

Loancare, A Div. of FNF Servicing, Inc. v Avelin
2014 NY Slip Op 31630(U)
March 25, 2014
Supreme Court, Suffolk County
Docket Number: 6226-12
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
IAS PART 43 - SUFFOLK COUNTY

PRESENT: Hon. ARTHUR G. PITTS
Justice of the Supreme Court

LOANCARE, A DIVISION OF FNF SERVICING,
INC.
Plaintiff,

-against-

SUSAN AVELIN A/K/A SUSAN M. AVELIN
THOMAS AVELIN A/K/A THOMAS E. AVELIN
BENEFICIAL NEW YORK, INC.
CAVALRY PORTFOLIO SERVICES, LLC A/A/O
CAVALRY SPV I, LLC A/A/O HSBC BANK
NEVADA, N.A. and "JOHN DOE #1" to "JOHN DOE
#10", the last 10 names being fictitious and unknown
to plaintiff, the persons or parties intended being
the persons or parties, if any, having or claiming
an interest in or lien upon the mortgaged premises
described in the verified complaint,

Defendants.

MOTION DATE: 7-11-13
ADJ. DATE: 8-13-13
Mot. Seq. # 001-MG

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/Order
to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers _____; Answering Affidavits
and supporting papers 16 - 19; Replying Affidavits and supporting papers 21 - 28; 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 against the defendant/counterclaim-plaintiff Susan
Avelin, striking her answer and dismissing the affirmative defenses and counterclaims set forth 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 determined
as indicated below; and it is

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

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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 promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 411 Clay Pitts Road, East Northport, New York 11731. On May 30, 2009, the defendants Susan Avelin and Thomas Avelin (the defendant mortgagors) executed a fixed-rate note in favor of Lend America (the lender) in the principal sum of \$540,546.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated May 30, 2009 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an endorsed allonge affixed to the note and two assignments of the mortgage, the loan instruments were allegedly transferred to the plaintiff, LoanCare, a Division of FNF Servicing, Inc.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about April 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on February 21, 2012.

Issue was joined by the interposition of the defendant Susan Avelin's verified answer dated March 20, 2012. By her answer, Mrs. Avelin admits the property address and description, but denies the remaining allegations in the complaint. In the answer, Mrs. Avelin also asserts fourteen affirmative defenses and two counterclaims, alleging, among other things, the alleged lack of standing; failure to serve a 90-day notice; a predatory loan; wrongful foreclosure; a fraudulent loan; bad faith and misrepresentations consisting of false promises; failure to provide a loan modification; defective service; violations of the Fair Debt Collection Practices Act (FDCPA), 15 USC § 1692; a violation of the Truth in Lending Act (TILA), 15 USC § 1601, *et seq.*; compliance with CPLR 3408; and improper loan documentation. By her counterclaims, Mrs. Avelin alleges, among other things, that the plaintiff improperly refused to accept partial payments from her, and that its representatives made false promises to her regarding a potential loan modification. Parenthetically, no affirmative relief is sought in the counterclaims; instead, Mrs. Avelin merely alleges that the plaintiff is liable to her for the costs of losing or potentially losing the defendant mortgagors' home. The defendant Calvary Portfolio Services, LLC a/a/o Calvary SPV I, LLC a/a/o HSBC Bank Nevada, N.A. (Calvary) appeared in this action and waived all, but certain, notices. The remaining defendants have neither answered nor appeared.

The plaintiff/counterclaim-defendant now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against Mrs. Avelin, striking her answer and dismissing the affirmative defenses and counterclaims set forth 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. Opposition and reply papers have been filed herein.

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*

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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]).

Where, as here, an answer served includes the defense of standing or lack of capacity to sue, 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, 651 NYS2d 121 [2d Dept 1996]). "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, "a good assignment is made by delivery only" (*Fryer v Rockefeller*, 63 NY 268, 276 [1875]; *U.S. Bank Natl. Assn. v Lanzetta*, 2013 NY Misc LEXIS 1509, 2013 WL 1699251, 2013 NY Slip Op 30755 [U] [Sup Ct, Suffolk County 2013, slip op, at 17]; *Deutsche Bank Natl. Trust Co. v Bills*, 37 Misc3d 1209 [A], ___ NYS2d ___, 2012 NY Misc LEXIS 4842, 2012 WL 4868108, 2012 NY Slip Op 51943 [U] [Sup Ct, Essex County 2012, slip op, at 5]). 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.

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (see, CPLR 3212; RPAPL § 1321; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *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 note with an endorsed allonge, the mortgage 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, *supra*). Furthermore, the plaintiff submitted proof of compliance with the notice requirements of RPAPL § 1304 (see, *Castle Peak 2012-I Trust v Choudhury*, 2013 NY Misc LEXIS 5510, 2013 WL 6229919, 2013 NY Slip Op 32971 [U] [Sup Ct, Queens County 2013]; *M & T Bank v Romero*, 40 Misc3d

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1210 [A], 977 NYS2d 667 [Sup Ct, Suffolk County 2013]; *cf.*, **Aurora Loan Servs., LLC v Weisblum**, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

The plaintiff also demonstrated that, as holder of the note with an endorsed allonge and as the assignee of the mortgage, it has standing to commence this action (*see*, **Bank of N.Y. v Silverberg**, 86 AD3d 274, *supra*; **First Trust Natl. Assn. v Meisels**, 234 AD2d 414, *supra*). In connection with the affirmative defense of standing, the plaintiff submitted, inter alia, the affidavit of its Vice President, wherein it is alleged that the plaintiff has been in continuous possession of the note and mortgage since November 11, 2011 (*see*, **Deutsche Bank Natl. Trust Co. v Whalen**, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also*, **Chase Home Fin., LLC v Miciotta**, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; **U.S. Bank N.A. v Cange**, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; **GRP Loan, LLC v Taylor**, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Additionally, the plaintiff submitted, inter alia, two assignments each dated on November 11, 2011, and duly recorded in the Office of the Suffolk County Clerk on February 12, 2012, which memorialized the transfer of the note and mortgage to it prior to commencement (*see*, **GRP Loan, LLC v Taylor**, 95 AD3d 1172, *supra*). Furthermore, the second assignment to the plaintiff includes a reference to the note (*see*, **Bank of N.Y. Mellon Trust Co., N.A. v Sachar**, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]; *see generally*, **Chase Home Fin., LLC v Miciotta**, 101 AD3d 1307, *supra*). Therefore, it appears that the plaintiff is also the transferee and holder of the original note and the assignee of the mortgage by virtue of the written assignments.

Moreover, the plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in Mrs. Avelin's 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*, **Bank of America v Lucido**, 114 AD3d 714, ___ NYS2d ___ [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; **Washington Mut. Bank v Schenk**, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; **JP Morgan Chase Bank, N.A. v Ilardo**, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; **Bank of N.Y. Mellon v Scura**, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; **Scarano v Scarano**, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]; **Shufelt v Bulfamante**, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; **Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn**, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]; **Charter One Bank, FSB v Leone**, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; **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]; **HSBC Bank USA v Picarelli**, 36 Misc3d 1218 [A], 959 NYS2d 89 [Sup Ct, Queens County 2012] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Mrs. Avelin (*see*, **HSBC Bank USA v Merrill**, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Mrs. Avelin to produce evidentiary proof in admissible form sufficient to

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demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see, Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see, Charter One Bank, FSB v Leone*, 45 AD3d 958, *supra*; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). 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 Montesana*, 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]).

A review of the opposing papers shows that the same are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff’s claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see, CPLR 3211[e]; U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]; *see also, Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In opposition to the motion, Mrs. Avelin has offered no proof or arguments in support of any of her pleaded defenses and counterclaims, except as to the plaintiff’s alleged lack of standing, the alleged lack of personal jurisdiction over her, discovery and the plaintiff’s alleged refusal to negotiate a loan modification in good faith. The failure by Mrs. Avelin to raise and/or assert each of her remaining pleaded defenses and her counterclaims 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*). Thus, the unsupported affirmative defenses and first counterclaim are dismissed.

The assertions by Mrs. Avelin as to the plaintiff’s alleged lack of standing, which rest upon alleged defects in the endorsement to the allonge and the assignments, are rejected as unmeritorious (*see, OneWest Bank FSB v Carey*, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; *see also, Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, *supra*; *U.S. Bank N.A. v Cange*, 96 AD3d 825, *supra*; *Hypo Holdings, Inc. v Chalasani*, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]). The plaintiff demonstrated, as indicated above, that the note with an allonge affixed thereto was physically delivered to it prior to commencement (*see, U.S. Bank N.A. v Cange*, 96 AD3d 825, *supra*; *HSBC Bank USA, N.A. v Avila*, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]). Additionally, the plaintiff submitted a copy of the recorded assignments of the mortgage, which memorialized the transfer of the note and mortgage to it prior to commencement (*see, OneWest Bank, FSB v Makarow*, 2013 NY Misc LEXIS 6401, 2013 WL 7045735, 2013 NY Slip Op 33544 [U] [Sup Ct, Suffolk County 2013]). Mrs. Avelin, therefore, failed to establish the merit of her standing defense.

