SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

----------X

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., F/K/A THE BANK OF NEW YORK TRUST COMPANY, N.A., AS TRUSTEE FOR CHASE FINANCE MORTGAGE TRUST MULTI-CLASS MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-S4,

Plaintiff,

- v -

BRIAN KIM, CITIBANK, N.A., ESPERANZA GALLARDO, MARGARITO VAZQUEZ, JPMORGAN CHASE BANK, NA, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, BOARD OF MANAGERS OF THE CHRISTODORA HOUSE CONDOMINIUM, JOHN DOE, JANE DOE

Defendant.

----------X

INDEX NO. 850276/2022

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

Plaintiff commenced this action, its third, to foreclose on a mortgage encumbering real property located at One Tompkins Square, Unit 3C, New York, New York. The mortgage, dated September 1, 2006, was given by Defendant Brian Kim ("Kim") to non-party JPMorgan Chase Bank, NA ("JPMorgan"). The lien secured a loan with an original principal amount of $1,100,000.00 which was memorialized by a note of the same date. Plaintiff's first action to foreclose this mortgage was commenced on March 29, 2013 (*see BONY v Kim*, NY Cty Index No 850055/2013). That action was dismissed by order of Justice Carol R. Edmead, dated March 9, 2016, pursuant to CPLR §§306-b and 3211[a][8].

Plaintiff commenced a second action by filing a summons and complaint on December 3, 2018 (*see BONY v Kim*, NY Cty Index No 850331/2018). By order dated July 24, 2019, Justice Arlene Bluth denied Defendant Kim pre-answer motion to dismiss the complaint as time barred. Thereafter, Kim answered and asserted numerous affirmative defenses. By order dated May 19, 2021, Plaintiff's motion for, *inter alia*, summary judgment and an order of reference was granted. By order dated July 7, 2022, this Court granted Kim's motion to renew and dismissed the action based upon the Appellate Division, Second Department's decision in *Bank of America, N.A. v Andrew Kessler*, 202 AD3d 10 [2nd Dept

2021] and its interpretation of RPAPL §1304. Notwithstanding the Court of Appeals' reversal of the Second Department's decision (*see Bank of America, NA v Kessler*, 39 NY3d 317 [2023]), Plaintiff sought no renewal of this Court's dismissal.

Plaintiff commenced this action on December 20, 2022. Defendant Kim answered and pled fifteen affirmative defenses, including expiration of the statute of limitations, as well as a counterclaim. Now, Defendant Kim moves to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][5] based upon the amendments made to the applicable statutes under the Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821 [eff Dec. 30, 2022]). Plaintiff opposes the motion and cross-moves for summary judgment against Kim, a default judgment against the non-appearing parties, appointment of a referee to compute and to amend the caption. Defendant opposes the cross-motion.

The initial inquiry must be whether the enactments in FAPA are applicable to this action. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. The express purpose of FAPA, according to the Senate Sponsor Memo, was to "overrule the Court of Appeals' recent decision in Freedom Mtge. Corp. v Engel" as well as certain other judicial decisions perceived to be "inconsistent with the intent of the Legislature" (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary "to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions" (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021) is specifically targeted by FAPA's legislative "response" which, by its reasoning, "restore[s] longstanding law that made it clear that a lenders' discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset the statute of limitations" (*id.*). As to its applicability, Section 10 of FAPA provides that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (*see* L 2022, ch 821 [eff Dec. 30, 2022]).

With respect to retroactive applicability of FAPA to previously commenced and pending actions, the Appellate Division, First Department held, while these motions were *sub judice*, that the statutory amendments therein are to be retroactively applied (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37 [1st Dept. 2023]). That Court reasoned that application of FAPA's amendments to pending litigation furthers the "the Legislature's goal, expressed in the language of FAPA and its legislative history" (*id.*).

As relevant here, the applicable statute of limitations, CPLR §213[4], was amended to provide that "[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." (CPLR §214[4][a]). CPLR §203 was also amended to add subdivision [h] which provides that:

> Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally

> waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

Also added was CPLR §205-a which supplanted the so-called "savings provision" under CPLR §205 in actions related to real property. Much like CPLR §205, the "statute is not technically a 'toll,' as it does not stop the underlying statute of limitations from running, but is instead a six-month 'extension' of the time for commencing the new action when its qualifying circumstances are present" (*Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]). However, application of CPLR §205-a is significantly more limited than its predecessor.

Based on the foregoing, the amendments instituted in FAPA will be applied in determining Kim's motion pursuant to CPLR §3211[a][5]. On a motion to dismiss a cause of action as barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). The commencement of the 2013 and 2018 actions were unequivocal acts of acceleration of the debt. Among other things, the complaints expressly stated that Plaintiff was electing to declare the entire principal balance to be due and owing. Based upon the foregoing, Defendant established that the statute of limitations in this matter accrued in 2013 and that more than six-years transpired before this action was commenced.

Accordingly, the burden shifted to Plaintiff to demonstrate that a toll, stay or extension is applicable or that an issue of fact exists (*see eg Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). In opposition, Plaintiff posits that this action was timely commenced based upon under the savings provision of CPLR §205-a. This section limits its use to the "original plaintiff" in the prior dismissed action or "a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff" (CPLR §205-a[a][1]). Further, the extension cannot be invoked if the prior action was terminated by:

> "a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits"
>
> (CPLR §205-a[a]).

It is also necessary that any newly commenced action "would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period" (*id.*)

Here, the Plaintiff has remained the same throughout all three actions. The dismissal of the 2018 action was based upon non-compliance with the requisites for pre-foreclosure notices under RPAPL §1304 and an Appellate Division decision which was later reversed. RPAPL §1304 is not amongst the statutorily excluded terminations nor does it constitute a neglect-based termination of an action. To the extent Defendant Kim claims this Court's July 7, 2022, dismissal was "a final judgment on the merits" that claim is unavailing as failure to comply with a procedural condition precedent does not qualify as same (*see CitiMortgage, Inc. v Moran*, 188 AD3d 407, 408 [1st Dept 2020]). Also, were this action commenced in 2018, it would have been timely as less than six-years had passed from commencement of the first action in 2013.

Determination of whether an action is commenced and served within the six-month savings period starts by establishing when "termination" of prior action occurred. This event arises either upon entry of an order of termination (*see Delzotti v Bowers*, 219 AD3d 967 [2d Dept 2023]; *Burns v Pace Univ.*, 25 AD3d 334 [1st Dept 2006]) or, if a notice of appeal as of right from the order of dismissal is filed, when the appeal process is truly "exhausted" (*see Malay v City of Syracuse*, 25 NY3d 323, 328-329 [2015]; *see also Deutsche Bank Nat'l Trust Co. v Gouin*, 194 AD3d 479 [1st Dept 2021]). Here, entry of dismissal of the 2018 action occurred on July 8, 2022, but a notice of appeal was filed by Plaintiff on August 8, 2022[1]. As there is no record that the appeal was perfected, it was deemed dismissed by rule six-months later on February 6, 2023 (*see* Practice Rules of the Appellate Division §1250.10[a][22 NYCRR]). Ergo, Plaintiff had until August 6, 2023, to commence this action and serve Kim. It is undisputed that this matter was commenced in 2022 and service on Kim, ostensibly made pursuant to CPLR §308[2], was complete ten-days after proof of service was filed, to wit January 14, 2023 (CPLR §308[2]). As such, Plaintiff satisfied the requisites under CPLR §205-a and this action is timely.

Concerning the Plaintiff's arguments regarding the constitutionality of the application of FAPA to this matter, this Court must bypass those issues since it determined the action was timely based upon a statute contained in that legislation (*see People of the State of New York v Felix*, 58 NY2d 156 [1983]).

As to the cross-motion, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendant's default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) and its strict compliance with RPAPL §§1303, 1304 and 1306 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]). Further, substantial compliance with the contractual requisites under the loan documents must also be established (*see eg Wells Fargo Bank, N.A. v McKenzie,* 186 AD3d 1582, 1584 [2d Dept 2020]).

Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). As such, in support of a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with

[1] The notice of appeal was timely as it was filed within 30 days of service of the disputed order via NYSCEF on July 11, 2022 (CPLR 5513[a]).

knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Daniel Maynes ("Maynes"), a Document Control Officer of Select Portfolio Servicing, Inc. ("SPS"), servicer and attorney-in-fact for Plaintiff. Maynes avers the affidavit was made based upon "based upon my personal review of SPS's business records and from my own personal knowledge of how the records are kept and maintained". Personal knowledge can be sufficient to demonstrate a *prima facie* case for summary judgment (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]). Maynes laid a proper foundation for the admission of SPS's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of prior servicers were also admissible since Maynes sufficiently established that those records were received from their makers and incorporated into the records SPS kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). The records of a prior servicer JPMorgan, the original lender, were also admissible based upon the affidavit submitted from Karla Baxter ("Baxter"), an authorized signer of that entity. The records referenced by Maynes and Baxter were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). The limited powers of attorney dated September 13, 2013, and February 1, 2023, demonstrated the authority of SPS and JP Morgan to act on behalf of their respective principals (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]). In sum, the affidavit and referenced documents sufficiently evidenced the note and mortgage (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, the review of the attached account records by Maynes and Baxter demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). In either the second or third instances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]) and upon proper transfer of same, a "mortgage passes with the debt as an inseparable incident'" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], *quoting Onewest Bank, F.S.B. v Mazzone*, 130 AD3d 1399, 1400 [2d Dept 2015]). "[M]ere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]).

"Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). Not every attachment can satisfy UCC §3-202[2] and a description of the nature of the attachment is necessary (*see HSBC Bank, USA, N.A. v Roumiantseva,* 130 AD3d 983 [2d Dept 2015]; *Slutsky v Blooming Grove Inn,* 147 AD2d 208 [2d Dept 1989]).

Here, Plaintiff claims that it was in physical possession of an endorsed note when the action was commenced. Although the note was attached to the complaint, the endorsements are contained in allonges on separate pages which reveals no discernable evidence of firm attachment from a visual inspection (*cf. US Bank NA v Hunte*, 215 AD3d 887 [2d Dept 2023]). Resultantly, Plaintiff was required, but failed, to describe how the allonges were affixed to the original note (*see 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]; *Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). Moreover, the affidavits of Maynes and Baxter were insufficient since both were dated after the action was commenced and neither averred "*when* [they] reviewed the copy of the note and allonge" (*Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1058 [2d Dept 2023]).

Accordingly, Plaintiff failed to establish, *prima facie*, it had standing when this action was commenced.

Plaintiff was also required to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). "Section 1304 (1) requires a 'lender, assignee, or mortgage loan servicer' to send a notice 90 days before it may 'commence[ ] legal action against [a] borrower.' That notice "shall include" several pages of specific text set out in that subdivision" (*Bank of Am., N.A. v. Kessler*, 39 NY3d 317, 321 [2023]). The notice must be sent in a "in a separate envelope from any other mailing or notice" by "registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage" (RPAPL §1304[2]).

As to the contractual pre-foreclosure notice, paragraph 22 of the mortgage, a ubiquitous provision in residential mortgages, provides that as a prior to acceleration of the note, the lender must send a notice containing the information specified in paragraph 22[b][1] – [6] in the manner described in paragraph 15 of the mortgage. Paragraph 15 provides that all notices must be in writing and "is considered given to [Mortgagor] when mailed by first class mail or when actually delivered to my notice address if sent by other means . . . The notice address is the address of the Property unless I give notice to Lender of a different address".

Here, no issue has been raised concerning the contents of the notice Plaintiff is alleged to have served. Defendant only asserts that the Proof proffered by Plaintiff in support of the motion is insufficient to demonstrate the required mailings occurred. On this subject, the Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of

actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). An affidavit from the person who performed the actual mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Proof from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

Maynes failed to describe the mailing procedure used by SPS in any detail (*see Freedom Mtge Corp v Granger*, 188 AD3d 1163,1165 [2d Dept 2020]; *M & T Bank v Biordi*, 176 AD3d 11941196 [2d Dept 2019]; *cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]) and did not claim to have personal knowledge of the mailing itself (*cf. United States Bank Trust, N.A. v Mehl,* 195 AD3d 1054 [2d Dept 2021]). Further, absent from the moving papers is "any receipt or corresponding document proving that the notices were actually sent by first-class and certified mail to the Defendants more than 90 days prior to the commencement of the action" (*US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]; *see also US Bank v Hammer*, 192 AD3d 846, 848-849 [2d Dept 2021]).

Accordingly, Plaintiff failed to establish *prima facie* that it sent contractual pre-foreclosure notices or those required by RPAPL §1304.

As to the branch of the motion to dismiss Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

The first affirmative defense that Plaintiff lacks standing is presently viable based upon the determination supra.

The second, fourth, fifth, sixth, eighth, tenth, and eleventh affirmatives defenses alleging n fraudulent, unfair, and deceptive loan practices, estoppel, unclean hands, res judicata, collateral estoppel, unconscionability, lack of good faith and fair dealing and usury are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden,* 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56

AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]).

The third affirmative defense that Plaintiff failed to provide contractual pre-foreclosure notice is presently viable based upon the determination supra.

The seventh affirmative defense that Plaintiff failed to comply with RPAPL §§ 1303, 1304 and 1306 is presently viable based upon the determination supra.

The ninth affirmative defense based upon expiration of the statute of limitations is dismissed based upon the determination supra.

The twelfth affirmative defense is dismissed as duplicative of the third affirmative defense.

The thirteenth affirmative defense fails as "documentary evidence is not by itself an affirmative defense, but merely one way in which a defense may be raised or proven" (*see Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993]).

The fourteenth affirmative defense that this Court lacks subject matter jurisdiction over this matter is dismissed as nonsensical.

To the extent Defendant Kim may have failed to raise specific legal arguments in support of any particular affirmative defense, it is also deemed abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The counterclaim for an award of attorney's fees based upon RPL §282 is, at present, viable (*see US Bank v Bajwa*, 208 AD3d 1197 [2d Dept 2022]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the Defendant's motion to dismiss pursuant to CPLR §3211 is denied, and it is

ORDERED that the branches of Plaintiff's cross-motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the first, third and seventh, are stricken, and it is

ORDERED that John Lerner be substituted in place and stead of John Doe No.1 and that the remaining JOHN DOE X defendant excised as a parties; and it is further

ORDERED that the branch of the motion to add JOHN DOE (name refused0 as a defendant is denied, as the New York County Clerk will not accept any judgment with a "Doe" Defendant in the caption; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., F/K/A THE BANK OF NEW YORK TRUST COMPANY, N.A. AS TRUSTEE FOR THE CHASE MORTGAGE FINANCE TRUST MULTI-CLASS MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-S4,

Plaintiff,

-against-

BRIAN KIM A/K/A BRIAN B. KIM; CITIBANK, N.A.; ESPERANZA GALLARDO; MARGARITO VAZQUEZ; JPMORGAN CHASE BANK, NA; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; BOARD OF MANAGERS OF THE CHRISTODORA HOUSE CONDOMINIUM;

Defendants.

----------X

and it is

ORDERED that this matter is set down for a status conference on **May 16, 2024 @ 11:00 am** via Microsoft Teams.

4/2/2024
DATE

FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE