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MEMORANDUM DECISION/SHORT FORM ORDER

INDEX No. 32514/2013

COPY

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 09/03/15
SUBMIT DATE: 01/15/16
Mot. Seq. # 002 - MOTD
Mot. Seq. #003 - XMD
Pre-Trial Conf.: 3/11/16
CDISP Y____ N__X__

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WELLS FARGO BANK, N.A.. SUCCESSOR BY MERGER TO WACHOVIA MORTGAGE FSB, F/K/A WORLD SAVINGS BANK, FSB, f/k/a WORLD SAVINGS BANK, FSB,

Plaintiff,

-against-

MAYA KENNY MANN, "JOHN DOE 1 to JOHN DOE 25" said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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DRUCKMAN LAW GROUP, PLLC
Attys. For Plaintiff
242 Drexel Ave. - Ste. 2
Westbury, NY 11590

ERICA T. YITZHAK, ESQ., PC
Atty. For Defendant Mann
17 Barstow Rd. - Ste. 406
Great Neck, NY 11021

Upon the following papers numbered 1 to 12 read on this motion by the plaintiff for accelerated judgments on its complaint, party identification and deletion and an order of reference and cross motion by the defendant for leave to renew and reargue her prior motion to determine "bad faith" on the part of plaintiff ; Notice of Motion/Order to Show Cause and supporting papers 1-4 ; Notice of Cross Motion supporting papers; 5-7 Opposing Papers: 8-9 ; Reply papers 10-11 ; Other 12 (correspondence 1/15/16) ; it is,

ORDERED that those portions of this motion (#002) by the plaintiff wherein it seeks dismissal pursuant to CPLR 3212 of the affirmative defenses set forth in the answer of defendant, Maya Kenny Mann, and summary judgment in favor of the plaintiff on its complaint against such defendant for foreclosure and sale, the identification the persons served as unknown defendants pursuant to CPLR 1024 and default judgments against them together with the deletion of the unknown defendants and a caption amendment to reflect these changes, is considered under CPLR 3212, 3215, 1024 and RPAPL § 1321 and are granted to the extent that all issues, except those surrounding the issue of the

plaintiff's compliance with the 90 day notice mailing requirements set forth in RPAPL § 1304, are resolved in favor of the plaintiff; and it is further

ORDERED that those portions of the plaintiff's motion (#002) wherein it seeks an order appointing a referee to compute is denied with leave to renew pending determination of the issue of the plaintiff's compliance with RPAPL § 1304; and it is further

ORDERED that the cross motion (#003) by defendant, Maya Kenny Mann, for renewal and/or reargument of her prior motion for an order determining "bad faith" on the part of the plaintiff in its interfaces with the defendant prior to and subsequent to the commencement of this action with respect to negotiating a possible loan modification is considered under CPLR 2221 and is denied; and it is further

ORDERED that a pre-trial conference shall be held herein on **March 11, 2016**, at 9:30 a.m. in the courtroom of th undersigned located in the Supreme Court Annex Building at One Court Street, Riverhead, New York 11901 for purposes of determining the readiness of this matter for trial on the limited issue of the plaintiff's compliance with the 90 day notice requirements set forth in RPAPL § 1304.

The record reflects that this action was commenced in December of 2013 to foreclose the lien of a September 20, 2007 mortgage in the amount of $900,000.00 that encumbers real property located in Sag Harbor, New York. The loan went into default in June of 2009. A prior foreclosure action had been commenced by the plaintiff under Index Number 1879/2010 in January of 2010, in which, defendant Mann failed to appear by answer. That action was, however, the subject of a discontinuation stipulation dated January 7, 2014 which was signed by both plaintiff's counsel and counsel for defendant Mann. Following an inquiry by the Justice assigned to that action on February 26, 2014, that prior action was marked disposed by a pre-note settlement.

By motion (#001) returnable May 7, 2015 filed in this action, defendant Mann, who appeared herein by answer, sought a determination that the plaintiff failed to negotiate in good faith and such other relief the court deems proper. The motion was marked submitted on June 12, 2015 and, by order of this court dated July 6, 2015, it was denied in all respects.

The plaintiff now moves (#002) for accelerated judgments on its complaint, party identification and deletion of unknowns and default judgments against those served as unknown defendants and an order appointing a referee to compute. The papers were prepared by the plaintiff's former counsel, who was substituted by its present counsel two weeks after the original return date of the motion.

The motion is opposed by defendant Mann in cross moving papers (#003) in which she seeks renewal and reargument of her prior motion (#001) to adjudicate the plaintiff guilty of bad faith in failing to negotiate a loan modification agreement. Defendant Mann also raises two of her pleaded affirmative defenses in opposition to the plaintiff's motion, namely, that the plaintiff failed to comply

with the 90 day notice of default and cure provisions of RPAPL § 1304 and that filing and pendency of the prior foreclosure action renders this action jurisdictionally defective.

