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MemoDec
SHORT FORM ORDER

ORIGINAL

INDEX
NO.: 43426-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 SUFFOLK COUNTY

PRESENT: HON. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9-3-13
~~ADJ.~~ DATE 10-3-13 ; submitted 1/23/15
Mot. Seq. #005-MotD

Wells Fargo Bank, NA,

Plaintiff,

-against-

Merle G. Krissel; Board of Managers of the Colonial Arms Condominium, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the Mortgaged premises described in the Complaint,

Defendants.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 17; Replying Affidavits and supporting papers 18 - 22; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Merle Krissel, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated below; and it is

ORDERED that the plaintiff is directed to file proof of filing of an additional or a successive notice of pendency with the proposed judgment of foreclosure (*see*, CPLR 6513; 6516[a]; ***Aames Funding Corp. v Houston***, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***Horowitz v Griggs***, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); 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

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 real property known as 43 Brushy Neck Lane, Unit #12, Westhampton, New York 11977. On February 8, 2008, the defendant Merle Krissel (the defendant mortgagor) executed a fixed-rate note in favor of Astoria Federal Savings and Loan Association (the lender) in the principal sum of $150,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated February 8, 2008 on the property. By an endorsement to the note with physical delivery, the lender allegedly transferred its interest in the note to the plaintiff, Wells Fargo Bank, N.A, memorialized by an assignment of the mortgage.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about March 1, 2010, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on November 29, 2010. Issue was joined by the interposition of the defendant mortgagor's answer November 14, 2011.

By her answer, the defendant mortgagor admits some of the allegations in the complaint, including the execution of the note and the mortgage, and denies the remaining allegations set forth therein. In the answer, the defendant mortgagor also asserts five affirmative defenses, alleging, among other things, the following: the failure to set forth a cause of action; the lack of standing or capacity to sue (alleged as second and third affirmative defenses); an incorrect calculation of the amounts claimed to be due from the plaintiff; and an uncertified complaint. The defendant Board of Managers of Colonial Arms Condominium (Colonial) has appeared herein and demanded service of all notices herein. The remaining defendants have neither answered nor appeared herein.

In compliance with CPLR 3408, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned beginning on September 2, 2011 and lasting until December 5, 2013. 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. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking her answer and dismissing the affirmative defenses 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.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]: ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

Where, as here, an answer served includes the defense of standing, 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, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v***

Sullivan, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], *quoting* ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911])

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201(5) (*see*, UCC 3-104; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see*, UCC § 3-202; § 3-204; § 9-203[g]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Franzese v Fidelity N.Y. FSB***, 214 AD2d 646, *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.

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 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]).

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 endorsed note, the mortgage, the assignment 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*). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

Furthermore, the plaintiff demonstrated that, as holder of the endorsed note 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*). With respect to standing, the plaintiff submitted, inter alia, the affidavit from its officer, wherein it is alleged that the plaintiff, directly or through an agent, has been in continuous possession of the note since prior to the commencement of this action (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***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]; ***US 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]). The documentary evidence submitted also includes, among other things, the note transferred via an endorsement in blank (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Additionally, the plaintiff submitted, among other things, an assignment of the mortgage executed on November 8, 2010, and thereafter duly recorded in the Office of the Suffolk County Clerk on November 29, 2010, which memorialized the transfer of the note and mortgage to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage by virtue of the written assignment.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the defendant mortgagors' 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*, ***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]; ***First Wis. Trust Co. v Hakimian***, 237 AD2d 249, 654 NYS2d 808 [2d Dept 1997]; ***Banque Arabe Et Internationale D'Investissement v One Times Square Assoc. Ltd. Partnership***, 193 AD2d 387, 597 NYS2d 48 [1st Dept 1993] [Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in New York and to commence actions to enforce obligations under those mortgages]). Further, "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (***Home Sav. of Am., FSB v Isaacson***, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]).

Since 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 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]). 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 Mentesana***, 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 submitted by the defendant mortgagor 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]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***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 Mentesana***, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of her pleaded defenses, except as to the plaintiff's lack of standing. The failure by the defendant mortgagor to raise and/or assert each of her remaining pleaded defenses 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*). All of the defendant mortgagor's unsupported affirmative defenses are thus dismissed.

Rejected as unmeritorious are the challenges by the defendant mortgagor to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the defendant mortgagor's contentions, the affidavit of the plaintiff's officer in support of the motion contains sufficient allegations as to the plaintiff's possession of the note prior to commencement and comports with the requirements of CPLR 3212 (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, *supra*; ***Trustco Bank, N.A. v Labriola***, 246 AD2d 735, 667 NYS2d 450 [3d Dept 1998]). The plaintiff demonstrated, as indicated above, that the endorsed note was delivered to it by the lender prior to commencement by virtue of the assignment, and by attaching a certified copy of the same to the complaint (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, *supra*; ***Bank of N.Y. Mellon Trust Co., N.A. v Sachar***, 95 AD3d 695, 981 NYS2d 547 [2d Dept 2014]). Such evidence demonstrates that the plaintiff holds the original note and mortgage. In response, the defendant mortgagor has not shown any valid basis to argue that this was not the actual note executed by her (*see*, ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). To the contrary, the defendant mortgagor admitted the execution of the note and mortgage in her answer. In any event, the affirmation of the defendant mortgagor's attorney which is not based upon personal knowledge of the facts is of no probative or evidentiary significance (*see*, ***Matter of Ziomek***, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; *see also*, ***US Natl. Bank Assn. v Melton***, 90 A.D.3d 742, 743, 934 NYS2d 352 [2d Dept 2011]).

The defendant mortgagor's argument that the motion should be denied because further discovery is required lacks merit (*see*, ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). The defendant mortgagor failed to demonstrate 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]). Furthermore, in denying the defendant mortgagor's motion for an order of preclusion (004), this court previously determined by order dated December 6, 2013 that the plaintiff was not required to produce the original note or assignment, and that the copies previously produced herein were properly certified by the plaintiff's attorney (*see*, CPLR 2105). The undersigned also determined that the plaintiff's

responses to the defendant mortgagor's interrogatories were properly verified by an agent or employee of the plaintiff (*see*, CPLR 3133 [b]) and timely served. The remaining contentions advanced by the defendant mortgagor are similarly without merit.

Notwithstanding the general denials in the answer, the submissions by the defendant mortgagor failed to raise a triable issue of fact rebutting the plaintiff's showing or as to the merit of her affirmative defenses (*see*, ***NYCTL 1998-2 Trustee v 2388 Nostrand Corp.***, 69 AD3d 594, 892 NYS2d 188 [2d Dept 2010]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, *supra*; ***Wolf v Citibank, N.A.***, 34 AD3d 574, 824 NYS2d 176 [2d Dept 2006]; ***McCann v Cronin***, 276 AD2d 472, 713 NYS2d 695 [2d Dept 2000]; ***Trustco Bank, N.A. v Labriola***, 246 AD2d 735, *supra*). Notably, absent from the opposing papers are any allegations by the defendant mortgagor that she did not receive the proceeds of the loan transaction, or any allegations denying her default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagor, her submissions are 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*, ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***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 the defendant mortgagor (*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, the defendant mortgagor's answer is stricken, and the affirmative defenses 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 excising the name of the fictitious named defendants, John Doe #1-10, is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 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 submissions, the plaintiff established the basis for the above-noted relief. These submissions include an affidavit from its agent that there are no "John Doe" defendants/occupants at the residence. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of Colonial (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of Colonial is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by Colonial, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***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: 2/6/15

[illegible] THOMAS [illegible]

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION