: May 11, 2017

Hon. John H. Rouse
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION