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SHORT FORM ORDER

COPY

INDEX
NO.: 39335-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-18-14 (003)
11-13-14 (004)
ADJ. DATE 11-13-14 (003)
Mot. Seq. # 003-MG
#004-XMD

WELLS FARGO BANK N.A., AS TRUSTEE FOR CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-NC2 ASSET-BACKED PASS-THROUGH CERTIFICATES,

Plaintiff,

-against-

HUGH G. ARTHUR III; ROSETTA I. ARTHUR; COLORADO CAPITAL INVESTMENTS INC.,; COMMISSIONERS OF THE STATE INSURANCE FUND; FIA CARD SERVICES NA; JST CAPITAL INC; NEW YORK ANESTHESIA ASSOCIATES; PEOPLE OF THE STATE OF NEW YORK; SLOMINS INC; "JOHN DOES" and "JANES DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
51 East Bethpage Road
Plainview, N .Y. 11803

ELIAS N. SAKALIS, ESQ.
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Cambria Heights, N.Y. 10411

Upon the following papers numbered 1 to 24 read on this motions for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 19 ; Answering Affidavits and supporting papers 20 - 23 ; Replying Affidavits and supporting papers ____; Other stipulation 24 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the plaintiff, and the motion (004) by the defendant Rosetta Arthur, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided herewith; and it is

ORDERED that this motion (003) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Rosetta Arthur, striking her answer, and dismissing the counterclaims 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 is granted; and it is

ORDERED that this motion (004) by the defendant Rosetta Arthur for, inter alia, an order: (1) pursuant to CPLR 3211 and 3212 dismissing the complaint insofar as asserted against her on the grounds that the plaintiff lacks standing; or, in the alternative, (2) restoring this action to a foreclosure conference calendar is denied in its entirety; and it is

ORDERED that the caption is amended by changing Hugh G. Arthur III to Hugh G. Arthur II, and substituting Tammie Grandville for the fictitious defendants "John Does" and "Jane Does" as well as the descriptive wording relating thereto; and it is

ORDERED that the plaintiff shall serve a copy of the order of reference amending the caption upon the Calendar Clerk of this Court; and it is

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon Elias N. Sakalis, Esq., counsel for the defendant Rosetta Arthur, and all other parties, if any, 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 shall promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the defendant Rosetta Arthur shall serve a copy of this order with notice of entry upon Rosicki, Rosicki, & Associates, P.C., counsel for the plaintiff and all other parties, if any, 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 shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 42 Pendale Drive, Amityville, New York 11701. On April 5, 2006, the defendant Rosetta Arthur executed a fixed-rate note in favor of Century Mortgage Corporation ("the lender") in the principal sum of $174,400.00. To secure said note, Rosetta Arthur and her son Hugh G. Arthur II sued herein as Hugh G. Arthur III (collectively "the defendant mortgagors") gave the lender a mortgage also dated April 5, 2006 on the property. By way of an allonge with an undated endorsement to the note as well as an assignment executed on October 4, 2007 and "effective" as of August 24, 2007, the note and mortgage were allegedly transferred to the plaintiff, Wells Fargo Bank, N.A., as Trustee, for Carrington Mortgage Loan Trust, Series 2006-NC2 Asset-Backed Pass-Through Certificates prior to commencement. The assignment of the note and mortgage to the plaintiff was subsequently duly recorded in the Office of the Suffolk County Clerk on October 22, 2007.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about February 1, 2009, 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 summons and complaint on November 18, 2010.

By way of background, a settlement conference was scheduled to be held before the foreclosure conference part on June 13, 2011. A representative of the plaintiff attended and participated in the settlement conference. On said date, this case was dismissed from the conference program by the assigned referee because the parties were unable to achieve a settlement. Accordingly, there has been compliance

with CPLR 3408; no further conference is required.

By way of further background, the plaintiff previously moved for an order of reference, which was granted by order dated February 12, 2012 (Pastoressa, J.). By said order, Mr. Richard A. Pino, Esq. was appointed referee to compute; however, this order was vacated by subsequent order dated November 7, 2012 (Pastoressa, J.) which granted a motion by Mrs. Arthur to vacate her default and interpose a late answer sworn to on July 31, 2012. Thus, issue was joined by the interposition of Mrs. Arthur's answer. The remaining defendants have neither appeared nor answered the complaint, and, thus, are in default.

By her answer, Mrs. Arthur admits some of the allegations set forth in the complaint, including the execution of the note and mortgage by her, and denies other allegations therein. Mrs. Arthur also asserts fourteen affirmative defenses, alleging, among other things, the lack of standing and legal capacity. In the answer, Mrs. Arthur also asserts five counterclaims, alleging, inter alia, the following: the breach of trust and a fiduciary duty; fraud; unjust enrichment; and violations of General Business Law §§ 349 and 350. In response to the counterclaims, the plaintiff interposed an answer denying the material allegations in the counterclaims, and asserts five affirmative defenses, alleging, among other things, the following: the failure to state a cause of action; claims barred by the doctrines of estoppel, waiver and/or ratification; the statute of frauds; the statute of limitations; and unclean hands.

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

Mrs. Arthur opposes the plaintiff's motion and moves for, inter alia, an order: (1) pursuant to CPLR 3211 and 3212 dismissing the complaint insofar as asserted against her on the grounds that the plaintiff lacks standing; or, in the alternative, (2) restoring this action to a foreclosure conference calendar. In her opposing and moving papers, Mrs. Arthur re-asserts her pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. Mrs. Arthur argues that this action should be dismissed because of the plaintiff's purported lack of standing, contending that a question of fact exists with respect to the assignment of the note and mortgage. In the alternative, Mrs. Arthur argues, among other things, that this case should be restored to the foreclosure conference part to give her the opportunity to secure a loan modification, and that she should be permitted to "discovery evidence" in support of her counterclaims.

In response to Mrs. Arthur's motion, the plaintiff has submitted opposition and reply papers. The plaintiff's counsel argues, among other things, that Mrs. Arthur is not entitled to another settlement conference, averring that a conference was already held on June 13, 2011. According to counsel, Mrs. Arthur represented to the plaintiff and the court that she did not want to participate in further settlement conferences because she sought to litigate this action. The plaintiff's counsel also asserts that discovery is not needed because, inter alia, it has demonstrated its standing and because Mrs. Arthur ratified the instant mortgage loan by making payments for several years prior to the default.

Initially, the court notes that on or about March 22, 2012, a notice of appearance on behalf of Mrs. Arthur was initially filed in this action by her attorney, Cathleen Williams, Esq., and that Mrs. Arthur's answer dated July 31, 2012 was also prepared and filed by counsel Williams. Although a consent to change attorney was never been filed with the court, Mrs. Arthur's instant motion (004) was submitted by Elias N. Sakalis, Esq., as her attorney, without a written notice of appearance from Mrs. Sakalis, and without any explanation from either Mr. Sakalis or Ms. Williams with respect to the same (*see*, CPLR 321 [a], [b]). Thus, the court is left in the untenable position of having to guess whether Mr. Sakalis is acting as co-counsel with Ms. Williams, or whether Ms. Williams has been discharged as Mrs. Arthur's attorney. Further, while the face of Mrs. Arthur's motion purports to include the defendant Hugh Arthur, who is in default (*see*, CPLR 320 [a]), the substance of the motion pertains solely to Mrs. Arthur.

Further, Mrs. Arthur's untimely motion was improperly denominated a cross motion because it was not made returnable at the same time as the plaintiff's motion (*see*, CPLR 2215; *see also*, ***Kershaw v Hospital for Special Surgery***, 114 AD3d 75, 978 NYS2d 13 [1st Dept 2013]). The plaintiff's motion-in-chief was made returnable on September 18, 2014, however, Mrs. Arthur's motion was made returnable November 13, 2014. By stipulation executed on October 14, 2014, the moving parties agreed to adjourn the plaintiff's motion to November 13, 2014, or to a date more convenient to the court. Parenthetically, the stipulation incorrectly recites that the plaintiff's motion and Mrs. Arthur's "cross motion" were scheduled for submission on October 16, 2014; however, neither of these two motions were scheduled for submission on that date. In the interest of judicial economy, the plaintiff's motion (003) and Mrs. Arthur's motion (004) are consolidated for the purposes of this determination and decided together. In any event, Mrs. Arthur's motion is denied for the reasons set forth below.

The court now turns to the motion-in-chief. 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; ***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 note with an endorsed allonge, 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, plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

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]).

With respect to Mrs. Arthur's affirmative defenses asserting the lack of standing and capacity to sue, standing and capacity to sue are related, but distinguishable, legal concepts (*see, **Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]). Although both are components of a party's authority to sue, capacity requires an inquiry into the litigant's status, such as, its power to appear and bring its grievance before the court, whereas standing requires an inquiry into whether the litigant has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (*see*, *id.* [internal quotations and citations omitted]).

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.

The plaintiff demonstrated that, as holder of the endorsed note, 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*). In support of the motion, the plaintiff submitted, inter alia, an affidavit from an officer of its representative, wherein it is alleged that the note and mortgage were assigned to the plaintiff by an instrument dated October 4, 2007, a date being prior to commencement (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v Weiss***, 133 AD3d 704, 21 NYS3d 126 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Idarecis***, 133 AD3d 702, 21 NYS3d 261 [2d Dept 2015]; ***Bank of Am., N.A. v Kyle***, 129 AD3d 1168, 13 NYS3d 253 [3d Dept 2015]). The documentary evidence submitted by the plaintiff includes, among other things, the note transferred via an allonge with an undated endorsement (*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 and note executed on October 4, 2007, and thereafter duly recorded in the Office of the Suffolk County Clerk on October 22, 2007, which memorialized the transfer of the note and mortgage to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Moreover, an examination of the assignment shows that it includes a reference to the mortgage note (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***Deutsche Bank Natl. Trust Co. v Williams***, 2015 NY Misc LEXIS 3792, 2015 WL 7008076, 2015 NY Slip Op 31945 [U] [Sup Ct, Suffolk County 2015]). More specifically, the assignment includes the mortgage "together with the bond or obligation described in said mortgage, and the moneys due and to grow thereon with interest." Such evidence demonstrates that the plaintiff holds the original note. Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage, which followed as an incident to the note (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Therefore, the plaintiff demonstrated its prima facie burden as to its standing.

Furthermore, the plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the 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*, ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]; ***DJL Mtge, Capital, Inc. v Smith***, 2007 NY Misc LEXIS 8988, 2007 WL 2814513, 2007 NY Slip Op 32745 [U] [Sup Ct, Queens County 2007] [the threshold defined in Banking Law 6-1 is generally based upon the annual percentage rate]). Moreover, a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan (***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]).

To the extent that Mrs. Arthur alleges fraud in the inducement, generally, a representation by a lender that a borrower can afford to repay a prospective loan is an expression of opinion of present or future expectations, which is not actionable and cannot form the basis for a claim against the lender (*see*, ***Goldman v Strough Real Estate, Inc.***, 2 AD3d 677, 770 NYS2d 94 [2d Dept 2003]; ***Crossland Sav., F.S.B. v SOI Dev. Corp.***, 166 AD2d 495, 560 NYS2d 782 [2d Dept 1990]). Furthermore, the legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors (*see*, ***Standard Fed. Bank v Healy***, 7 AD3d 610, 777 NYS2d 499 [2d Dept 2004]; *see also*, ***Walts v First Union Mtge. Corp.***, 259 AD2d 322, 686 NYS2d 428 [1st Dept 1999]).

By its submissions, plaintiff also established that the counterclaims, sounding in, inter alia, fraud and misrepresentation lack merit as a matter of law because Mrs. Arthur failed to allege that plaintiff or its predecessor owed her a fiduciary duty with respect to her future ability to afford the mortgage (*see generally*, ***Schwatka v Super Millwork, Inc.***, 106 AD3d 897, 965 NYS2d 547 [2d Dept 2013]; ***Levin v Kitsis***, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; *see also*, ***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, *supra*; ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]). Additionally, Mrs. Arthur's general factual assertions do not satisfy the pleading requirements of fraud (*see*, ***Abdourahamane v Public Stor. Institutional Fund***, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014]; ***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; ***Jones v OTN Enter., Inc.***, 84 AD3d 1027, 922 NYS2d 810 [2d Dept 2011]; *see also*, ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). Furthermore, to the extent that the remaining counterclaims sound in a purported cause of action for wrongful foreclosure, they are not cognizable (*see*, ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, ***Gottlieb v City of New York***, 2013 NY Misc. LEXIS 4407, 2013 WL 552202, 2013 NY Slip Op 32340 [U] [Sup Ct, Queens County 2013], *affd* 129 AD3d 724, 10 NYS3d 542 [2d Dept 2015]; ***Dickman v Verizon Commc'ns, Inc.***, 876 FSupp2d 166 [ED NY 2012]). Moreover, Mrs. Arthur, a non-party to the subject loan trust and/or pooling and servicing agreement lacks standing to assert noncompliance therewith (*see*, ***Bank of Am., N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312

[2d Dept 2015]; ***Bank of N.Y. Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; *see also*, ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 2007] [those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract]). Accordingly, all of Mrs. Arthur's counterclaims are dismissed in their entirety.

Because the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Mrs. Arthur (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Mrs. Arthur 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 Mrs. Arthur 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, or any bona fide counterclaims (*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]; *see also*, ***CWCapital Asset Mgt. v Charney-FPG 114 41st St., LLC***, 84 AD3d 506, 923 NYS2d 453 [1st Dept 2011]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In opposition to the motion, Mrs. Arthur has offered no proof or arguments in support of any of the pleaded defenses in the answer, except those relating to the plaintiff's alleged lack of standing. The failure by Mrs. Arthur to raise and/or assert each of the remaining pleaded defenses and the counterclaims in the answer 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 unsupported affirmative defenses and the counterclaims contained in the answer are thus dismissed.

In response to the motion, Mrs. Arthur has not shown any valid basis to argue that the subject note and mortgage produced herein by plaintiff were not the actual loan instruments executed by her (*see*, ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). In any event, Mrs. Arthur ratified the mortgage and note by making payments for several years prior to the default in payment (*see*, ***Citibank, N.A. v Silverman***, 84 AD3d 425, 922 NYS2d 56 [1st Dept 2011]).

Mrs. Arthur's speculation and conclusory allegations questioning the intent of the parties to the allonge and assignment, which appear aimed at obscuring the issue of nonpayment, are also without merit (*see*, ***Finance v Abundant Life Church, U.P.C., Inc.***, 122 AD3d 918, 919, 998 NYS2d 387 [2d Dept

2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]; *see also*, ***Wells Fargo Bank, NA v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]; ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]). The plaintiff demonstrated its standing, as indicated above, by producing documentation, inter alia, in the form of a written assignment, which established that it was the owner and holder of the subject mortgage and note prior to commencement (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). The court finds that none of Mrs. Arthur's allegations give rise to a question of fact as to the plaintiff's standing (*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]). Mrs. Arthur, therefore, failed to establish the merit of the standing defense in the answer, or the merits of the branch of the cross motion for dismissal of this action based upon that defense. Accordingly, the affirmative defenses set forth in the answer, which assert the lack of standing and/or the lack of capacity to sue, are dismissed in their entirety.

To the extent that Mrs. Arthur's asserts that she is entitled to a loan modification, a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see*, ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). The mere fact that the plaintiff refused to consider a reduction in principal or interest rate, does not establish that it was not negotiating in good faith (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638). Further, "[n]othing in CPLR 3408 requires [the] plaintiff to make the exact offer desired by [Mrs. Arthur], and [the] plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638; *see*, ***Bank of Am., N.A. v Lucido***, 114 AD3d 714, *supra*).

Mrs. Arthur's request for an additional settlement conference is denied. Mrs. Arthur failed to demonstrate the merits of this argument by submitting any evidence of a pending loan modification (*see*, ***Deutsche Bank Natl. Trust Co. v. Kent***, 2013 NY Misc LEXIS 4921, 2013 WL 5823056, 2013 NY Slip Op 32661 [U] [Sup Ct, Suffolk County 2013]). Furthermore, Mrs. Arthur's allegation that she was "never given a [s]ettlement [c]onference," which is repeated, in sum and substance, in counsel's memorandum of law, and clearly contradicted by the record, is patently frivolous (*see*, Uniform Rules Trial Cts [22 NYCRR] § 130-1.1). As indicated above, there has been compliance with CPLR 3408, and no further conference is required under any statute, law or rule.

Contrary to Mrs. Arthur's contentions, the instant motion for summary judgment made by plaintiff imposed an automatic stay of discovery (*see*, CPLR 3214 [b]; ***Schiff v Sallah Law Firm, P.C.***, 128 AD3d 668, 7 NYS3d 587 [2d Dept 2015]). In any event, Mrs. Arthur failed to demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see*, CPLR 3212 [f]; ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; ***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]; ***Loancare, a Div. of FNF Servicing, Inc. v Fox***, 2015 NY Misc LEXIS 27, 2015 WL 162359, 2015 NY Slip Op 30005 [U] [Sup Ct, Suffolk County

2015]). 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]). The court has considered Mrs. Arthur's remaining contentions and finds that they are entirely without merit.

Notably, Mrs. Arthur did not deny having received the loan proceeds and having defaulted on the subject loan payments in her opposing and moving papers (*see*, ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also*, ***Stern v Stern***, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). Further, the memorandum of law submitted by Mrs. Arthur's attorney is without probative value and insufficient to defeat the plaintiff's 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 [1st Dept 2005]; *see also*, ***US Natl. Bank Assn. v Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

Thus, even when considered in the light favorable to Mrs. Arthur, her opposing papers and moving papers are insufficient to raise any genuine question of fact requiring a trial on the merits of plaintiff's claims for foreclosure and sale (*see*, ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS3d 619 [2d Dept 2015]; ***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]). Mrs. Arthur's opposition and moving papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [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 Mrs. Arthur (*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, Mrs. Arthur's answer and affirmative defenses are stricken; the counterclaims asserted in the answer are dismissed in their entirety.

By its submissions, the plaintiff also demonstrated its entitlement to an amendment of the complaint and a correction of certain alleged scrivener's errors therein, and it appearing that the substantial right of any party to this action has not been prejudiced (*see*, CPLR 2001; ***Household Fin. Realty Corp. v Emanuel***, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; ***Rennert Diana & Co. v Kin Chevrolet, Inc.***, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also*, ***Serena Constr. Corp. v Valley Drywall Serv.***, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). Accordingly, pursuant to CPLR 2001 and 3025 (c), paragraphs "5" and "10" of the complaint is amended nunc pro tunc to November 18, 2010 to change Hugh G. Arthur III to Hugh G. Arthur II. The lis pendens re-filed on October 25, 2013 is also amended nunc pro tunc to change Hugh G. Arthur III to Hugh G. Arthur II (*see*, ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]).

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by changing Hugh G. Arthur III to Hugh G. Arthur II, and substituting Tammie Grandville for the fictitious defendants "John Does" and "Jane Does" 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, 943 NYS2d 551 [2d Dept 2012]; ***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, Hugh G. Arthur II, Colorado Capital Investments Inc., Commissioners of the State Insurance Fund, FIA Card Services NA, JST Capital Inc. New York Anesthesia Associates, People of the State of New York and Slomins Inc. as well as the newly substituted defendant, Tammie Grandville (*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, *supra*; ***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 default in answering of the above-noted remaining defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against Mrs. Arthur 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.

Accordingly, the motion by the plaintiff is granted, and the motion by Mrs. Arthur, which has been rendered academic, is denied as moot and because it is without merit set forth above.

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

Dated: February 1, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION