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MEMO DECISION & ORDER

INDEX No. 32528/12

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/22/15
ADJ. DATES 3/6/15
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - XMD
Compliance Conf.: 6/12/15
CDISP: No

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US BANK NATIONAL ASSOCIATION, as Trustee for JP MORGAN MORTGAGE TRUST 2007-S3,

Plaintiff,

-against-

LUC A. FEDNARD, SABINE M. FEDNARD, JPMORGAN CHASE BANK, NA, "JOHN DOES" and "JANE DOES", said names being fictitious parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim or may claim a lien against the premises,

Defendants.

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PARKER, IBRAHIM & BERG, LLC
Attys. For Plaintiff
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Somerset, NJ 08873

CHARLES WALLSHEIN, ESQ.
Atty. For Defendants
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Upon the following papers numbered 1 to 13 read on this motion for an order of reference, among other things, and cross motion for leave to amend the answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-7; Answering papers 8-9; Reply papers 12; Other 10 (affidavit); 11 (affidavit in support of motion); 13 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that, this motion (#001) by the plaintiff for accelerated judgments on its complaint, the substitution and/or deletion of certain party defendants and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is denied; and it is further

***ORDERED*** that the cross motion (#002) by the obligor/mortgagor defendants, Luc A. Fednard and Sabine M. Fednard, for leave to amend their answer and to compel discovery is denied; and it is further

***ORDERED*** that counsel are directed to appear at a compliance conference scheduled for Friday **June 12, 2015** at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

In this mortgage foreclosure action, the plaintiff moves for summary judgment dismissing the affirmative defenses and counterclaims asserted in the answer served by the obligor/mortgagor defendants, Fednard, and for summary judgment in favor of the plaintiff on its complaint. The plaintiff further demands an order fixing the defaults in answering of the remaining defendants who were served with process and, among other things, the appointment of a referee to compute.

The motion is opposed by the answering defendants in cross moving papers wherein they seek to compel the plaintiff to comply with outstanding discovery demands and for leave to serve an amended answer.

The plaintiff's motion (#001) is denied. The moving papers failed to demonstrate, prima facie that the affirmative defenses, such as the standing defenses asserted in the answer of the defendants Fednard, are, as a matter of law, without merit and the plaintiff's entitlement to judgment on its complaint for foreclosure and sale against said defendants. Review of the affidavit of Tisha Denney, Assistant Secretary to the plaintiff's attorney-in-fact and servicer and the other attachments to the moving papers reveal that they are insufficient to establish a prima facie entitlement to the dismissal of the plaintiff's affirmative standing defenses as particulars regarding note delivery were not advanced in the affidavit of the plaintiff's servicer or other its agents (*see* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]; ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *see also* ***Bank of America, N.A. v Paulsen***, 125 AD3d 909, 2015 WL 775197 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 2015 WL 542140 [2d Dept 2015]; ***U.S. Bank Natl. Ass'n v Faruque***, 120 AD3d 575, 575, 991 NYS2d 630 [2d Dept 2015]; ***U.S. Bank Natl. Ass'n v Weinman***, 123 AD3d 1108, 2014 WL 7392278 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; cf., ***Aurora Loan Serv., LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; ***Central Mtge. Co. v McClelland***, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; *see also* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The assertion by plaintiff's counsel set forth in ¶ 43 of his affirmation is woefully insufficient to warrant dismissal of the defendants' standing defenses as a matter of law

Nor may the plaintiff successfully rely upon the assignment of the mortgage attached to the moving papers as said assignment did not include an assignment of the mortgage note (*see* ***Bank of America, N.A. v Paulsen***, 125 AD3d 909, 2015 WL 775197 [2d Dept 2015]; ***U.S. Bank Natl. Ass'n v Faruque***, 120 AD3 575, 575 , 991 NYS2d 630 [2d Dept 2014]; ***Bank of New York Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; ***US Bank of NY v Silverberg***, 86 AD3d 274, 280,

926 NYS2d 532 [2d Dept 2011]). .The plaintiff's motion is thus denied without regard to the sufficiency of the defendants' opposing papers.

The cross motion (#002) by the Fednard defendants is next considered. Therein, these defendants seek leave to amend their answer. The proposed amendments are briefly described in the cross moving papers as aimed at alleging facts to support their newly proposed claim for recision of the assignment of mortgage pursuant to RPL § 329 due to, among other things, the existence of two differing versions of the mortgage note, namely, one containing an indorsment and one without it and to assert three additional counterclaims (*see* affidavit of the defendants in support of cross motion ¶¶ 10-11). The proposed amended answer attached to the moving papers reflect the deletion of the previously asserted two counterclaims which were aimed at recision of the mortgage and the assertion of the following four counterclaims: 1) recision of the assignment of the mortgage due to a purported illegal splitting of the note and mortgage and violations of New York Trust Law and its recording statutes thereby creating a cloud on the defendants' title; 2) bad faith and frivolous action for which the defendants demand money damages; 3) a demand for a declaratory judgment compelling the plaintiff to identify the entity who has authority to affect the mortgage interest in the premises so that they can remove the cloud therefrom allegedly arising from the actions of the plaintiff or others; and 4) a second demand for a declaratory judgment determining that certain actions undertaken by the plaintiff or its predecessor-in-interest were void under New York Trust Law and have rendered title to the plaintiff's premises, unmarketable.

While this court is ever mindful that the statutory standard in determining applications to amend pleadings is expressly skewed towards a liberal grant in the absence of prejudice or surprise except where the amendment is palpably improper or patently insufficient as a matter of law (*see* CPLR 3025[b]; ***Carroll v Motola***, 109 AD3d 629, 970 NYS2d 820 [2d Dept 2013]; ***Koenig v Action Target, Inc.***, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]), the court finds that the amendments proposed here are patently insufficient as a matter of law and palpably improper. The newly proposed counterclaims numbered First, Third and Fourth rest upon a myriad of theories, such as violations of the principal incident rule and violations of certain provisions of EPTL § 7-6.4 and claims of improper securitization, improper assignments, note alteration and more resulting in a cloud on the defendants' title or rendering such title unmarketable. However, these claims have been held to be without merit in a host of recent controlling or persuasive case authorities (*see* ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]; ***Bank of New York Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; ***Brown v Deutsche Bank Natl. Trust Co.***, 120 AD3d 440 991 NYS2d 511 [1st Dept 2014]; ***Rajamin v Deutsche Bank Natl.***, 757 F3d 79 [2d Cir, 2014]; ***Ocampo v JP Morgan Chase Bank, N.A.***, 2015 WL 1345282 [E.D.N.Y. 2015]; ***Barnett v Countrywide Bank***, 2014 WL 6603986 [E.D.N.Y. 2014]; ***Zutel v Wells Fargo Bank***, 2014 WL 4700022 [E.D.N.Y. 2014]; ***Tran v Bank of New York***, 2014 WL 1225575 [S.D.N.Y. 2014]; ***Berezovskaya v Deutsche Bank Natl. Trust Co.***, 2014 WL 4471560 [E.D.N.Y. 2014], findings adopted, ***Berezovskaya v Deutsche Bank Natl. Trust Co.***, 2014 WL 4470786 [E.D.N.Y. 2014]; ***Pollack v Bank of America***, 2013 WL 4799264 [S.D.N.Y. 2013]; ***U.S. Bank Natl. Ass'n. v Duthie***, 45 Misc3d 1218 [A] 2014 WL 6434511 [Sup.Ct. Kings County 2014]; ***Central Mtge. v Jahnsen*** 2014 WL 4785746 [Sup. Ct. Suffolk County 2014]).

As for the claims which rest upon the alleged existence of differing versions of the mortgage note, such claims have been rejected as devoid of merit by controlling case authorities which have declared that the existence of differing versions of a note or a written assignment thereof do not render a claim for foreclosure and sale non-actionable (*see* ***Emigrant Sav. Bank-Brooklyn/Queens v Doliscar***, 124 AD3d 831, 2 NYS3d 539 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Sene***, 121 AD3d 755, 994 NYS2d 352 [2d Dept 2014]; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]). The court thus finds that the defendants' First, Second and Third counterclaims and the factual amendments to the original answer offered in support thereof are patently lacking in merit.

The proposed Second counterclaim is also patently lacking in merit as it too is premised upon a purported lack of standing on the part of the plaintiff to prosecute its claims for foreclosure and sale. Prosecution of a claim by one without standing, like the prosecution of a claim that is stale under an applicable statute of limitations, is not a wrong that is actionable under the law of torts, as the defense of standing, like the a statute of limitations defense, is merely an affirmative defense which must be raised by a defendant possessed of such defense and if successful, may serve to defeat the plaintiff's claim for relief (*see* ***Wells Fargo Bank Minnesota, Natl. Ass'n v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]; *see also* ***Deutsche Bank Trust Co. Americas v Cox***, 110 AD3d 760, 973 NYS2d 662 [2d Dept 2013]). With respect to the standing of a mortgage foreclosure plaintiff, the forgoing precepts find support in certain provisions of Article 13 of the Real Property Actions and Proceedings Law as they expressly authorize entities other than an owner and holder of mortgages and notes, such as servicers, to commence and prosecute mortgage foreclosure actions (*see* RPAPL § 1304; § 1302). In this regard, a recent appellate case authority emanating from the Third Department has pronounced that "[t]he holder of an instrument whether or not he [or she] is the owner may transfer or negotiate it, [and] discharge it or enforce payment in his [or her] own name (UCC 3–301)" and the fact that the beneficial interest has been sold to Freddie Mac has no effect upon the plaintiff's standing (***Wells Fargo Bank, N.A., v Ostiguy***, ___AD3d ___, 2015 WL 1565673 [3d Dept 2015]). In addition, appellate case authorities emanating from the Second Department have held that the prosecution of a claim for foreclosure and sale by one without standing does not in any manner vitiate the validity of the mortgage at issue (*see* ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, *supra*, and the cases cited therein). For these reasons and those listed above, the court finds that the proposed Second counterclaim is patently lacking in merit.

The proposed Second counterclaim is also palpably improper since stand alone claims of bad faith and frivolous action do not give rise to claims for damages (*see* ***Licalzi v Wells Fargo Bank, N.A.***, 125 AD3d 942, 2015 WL 775032 [2d Dept 2015]; *remedy for frivolous conduct is available under 22 NYCRR Part 130-1 and does not give rise to independent cause of action*; ***U.S. Bank Natl. Ass'n v Smith***, 123 AD3d 914, 999 NYS2d 468 [2d Dept 2014]; *courts are authorized to impose sanctions for violations of CPLR 3408[f] such as imposition of interest toll*; ***U.S. Bank Natl. Ass'n v Williams***, 121 AD3d 1098, 995 NYS2d 172 [2d Dept 2014]; *interest toll & commensurate attorneys fees bar*]). The defendants' demands for leave to serve an amended answer are thus denied.

The defendants' further demands for an order compelling the plaintiff to comply with the defendants' written discovery demands is denied but such denial is subject to a reassertion of this demand at the conference scheduled by the terms of this order. Meanwhile, the plaintiff and the defendants are each directed to review their responses to the discovery demands served upon them and to furnish responses thereto, or to update, amplify and/or supplement those previously served on or before June 3, 2015.

The court has considered all other demands for relief interposed by the parties on these applications and denies them as it finds all such demands to be without merit.

DATED: 4/14/15

THOMAS F. WHELAN, J.S.C.