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MEMO DECISION & ORDER

INDEX No. 13/12383

ORIGINAL

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: 1/20/15
SUBMIT DATE: 3/8/16
Mot. Seq. # 001 - MG
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WELLS FARGO BANK, NA,

Plaintiff,

-against-

MEGAN BROOKS, ELEFTHERIOS KOURTIS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, "JOHN DOES" and "JANE 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.

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Upon the following papers numbered 1 to 10 read on this motion by plaintiff for summary judgment, default judgments and the appointment of a referee to compute, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 7-9; Answering papers 4-6; Reply papers ___; Other 7-8 (memorandum); 9-10 (memorandum); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the plaintiff for an order awarding it summary judgment against answering defendant, Megan Brooks, and default judgments against the remaining defendants joined by service of process, and deleting the unknown defendants together with a caption amendment to reflect these changes and an order appointing a referee to compute, is considered under CPLR 3212, 3215, 1003 and RPAPL § 1321 and is granted.

Plaintiff commenced this action to foreclose the lien of a mortgage given to the plaintiff by the individual named defendants to secure a mortgage note, which was subsequently modified by agreement dated June 11, 2012, likewise given to the plaintiff in the new amount of $411,503.81. The loan went into default and such default remains without cure. Defendant, Megan Brooks, appeared herein by service of an answer in which she asserts eighteen affirmative defenses, including a lack of standing on the part of the plaintiff, and four counterclaims for recovery of damages. All other defendants served with process defaulted in answering.

By the instant motion (#001), the plaintiff seeks summary judgment against answering defendant, Megan Brooks, default judgments against the remaining defendants joined by service of process, an order deleting the remaining unknown defendants together with a caption amendment to reflect these changes and an order appointing a referee to compute. Defendant, Megan Brooks, opposes in papers in which she only challenges the standing of plaintiff, thereby abandoning all remaining affirmative defenses and counterclaims.

For the reasons stated below, the plaintiff's motion is granted.

In a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*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 if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Loancare v Firshing***, 130 AD3d 787, *supra*; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, ***Wells Fargo Bank, NA v Parker***, 125 AD3d 848, 5 NYS3d 130 [2d Dept 2015]; ***U.S. Bank NA v Guy***, 125 AD3d 845, 5 NYS3d 116 [2015]).

In cases wherein the plaintiff is the original lender and its standing is challenged by the interposition of a due and timely standing defense, the plaintiff need not establish its ownership or holder status of the note and mortgage via a written assignment or physical delivery to it or to any of its custodial agents (*see* ***Wells Fargo bank, N.A. v Ali***, 122 AD3d 726, *supra*). Instead, the

plaintiff need only establish that it alone, or in conjunction with a predecessor by merger or acquisition or a custodial agent, has maintained possession of the subject note and mortgage since the origination of the loan and that such possession continued through the commencement date of the foreclosure action (*see PNC Bank, Natl. Ass'n v Klein*, 125 AD3d 953, 5 NYS3d 439 [2d Dept 2015]; *Wells Fargo Bank, N.A, v Hudson*, 98 AD3d 576, 949 NYS2d 703 [2d Dept 2012]; *Bank of America, N.A. O'Donnell*, 47 Misc3d 1210[A],16 NYS3d 791 [Sup. Ct. Suffolk County 2015]; *see also Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376, 8 NYS3d 669, 671 [3d Dept 2015]).

Here, the moving papers of the plaintiff, who was the original lender of the monies loaned and secured by the subject mortgage, demonstrated, prima facie, its entitlement to the dismissal of the counterclaims and the affirmative defenses asserted in the answer served by defendant, Megan Brooks, including her standing defense as lacking in merit (*see Aurora Loan Serv., LLC v Taylor*, 25 NY3d 355, *supra*; *Jessabell Realty Corp. v Gonzalez* 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]). The moving papers further established, prima facie, the plaintiff's entitlement to summary judgment on its complaint against this answering defendant (*see* CPLR 3212, 3215, 1003 and RPAPL §1321; *see also Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, *supra*; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, *supra*; *Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, *supra*; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, *supra*; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [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 Jessabell Realty Corp. v Gonzalez* 117 AD3d 908, *supra; Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). 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 only defense asserted by the opposition papers is the pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. However, this defense is without merit since there is no dispute that the plaintiff was the original lender and its affidavit of merit provides due and sufficient proof that it continually possessed the subject note since May 10, 2007. The defendant's challenges to this affidavit and the other proof adduced by the plaintiff are unavailing as the court finds that the plaintiff's submissions were compliant with CPLR 3212 (*see* CPLR 4518[a]; *Citimortgage, Inc. v Espinal*, 134 AD3d, 2015 WL 8828613 [2d Dept 2015]). That an employee of the plaintiff or of its loan servicer may testify as to the elements of a foreclosing plaintiff's claim is clear (*see Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 16 NYS3d 459 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 73, 995 NYS2d 118 [2d Dept 2014]; *HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *Aames Capital Corp. v Ford*, 294 AD2d 134, 740 NYS2d 880 [2d Dept 2002]). Such testimony may be based upon the personal knowledge of the affiant, his or her review of the business records of the plaintiff, its servicer or assignee or both (*see Landmark Capital Inv., Inc. v Li-Shan Wang*, 94 ADd3d 418, 941 NYS2d 144 [1st Dept 2012]).

The plaintiff is thus entitled summary judgment dismissing the standing defense asserted in the answer due to its lack of merit and the remaining affirmative defenses and counterclaims likewise asserted due to their abandonment (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, *supra*).

The Court notes the rationale of standing was raised in an affirmative defense asserted in the answer served by defendant, Megan Brooks, who thereby avoided the waiver issue that arises upon a failure to assert the defenses in a timely pre-answer motion or answer duly served. However, the defense of standing may be waived by a mortgagor who negotiates and executes a loan modification agreement with the foreclosing plaintiff to whom the subject mortgage note and mortgage were transferred prior to the commencement of a foreclosure action. The execution of such agreement, coupled with the defendant's payment of the monthly amounts due under the terms of the modification agreement, has been held to effect a 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 such note and mortgage under other theories (*see IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.*, 84 AD3d 637, 923 NYS2d 508 [1st Dept 2011]; *see also Confidential Lending, LLC v Nurse*, 120 AD3d 739, 992 NYS2d 77 [2d Dept 2014]; *Moweta v Citywide Home Improvements of Queens, Inc.*, 267 AD2d 438, 700 NYS2d 845 [2d Dept 1999]; *Verela v Citrus*

Lake Dev., Inc., 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]; ***Paramount Ins. Co. v Brown***, 205 AD2d 464, 613 NYS2d 910 [1st Dept 1994]). The Court finds that the same rationale is applicable here and the standing defense asserted by defendant, Megan Brooks, may not be successfully invoked against the plaintiff with whom defendant, Megan Brooks, successfully negotiated a loan modification agreement on June 11, 2012 and made payments thereon in accordance with the modified loan terms prior to defaulting thereunder.

The court thus finds that the plaintiff is entitled to summary judgment on its complaint and dismissing the affirmative defenses and counterclaims set forth in the answer of defendant, Megan Brooks. Those portions of this motion wherein the plaintiff seeks such relief are thus granted.

Those portions of the instant motion wherein the plaintiff seeks an order deleting the unknown defendants listed in the caption and an amendment of the caption to reflect same are granted.

The moving papers further established the default in answering on the part of the remaining defendants, none whom served answers to the plaintiff's complaint (*see* ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***U.S. Bank, N.A. v. Razon***, 115 AD3d 739, 740, 981 NYS2d 571 [2d Dept 2014]). Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a 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; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994];***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***LaSalle Bank, NA v Pace***, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

Proposed Order of Reference, as modified by the court to reflect the terms of this memo decision and order, has been marked signed.

DATED: 3/25/16

THOMAS F. WHELAN, J.S.C.