

<b>Midfirst Bank v Hoeffner</b>
2015 NY Slip Op 31605(U)
July 29, 2015
Supreme Court, Suffolk County
Docket Number: 17976-11
Judge: Arthur G. Pitts
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**SUPREME COURT - STATE OF NEW YORK**  
**IAS PART 43 - SUFFOLK COUNTY**

**COPY**

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

\_\_\_\_\_  
**MIDFIRST BANK**  
999 N. W. Grand Boulevard, Suite 100  
Oklahoma City, OK 73118

Plaintiff,

-against-

**MICHELE M. HOFFNER, ANDREW F.  
HOEFFNER, JR., CITIFINANCIAL COMPANY  
(DE), SUFFOLK ANESTHESIOLOGY ASSOC  
PC., UNITED STATES OF AMERICA ACTING  
THROUGH THE SECRETARY OF HOUSING  
AND URBAN DEVELOPMENT**

**JOHN DOE (Said name being fictitious, it being the  
intention of Plaintiff to designate any and all occupants  
of premises being foreclosed herein, and any parties  
corporations or entities, if any, having or claiming  
an interest or lien upon the mortgaged premises.)**

Defendants.

**MOTION DATE: 1-30-14 (001)  
1-30-14 (002)  
SUBMIT DATE: \_\_\_\_\_ (001, 002)  
Mot. Seq. #: 001-MG  
#: 002-XMD**

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\_\_\_\_\_  
x

Upon the following papers numbered 1 to 23 read on this motion for summary judgment and an order of reference and this cross motion for dismissal of the complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 20; Answering Affidavits and supporting papers 21 - 23; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Michele M. Hoeffner and Andrew F. Hoeffner, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted; and it is

**ORDERED** that this cross motion (002) by the defendants Michele M. Hoeffner and Andrew F. Hoeffner for an order dismissing the complaint insofar as asserted against them is denied in its entirety; and it is

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**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 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 184 Iroquois Street, Ronkonkoma, NY 11779 ("the property"). On November 30, 2000, the defendants Michele Hoeffner and Andrew Hoeffner Jr. (collectively "the defendant mortgagors") executed a note in favor of Founding Funding Group, Inc. ("the lender") in the principal sum of \$191,850.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated November 30, 2000 on the property. By way of an undated endorsement, the note was allegedly initially transferred from the lender to Washington Mutual Bank, FA ("WAMU"). Thereafter, by an affixed allonge dated November 30, 2000, WAMU allegedly transferred the note to Midfirst Bank ("the plaintiff").

The note was subsequently modified by three loan modification agreements. The first loan modification agreement was made on October 1, 2002 between the defendant mortgagors and WAMU, and subsequently recorded on May 30, 2003. By said agreement, the outstanding principal balance at that time, approximately \$190,554.60, was adjusted by an additional \$19,138.77 to reflect a new unpaid principal balance in the sum of \$209,693.37.

A second loan modification was made on July 1, 2005 between the defendant mortgagors and WAMU, and subsequently recorded on October 4, 2005. By said agreement, the parties thereto agreed, inter alia, to an increase in the unpaid principal balance to approximately \$249,830.43, inclusive of unpaid capitalized interest in the sum of \$42,078.59, subject to yearly interest of 5.500%. This agreement also provides for, inter alia, monthly payments of principal and interest of \$1,520.20, beginning on August 1, 2005, and continuing thereafter on the same day of each succeeding month until principal and interest are paid in full on January 1, 2013, the maturity date.

The third and final loan modification agreement was made on May 6, 2010 between the defendant mortgagors, the plaintiff and Mortgage Electronic Registration Systems, Inc. ("MERS"), the latter acting solely as a nominee for the plaintiff and its successors and assigns. This modification was duly recorded on July 28, 2010. It reflects that the unpaid principal balance at that time approximately, \$230,317.64, was increased by capitalized interest in the sum of \$21,567.47 to \$251,885.11, subject to yearly interest of 5.500%. This agreement also provides for, inter alia, monthly payments of principal and interest in the sum of \$1,430.18, beginning on April 1, 2010, and continuing thereafter on the same day of each succeeding month until principal and interest are paid in full on April 1, 2040, the maturity date.

The defendant mortgagors allegedly defaulted on the note and mortgage, as modified, by failing to make the monthly payment of principal and interest due on July 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on May 31, 2011. Parenthetically, the plaintiff re-filed the lis pendens on or about June 2, 2014.

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Issue was joined by service of the defendant mortgagors' joint verified answer sworn to on July 20, 2011. In their answer, the defendant mortgagors generally deny all of the allegations in the complaint, except admit executing a loan modification in the new principal amount of \$251,885.11. In the answer, the defendant mortgagors also assert two affirmative defenses, alleging, that the plaintiff lacks standing to prosecute the within action, and that the plaintiff failed to properly provide them with notice pursuant to RPAPL § 1304. The United States of America acting through the Secretary of Housing and Urban Development has appeared herein and waived all, but certain, notices. The remaining defendants have neither answered nor appeared herein, and thus, are in default.

In compliance with CPLR 3408, a settlement conference was scheduled to be held before the specialized foreclosure conference part on November 1, 2012. The conference was re-scheduled to December 13, 2012, and on that date this case was dismissed from the conference program because the parties were unable to modify the loan or otherwise settle this action. Accordingly, there has been compliance with CPLR 3408; 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 mortgagors, and striking their answer; (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.

In support of the motion, the plaintiff submits, among other things, the endorsed note with an affixed allonge and the mortgage; the pleadings; an affirmation in support from counsel; an affidavit in support from Matt Kinders, the plaintiff's Vice President; two copies of a 30-day default notice; two copies of a 90-day notice pursuant to RPAPL 1304.

The defendant mortgagors oppose the motion and cross move for, inter alia, an order pursuant to CPLR 3211 dismissing the plaintiff's complaint insofar as asserted against them on the grounds the plaintiff lacks standing. In support of their cross motion and in opposition to the plaintiff's motion, the defendant mortgagors submit, among other things, an affirmation from their counsel. In response, the plaintiff has filed opposition and reply papers.

The Court will first address the cross motion by the defendant mortgagors because that determination may render the plaintiff's motion-in-chief academic. In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704, 864 NYS2d 70 [2d Dept 2008]; *Turkat v Lalezarian Developers, Inc.*, 52 AD3d 595, 595-596, 860 NYS2d 153 [2d Dept 2008]). Such a motion should be granted only where, viewing the allegations as true, the plaintiff cannot establish a cause of action (*Asgahar v Tringali*, 18 AD3d 408, 409, 795 NYS2d 68 [2d Dept 2005]). It is well-settled, however, that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action (*Doria v Masucci*, 230 AD2d 764, 764, 646 NYS2d 363 [2d Dept 1996]). When the moving party offers evidentiary material, the court is required to determine "whether the proponent of the pleading has a cause of

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action, not whether [he or] she has stated one” (*Meyer v Guinta*, 262 AD2d 463, 464, 692 NYS2d 159 [2d Dept 1999]).

Initially, the cross motion is defective to the extent that it does not fully set forth the specific rules upon which each branch therein is predicated, and to the extent the same is not referred to in counsel’s affirmation in support (*see*, CPLR 2214 [a]). Also, to the extent that the cross motion is predicated upon dismissal pursuant to CPLR 3211 (a) (3) and/or CPLR 3211 (a) (1) it was not timely interposed because it was made after joinder of issue and service of the answer cut off the defendant mortgagors’ right to make a CPLR 3211 motion to dismiss on these grounds (*see generally*, CPLR 3211 [e]; *see also*, CPLR 3018 [b]). It is well-settled that motions under CPLR 3211 (a) are to be made at any time before service of the responsive pleading (*see*, CPLR 3211 [e]; *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; *Creмоса Food Co., LLC v Elwood Catering, LLC*, 2013 NY Misc. LEXIS 4746, 2013 WL 5761461, 2013 NY Slip Op 32556 [U] [Sup Ct, Suffolk County 2013]; *U.S. Bank, N.A. v Arias*, 2012 NY Misc LEXIS 3621, 2012 WL 3135064, 2012 NY Slip Op 31999 [U] [Sup Ct, Queens County 2012]; *see also*, *EMC Mtge. Corp. v Gass*, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; *Hertz Corp. v Luken*, 126 AD2d 446, 510 NYS2d 590 [1<sup>st</sup> Dept 1987]). The defendant mortgagors’ post-answer demand for dismissal of the complaint, to the extent it is premised upon the alleged lack of capacity to sue/standing grounds embraced by CPLR 3211 (a) (3) and the grounds embraced by CPLR 3211 (a) (1) and/or CPLR 3211 (a) (5), is untimely by more than two years and will thus not be considered as an independent basis for dismissal.

Even though CPLR 3211 (c) empowers the court to treat a motion to dismiss as a motion for summary judgment, in this case, conversion is inappropriate because, inter alia, this action does not exclusively involve issues of law which were fully appreciated and argued by the parties, and since notice has not been provided to the parties (*see*, *Bennett v Hucke*, 64 AD3d 529, 881 NYS2d 335 [2d Dept 2009]; *Bowes v Healy*, 40 AD3d 566, 833 NYS2d 400 [2d Dept 2007]; *Moutafis v Osborne*, 18 AD3d 723, 795 NYS2d 716 [2d Dept 2005]; *Matter of Weiss v N. Shore Towers Apts., Inc.*, 300 AD2d 596, 751 NYS2d 868 [2d Dept 2002]). While the lack of legal capacity/standing defense is preserved in the answer, adjudication of such defense must be made at trial or its procedural equivalent, namely a motion for summary judgment (*see*, *Diaz v DiGiulio*, 29 AD3d 623, 816 NYS2d 125 [2d Dept 2006]; *US Bank v Reed*, 38 Misc3d 1206 [A], 967 NYS2d 870 [Sup Ct, Suffolk County 2013]).

To the extent that cross motion is made pursuant to CPLR 3211 (a) (7) premised on the grounds that the complaint fails to state a cause of action, it is arguably not subject to waiver because the provisions of CPLR 3211 (e) state that it “may be made at any subsequent time” (*see*, *Hense v Baxter*, 79 AD3d 814, 914 NYS2d 200 [2d Dept 2010]). In this case, however, the cross motion pursuant to CPLR 3211 (a) (7), which is entirely unsupported, constitutes nothing more than a recasting of the defendant mortgagors’ lack of capacity/standing defense, which is untimely as a ground for dismissal (*see*, CPLR 3211 [e]; *JPMorgan Chase Bank, NA v Henry*, 2014 NY Misc LEXIS 5048, 2014 WL 6775808, 2014 NY Slip Op 32980 [U] [Sup Ct, Suffolk County 2014]; *see also*, *Bank of Am., N.A. v Simon*, 47 Misc3d 1202 [A], 2015 NY Slip Op 50363 [U] [Sup Ct, Suffolk County 2015]).

In any event, contrary to the arguments of the defendant mortgagors, the complaint adequately pleads a cause of action for foreclosure and sale of the mortgage. The factual allegations asserted in the complaint state a legally cognizable claim for the foreclosure and sale of the subject property as against the defendant mortgagors,

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because the same sets forth the existence of, and the defendant mortgagors' execution and delivery of the note, the mortgage and the modification agreements pertaining thereto as well as their continuing default in payment thereunder (*see*, RPAPL § 1321; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]). Further, the plaintiff has alleged facts, which if proven, would demonstrate standing (*see*, *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). In the complaint, the plaintiff also sets forth facts relating to the three modifications of the mortgage and the subsequent assignments of the mortgage. Additionally, the allegations by the plaintiff's affiant concerning the particulars of this action and the plaintiff's possession of the note currently as well as prior to the filing of the complaint, augment the complaint and clearly state a cause of action for foreclosure and sale. The cross motion is thus denied in its entirety.

The Court next turns to the plaintiff's motion for summary judgment. 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" (*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]). 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, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012]; *Argent Mite. Co., LLC v Mentasana*, 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 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

Inasmuch as the standing of the plaintiff has now been drawn into question, it was incumbent upon the plaintiff to prove such standing before being entitled to any 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, *supra*). 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

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the plaintiff is the special endorsee 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 [1<sup>st</sup> 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.

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]; *Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]). In the instant case, the plaintiff produced, inter alia, the endorsed note, the allonge, the mortgage and the recorded loan modifications as well as 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*). The plaintiff also submitted proof of compliance with the notice requirements of section 1304 of the Real Property Actions and Proceedings Law prior to commencement (*see, U.S. Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *see also, 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.

Furthermore, the plaintiff demonstrated that, as holder of the endorsed note with an allonge, 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, as noted above, an affidavit from its representative, wherein it is alleged, inter alia, that the plaintiff has been the holder of the note and mortgage since prior to commencement (*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.*

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*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 and an allonge dated, November 30, 2000, which date is prior to commencement (*cf.*, *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Additionally, the plaintiff submitted, among other things, the three recorded loan modification agreements, the last of which was made with the plaintiff and MERS as its nominee (*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, and that the mortgage passed as an incident with the debt to the plaintiff (*see*, *Deutsche Bank Trust Co. Ams. v Codio*, 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2012]; *US Bank N.A. v Cange*, 96 AD3d 825, *supra*).

In any event, the execution of the three loan modification agreements, coupled with the defendant mortgagors' payments of the monthly amounts due under the terms of thereof, in effect, resulted in a ratification of the agreements and waiver of all defenses and claims resting on the plaintiff's purported lack of ownership in the note and mortgage as modified by the plaintiff or the unenforceability of the note and mortgage under other theories (*see*, *IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637, 923 NYS2d 508 [1<sup>st</sup> Dept 2011]; *see also*, *Confidential Lending, LLC v Nurse*, 120 AD3d 739, 992 NYS2d 77 [2d Dept 2014]; *Verela v Citrus Lake Dev. Inc.*, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]).

Since the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see*, *HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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]).

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]). 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 [1<sup>st</sup> Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 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 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]). 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 [1<sup>st</sup> Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 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 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

A review of the opposing papers submitted by the defendant mortgagors 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

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and sale, and insufficient to demonstrate any bona fide defense to such claim (*see*, CPLR 3211 [e]; *Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *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]; *CWCapital Asset Mgt. v Charney-FPG 114 41<sup>st</sup> St., LLC*, 84 AD3d 506, 923 NYS2d 453 [1<sup>st</sup> Dept 2011]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagors have offered no proof or arguments in support of any of their pleaded defenses, except those relating to the plaintiff's alleged lack of standing. The failure by the defendant mortgagors to raise and/or assert their remaining pleaded defense 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*). The second affirmative defense is thus dismissed.

Regarding standing, the plaintiff demonstrated, as noted above, that it was the holder of the note and the mortgage at the time of commencement, by the submission of, inter alia, the affidavit of its representative and by attaching copies of the endorsed note with an allonge, the mortgage and loan modification agreements to the moving papers (*see, Emigrant Bank v Larizza*, 129 AD3d 904, 2015 NY Slip Op 05151 [2d Dept, June 17, 2015]; *Kondaur Capital Corp. v McCary*, 115 AD3d 649, *supra*). Also, as noted above, the defense of standing was waived by the execution of the loan modifications and the payments thereunder. Thus, the first affirmative defense is stricken.

In response, the defendant mortgagors have not shown any valid basis to argue that the subject note, mortgage and loan modification agreements produced herein by the plaintiff were not the actual loan instruments executed by them (*see, JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). The defendant mortgagors also have not supplied any documentary evidence that would raise a question of fact as to whether the plaintiff is not the lawful owner or holder of the note and mortgage (*see, Peak Fin. Partners, Inc. v Brook*, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; *cf., Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]).

The defendant mortgagors' reliance upon certain findings by the Supreme Court, Kings County in an unofficial case, *U.S. Bank, N.A. v Guy*, 40 Misc3d 1242 (A), 977 NYS2d 670, *revd* 125 AD3d 845, 5 NYS3d 116 [2d Dept 2015]), is misplaced. In *Guy*, which was reversed insofar as appealed from, the lower court found, inter alia, that the plaintiff had failed to demonstrate its standing because the allonge was undated and because was insufficient proof that the allonge was attached to and made a part of the note. In reversing the lower court, the Second Department in *Guy* found, among other things, that the allonge submitted by the plaintiff was affixed to the note. In this case, as indicated above, the allonge is affixed to and made a part of the note; it is also dated. In any event, the affirmation of the defendant mortgagors' attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see, Matter of Ziomek*, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; *Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282, 792 NYS2d 408 [1<sup>st</sup> Dept 2005]; *see also, US Natl. Bank Assn. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]). The defendant mortgagors, therefore, failed to establish the merit of their defenses based upon the plaintiff's alleged lack of standing. Therefore, the second affirmative defense is dismissed.

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Notably, the defendant mortgagors do not deny that they received the loan proceeds, or that they have defaulted on the mortgage loan payments by way of an affidavit from them (*see, Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996]; *see also, Stern v Stern*, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). Thus, even when considered in the light favorable to the defendant mortgagors, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see, Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 3 NYS3d 619 [2 Dept 2015]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *see also, Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282, *supra*). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*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 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 fictitious defendant JOHN DOE is granted (*see, Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *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. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the remaining defendants, Citifinancial Company (DE), Suffolk Anesthesiology Assoc PC and United States of America Acting Through the Secretary of Housing and Urban Development (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ambrosov*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; *U.S. Bank, N.A. v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all such defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors and has established the default in answering by the remaining defendants, 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]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

The proposed order appointing a referee to compute, as modified by the court, has been signed concurrently herewith.

Dated: July 29, 2015

  
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 J.S.C.