NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS, INC., CHL MORTGAGE PASS THROUGH TRUST 2007-11, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-11, Plaintiff,	Index No. 7973/12
	Motion Date August 19, 2013
- against -	Motion Cal. No. 106
JUSTICE E. OBI, et al., Defendants.	Motion Seq. No. 1

The following papers numbered 1 to 16 read on this motion by plaintiff for summary judgment against defendant, Blessing C. Achuobi, to strike the answer of defendant, Blessing C. Achuobi, and dismiss the counterclaims, for leave to enter a default judgment against the defaulting parties, for leave to appoint a referee to compute the sums due and owing plaintiff, and for leave to amend the caption excising defendants "John Doe #3" through "John Doe #10," and substituting Salumi Duru s/h/a "John Doe #1" in place and stead of "John Doe #1" and "John Doe" s/h/a "John Doe #2" in place and stead of "John Doe #2."

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-9
Affirmation in Opposition - Exhibits.....	10-13
Reply Affirmation.....	14-16

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff commenced this action on April 13, 2012, to foreclose a mortgage encumbering the real property known as 119-35 164th Street, Jamaica, New York, given by defendants, Justice E. Obi and Blessing C. Achuobi, as security for the payment of a note, evidencing an obligation in the principal amount of $536,000.00 plus interest. The mortgage names Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender (Countrywide) as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the lender and the lender's successors and assigns, and as the mortgagee of record for the purpose of recording the mortgage. Plaintiff alleged in its complaint that it is the holder of the note and subject mortgage, and that defendants, Obi and Achuobi, defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due on December 1, 2008, and the

default continued for a period in excess of 15 days, and as a consequence, it elected to accelerate the entire mortgage debt.

Plaintiff caused defendants, Achuobi, Obi, MERS, New York City Environmental Control Board Discover Bank, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, and Salumi Duru, as "John Doe #1," and "John Doe" (who refused to give his name to the process server) as "John Doe #2" to be served with process. Plaintiff did not cause defendants, "John Doe #3" through "John Doe #10," to be served with process because plaintiff determined that they are unnecessary party defendants.

Defendant, Achuobi, served an answer, denying the material allegations of the complaint, asserting various affirmative defenses, including failure to comply with RPAPL 1304 and lack of standing, and interposing certain counterclaims. The remaining defendants have not appeared or answered the complaint. Plaintiff served a reply to the counterclaims interposed by defendant, Achuobi.

That branch of the motion by plaintiff for leave to amend the caption excising defendants, "John Doe #3" through "John Doe #10," and substituting Salumi Duru s/h/a "John Doe #1" in place and stead of "John Doe #1" and "John Doe" s/h/a "John Doe #2" in place and stead of "John Doe #2" is granted.

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWMBS, Inc., CHL Mortgage Pass Through Trust 2007-11, Mortgage Pass-Through Certificates, Series 2007-11,

Plaintiff .

-against-

Justice E. Obi, Blessing C. Achuobi, Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Countrywide Bank, FSB, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Salumi Duru, and "John Doe,"

Defendants.

Index No. 7973/2012

It is well established that the proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Where standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *US Bank N.A. v Cange*, 96 AD3d 825, 826 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753-754 [2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2d 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, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]).

In addition, where satisfaction with the statutory condition precedent of providing notice pursuant to RPAPL 1304 is put into issue by the defendant, the plaintiff must demonstrate satisfaction this condition (*see Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 106).

In support of that branch of the motion for summary judgment, plaintiff offers, among other things, a copy of the pleadings, affidavit of service upon defendant Achuobi, an affirmation of regularity by its counsel, a copy of the subject mortgage, underlying note and an assignment dated August 14, 2009, and an affidavit dated of Charles Lischner, an offer of Bank of America, N.A., the servicing agent for plaintiff. Mr. Lischner attests to plaintiff's possession of the note with an endorsement, and that plaintiff is the assignee of the "security instrument" for the loan, and the default in payment by defendants, Achuobi and Obi, of the monthly mortgage installment due under the mortgage on December 1, 2008, and thereafter. The copy of the note presented includes an undated endorsement in blank, without recourse, by Michele Sjolander, as the executive vice-president of Countrywide.

Defendant, Achuobi, opposes the motion, asserting improper service of process, that plaintiff has failed to establish a *prima facie* showing of standing and compliance with RPAPL 1304 and 1303, and the motion is premature because plaintiff has failed to respond to her discovery demands. The remaining defendants have not appeared in relation to the motion.

To the degree defendant, Achuobi, asserts the court lacks personal jurisdiction over her due to improper service of process, she is deemed to have waived such defense, for failing to assert it, with specificity, in her answer or to make a pre-answer motion based upon such ground (CPLR 3211 [a]) (*see Wiesener v Avis Rent-A-Car, Inc.*, 182 AD2d 372, 372-373 [1st Dept 1992]). Defendant, Achuobi, also failed to raise a violation of RPAPL 1303 in her answer or in a pre-answer motion to dismiss based upon noncompliance with that statute. She is deemed to have waived such defense as well (*see Pritchard v Curtis*, 101 AD3d 1502 [3d Dept 2012]; *contra Citimortgage, Inc. v Pembelton*, 39 Misc 3d 454, 461-462 [Suffolk County, Whelan, J.).

To the extent plaintiff contends it is the assignee of the mortgage and note by virtue of an assignment executed by MERS, plaintiff has failed to show MERS had been the holder thereof, or that MERS had been given an interest in the underlying note by the lender or specifically authorized to assign the subject note (*see Bank of N.Y. v Silverberg*, 86 AD3d at 283). In addition, although there is reference to the possession of the note by plaintiff in the affidavit of Mr. Lischner, the affidavit does not give any factual details of a physical delivery of the note and when the note was endorsed in blank (*see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]). It therefore is insufficient to establish, *prima facie*, that delivery and the endorsement of the note were properly effected prior to the start of the action. The affirmation of plaintiff's counsel dated June 14, 2013, furthermore, does not indicate it is based upon personal knowledge and lacks detail as to when the note was endorsed and physically came into possession by plaintiff. In addition, plaintiff cannot rely upon the evidence submitted for the first time in its reply papers to sustain its *prima facie* burden of showing that it had standing as the holder of the note and mortgage at the time of the commencement of the action (*see Daguerre, S.A.R.L. v Rabizadeh*, 112 AD3d 876 [2d Dept 2013]; *L'Aquilla Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692 [3d Dept 2013]).

Plaintiff has also failed to submit an affidavit of service evincing that it properly served defendant, Achuobi, pursuant to RPAPL 1304 (*see Aurora Loan Servs., LLC*, 85 AD3d at 106). The affidavit of Mr. Lischner is insufficient to prove plaintiff's strict compliance with RPAPL 1304, regardless of the opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Aurora Loan Servs., LLC*, 85 AD3d at 106).

That branch of the motion by plaintiff for summary judgment against defendant, Achuobi, is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses asserted by defendant, Achuobi, in her answer, plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]*; Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]).

That branch of the motion by plaintiff to strike the first and second affirmative defenses asserted by defendant, Achuobi, in her answer based upon failure to comply with RPAPL 1304 and lack of standing, respectively, is denied (*see above*).

Defendant, Achuobi, asserts as a third affirmative defense that plaintiff engaged in deceptive business practices in violation of General Business Law § 349 claim under General Business Law § 349 (a), a party must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages' (*Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005]; *see Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Gaidon v Guardian Life Ins. Am.*, 94 NY2d 330, 344 [1999])" (*Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]). Here, defendant, Achuobi, makes no allegation that plaintiff was involved in the loan transaction. The loan documents furthermore fully set forth the terms of the subject mortgage loan and demonstrate that no deceptive act or practice occurred (*see Patterson v Somerset Investors Corp.*, 96 AD3d 817 [2d Dept 2012]). Defendant, Achuobi, has failed to proffer evidence sufficient to establish a meritorious defense or claim as to whether plaintiff's predecessor in interest made any materially misleading statements or committed any misconduct with respect to the subject loan (*see Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1172). That branch of the motion by plaintiff to strike the third affirmative defense asserted in the answer of defendant, Achuobi, is granted.

Those branches of the motion by plaintiff to dismiss the fourth affirmative defense and first counterclaim based upon violation of Banking Law §§ 6-l and 6-m and corresponding regulations, and the fifth affirmative defense and second counterclaim based upon plaintiff's alleged bad faith and unreasonable and unconscionable conduct in relation to the subject mortgage loan are granted. Again, plaintiff was not the originator of the subject mortgage loan. It appears from plaintiff's submissions that at the time of the origination of the loan, the combined monthly gross income of defendants, Achuobi and Obi, was $16,356.00 per month, and such income was sufficient to make the monthly mortgage payments. Defendant, Achuobi, has failed to raise any triable issue of fact to show the terms of the mortgage and note were unconscionable, or that Countrywide acted unconscionably in the transaction or extended defendants, Achuobi and Obi, credit while knowing they could not afford the payments (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1081 [2d Dept 2010]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 577 [2d Dept 2006]; *FGH Contr. Co. v Weiss*, 185 AD2d 969, 971 [2d Dept 1992]). Defendant, Achuobi, also has failed to raise any triable issue of fact as to whether she and defendant, Obi, lacked any meaningful choice when entering into the mortgage loan, or to allege any mortgage terms which are unreasonably favorable to plaintiff (*see Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383, 389 [1980]; *Baron Associates, LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793 [2d Dept 2012]; *see generally Matter of Friedman*, 64 AD2d 70, 84 [2d Dept 1978]).

The sixth affirmative defense and first setoff and counterclaim is based upon defendant, Achuobi's allegation that plaintiff has "overstated and thereby overcharged the alleged monthly mortgage and finance charges." Such allegation is, without more, not a defense to foreclosure or a proper basis for a counterclaim. In any event "[a] dispute as to the exact amount owed by

the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321, and the existence of such a dispute does not preclude the issuance of summary judgment directing the sale of the mortgaged property" (*Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831, 832 [2d Dept 1990]; *see Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659 [2d Dept 1995]). That branch of the motion by plaintiff to dismiss the sixth affirmative defense and first setoff and counterclaim asserted by defendant, Achuobi, is granted.

The seventh affirmative defense asserted by defendant, Achuobi, in her answer, purportedly reserves her right to assert further affirmative defenses. Such alleged reservation of rights does not constitute an affirmative defense. Furthermore, a defendant may amend his or her answer to assert an affirmative defense not previously raised, within 20 days after service of the answer without leave of court (CPLR 3025,[a]). A defendant thereafter is obligated to obtain the consent of the other parties or the leave of court to amend the answer in the event it seeks to assert an affirmative defense not previously raised (CPLR 3025 [b]). Defendant, Achuobi, has failed to demonstrate she has obtained such consent or moved for to obtain such leave. That branch of the motion by plaintiff to strike the seventh affirmative defense asserted by defendant, Achuobi, is granted.

Those branches of the motion by plaintiff to deem all non-appearing parties and non-answering defendants in default and for leave to appoint a referee are denied at this juncture.

Dated: January 27, 2014

DARRELL L. GAVRIN, J.S.C.