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SHORT FORM ORDER

INDEX No. 29534/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. RICHARD I. HOROWITZ

A.J.S.C.

MOTION DATE 03/25/14
CROSS MOTION DATE 03/25/14
Mot. Seq. #002 MG
Cross Mot. Seq. #003 XMD

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE WAMU 2005-AR6,

Plaintiff,

- against -

JED PAVLIN; CAROLINE PAVLIN; MIN CAPITAL CORP. RETIREMENT TRUST; FORD MOTOR CREDIT COMPANY D/B/A VOLVO CAR FINANCE NORTH AMERICA; ANTHONY PERGOLA C/O ATTONITO & RING; NICHOLAS MIRANTE; JACLYN MANCINO; TOMASSA MANCINO; VITO DIGIUSEPPE; "JOHN DOE # 1-5" AND "JANE DOE # 1-5", said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

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Upon the following papers numbered 1 - 27 read on this motion for summary judgment and order of reference; action; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 25; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 26 - 27; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is hereby,

ORDERED that the motion (#002) by plaintiff Deutsche Bank National Trust Company, as Trustee WAMU 2005-AR6, *inter alia*, pursuant to CPLR §3212 for summary judgment on its

complaint against the answering defendants Jed Pavlin, Caroline Pavlin, Anthony Pergola, Jaclyn Mancino, Tomassa Mancino and Vito DiGiuseppe, fixing default judgments against the non-appearing, non-answering defendants, for leave to amend the caption pursuant to CPLR §3025(b) and an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law 1321, is granted; and it is further

ORDERED that the cross-motion (#003) by defendants Jed Pavlin and Caroline Pavlin for an order pursuant to CPLR §3025 to serve and file an amended answer and CPLR § 3211(a)(3) dismissing the complaint on the grounds that plaintiff does not have standing to bring the action is denied; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants "John Doe # 1-5" and "Jane Doe # 1-5", and, further the action is dismissed as against defendants "John Doe # 1-5" and "Jane Doe # 1-5"; and it is further

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

ORDERED that the caption of this action hereinafter appears as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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DEUTSCHE BANK NATIONAL TRUST COMPANY
AS TRUSTEE WAMU 2005-AR6,

Plaintiff,

- against -

JED PAVLIN; CAROLINE PAVLIN; MIN CAPITAL CORP.
RETIREMENT TRUST; FORD MOTOR CREDIT COMPANY D/B/A
VOLVO CAR FINANCE NORTH AMERICA;
ANTHONY PERGOLA C/O ATTONITO & RING; NICHOLAS MIRANTE;
JACLYN MANCINO; TOMASSA MANCINO; VITO DIGIUSEPPE;

Defendants.

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This is an action to foreclose a mortgage on a premises known as 40 Fairway Avenue, Seaview a/k/a Ocean Beach, New York. On February 22, 2005, defendant Jed Pavlin, as attorney-in-fact and on behalf of defendant Caroline Pavlin, executed a note in favor of Washington Mutual Bank, FA (hereinafter "WaMu") wherein defendant Caroline Pavlin agreed

to pay the sum of $465,000.00 at the yearly rate of 4.662 percent. On the same date, defendants Jed Pavlin and Caroline Pavlin executed a first mortgage in the principal sum of $465,000.00 on the subject property. The mortgage indicated WaMu to be the lender and was recorded on March 8, 2005 in the Suffolk County Clerk's Office. The mortgage and note were transferred by assignment of mortgage dated July 23, 2009 from JP Morgan Chase Bank, National Association (hereinafter "Chase Bank"), as successor to WaMu, to plaintiff.

Notice of default dated February 10, 2009 was sent to defendant Caroline Pavlin at her last known address by Chase Bank, as servicer for the plaintiff. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on July 28, 2009. In its complaint plaintiff alleges, *inter alia*, that defendants breached their obligations under the terms and conditions of the note and mortgage by failing to make their monthly payments. Defendants Jed Pavlin and Caroline Pavlin filed a joint answer to the summons and complaint. Defendants Anthony Pergola, Jaclyn Mancino, Tomassa Mancino and Vito DiGiuseppe filed answers and also asserted several counterclaims and cross-claims.

The Court's computerized records indicate that several foreclosure settlement conferences were held in 2010 and 2011. On April 5, 2012, Jed Pavlin and Caroline Pavlin filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York (No. 8-12-72161). The Court notes that in their petition the Pavlins submitted an address other than the property at issue in this action. A review of the Court's file indicates that there was a discharge of the Pavlins' bankruptcy on October 16, 2012 (J. Grossman, U.S. Bank. Ct. EDNY).

Plaintiff now moves for an order granting summary judgment, fixing default judgments against the non-appearing, non-answering defendants, amending the caption and appointing a referee to compute alleging that defendants failed to comply with the terms of the loan agreement and mortgage, and that defendants' denials fail to raise a material issue of triable fact. In support of its motion, plaintiff submits, *inter alia*, the affidavit of Victoria J. Greenwood, vice president of Chase Bank; the affirmation of Peter R. Bonchonsky, Esq.; the pleadings; the note and mortgage, and assignments of mortgage; notice of default; notices pursuant to RPAPL § 1303; affidavits of service for the summons and complaint; and affidavit of service for the instant summary judgment motion.

Defendants Jed Pavlin and Caroline Pavlin oppose the application, and further have submitted a cross-motion for leave to serve and file an amended answer and further to dismiss the action asserting, *inter alia*, that plaintiff does not have standing and further has acted in violation of the pooling and servicing agreement with respect to the loan. Defendants failed to assert the affirmative defense of lack of standing in their original answer dated August 20, 2009. The gravamen of defendants' argument with respect to the issue of standing is that plaintiff failed to demonstrate the note was properly assigned to plaintiff prior to the commencement of the action. For the reasons asserted below, plaintiff's motion is granted, and defendants' cross-motion is denied.

Initially, the Court notes that this action was commenced in 2009 when the notice requirements pursuant to RPAPL § 1304 were applicable to high-cost, subprime and non-traditional home loans. Since it is undisputed the subject loan was none of the aforementioned types of loans, compliance with the more recent amendments applicable to RPAPL § 1304 was not required (*see generally* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (***Republic Natl. Bank of N.Y. v O'Kane***, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see* ***Redrock Kings, LLC v Kings Hotel, Inc.***, 109 AD3d 602, 970 NYS2d 804 [2d Dept 2013]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *see also* ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff demonstrated prima facie entitlement to summary judgment against the answering defendants by providing sufficient proof of the note, mortgage and the assignment of mortgage and note, together with due evidence of defendant's default in payment under the terms of the loan documents (*see* CPLR §3212; RPAPL §1321; ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS3d 619 [2d Dept 2015]; ***Neighborhood Hous. Serv. of New York City v Hawkins***, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enters.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). The failure to submit any documentation confirming the acquisition of the instant loan by Chase Mortgage, as successor of WaMu, is of no moment since the Appellate Divisions of both the First and Second Departments have recently recognized that Chase Bank, pursuant to a purchase and assumption agreement between Chase Bank and the Federal Deposit Insurance Corporation in 2008, "acquired all of WaMu's loans and loan commitments" (*see* ***JP Morgan Chase Bank v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***JP Morgan Chase Bank v Russo***, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014]; ***JP Morgan Chase Bank v Shapiro***, 104 AD3d 411, 959 NYS2d 918 [1st Dept 2013]). Based upon the foregoing, plaintiff demonstrated *prima facie* entitlement to summary judgment.

In opposition, defendants Jed Pavlin and Caroline Pavlin cross-move, *inter alia*, for leave to serve an amended answer and opposes plaintiff's motion based on lack of standing when the action was commenced. Addressing defendant's application for leave to serve an amended answer, the Court notes that as a general rule, motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see* ***Glaser v County of Orange***, 20 AD3d 506, 799 NYS2d 120 [2d Dept 2005]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see* ***Buckholz v Maple Garden Apts., LLC***, 38 AD3d 584, 832 NYS2d 255 [2d

Dept 2007]; ***Curran v Auto Lab Serv. Cetr.***, 280 AD2d 636, 721 NYS2d 662 [2d Dept 2001]).

Addressing defendants' opposition which asserts of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (***Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The Court further held that "an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (*see* ***Wells Fargo Bank Minn., NA v Mastropaolo***, 42 AD3d 239, 837 N.Y.S.2d 247; *see also* ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; ***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; ***Aames Funding Corp. v Houston***, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]).

In this instance, defendants' original verified answer is dated August 20, 2009. The Court notes that approximately two and one-half years of the more than four year delay in making the application included stays imposed as a result of mandatory settlement conferences and defendants' bankruptcy petition. However, defendants have not otherwise offered an explanation for such a prolonged deferment. More significantly, defendants have failed to demonstrate by any credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment (*see generally* ***Majestic Investors, Ltd. v Lopez***, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). In addition, at this juncture defendants' request to amend their answer to include the waived affirmative defense of standing would be prejudicial to plaintiff because "[b]y not raising the defense [of standing in a pre-answer motion or in an answer, defendant] failed to put the plaintiff on notice of the defense at a time the plaintiff could have cured any defect by promptly recommencing the action" (***HSBC Bank USA v Philistin***, 99 AD3d 667, 952 NYS2d 83 [2d Dept 2012]). Lastly, defendant has failed to make a sufficient evidentiary showing that the proposed affirmative defenses have any merit. Accordingly, that branch of defendant's cross-motion seeking leave to amend their answer is denied.

As to the remaining assertions in the cross-motion and opposition, even when viewed in the light most favorable to defendant, the submissions failed to raise a triable issue of material fact as to a bona fide defense to the action (*see* ***Bayview Loan Servicing, LLC v 254 Church Street, LLC***, 129 AD3d 650, 9 NYS3d 589 [2d Dept 2015]; ***Emigrant Funding Corp. v Agard***, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]; ***Mendel Group, Inc. v Prince***, 114 AD3d 732, 980 NYS2d 519 [2d Dept 2014]). Defendants have failed to demonstrate, through the production or competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see* ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (***Shaw v Time-Life Records***, 38 NY2d 201, 341 N.E.2d 817, 379 NYS2d 390 [1975]). Notably, defendants did not deny having received the loan proceeds and having defaulted on the loan payments in their opposition papers (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d

466, 647 NYS2d 467 [1st Dept 1996]). Nor do they have standing to challenge plaintiff's status of the loan based on alleged noncompliance with the pooling and servicing agreement (*see* ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]). Moreover, the affirmation of counsel, who lacks personal knowledge of the facts, is insufficient to defeat the motion (*see* ***Bank of New York v Castillo***, 120 AD3d 598, 991 NYS2d 446 [2d Dept 2014]. The Court considered the remaining contentions and found them to be similarly without merit.

Based upon the foregoing, plaintiff's motion for summary judgment is granted against the answering defendants and defaults are fixed against the non-appearing, non-answering defendants. Plaintiff's request to amend the caption and for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is similarly granted (*see* ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). The Court is simultaneously signing the Order of Reference with this Order. The cross-motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 22, 2015

Hon. Richard I. Horowitz, A.J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**