SHORT FORM ORDER **INDEX NO. 33866/2009**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

US BANK, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR-IN-INTEREST TO WACHOVIA BANK, N.A. POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 2004. ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2004-WWF1,

Plaintiff,

-against-

JOSEPH CIZAN, JENNIFER CIZAN, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS A NOMINEE FOR AMERICA'S WHOLESALE LENDER, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS A NOMINEE FOR FULL SPECTRUM LENDING, INC.,

Defendants.

ORIG. RETURN DATE: 2/24/2014
FINAL SUBMISSION DATE: 9/24/2014
MOTION SEQ#003
MOTION: MG

PLAINTIFF'S ATTORNEY:
KOZENY, MCCUBBIN & KATZ, LLP
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DEFENDANT'S ATTORNEY:
FRANK J. ROMANO, ESQ.
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SMITHTOWN, NY 11787

The Plaintiff petitions the Court for orders granting a Judgment of Foreclosure and Sale and substituting the corrected Affidavit of Merit and amount due, *nunc pro tunc*.

Plaintiff submits a Proposed Judgment of Foreclosure and Sale and Affirmation of Regularity of Foreclosure and Sale, Counsel's Affirmation In Support of Reasonable Attorneys' Fees and a Bill of Costs with Exhibits A through I. The Defendants oppose the application and submit the Affirmation of Counsel In Opposition with Exhibits A through

D. The Defendants do not provide the Court with an Affidavit and/or Affidavits of the mortgagors.

As noted hereinabove, this is an action to foreclose a mortgage on residential real property. Although the Defendants have not submitted a proposed answer the Court has, in fact, reviewed counsel's Affirmation. The Defendants seek denial of the Petition on the following grounds:

(1) Pursuant to CPLR § 3215(c) claiming Plaintiff failed to take proceedings for entry of judgment within one (1) year after the default. Defendants claim the Court may not enter judgment but must dismiss the Complaint as abandoned, unless Plaintiff can show sufficient cause why the Complaint should not be dismissed;

(2)The assignment to the Plaintiff is void and of no effect as a matter of law;

(3) No proof of claim in admissible form as required by CPLR § 3215(f) has been offered:

(4) The Plaintiff has failed to comply with the Administrative Order of the Chief Administrative Judge; and

(5) No proof of notice of default has been provided as required by law. The Defendants claim that where a mortgage agreement requires written notice prior to acceleration, a lender seeking to foreclose must prove that the proper notice was given to the borrower from someone with personal knowledge.

As noted hereinabove, this matter concerns a foreclosure action covering the premises known as and by 37 Carmen View Drive, Shirley, New York 11967. The action was commenced upon the filing of the Summons and Complaint on August 26, 2009. Service of process is not an issue. The Cizans executed and delivered a mortgage dated October 27, 2004 to Argent Mortgage Company, LLC in the amount of Four Hundred Twenty Thousand Dollars ($420,000.00). On October 27, 2004, Joseph Cizan executed and delivered his note in the amount of Four Hundred Twenty Thousand Dollars ($420,000.00) payable to Argent Mortgage Company, LLC. Thereafter, the mortgage was assigned from Argent Mortgage Company, LLC to Ameriquest Mortgage Company, LLC by an assignment dated November 3, 2004. The mortgage was further assigned from Ameriquest Mortgage Company, LLC to the Plaintiff by assignment dated November 3, 2004. Subsequent to the commencement of this action, the mortgage was assigned by Plaintiff to US Bank, National Association as trustee, successor-in-interest to Wachovia Bank, N.A. as trustee for Park Place Securities, Inc. asset-backed pass-through certificates series 2004-WWF1 by assignment dated

November 13, 2013. The Court concurs with Plaintiff that this action may proceed even though the new assignee has not been formerly substituted as Plaintiff. Pursuant to CPLR § 1018, an action may be continued by or against the original parties unless the Court directs the person to whom the interest is transferred to be substituted or joined in the action. The determination to substitute or join a party pursuant to CPLR § 1018 is within the discretion of the trial court. *City Mortgage, Inc. v. Rosenthal*, 931 N.Y.S.2d 638 (2nd Dept. 2011).

On July 12, 2010, the Honorable Robert W. Doyle issued an Order of Reference in favor of the Plaintiff in this matter.

As noted above, neither Defendant submits his/her own Affidavit In Opposition to the motion seeking Judgment of Foreclosure and Sale and have not denied executing the Note and Mortgage and their default under the terms thereof.

In an action seeking an Order of Reference/Summary Judgment sounding foreclosure, a plaintiff, in order to make a *prima facie* case must show the Mortgage, the unpaid Note, evidence of default and assignment of the Mortgage documents. *HSBC Bank USA, N.A. v. Baksh*, 34 Misc.3d 1242A. Upon the consideration of all submissions, Plaintiff has established a *prima facie* case based upon documentary evidence.

CPLR § 3215(c) is inapplicable to the matter at bar. In foreclosure matters, where plaintiff petitions for appointment of a referee to compute the amount due on the mortgage within one (1) year of Defendants' default as a preliminary step towards obtaining a Judgment of Foreclosure, the Supreme Court must deny a petition to dismiss the action as abandoned pursuant to CPLR § 3215(c). In the matter at bar, the Plaintiff did initiate proceedings for entry of a default judgment within one (1) year of the default. *See, Home Savings of America, F.A. v. Gkanios*, 646 N.Y.S.2d 530 (2nd Dept. 1996). The Defendants do not dispute service of process on September 2, 2009 and September 8, 2009. The Defendants had thirty (30) days from completion of service to interpose an Answer or be in default. Defendants did not interpose an Answer and found themselves in default on or about November 8, 2009. Thereafter, the Plaintiff obtained on July 12, 2010 an Order of Reference within one (1) year of the Defendants' default.

Many of the suggested defenses sound in "standing." It cannot be disputed that the Defendants were served with process and defaulted. As such, Defendants waived all standing defenses as a matter of law. Within the Second Department the law is quite clear that a defendant waives any and all standing defenses by failing to raise the defense either in an Answer or in pre-answer motion to dismiss the complaint. *See, City Mortgage v. Friedman*, 109 A.D.3d 573 (2nd Dept. 2013). Therefore, it is the finding of the Court that the Plaintiff has standing to prosecute this matter.

The Defendants suggest a defense related to "a pooling agreement." This defense is unavailing as the Defendants were not parties to the Pooling and Servicing Agreement and were not an intended third party beneficiary of the Pooling and Servicing Agreement in question. As such, neither Defendant enjoys standing to bring a claim under the Pooling and Servicing Agreement or otherwise regarding the security issues of the loan. In *US Bank National Association v. Weinman*, 2013 N.Y. Slip Op. 30675(U)(Supreme Suffolk 2013) citing. *In re Marks*, 2012 Bnkr. LEXIS 5788 it is noted that Courts have routinely rejected defendants complaints about non-compliance with pooling and serving agreements between the plaintiff and non-parties as irrelevant and immaterial since any such non-compliance does not constitute a viable defense to a foreclosure action.

CPLR § 5019(a) and CPLR § 2001 permit the Court to correct or cure minuscule mistakes. defects or irregularities which do not affect substantial rights of the parties. Plaintiff has set forth that no substantial right of the Defendant will be affected by the Court's acceptance and reliance of a new affidavit of merit and calculation of amount due. The courts are empowered to cure defects or irregularities in a judgment and they may even correct matters of substance where the record offers irrefutable support for a correction.

In sum and substance, the Court finds the argument set forth in the Affirmation In Opposition to be unavailing. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiff's petition shall be ***GRANTED*** in all respects. Judgment of Foreclosure and Sale executed simultaneously herewith.

The foregoing constitutes the decision and ***ORDER*** of this Court.

Dated: October 1, 2014

HON. JERRY GARGUILO, JSC