The court first considers the cross motion (#003) by defendant Mann for renewal and/or reargument of her prior motion for a determination of bad faith conduct on the part of the plaintiff in failing to negotiate a loan modification. For the reasons stated, the cross motion (#003) is denied.

It is well established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason, mistakenly arrived at its determination (*see* ***Butler v City of Rye Planning Com'n,*** 114 AD3d 937, 980 NYS2d 831 [2d Dept 2014]; ***Anthony J. Carter, DDS, P.C. v Carter,*** 81 AD3d 819, 916 NYS2d 821 [2d Dept. 2011]; ***Everhart v County of Nassau***, 65 AD3d 1277, 885 NYS2d 765 [2d Dept 2009]; ***McDonald v Stroh***, 44 AD3d 720, 842 NYS2d 727 [2d Dept 2007]). CPLR 2221 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). A motion for leave to reargue is thus not one which provides an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced. Nor is it one that provides a platform for the presentation of arguments different from those already presented (*see* ***Haque v Daddazio***, 84 AD3d 940, 922 NYS2d 548 [2d Dept 2011]; ***Mazinov v Rella***, 79 AD3d 979, 912 NYS2d 896 [2d Dept 2010]; ***V. Veeraswamy Realty v Yenom Corp.,*** 71 AD3d 874, 895 NYS2d 860 [2d Dept 2010]); ***Woody's Lumber Co., Inc. v Jayram Realty Corp.***, 30 AD3d 590, 817 NYS2d 391 [2d Dept 2006]; ***Williams v Board of Educ. of City School Dist. of New York City***, 24 AD3d 458, 805 NYS2d 126 [2d Dept 2005]; ***Simon v Mehryari***, 16 AD3d 543, 792 NYS2d 543 [2d Dept 2005]; ***McGill v Goldman***, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]).

Here, the court denies the moving defendant's application for reargument since the moving papers failed to establish that the court misapprehended or overlooked material facts presented on the prior application or that it misapplied controlling principles of law in arriving at its determination of said prior application (*see* ***Mazinov v Rella***, 79 AD3d 979, *supra*; ***V. Veeraswamy Realty v Yenom Corp.,*** 71 AD3d 874, *supra*; ***McGill v Goldman***, 261 AD2d 593, *supra*).

The court further denies the defendant's request of renewal of her prior motion. Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new facts not offered on a prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (*see* ***Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]; ***Jacobson v Adler*** 119 AD3d 902, 989 NYS2d 898 [2d Dept 2014]; ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Siegel v Morsey New Sq. Trails Corp.***, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]). The motion must be predicated upon facts or materials in existence at the time of the original motion but not known to the party seeking renewal or, in the discretion of the court, on such facts or material known to such party but not brought to the attention of the court (*see* ***Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980, *supra*; ***Cioffi v S.M. Foods, Inc.***, 129 AD3d 888, 10 NYS3d 620 [2d Dept 2015]; ***Deutsche Bank Trust Co. v Ghaness***, 100 AD3d 585, 953 NYS2d 301[2d Dept 2012]; ***DeMarquez v Gallo***, 94 AD3d 1039, 943

NYS2d 169 [2d Dept 2012], In either case, "[t]he Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (***Leone Properties, LLC v Board of Assessors for Town of Cornwall***, 81 AD3d 649, 916 NYS2d 149; *see* ***Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980,*supra*; ***Cioffi v S.M. Foods, Inc.***, 129 AD3d 888, *supra*; ***Rowe v NYCPD***, 85 AD3d 1001, 926 NYS2d 121 [2d Dept 2011]), since a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (*see* ***Bank of New York v. Waters***, 127 AD3d 1005, 5 NYS3d 877 [2d Dept 2015]; ***Ali v Verizon N.Y., Inc.***, 116 AD3d 722, 982 NYS2d 903 [2d Dept 2014]; ***Joseph v Simmons,*** 114 AD3d 644, 979 NYS2d 675 [2d Dept. 014]; ***Yebo v Cuadra,*** 98 AD3d 504, 949 NYS2d 451 [2d Dept 2012]; ***Sobin v Tylutki***, 59 AD3d 701, 873 NYS2d 743 [2d Dept 2009]). "Leave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion" (***Varela v Clark***, 134 Ad3d 925, 21 NYS3d 331 [2d Dept 2015]).

Here, the purported new facts would not have changed the prior determination of the court and the defendant's attempt to embellish previously advanced claims and arguments with new facts or material known to her at the time of the first motion is unavailing for want of a reasonable excuse for failing to advance them at that time (*see* ***Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980, *supra*). Defendant's reliance upon facts or material coming into existence subsequent to the submission of the prior motion is cumulative and thus unavailing.

In view of the forgoing, the cross motion (#003) by defendant Mann for renewal and/or reargument of her prior motion (#001) is denied.

Next considered is the plaintiff's motion-in-chief (#002) for accelerated judgments on its complaint, the identification of the four persons served as unknown defendants and the deletion of the remaining unknown defendants. It is well established that a foreclosing plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of a default on the part of the mortgagor under the terms of the subject note and moprtgage (*see* ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Where, as here, the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Loancare v Firshing***, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 77, 10 NYS2d 255 [2d Dept 2015]). A foreclosing plaintiff has standing where it establishes that it merged with the original lender prior to its commencement of the foreclosure action (*see* ***Citimortgage Inc. v Goldberg***, 134 AD3d 880, 20 NYS3d 906 [2d Dept 2015]; ***PNC Bank v Klein***, 125 AD3d 953, 5 NYS2d 439 [2d Dept 2015]; ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2011]).

Here, the moving papers established the plaintiff's entitlement to summary judgment and default judgments on its claims for foreclosure and sale as they included copies of the mortgage, the

unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; *see also* ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, *supra*; ***One West Bank, FSB v DiPilato***, *124 AD3d 735, supra*; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Bank of New York v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***Jessabell Realty Corp. v Gonzalez*** 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 985 NYS2d 254 [2d Dept 2014]; ***W & H Equities LLC v Odums***, 113 AD3d 840, 978 NYS2d 910 [2d Dept 2014]). In addition, the moving papers established that the plaintiff, whose standing was challenged in an affirmative defense in the answer of the mortgagor defendant, was sufficiently possessed of the requisite standing to prosecute its claims for foreclosure and sale in this action due to the plaintiff's merger with the original lender prior to the commencement of this action (*see* ***Citimortgage Inc. v Goldberg***, 134 AD3d 880, *supra*).

The moving papers further established, prima facie, that the affirmative defenses asserted in the answer served are without merit (*see* ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; ***Bank of New York v McCall***, 116 AD3d 993, *supra*; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, *supra*; ***Mendell Group, Inc. v Prince***, 114 AD3d 732, 980 NYS2d 519 [2d Dept 2014]; ***Becher v Feller***, 64 AD3d 672,884 NYS2d 83 [2d Dept 2009]). Also established was the plaintiff's entitlement to the identification of the four persons served as unknown defendants, the deletion of the remaining unknown defendants and a caption amendment to reflect these changes (*see* CPLR 1024; 1003). Finally, the plaintiff's moving papers established the plaintiff's entitlement to default judgments against the newly identified defendants who were duly served with process and who failed to appear herein by answer (*see* CPLR 3215[f]; ***US Bank NA v Dorestant***, 131 AD3d 467, 469, 15 NYS2d 142 [2d Dept 2015]; ***U.S. Bank, N.A. v Razon***, 115 AD3d 739, 981 NYS2d 571[2d Dept 2014]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (*see* ***Midfirst Bank v Agho,*** 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Jessabell Realty Corp., v Gonzales***, 117 AD3d 908, *supra*; ***Mendell Group, Inc. v Prince***, 114 AD3d 732, *supra*; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 *supra*; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as 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 Enter., 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]). In addition, the failure to raise pleaded

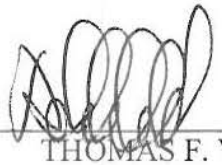
affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

Here, the defendant raised only two defenses in opposition to the plaintiff's motion. While her claim that the filing and/or pendency of the prior foreclosure action precludes the prosecution of this foreclosure action on jurisdictional grounds is rejected as lacking in merit (*see* RPAPL § 3001), the court finds merit in the defendant's contention that the plaintiff failed to demonstrate compliance with the 90 day notice requirements imposed upon it by the provisions of RPAPL § 1304. The plaintiff's affiant failed to allege any basis for her conclusion that the required 90 day notice was mailed to the last known address of the defendant Mann and to the mortgaged premises in certified and regular mailings (*see* ¶ 9 of the affidavit of Joanna M. Gloria, attached to the moving papers).

Accordingly, and pursuant to CPLR 3212(g), those portions of the plaintiff's motion (#002) wherein it seeks summary judgment dismissing the affirmative defenses set forth in the answer of defendant Mann and summary judgment in favor of the plaintiff on its complaint against such defendant, the identification of the persons served as unknown defendants pursuant to CPLR 1024 and default judgments against them together with the deletion of the unknown defendants and a caption amendment to reflect these changes, are granted to the extent that all issues, except those resting on the issue of the plaintiff's compliance with the 90 day notice mailing requirements set forth in RPAPL § 1304, are resolved in favor of the plaintiff against all defendants. Those portions of the plaintiff's motion wherein it seeks an order appointing a referee to compute is denied with leave to renew pending the court's determination of the issue of the plaintiff's compliance with RPAPL § 1304.

Counsel for appearing parties are directed to appear on **March 11, 2016** at 9:30 a.m. for the a pre-trial conference scheduled at which, the court shall inquire as to the readiness of this matter for trial on the limited issue of the plaintiff's compliance with the 90 day notice requirements set forth in RPAPL § 1304. Proposed Order of Reference submitted with the motion papers herewith has been marked "not signed".

Dated: 11/27/16



THOMAS F. WHELAN, J.S.C.