Wells Fargo Bank, N.A. v Del Carpio
2016 NY Slip Op 31880(U)
August 3, 2016
Supreme Court, Suffolk County
Docket Number: 13-27684
Judge: Denise F. Molia
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-27684

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-13-15 (001)
MOTION DATE 3-6-15 (002)
ADJ. DATE 4-24-15 (001)
Mot. Seq. # 001 -MotD
Mot. Seq. # 002 - XMD

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WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR SECURITIZED ASSET BACK RECEIVABLES LLC 2005-FR5 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-FR-5,

Plaintiff,

- against -

MOISES DEL CARPIO A/K/A MOISES A. DEL CARPIO, ALFREDO CASAS, TOWN SUPERVISOR, TOWN OF BABYLON, "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.

---X

GROSS POLOWY, LLC
Attorney for Plaintiff
1775 Wehrle Drive, Suite 100
Williamsville, New York 14221

PAOLA D. VERA, ESQ.
Attorney for Defendant
Mosises Del Carpio
a/k/a Moises A. Del Carpio
40-47 75th Street, 2nd Floor
Elmhurst, New York 11373

ALFREDO CASAS
Defendant
14 Mohawk Drive
North Babylon, NY 11703

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated January 9, 2015, and supporting papers, (including Memorandum of Law dated January 9, 2015; (2) Notice of Cross Motion by the defendant Moises Del Carpio, dated February 27, 2015, and supporting papers; (3) Affirmation in Opposition and reply by the plaintiff, dated April 17, 2015, and supporting papers; (4) Other Stipulations To Adjourn; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (001) by the plaintiff, and the motion (002) by the defendant Moises Del Carpio, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided herewith; and it is

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ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Moises Del Carpio and striking his 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 is granted solely to the extent indicated below, otherwise denied; and it is

ORDERED that this motion (002) by the defendant Moises Del Carpio for, inter alia, an order: (1) pursuant to CPLR 3211 dismissing the complaint insofar as asserted against him, ostensibly, on the grounds that: (a) the plaintiff lacks standing; and/or (b) the plaintiff failed to demonstrate proof of service of the 90-day pre-foreclosure notice; or, in the alternative, (2) pursuant to CPLR 3025 (b) for leave to interpose an amended answer asserting counterclaims for certain declaratory relief quieting title and/or for damages on the grounds of slander of title; (3) pursuant to CPLR 3408 for a hearing on the issue of whether the plaintiff engaged in a good-faith attempt to modify the subject mortgage loan; and (4) for sanctions is denied in its entirety; and it is

ORDERED that plaintiff shall serve a copy of this order 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 The Donado Law Firm, P.C., counsel for the defendant Moises Del Carpio, 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 thereafter promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the defendant Moises Del Carpio shall serve a copy of this order with notice of entry upon Gross Polowy, LLC, 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 thereafter promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a modified mortgage on the real property known 1680 North Gardiner Drive, Bay Shore, New York 11706 ("the property"). On May 27, 2005, Moises Del Carpio ("the defendant mortgagor") executed a note in favor of Fremont Investment & Loan ("the lender") in the principal sum of $276,250.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated May 27, 2005 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") acted solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was subsequently duly recorded in the Office of the Suffolk County Clerk on July 13, 2005.

Pursuant to a loan modification agreement made March 24, 2008 ("the modification agreement") between the defendant mortgagor and Countrywide Home Loans Servicing LP ("Countrywide"), the unpaid principal due and owing under the mortgage was increased to $284,622.13. The modification agreement includes a recitation that it amends and supplements the mortgage and note relating to the property. By way of, inter alia, an undated endorsement with physical delivery, the note was allegedly transferred to Wells

Fargo Bank, N.A. as Trustee for Securitized Asset Backed Receivables LLC 2005-FR5 Mortgage Pass-Through Certificates, Series 2005-FR5 ("the plaintiff") prior to commencement. The transfer of the note to the plaintiff was memorialized by an assignment of the mortgage and the note as well as a correction assignment of the mortgage both executed on May 13, 2009, and subsequently duly recorded in the Office of the Suffolk County Clerk on October 13, 2010.

The defendant mortgagor allegedly defaulted on the mortgage, as modified, by failing to make the monthly payment of principal and interest due on or about July 1, 2008, and each month thereafter. Parenthetically, by indenture which was recorded on July 28, 2008, the defendant mortgagor transferred an ownership interest in the property to himself and the defendant Alfredo Casas ("Casas"), ostensibly, without any consideration and without the lender's prior written permission (*see*, Mtge. § "18").

After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on October 15, 2013. Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on November 5, 2013. By his answer, the defendant mortgagor admits some of the allegations set forth in the complaint, denies other allegations therein and asserts fifteen affirmative defenses, alleging, among other things, the plaintiff's lack of standing and failure to comply with all conditions precedent to acceleration. The remaining defendants have not answered the complaint and, thus, all are in default.

By way of background, a settlement conference was held before the foreclosure conference part on April 21, 2014, and continued on July 10, 2014. A representative of the plaintiff attended and participated in the settlement conference. On the last 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.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor and striking his 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.

The defendant mortgagor opposes the plaintiff's motion and also moves for, inter alia, an order: (1) pursuant to CPLR 3211 dismissing the complaint insofar as asserted against him, ostensibly, on the grounds that: (a) the plaintiff lacks standing; and/or (b) the plaintiff failed to demonstrate proof of service of the 90-day pre-foreclosure notice; or, in the alternative, (2) pursuant to CPLR 3025 (b) for leave to interpose an amended answer asserting counterclaims for certain declaratory relief quieting title and/or for damages on the grounds of slander of title; (3) pursuant to CPLR 3408 for a hearing on the issue of whether the plaintiff engaged in a good-faith attempt to modify the subject mortgage loan; and (4) for sanctions is denied in its entirety. In response, opposition and reply papers have been filed.

Initially, the court notes that the defendant mortgagor's notice of motion and moving papers are defective to the extent that the grounds for the various relief requested is not set forth therein (*see*, CPLR 2214 [a]; CPLR 3212 [b]). To the extent that the requested relief is supported by the affirmation of counsel

and/or the affidavit from the defendant mortgagor, it has been considered. The court also notes that the defendant mortgagor'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 February 13, 2015, however, the defendant mortgagor's motion was not made returnable until March 6, 2015. Thereafter, by two stipulations, the moving parties agreed to adjourn the plaintiff's motion to March 6 and then April 24, 2015. In the interest of judicial economy, these motions are thus consolidated for the purposes of this determination.

The court turns first to the motion made by the defendant mortgagor. To the extent that the defendant mortgagor's motion is predicated upon dismissal pursuant to CPLR 3211 subdivision (a) (3), it was not timely interposed because it was made after joinder of issue and service of the answer cut off the defendants mortgagor's right to make a CPLR 3211 motion to dismiss on this ground (*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]; ***Cremosa 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 [1st Dept 1987]). Therefore, the defendant mortgagor's post-answer demand for dismissal of the complaint, to the extent it is premised upon the ground embraced by CPLR 3211 subdivision (a) (3), is untimely by approximately sixteen months and will not be considered as an independent basis for dismissal.

Even though CPLR 3211 (c) empowers the court to treat a motion to dismiss 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]; *cf.*, ***Bank of N.Y. Mellon v Green***, 132 AD3d 706, 17 NYS3d 651 [2d Dept 2015]). While a defense asserting the lack of standing 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, NA v Reed***, 38 Misc3d 1206 [A], 967 NYS2d 870 [Sup Ct, Suffolk County 2013]).

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

To the extent that the defendant mortgagor's 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, to the extent that the motion is made pursuant to CPLR 3211 (a) (7), it constitutes nothing more than a recasting of the moving defendants' standing defense, which is untimely as a ground for dismissal, as indicated above (*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., NA v Simon***, 47 Misc3d 1202 [A], 15 NYS3d 710 [Sup Ct, Suffolk County 2015]). In any event, 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 mortgagor, because the same set forth the existence of, and the defendant mortgagor's execution and delivery of the note and mortgage, and the 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*, ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; *see generally*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). More specifically, in the complaint, the plaintiff alleges that it is the owner and/or holder of the subject note and mortgage, or has been delegated the authority to institute a mortgage foreclosure action by the owner and/or holder of the subject mortgage and note. Additionally, the allegations by the plaintiff's representative concerning the particulars of this action and the plaintiff's possession of the note, contained in the affidavit in support, augment the complaint and clearly state a cause of action for foreclosure and sale.

To the extent that the defendant mortgagor moves, ostensibly, pursuant to CPLR 3124 for an order compelling the production of unspecified "discovery" ostensibly related to the plaintiff's standing, the same is denied as procedurally and substantively deficient because such is not supported by an affirmation of good-faith effort to resolve the issues raised herein (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]; ***Ponce v Miao Ling Liu***, 123 AD3d 787, 996 NYS2d 548 [2d Dept 2014]; ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]; ***Zorn v Bottino***, 18 AD3d 545, 794 NYS2d 659 [2d Dept 2005]). Additionally, this branch of the motion is not supported by a compliance conference order directing the requested discovery (*see*, ***HSBC Bank, USA, N.A. v Arias***, 112 AD3d 785, 977 NYS2d 323 [2d Dept 2013]; ***Oller v Liberty Lines Tr., Inc.***, 111 AD3d 903, 975 NYS2d 768 [2d Dept 2013]). In any event, this branch of the motion is denied as academic for the reasons set forth below.

The court now turns to the issue of standing. 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]). 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 [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]).

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, *supra* at 911 [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 its standing as holder of the endorsed note on the date of 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]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). In support of the motion, the plaintiff has submitted, inter alia, an affidavit from Ms. Olumide Jones, a Document Execution Specialist from Nationstar Mortgage, LLC, the plaintiff's servicer. In her affidavit, Ms. Jones alleges, inter alia, that the original note endorsed to the plaintiff was transferred to it prior to commencement of this action, and that the plaintiff continues to hold the original note. The plaintiff also submitted, inter alia, a recorded assignment of the mortgage and note (as well as the modification agreement) predating the commencement of this action, which includes a reference to the mortgage note and/or obligation (*see*, ***U.S. Bank N.A. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***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]). More specifically, the assignment to the plaintiff includes the mortgage "together with the indebtedness or obligation described in said instrument, and the monies due and to grow thereon with interest[]." Thus, the assignment is sufficient to transfer the note and the modification agreement.

Additionally, the documentary evidence submitted by the plaintiff includes, among other things, the note transferred via an undated endorsement to the plaintiff (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). 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 mortgage which follows 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.

Rejected as unmeritorious are the defendant mortgagor's challenges to the sufficiency of Jones' affidavit as it concerns the plaintiff's standing. Contrary to the defendant mortgagor's contentions, the affidavit of the plaintiff's representative is legally sufficient and comports with the requirements of CPLR 3212 (*see*, ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; ***Fleet Bank v Pine Knoll Corp.***, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also*, ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *cf.*, ***Citibank, N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). The defendant mortgagor's assertion that the affidavit is hearsay because the affiant did not personally service her account is also

unavailing in light of the affiant's unchallenged assertion of personal knowledge of the default in payment (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d513 [3d Dept 2007]). In her affidavit, the plaintiff's affiant alleges that she reviewed the records and documents kept by the plaintiff related to this action, and represents that they were kept in the ordinary course of business and made at or near the time of the transactions or events by or from a person with personal knowledge. The plaintiff's affiant further alleges that the lender's records that relate to the subject loan, which were reviewed and relied upon for the statements in her affidavit, include a copy of recorded mortgage and the original note. Accordingly, the tenth affirmative defense is stricken.

The defendant has also not demonstrated any prejudice by the plaintiff's failure to furnish a certificate of conformity for the affidavit in support of the motion, which may be provided nunc pro tunc (*see*, CPLR 2001; ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Betz v Daniel Conti, Inc.***, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; ***Smith v Allstate Ins. Co.***, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). Additionally, an examination of the out-of-state affidavit submitted by the plaintiff shows that it substantially conforms to the statutory requirements of this State. In any event, the defendant mortgagor has not demonstrated any prejudice by the submission of the affidavit without a certificate of conformity.

The court next turns to the issue of the plaintiff's compliance with certain conditions precedent to commencement of this action. In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language, and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Initially, it is noted that, while the defendant mortgagor did not specifically raise non-compliance with RPAPL 1304 as an affirmative defense in the answer, he raises this issue in opposition to the plaintiff's motion and in support of his own motion. Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on or after January 14, 2010, the 90-day notice requirement set forth in the statute is applicable (*see*, RPAPL §1304; Laws 2008, ch 472, § 2, eff Sept 1, 2008, as amended by Laws 2009, ch 507, § 1-a, eff Jan 14, 2010). Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with

RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law because it failed to supply adequate evidentiary proof of compliance with RPAPL § 1304 (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). The plaintiff submitted neither affidavits of service of the 90-day notice upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

Under the facts presented, the statements set forth in the affidavit of Ms. Jones regarding the 90-day pre-foreclosure notice, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank N.A. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). Although Ms. Jones alleges that the subject notices were mailed on June 24, 2013, she did not set forth sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notices; nor did she identify the individuals who allegedly did so. Further, it is noted that Ms. Jones's affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*).

In any event, the plaintiff submitted conflicting proof as to whether the subject property is the defendant mortgagor's residence and whether the mandates of RPAPL 1304 apply to this action (*see*, ***Citimortgage, Inc. v Simon***, 137 AD3d 1190, 28 NYS3d 454 [2d Dept 2016]; ***Richlew Real Estate Venture v Grant***, 131AD3d 1223, 17 NYS3d 475 [2d Dept 2015]; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]; *see also*, ***US Bank N.A. v Kostanovic***, 2015 NY Misc LEXIS 685, 2015 NY Slip Op 50307 [U] [Sup Ct, Queens County 2015]). In support of the motion, the plaintiff submitted, inter alia, an affidavit of John J. McGuigan and the affidavit of Andrea L. Schrader. In his affidavit, Mr. McGuigan alleges, in relevant part, that he served the defendant mortgagor by, inter alia, delivery of the summons and complaint upon the defendant mortgagor's sister, Gladys Alcarrac, at the defendant mortgagor's place of residence, 14 Mohawk Drive, North Babylon, New York 11703 ("the North Babylon address"). In her affidavit, Ms. Schrader alleges, inter alia, that she mailed a copy of the summons in this action to the defendant mortgagor by first class mail to him at the North Babylon address. Such affidavits, by themselves, are insufficient to demonstrate that the defendant mortgagor did not reside at the property during the relevant time period for the purposes of RPAPL § 1304. Additionally, the defendant mortgagor's address listed in the mortgage is the property (Mtge. § "B"), not the North Babylon address. If the defendant mortgagor did not reside or intend to reside at the property during the relevant time herein, then, in that event, the mandates of RPAPL §1304 would not apply herein, thus, raising additional triable issues of fact (*see*, RPAPL §1304 [5]).

The defendant mortgagor, however, has not established his entitlement to dismissal of the complaint on the plaintiff's alleged failure to comply with the mandates of section 1304 of the Real Property Actions and Proceedings Law (*see*, ***TD Bank, N.A. v Leroy***, 121 AD3d 1256, 995 NYS2d 625 [3d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]). In this case, the defendant mortgagor's motion is unsupported by proof in evidentiary form demonstrating that the plaintiff did not send him the 90-day notices, or demonstrating that the property was his "principle dwelling" during the relevant time period. As the moving party, the defendant mortgagor needed to affirmatively demonstrate that the pre-condition mandated by RPAPL §1304, if applicable, was not satisfied. Indeed, "[a] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***Velasquez v Gomez***, 44 AD3d 649, 650-651, 843 NYS2d 368 [2d Dept 2007], quoting ***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]).

In the complaint, the plaintiff alleged that it complied with the provisions of RPAPL § 1304. Further, as noted above, the plaintiff's representative alleged that the plaintiff mailed the 90-day notices by regular and certified mail to the defendant mortgagor at his last known address and to the property address in a separate envelope from any other mailing pursuant to the mandates of RPAPL § 1304; however, the plaintiff also submitted other evidence that the property may not be owner-occupied. Having failed to submit evidence which disproved either of these allegations, the defendant mortgagor failed to satisfy his initial burden on this branch of his motion (*see*, ***Citimortgage, Inc. v Simon***, 137 AD3d 1190, *supra*; ***Richlew Real Estate Venture v Grant***, 131AD3d 1223, *supra*; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

The plaintiff also failed to demonstrate that it complied with the condition precedent contained in the mortgage, which required that it provide the defendant mortgagor with notice of default prior to

demanding payment of the loan in full (*see*, ***Nationstar Mtge., LLC v Dimura***, 127 AD3d 1152, 7 NYS3d 573 [2d Dept 2015]; ***HSBC Mtge. Corporation (USA) v Gerber***, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v MacPherson***, 122 AD3d 896, 998 NYS2d 394 [2d Dept 2014]; ***Indymac Bank, F.S.B. v Kamen***, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]). The unsubstantiated and conclusory statements in the affidavit of the plaintiff's representative that "a 30-day letter was mailed to [the defendant mortgagor] on August 4, 2008, which letter advised [the defendant mortgagor] of the default[]," even when combined with a copies of the notice of default, did not establish that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage (*see*, ***GMAC Mtge., LLC v Bell***, 128 AD3d 772, 11 NYS3d 73 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Eisler***, 118 AD3d 982, 988 NYS2d 682 [2d Dept 2014]; *cf.*, ***JPMorgan Chase Bank v Kang***, 2015 NY Misc LEXIS 1953, 2015 NY Slip Op 30955 [U] [Sup Ct, Queens County 2015] [affidavit of merit of plaintiff's "Legal Specialist III" sufficiently detailed proof of mailing of the default notice, by indicating that she had knowledge of and has reviewed business records, which were maintained in the course of the plaintiff's regularly conducted business activities, and said records included proof of mailing documentation obtained from the United States Post Office at or near the time of mailing was made]). In this case, the plaintiff's officer, did not allege sufficient facts as to how compliance with the default notice provisions in the mortgage were accomplished; nor did she identify the individual who allegedly did so (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, *supra*; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, *supra*). More specifically, the affiant did not give any indication that she is familiar with the standard mailing practices or procedures of the entity alleged to have sent the notices, and that those practices or procedures were followed in this instance. The defendant mortgagor, however, also failed to submit evidence which disproved the mailing of the 30-day default notice to him. Thus, the defendant mortgagor is not entitled to dismissal of the complaint.

The branch of the defendant mortgagor's motion for, inter alia, an order pursuant to CPLR 3025 (b) for leave to interpose an amended answer asserting counterclaims for certain declaratory relief quieting title and/or for damages on the grounds of slander of title, has been rendered academic and is denied as moot (*see generally*, ***Lighting Horizons, Inc. v E. A. Kahn & Co.***, 120 AD2d 648, 502 NYS2d 398 [2d Dept 1986]). When a motion for summary judgment is granted, a cross motion to amend an answer is academic when that cross motion seeks a determination that could not have any practical effect on the existing controversy (*see generally*, ***Village Bank v Wild Oaks Holding***, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; ***First N. Mortgagee Corp. v Yatrakis***, 154 AD2d 433, 546 NYS2d 9 [2d Dept 1989]).

In this case, the documentary evidence submitted by the plaintiff conclusively establishes the validity of the subject mortgage and note, and the defendant mortgagor is not entitled to the prospective relief demanded in the proposed amended counterclaims (*see*, ***Jahan v U.S. Bank N.A.***, 127 AD3d 926, 9 NYS3d 65 [2d Dept 2015]; ***Acocella v Bank of N.Y. Mellon***, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]; ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]). In any event, the defendant mortgagor has not advanced any valid arguments in support of the proposed amendments (*see generally*, ***Tarantini v Russo Realty Corp.***, 273 AD2d 458, 712 NYS2d 358 [2d Dept 2000]; ***Alejandro v Riportella***, 250 AD2d 556, 672 NYS2d 412 [2d Dept 1998]; ***Flushing Preferred Funding Corp. v Patricola Realty Corp.***, 36 Misc3d 1240 [A], 964 NYS2d 58 [Sup Ct, Suffolk County 2012]; *see also*, ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]). Nor has the defendant mortgagor shown any valid basis to argue that the note and mortgage produced herein by the plaintiff were

not the actual loan instruments executed by him (*see*, ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). In fact, the defendant mortgagor ratified the mortgage and note by making payments for several years prior to the default in payment and also by executing the loan modification (*see*, ***Citibank, N.A. v Silverman***, 84 AD3d 425, 922 NYS2d 56 [1st Dept 2011]).

The relief requested herein by the defendant mortgagor for costs and attorneys fees due to the plaintiff's action by enforcing available remedies in this action is denied as entirely without merit (*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]). Even if it were demonstrated that the plaintiff lacked standing in a prior discontinued action, Wells Fargo Bank, N.A. v Del Carpio, et. al., commenced under Index No.: 019303-2009, Supreme Court, Suffolk County, the absence of standing on the part of a plaintiff is not an actionable wrong, as it does not constitute bad faith, frivolous, unconscionable, fraudulent or oppressive conduct (*see*, ***U.S. Bank, N.A. v Reed***, 38 Misc3d 1206 [A], 2013 NY Misc LEXIS 6, 2013 WL 49817, 2013 NY Slip Op 50004 [U] [Sup Ct, Suffolk County 2013, slip op, at 5]; *see also*, ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]). Further, while the plaintiff failed to disclose the specifics of the prior action in the instant complaint, alleging only that no prior action was "completed," the actions of the plaintiff and the plaintiff's counsel do not rise to the level of frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (*see*, ***Gregoriades v Nann Corp.***, 285 AD2d 449, 726 NYS2d 729 [2d Dept 2001]; ***Musumeci v Musumeci***, 267 AD2d 364, 700 NYS2d 71 [2d Dept 1999]). Therefore, under the circumstances herein, a frivolous conduct sanction hearing is not warranted.

Contrary to the defendant mortgagor'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, the defendant mortgagor 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 reaches a different conclusion with respect to the remaining affirmative defenses asserted in the answer. The plaintiff submitted sufficient proof that the remainder of the defendant mortgagor's affirmative defenses, all of which are unsupported, 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*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016 (b) requires that the circumstances of fraud be "stated

in detail," including specific dates and items]; ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; ***Scarano v Scarano***, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]). Furthermore, "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (***Home Sav. of Am., FSB v Isaacson***, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]). Moreover, non-parties to a lender's pooling and servicing agreement lack 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]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses contained in the answer, except as to certain conditions precedent and the plaintiff's alleged lack of standing. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses 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, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the defendant mortgagor's unsupported affirmative defenses are thus stricken. The tenth affirmative defense relating to the plaintiff's standing is also stricken.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Alex Flores and Wilma Guia for the fictitious defendants, "JOHN DOE 1-2," and by excising the remaining fictitious defendants, "JOHN DOE 3-25," is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***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 newly identified defendants, Alex Flores and Wilma Guia, and the remaining defendants, Casas, Town Supervisor Town of Babylon (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA 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 default in answering of the above-noted remaining defendants is fixed and determined.

The court has considered all other demands for relief interposed by the parties on these motions and denies the same because it finds that such demands are entirely without merit. Therefore, the trial of this action shall be limited to the issue of the plaintiff's compliance with the service requirements of the 90-day pre-foreclosure notice pursuant to RPAPL 1304 and the 30-day acceleration notice (*see*, CPLR 3212 [g]).

Accordingly, the motion by the plaintiff for summary judgment is determined as indicated above. All of the affirmative defenses asserted in the answer, except for the eighth affirmative defense, are stricken.

The defendant mortgagor's motion for, inter alia, an order dismissing the complaint insofar as asserted against him is denied in its entirety.

In view of the foregoing the proposed order submitted by the plaintiff has been marked "not signed."

Dated: 8·3·16

Hon. DENISE F. MOLIA, A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**