With respect to the tenth affirmative defense, the affidavit of service by the plaintiff’s agent constituted prima facie evidence of proper service of the summons and complaint upon Mrs. Avelin pursuant to CPLR 308(2), and her unsubstantiated denial of receipt of same is insufficient to rebut the presumption of proper service

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created by the affidavit (*see, Carver Fed. Sav. Bank v Supplice*, 109 AD3d 572, 970 NYS2d 706 [2d Dept 2013]; *ACT Props., LLC v Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; *Beneficial Homeowner Serv. Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). In her affidavit, Mrs. Avelin does not specifically deny service of process upon her by substitute service upon her mother, Jean Esposito (Esposito); instead, she disputes the physical description of Esposito set forth in the process server's affidavit. Mrs. Avelin merely states, in essence, that Esposito was 79 years old at the time of service, instead of 65 years old, and that her mother was 5' in height, not 5'5" as described. All that is offered is a general denial of the exact description set forth in the affidavit of service. These minor discrepancies are insufficient to rebut the presumption of proper service (*see, Deutsche Bank Natl. Trust Co. v Pietranico*, 33 Misc3d 528, 928 NYS2d 818 [2011], *affd*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *J. Kings Food Serv. Professionals, Inc. v Ocean Garden Café, Inc.*, 7 Misc3d 129 [A], 801 NYS2d 235 [App. Term, 2d Dept 2005]). As Mrs. Avelin failed to swear to "sufficient facts to rebut the statements" in the process server's affidavit, no hearing is required (*Bank of N.Y. Mellon v Scura*, 102 AD3d 714, *supra* at 716] [internal quotation marks and citations omitted]; *cf., U.S. Bank, N.A. v Arias*, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]). In any event, the tenth affirmative defense was waived as Mrs. Avelin failed to move to dismiss the complaint against her on this ground within 60 days after serving the answer (*see, CPLR 3211[e]; Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]; *Reyes v Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]). Therefore, the tenth affirmative defense asserting a lack of personal jurisdiction is dismissed.

Moreover, Mrs. Avelin has failed to demonstrate that she 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]; Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *JP Morgan Chase Bank v Agnello, N.A.*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). 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]).

Equally unavailing is Mrs. Avelin's contention that she is entitled to a judicially mandated loan modification, as a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see, Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; *First Fed. Sav. Bank v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). "Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagor], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra* at 638). Accordingly, the twelfth affirmative defense and the second counterclaim are dismissed.

Mrs. Avelin's request for an additional settlement conference is denied. According to the records maintained by the court's computerized database, a series of settlement conferences were held before the specialized foreclosure conference part on July 26, October 16 and December 6, 2012. A representative of the plaintiff attended and participated in all settlement conferences. At the last conference, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action.

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Accordingly, the conference requirements imposed by CPLR 3408 have been satisfied; no further conference is required under any statute, law or rule.

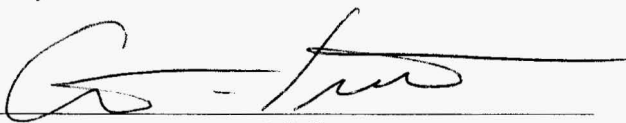
Notwithstanding the general denials by Mrs. Avelin as to all allegations, except the property address and description, notably absent from the opposition papers are any allegations denying her continuous default in payment. Thus, even when viewed in the light most favorable to Mrs. Avelin, the opposition is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses or counterclaims (*see*, CPLR 3211[e]; *see*, **Valley Natl. Bank v Deutsch**, 88 AD3d 691, *supra*; **Rossrock Fund II, L.P. v Commack Inv. Group, Inc.**, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; **Cochran Inv. Co., Inc. v Jackson**, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against Mrs. Avelin (*see*, **Federal 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]). Accordingly, Mrs. Avelin's answer is stricken, and the affirmative defenses and counterclaims set forth therein are dismissed in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Jean Esposito for the fictitious defendant John Doe #1, and excising the fictitious named defendants, John Doe # 2-10, is granted (*see*, **PHH Mtge. Corp. v Davis**, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; **Flagstar Bank v Bellafore**, 94 AD3d 1044, *supra*; **Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer**, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]).

By its moving papers, the plaintiff further established the default in answering on the part of the defendants Thomas Avelin, Beneficial New York, Inc., and Calvary (*see*, RPAPL § 1321; **HSBC Bank USA, N.A. v Roldan**, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against Mrs. Avelin, and has established the default in answering by all of the non-answering defendants, 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]; **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]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as set forth above. 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: March 25, 2014


 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION