SHORT FORM ORDER

INDEX
NO.: 33836-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 48 - SUFFOLK COUNTY

PRESENT: Hon. HECTOR D. LASALLE
Justice of the Supreme Court

The Bank of New York fka The Bank of New York as successor to JPMorgan Chase Bank, N.A. as Trustee for Holders of SAMI II Trust 2006-AR7,

Plaintiff,

-against-

Jason Mungro, Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Countrywide Bank, N.A., its successors and assigns, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

Motion Date: 10-25-12
Adj. Date: _____
Mot. Seq. #001-MotD

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment and an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13 - 15; Replying Affidavits and supporting papers 16 - 19; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff/counterclaim-defendant for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and striking the answer, affirmative defenses and counterclaims of the defendant Jason Mungro/counterclaim-plaintiff; (2) amending the caption; and (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, is granted solely to the extent indicated below, otherwise denied; and it is

ORDERED that the moving parties are directed to serve a copy of this Order with notice of entry upon opposing counsel and upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103 (b)(1), (2) or (3) within thirty (30) days of the date herein, and to file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known and described as 12 Wellington Place, Amityville, New York 11701 (the property). The defendant Jason Mungro (the defendant mortgagor) executed an adjustable-rate payment option note dated July 27, 2006 in favor of Countrywide Bank, N.A. (Countrywide) in the principal sum of $432,000.00. To secure said note, the defendant mortgagor gave Countrywide a mortgage also dated July 27, 2006 (the mortgage) on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for Countrywide and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By assignment dated April 3, 2010 and recorded on March 29, 2011, MERS as nominee for Countrywide purportedly transferred its interest in the mortgage "together with the note or obligation described and secured by said mortgage, and the monies due to and to grow thereon with the interest" to the plaintiff.

The defendant mortgagor allegedly defaulted on his monthly payment of interest due on October 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 summons and verified complaint on September 14, 2010. Issue was joined by the service of the defendant mortgagor's verified answer sworn to on June 18, 2012. By his answer, the defendant mortgagor admits that he is the owner of the property, but denies all of the other allegations therein. In his answer, the defendant mortgagor also sets forth forty-three affirmative defenses, asserting, inter alia, lack of standing, and ten counterclaims. In response to the counterclaims, the plaintiff filed a reply. The remaining defendants have neither answered nor appeared in this action.

According to the records maintained by the Court's computerized database, in compliance with CPLR 3408 a settlement conference (pre-screening) was held in this Court's specialized mortgage foreclosure conference part on December 14, 2010. On that date, this case was dismissed from the conference program and referred to IAS as the defendant mortgagor did not appear or otherwise participate. A settlement/status conference was subsequently held before Part 48 on July 13, 2012 and adjourned a final time to October 19, 2012, at which time this action was again referred as an IAS case. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a as amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and striking the answer, affirmative defenses and counterclaims of the defendant Jason Mungro/counterclaim-plaintiff; (2) amending the caption; and (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. In response, the defendant

mortgagor has filed opposition papers. A reply has been filed by the plaintiff.

In support of the motion, the plaintiff has submitted, *inter alia*, the pleadings, the mortgage, the note, the assignment, a notice of default, a 90-day notice, affidavits of service, an undated uniform residential loan application allegedly executed by the defendant mortgagor, an affidavit of merit along with a certificate of conformity for same, and an affirmation by counsel. In the complaint, the plaintiff alleges, among other things, that the note and mortgage were assigned to it, and that the plaintiff is in possession of the original note with a proper endorsement and/or allonge. It is the sole, true and lawful owner of the note and mortgage, or has been delegated the authority to institute this mortgage foreclosure action by the owner and holder of the mortgage and note. The plaintiff further alleges that it has complied with the applicable provisions of the Banking Law and the Real Property Actions and Proceedings Laws, unless exempt from doing so. In his affidavit of merit, an officer of the plaintiff's servicing agent and attorney-in-fact alleges that the plaintiff was the holder of the note prior to commencement and was assigned the mortgage. According to the officer, the instant mortgage loan has been in default continuously since October 1, 2008. The plaintiff provided a notice of default as well as a 90-day notice to the defendant mortgagor. The officer further alleges, inter alia, that the 90-day pre-foreclosure notice was sent by certified mail and also by first class mail to defendant mortgagor at his last known address, and if different, to the residence that is the subject of the foreclosure. In his affirmation, counsel requests that the caption be amended to reflect its current full name as the current caption designates a truncated version.

In opposition to the motion, the defendant submits, inter alia, an affidavit by the defendant mortgagor and an affirmation by counsel. In his affidavit, the defendant mortgagor concedes that he executed the mortgage in favor of Countrywide and delivered it to MERS as nominee for Countrywide. He also concedes that a foreclosure settlement conference pursuant to CPLR 3408 has been conducted, but that his loan was not modified and this action was not settled. In his affirmation, counsel requests that the motion be denied, arguing that there may be an issue as to standing since MERS as nominee for Countrywide lacked the authority to assign the note to the plaintiff. Counsel also asserts that the assignment of the mortgage to the plaintiff was not recorded at the time this action was commenced. Parenthetically, in what appears to be a scrivener's error, and in contradiction to the defendant mortgagor's concession, counsel asserts that a foreclosure settlement conference pursuant to CPLR 3408 has never been held.

In reply, counsel avers that the note is a negotiable instrument and includes a provision that Countrywide may transfer the same. He also avers that the signatory to the assignment was duly authorized to sign the document. Counsel asserts that the plaintiff established its right to summary judgment, arguing that the defendant mortgagor's defenses are meritless and his contentions in opposition are in apposite.

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 1228A, 954 NYS2d 758 [Sup Ct, Suffolk County, May 22, 2012, Whelan, J., 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]).

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 Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. 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]).

Where the issue of standing is raised by a defendant, a 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]). A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (*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]). "As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note" (***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra* at 280; *see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). "By contrast, a transfer of a mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it" (***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra* at 280; *see*, ***LaSalle Bank Natl. Assn. v Ahearn***, 59 AD3d 911, 875 NYS2d 595 [3d Dept 2009]). "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" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754).

In the instant case, the plaintiff failed to establish, prima facie, that it had standing as its evidence did not demonstrate that the note was physically delivered to it prior to the commencement of the action (*see*, ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). In his affidavits, the plaintiff's servicing agent did not give any factual details of a physical delivery of the note and thus, failed to

establish that the plaintiff had physical possession of the note prior to commencing this action (*see*, ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Also, the note itself does not contain an endorsement, and, in any event, MERS was not a party to the note (*see*, ***U.S. Bank Natl. Assn. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; ***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra*). If MERS, as nominee of Countrywide was not the owner of the note, as it appears, it would have lacked the authority to assign the note to plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to plaintiff would be a nullity (*see*, ***Kluge v Fugazy***, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Additionally, the plaintiff failed to demonstrate that the note is a negotiable instrument as it is neither endorsed to the plaintiff, nor endorsed in blank (*see*, UCC 3-104 [a][1]; *cf.*, ***Mortgage Elec. Registration Sys. v Coakley***, 41 AD3d 674, *supra*). Furthermore, the plaintiff makes no showing that the note has an allonge affixed to it endorsing it over to the plaintiff (*see*, UCC 3-302[2]; ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Thus, the plaintiff failed to demonstrate its prima facie burden with respect to the first affirmative defense to the extent that it alleges lack of standing. The Court now turns to the defendant mortgagor's other affirmative defenses and to the counterclaims.

The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the defendant mortgagor's answer and the counterclaims asserted therein, however, 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., Natl. Assn. 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*, ***Albertina Realty Co. v Rosbro Realty Co.***, 258 NY 472, 475-76, 180 NE 176 [1932] ["*acceleration clause does not constitute a forfeiture or penalty" and "the filing of the summons and verified complaint and lis pendens constitutes a valid election" to accelerate*]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [*no valid defense or claim of estoppel where mortgage provision bars oral modification*]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012] [*foreclosing plaintiff has no obligation to modify loan before or after a default*]; ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988]; ***Baron Assoc., LLC v Garcia Group Enters.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012] [*unconscionability generally not a defense*]; ***CFSC Capital Corp. XXVII v W. J. Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [1998], *lv dismissed* 92 NY2d 919, 680 NYS2d 459 [1998]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [*defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior*]; ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] ["*a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms*"]; ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [*claimed violations of General Business Law § 349 and/or engagement in deceptive business practices do not generally give rise to claims against a lender*]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 951 [2d Dept 2010] [*unaffordability of loan will not support damages claim against lender and is not a defense to a foreclosure action*]; ***La Salle Bank Nat. Assn. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [*claimed violations of the Truth In Lending Act do not constitute affirmative defenses to a*

foreclosure action]; ***Grogg v South Rd. Assocs., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [*the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery*]; ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [*CPLR 3016[b] requires that the circumstances of fraud be "stated in detail," including specific dates and items*]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, *supra* [*no competent evidence of an accord and satisfaction*]; ***Deutsche Bank Natl. Trust Co. v Campbell***, 26 Misc3d 1206A, 906 NYS2d 779, 2009 NY Slip Op 526780[U] [Sup Ct, Kings County, Dec. 23, 2009, Miller, J.] [*a disclosure violation of the Real Estate Settlement Procedures Act*, 12 USC § 2601, *et seq.*, *does not constitute a valid defense to a mortgage foreclosure*]). Additionally, to the extent that the defendant mortgagor asserts a lack of standing in the remaining affirmative defenses, they are stricken as duplicative of the first affirmative defense (*see*, CPLR 3212[b]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law with respect to all defenses other than standing and with respect to the counterclaims, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [2007], *lv dismissed* 8 NY3d 967, 836 NYS2d 540 [2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to the other affirmative defenses to the action and as to the counterclaims (*see*, ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2007], *lv denied* 10 NY3d 704, 857 NYS2d 37 [2008]; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, *supra*; ***Wash. Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Grogg v South Rd. Assocs., LP***, 74 AD3d 1021, *supra*). In instances where a defendant fails to oppose some or all matters advanced on 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, Inc. 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, *supra*).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of his pleaded defenses, except as to standing, which has been asserted in, inter alia, the defendant mortgagor's first affirmative defense. The failure to raise and/or assert each of the remaining pleaded defenses and counterclaims in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). Contrary to the assertion by counsel for the defendant mortgagor, the affidavit of merit by the plaintiff's representative, which has a certificate of conformity attached thereto, is in compliance with CPLR 2309(c). The remainder of the defendant mortgagor's contentions with respect to his non-default by answering the complaint are misplaced and have been disregarded (*see*, CPLR 3111[b]; CPLR 3212[b],[c]; *see generally*, ***Emigrant Mtge. Co. Inc. v Beckerman***, 2013 NY App Div LEXIS 2469, 2013 NY Slip Op 2535 [2d Dept, Apr. 17, 2013]). Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment striking all affirmative defenses, other than standing, and dismissing all of the counterclaims (*see generally*, ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *see generally*, ***Hermitage Ins. Co. Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870

[2d Dept 2007]).

The plaintiff, therefore, is awarded partial summary judgment against the defendant mortgagor striking all affirmative defenses, except the first affirmative defense to the extent that it asserts standing as an affirmative defense, and dismissing all of the counterclaims (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 665 NYS2d 631 [2d Dept 1997]; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the affirmative defense enumerated as "First " is stricken, except as to standing, the affirmative defenses enumerated "Second" through "Forty Third" are stricken, and all of the counterclaims are dismissed pursuant to CPLR 3212.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Anna Diaz, Patrick Diaz, Hipolito Costallone and Paulito Costallone as party defendants in place of John Doe 1-4, and excising the fictitious defendants sued herein as John Doe #5-10, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 1997]). All future proceedings shall be captioned accordingly.

Accordingly, the motion is determined as set forth above. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

The foregoing constitutes the Order of this Court.

Dated: May 8, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION