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SHORT FORM ORDER

INDEX
NO.: 19268-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Justice of the Supreme Court

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF RENAISSANCE HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-3,

Plaintiff,

-against-

STEVEN SOPKO, THE COUNTY OF SUFFOLK,

"JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

MOTION DATE: 1-30-13
ADJ. DATE: _____
Mot. Seq. #: 001-MG

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion by the plaintiff/counterclaim-defendant for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor striking the defendant/counterclaim-plaintiff Steven Sopko's answer, and dismissing his affirmative defenses and counterclaims; (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 further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry 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 the residential real property known as 133 Bay Shore Road, Deer Park, NY 11729. On July 30, 2004, Steven Sopko (the defendant mortgagor) executed a fixed rate note in favor of Delta Funding Corporation (Delta) in the principal sum of $265,000.00. To secure said note, the defendant mortgagor gave Delta a mortgage also dated July 30, 2004 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the Delta and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The note contains an undated allonge, whereby Delta endorsed the note to the plaintiff without recourse. By assignment dated August 6, 2010, MERS, as nominee for Delta, memorialized the transfer of the mortgage and the note to the plaintiff. The assignment was subsequently recorded in the Suffolk County Clerk's Office on September 28, 2010.

The defendant mortgagor allegedly defaulted on the subject loan by failing to make his monthly payment of principal and interest due on January 1, 2011, 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 June 14, 2011. Issue was joined by the interposition of the defendant mortgagor's answer verified on September 12, 2012.

By his answer, the defendant mortgagor generally denies some of the allegations in the complaint, admits other allegations and asserts ten affirmative defenses and three counterclaims, alleging, among other things, lack of standing; failure to properly serve a default notice; unclean hands, bad faith and unconscionability; improper income verification; fraud in the loan origination; an invalid assignment of the note and mortgage; the statute of limitations; violations of the Truth in Lending Act (TILA), 15 USC § 1601, *et seq*., predicated upon, inter alia, fraud and misrepresentation with respect to the loan application; violations of the Real Estate Settlement Procedures Act (RESPA), 12 USC § 2601, *et seq*., predicated upon improper loan servicing by the plaintiff and/or its agents; and violations of the New York State Banking Laws, predicated upon, inter alia, fraud and misrepresentation in connection with the loan application as well as improper fees and "kickbacks."

In response, the plaintiff/counterclaim-defendant has filed a reply dated September 26, 2011 which includes thirteen affirmative defenses, alleging, inter alia, failure to state a cause of action; improper counterclaims that may not be interposed in this action against the plaintiff; estoppel; waiver of the right to interpose counterclaims; waiver of all defenses; frivolous counterclaims lacking a legal basis; documentary evidence; expiration of the statute of limitations; defendant mortgagor's own culpable conduct; failure to mitigate damages; defendant mortgagor's own lack of diligence; laches; and lack of a factual basis for the affirmative defenses in the answer. The remaining defendants have neither answered nor appeared. By a written stipulation between the plaintiff and the defendant The County of Suffolk (Suffolk), filed in the Suffolk County Clerk's Office on September 13, 2011, all causes of action were discontinued against Suffolk.

In compliance with CPLR 3408, two foreclosure settlement conferences were held before the mortgage foreclosure conference part on March 2 and May 2, 2012. At the last conference, this case was dismissed from the conference program as the loan was not modified and as this action was not otherwise settled. 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.

Parenthetically, by Order dated February 4, 2013 (Molia, J.), this Court granted a motion (002) made by the defendant mortgagor's prior counsel, seeking permission to be relieved herein. Pursuant to said Order, the defendant mortgagor was directed to advise the Court, in writing within thirty (30) days of receipt of a copy of said Order, with notice of entry, of the name, address and telephone number of new counsel. According to the records maintained by the Court's and the Suffolk County Clerk's databases, the defendant mortgagor was served with a copy of said Order with notice of entry, and he retained new counsel as noted above.

The plaintiff/counterclaim-defendant now moves for, among other things, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor striking the defendant mortgagor/counterclaim-plaintiff's answer, and dismissing his affirmative defenses and counterclaims; (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.

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 [citation omitted]; *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).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank Natl. Assn. 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]; ***HSBC Bank USA, N.A. v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). In the instant case, the plaintiff produced the note with an allonge, the mortgage, the assignment and evidence of nonpayment (*see*, ***Fed. 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]).

The plaintiff demonstrated that, as holder of the note, with an allonge containing proper endorsement, and as the assignee of the mortgage, it has standing to commence this action (*see*, ***Bank of New York v Silverberg***, 86 AD3d 274, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*). The plaintiff also submitted, inter alia, an affidavit from the plaintiff's representative, whereby the officer verifies the statements in the complaint, wherein it is alleged, inter alia, that the plaintiff is the owner and/or holder of the note and the mortgage, and was so at the time of commencement (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *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. In this case, the assignment dated August 6, 2010 memorialized the transfer of the mortgage and note to the plaintiff. Thus, the plaintiff established that it took possession of the note, prior to the commencement of the action and was the holder thereof as such note contained an allonge with an endorsement to it on the face thereof.

The plaintiff also 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, 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*, ***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*]; ***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*]; ***Molino v Sagamore***, 105 AD3d 922, 963 NYS2d 355 [2d Dept 2013] [*a party claiming the defense of a contract of adhesion must show that the contract is unreasonable or unjust, or would contravene public policy, or that the contract is invalid because of fraud or overreaching*]; ***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 [2d Dept 1998]; ***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 591 [2d Dept 2010] [*unaffordability of loan will not support damages claim against lender and is not a defense 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*]; ***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*]; ***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*]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [*unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense*]; ***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*]; ***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*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 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 affirmative defenses and as to the counterclaims (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Wash. Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Grogg v South Rd. Assocs., LP***, 74 AD3d 1021, *supra*).

The defendant mortgagor's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). Further, the affirmative defenses and counterclaims asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see*, ***Grogg v South Road Assocs., L.P.***, 74 AD3d 1021, *supra*; ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; ***Kahraman v Countrywide Home Loans, Inc.***, 886 F Supp 2d 114 [US Dist Ct, ED NY 2012]). In any event, 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 generally*, ***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*). 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 requested by it (*see*, ***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 summary judgment striking the

defendant mortgagor's answer, and dismissing his affirmative defenses/counterclaims in their entirety (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Janet Smith (Smith) as a party defendant for the fictitious defendant John Doe #1, excising the fictitious defendants, John Doe #1 through #10, and excising the defendant Suffolk, 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, *supra*; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, *supra*). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendant, Smith, as she never answered the complaint (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, Smith's default is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by Smith, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005];***Vt. Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is granted. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: July 31, 2013

Hon. DENISE F. MOLIA, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**