SHORT FORM ORDER

INDEX NO. 19879/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 2/18/2016
Motion Seq: 002 : MotD & 003: MD

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HSBC BANK USA, AS TRUSTEE FOR DALT
2007-1 3232 Newmark Drive
Miamisburg, OH 45342

Plaintiff,

- against -

PELAYO SERAFIN, VICTOR SERAFIN, NICOLE TORRES, CSGA LLC, LAUREN MARZLOCK, MRC RECEIVABLES CORP., THE BIG M CORPORATION D/B/A MANDEE,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated January 7, 2016, and supporting papers; (2) Notice of Cross Motion by the answering defendants Pelayo Serafin and Victor Serafin, dated March 14, 2016, and supporting papers; (3) Affirmation in Opposition/Reply by the plaintiff, dated April 8, 2016, and supporting papers; (4) Other: Stipulations dated February 29, and March 23, 2016; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

***ORDERED*** that this motion (002) by the plaintiff, and the motion (003) by the defendants Pelayo Serafin and Victor Serafin, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided herewith; and it is

***ORDERED*** that the motion (002) by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendants Pelayo Serafin and Victor Serafin, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted in part and denied in part in accordance herewith; and it is

***ORDERED*** that so much of the plaintiff's motion for an order striking the affirmative defenses in the defendants' answer is granted; and it is

***ORDERED*** that the branch of the plaintiff's motion for an award of the costs of this motion is denied without prejudice, leave to renew upon proper documentation for same at the time of submission of the judgment; and it is

***ORDERED*** that pursuant to CPLR §3212(g), the court finds that the sole remaining issue of fact is whether the plaintiff was required to comply with the notice requirements of RPAPL §1304 in effect at the time this action was commenced, and if so, whether it complied therewith, and that the trial of this action shall be limited to these issues; and it is further

***ORDERED*** that a pre-trial conference shall be held in this action on **March 8, 2017 at 9:30 a.m.** at IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York 11901, at which counsel are directed to appear; and it is further

***ORDERED*** that the caption is amended by excising the fictitious "John Doe #1" to "John Doe #10" defendants, as well as the descriptive wording relating thereto; and it is

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

***ORDERED*** that the cross motion (#003) by defendants for, inter alia, an order granting leave to compel discovery, reschedule foreclosure conferences and denying plaintiff's summary judgment motion is denied; and it is further

***ORDERED*** that the moving parties shall serve a copy of this order with notice of entry upon opposing counsel pursuant to CPLR §2103 (b), and by regular mail upon all other defendants, if any, who have appeared herein and not waived further notice within thirty (30) days of the date herein, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 6 Parnet Court, Port Jefferson Station, Mew York 11776 ("the property"). On April 20, 2007, the defendant Pelayo Serafin ("the defendant obligor") executed a fixed-rate note in favor of National City Mortgage, a Division of National City Bank ("the lender") in the principal sum of $328,700.00. On April 20, 2007, the defendant obligor also executed an interest only payment period note addendum, whereby the note was modified to provide for 120 payments of interest only in the approximate sum of $2,020.14, and thereafter payments in the amount of $2,622.92. To secure said note, the defendant obligor, Victor Serafin and Nicole Torres (collectively "the defendant mortgagors") gave the lender a mortgage also dated April 20, 2007 on the property. The mortgage was recorded on May 29, 2007.

By way of, inter alia, a series of bank mergers and assignments, the subject note and mortgage were allegedly acquired by HSBC Bank USA, as Trustee for DALT 2007-1 ("the plaintiff"), prior to commencement. More specifically, by assignment executed on July 24, 2007 the lender transferred the mortgage and "all beneficial interest" thereunder to National City Mortgage Co., a subsidiary of National City Bank. The assignment was subsequently recorded on October 11, 2007. By assignment executed on May 18, 2009, National City Real Estate Services, successor to National City Mortgage, Inc., formerly known as National City Mortgage Co., transferred the mortgage and the [a]ssignor's beneficial interest under the [m]ortgage" to the plaintiff. The second assignment was recorded on June 15, 2009.

By way of further background, the lender merged with and into National City Bank effective October 1, 2008. On November 6, 2009, National City Bank merged with and into PNC Bank, National Association ("PNC").

The defendant obligor allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on August 1, 2008, and each month thereafter. After the defendant obligor allegedly failed to cure the default in payment, the plaintiff commenced an action by the filing of the lis pendens, summons and complaint on May 26, 2009.

By order dated August 8, 2013 (Spinner, J.), a prior motion by the defendants Pelayo Serafin and Victor Serafin (collectively "the Serafin defendants") to enlarge their time to answer was granted, and the Serafin defendants interposed a verified answer sworn to on November 9, 2009. By their answer, the Serafin defendants deny all of the material allegations in the complaint, and assert twelve affirmative defenses, alleging, inter alia, the plaintiff's lack of standing, unconscionable loan terms and the lack of good faith in negotiating a loan modification with them. The remaining defendants have not answered the complaint and, thus, all are in default.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR §3212 awarding summary judgment in its favor against the Serafin defendants, striking their answer and dismissing the affirmative defenses asserted 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.

The Serafin defendants oppose the plaintiff's motion and move for, inter alia, an order scheduling another foreclosure settlement conference and compelling the production of certain discovery. In addition, the Serafin defendants assert an unpleaded defense which rests upon the plaintiff's purported failure to comply with the 90-day pre-foreclosure notice provisions set forth in RPAPL §1304. An alternate demand for an order compelling the plaintiff to provide responses to the Serafin defendant's outstanding discovery requests is also advanced in their moving papers. The motion by the Serafin defendants is opposed by the plaintiff in papers which also serve as reply papers to its motion-in-chief. A reply affirmation has been submitted by the Serafin defendants. After the submission of these motions, this action was administratively transferred from the inventory of the Honorable Jeffrey Arlen Spinner, A.J.S.C. to this IAS Part 49.

At the outset, the court notes that the Serafin defendants' 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 served on January 7, 2016, and made returnable on February 18, 2016; however, the Serafin defendants' motion was served on March 14, 2016 and made returnable on March 28, 2016. By stipulation executed on February 29, 2016, the parties agreed to adjourn the plaintiff's motion to March 28, 2016, and by stipulation executed on March 23, 2016 the parties agreed to adjourn these motions to April 25, 2016. Thus, in the interest of judicial economy, the motions are consolidated for the purposes of this determination.

The court also notes that the Serafin defendants' motion is also procedurally defective to the extent that their moving papers submitted herein do not fully recite the grounds for the relief sought along with the specific provisions of the civil practice law and rules relating thereto (*see*, CPLR §2214 [a]). To the extent that the requested relief is supported by the affirmation of counsel and/or the affidavit from the Serafin defendants, it has been considered.

The court turns first to the motion-in-chief. 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]).

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, the mortgage 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, 651 NYS2d 121 [2d Dept 1996]).

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 plaintiff demonstrated that, as owner of the 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, the affidavit from Christopher Jones, an Authorized Signer of PNC, the assignments, the relevant bank merger documents and the relevant excerpts of the pooling and servicing agreement with redacted loan list. In his affidavit, Mr. Jones alleges that the plaintiff was the owner of the note by virtue of the assignment executed on May 18, 2009, 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]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]), and that National City Mortgage Co., National City Bank and PNC continued to hold and service the subject loan by virtue of various bank mergers (*see*, Banking Law § 602; ***Bank of Am., N.A. v O'Gorman***, 137 AD3d 1179, 28 NYS3d 417 [2d Dept 2016]; ***Citimortgage, Inc. v Goldberg***, 134 AD3d 880, 20 NYS3d 906 [2d Dept 2015]; ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, ***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]). Additionally, the documentary evidence submitted by the plaintiff includes, among other things, an assignment of the mortgage and the [a]ssignor's beneficial interest under the [m]ortgage" (*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]). Thus, the assignment is sufficient to transfer

the note. Such evidence demonstrates that the plaintiff is the owner of the original note and mortgage, and that National City Mortgage Co. was the holder of the note at the time of commencement by virtue of the assignments and/or the bank mergers with the originating lender. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also 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*, ***Gillman v Chase Manhattan Bank, N. A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***Bank of Am., N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law §349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***HSBC Bank USA v Picarelli***, 36 Misc3d 1218 [A], 959 NYS2d 89, *affd on other grounds by* 110 AD3d 1031, 974 NYS2d 90 [2d Dept 2013] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]; ***United Cos. Lending Corp. v Candela***, 292 AD2d 800, 740 NYS2d 543 [4th Dept 2002] [holding that the Fair Debt Collection Practices Act (FDCPA) (15 USC §1692) does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or a note]). Further, 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]), and "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*see*, ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]). Moreover, the Serafin defendants, who are non-parties to the assignments of the note and the mortgage or the trust instruments, lack standing to challenge the validity thereof (*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]; ***Rajamin v Deutsche Bank Natl. Trust Co.***, 757 F3d 79 [2d Cir 2014]; ***Kokirtsev v Wells Fargo N.A.***, 2014 US Dist LEXIS 109443, 2014 WL 3888301 [EDNY, Feb. 3, 2014, No. 12-CV-06056 (ERK/SMG)]; *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]).

To the extent that the Serafin defendants allege fraud in the inducement in their affirmative defenses, 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***, 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, the plaintiff established that the affirmative defenses, sounding in, inter alia, fraud and misrepresentation lack merit as a matter of law because the Serafin defendants failed to allege that the plaintiff or its predecessor owed them a fiduciary duty with respect to their 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*). The plaintiff also demonstrated that the terms of the subject mortgage loan were fully set forth in the loan documents, and that no deceptive act or practice occurred in this case (*see*, ***Disa Realty, Inc. v Rao***, 137 AD3d 740, 25 NYS3d 677 [2d Dept 2016]; ***Shovak v Long Is. Commercial Bank***, 50 AD3d 1118, 858 NYS2d 660 [2d Dept 2008]). Moreover, the defendant obligor cannot claim to have been misled by an inaccurate statement of income in the subject loan application because he was aware of his own income (*see*, ***Deutsche Bank Nat. Trust Co. v. Sinclair***, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]).

The court next turns to the issue of the plaintiff's compliance with certain conditions precedent to this action. To the extent that the Serafin defendants attempt to assert a defense based upon non-compliance with the default notice requirements of the mortgage, they waived such by failing to assert the same in their joint answer (*see*, CPLR 3015 [a]; 3018; ***1199 Hous. Corp. v International Fid. Ins. Co.***, 14 AD3d 383, 788 NYS2d 88 [1st Dept 2005]; ***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup Ct, Suffolk County 2013]).

With respect to the 90-day notice, failure to comply with RPAPL §1304 is not jurisdictional (***Pritchard v Curtis***, 101 AD3d 1502, 1505, 957 NYS2d 440 [3d Dept 2012]). Rather, it is a defense which may be raised at any time (***U.S. Bank N.A. v Carey***, 137 AD3d 894, 896, 28 NYS3d 68 [2d Dept 2016]). Because the notice defense remains viable during the pendency of the action it may be raised by a non-defaulting party any time prior to judgment (***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup Ct, Suffolk County 2013] [finding that the failure to comply with RPAPL §1304 gives rise to a heightened or "super" defense to the plaintiff's claim that is not subject to waiver]; *cf.*, ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015] [defendant precluded from raising RPAPL §1304 defense since he was not entitled to an order vacating his default pursuant to CPLR §5015 [a]).

For foreclosure actions commenced on or after September 1, 2008, RPAPL §1304 requires that, with regard to a "high-cost home loan," a "subprime home loan" or a "non-traditional home loan," at least 90 days before a lender or mortgage loan servicer commences legal action against the borrower, the lender or mortgage loan servicer must give the borrower a specific statutorily prescribed notice (*see*, L 2008, ch 472, § 2; *cf.*, L 2009 ch 507). In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific language and type-size requirements of the notice are set forth in RPAPL §1304 (1).

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]).

When initially enacted, RPAPL 1304 applied only to "high-cost," "subprime," and "non-traditional" home loans, terms which were defined in subdivision (5) (*see*, L 2008, ch 472, § 2; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]; ***Wilmington Trust Co. v Hurtado***, 48 Misc3d 1201 [A], 18 NYS3d 582 [Sup Ct, Suffolk County 2015]). Subsequently, RPAPL 1304 was amended, effective January 14, 2010, to take its current form, by deleting all references to high-cost, subprime, and non-traditional home loans (L 2009, ch 507, § 1-a; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 105). In its current form, RPAPL 1304 is applicable to any "home loan," as defined in subdivision (5) (a) of that section.

The plaintiff's submissions are insufficient to demonstrate conclusively whether service of a 90-day notice was required at the time this action was commenced, and if so whether it complied with the service mandates of the former statute (*see*, ***Emigrant Mtge. Co. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]). In the version of RPAPL 1304 applicable when the plaintiff commenced this action (*see*, L 2008, ch 472, § 2; *cf.*, L 2009, ch 507, § 1-a), notice pursuant to RPAPL § 1304 was required only with respect to "subprime," "high-cost," or "non-traditional" home loans (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 104-105). In this case, the principal amount of the loan exceeded $300,000.00, therefore it the loan was non-conforming and not a "home loan" within the meaning of the statute (*see*, former Banking Law § 6-l [1][e][i][B] [L 2002, ch 626, § 1]). Nevertheless, in the complaint, the plaintiff has alleged that it complied with the mandates of RPAPL 1304, "if applicable," and in the affidavit of Mr. Jones, the plaintiff has alleged that it mailed the "required" 90-day notices. If required, the plaintiff proffered insufficient proof of compliance with the service requirements of RPAPL § 1304 because it submitted neither an affidavit of service of the notice (*see*, ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]), nor sufficient proof of business records that detail a standard of office practice or procedure designed to ensure that items are properly addressed and mailed (*see*, ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 776 [2d Dept 2001]).

The court next turns to the affirmative defenses asserted in the answer and the opposition submitted by the Serafin defendants. 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 the Serafin defendants 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 (*see*, CPLR 3211[e]; ***Retained Realty, Inc. v Syed***, 137 AD3d 1099, 26 NYS3d 889 [2d Dept 2016]; ***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, the Serafin defendants have 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 alleged unconscionable loan terms and the alleged lack of good faith in negotiating a loan modification with them. The failure by the Serafin defendants 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 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 asserted in the answer are thus dismissed.

The plaintiff demonstrated its standing, as indicated above, by producing the affidavit in support of Mr. Jones and documentation in the form of a written assignments, which established that it was the owner of the subject mortgage and note prior to commencement (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***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 the Serafin defendants' assertions 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]).

Moreover, the Serafin defendants' speculation and conclusory contentions questioning the intent of the parties to the assignments, 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, 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]). The Serafin defendants, therefore, failed to establish the merit of the standing defense in the answer. Accordingly, the second affirmative defense is dismissed.

To the extent the Serafin defendants assert that the plaintiff violated Banking Law §6-1, they have failed to demonstrate that the mortgage loan was a "high-cost" home loan, as that term was defined in that section, as of the date of the making of the subject loan (*see*, Banking Law § 6-l [1] [d]; former Banking Law §6-l [e] [I] [L 2002, ch 626, § 1, eff. April 1, 2003]). Prior to the amendment (effective October 14, 2007 [L 2007, ch 552, § 2]) to former Banking Law § 6-l (e) (I) (L 2007, ch 552, § 1), mortgage loans in principal amounts exceeding $300,000.00 were not covered by the statute (*see*, L 2002, ch 626, § 4; Banking Law § 6-1; ***Lewis v Wells Fargo Bank, N.A.***, 134 AD3d 777, 22 NYS3d 461 [2d Dept 2015]; ***Endeavor Funding Corp. v Allen***, 102 AD3d 593, 958 NYS2d 300 [1st Dept 2013]; ***Community Preserv. Corp. v Sahara Realty Dev., LLC***, 2011 NY Misc LEXIS 734, 2011 WL 766384, 2011 NY Slip Op 30437 [U] [Sup Ct, Suffolk County 2011]; ***Sebrow v Fairmont Funding, LTD.***, 2011 NY Misc LEXIS 5997, 2011 WL 6738763, 2011 NY Slip Op 33271 [U] [Sup Ct, Queens County 2011]; ***Alliance Mtge. Banking Corp. v Dobkin***, 19 Misc 3d 1121 [A], 862 NYS2d 812 [Sup Ct, Nassau County 2008]). In opposition, the Serafin defendants presented no evidence that the principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal national mortgage association (*see*, former RPAPL 1304 [5][b][I]). Accordingly, the first and eighth affirmative defenses are dismissed.

Rejected as unmeritorious are the Serafin defendants' challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the Serafin defendants' contentions, the affidavit of the plaintiff's representative is legally sufficient and comports with the requirements of CPLR 3212 (*see, **Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; *see also*, ***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]; ***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 Serafin defendants' assertion that the affidavit is hearsay because the affiant did not personally service the subject account is also unavailing in light of the affiant's unchallenged assertion of personal knowledge of the defendant mortgagors' default (***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***HSBC Bank USA, N.A. v Spitzer***, 131 AD3d 1206, 18 NYS3d 67 [2d Dept 2015]; *see also*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]). The contents of the affidavit of Christopher Jones, an Authorized Signer for PNC, were based upon his knowledge of PNC's and the prior servicer's record-keeping practices and records relating to the loan (*see*, ***US Bank N. A. v Ehrenfeld***, 2016 NY Slip Op 07639 [2d Dept, Nov 16, 2016]; *see, **Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*). Further, the court notes that a copy of the loan document history for the mortgage is referenced, as an attached exhibit, in the affiant's affidavit in support of the plaintiff's motion-in-chief.

The Serafin defendants' conclusory and self-serving contentions concerning their alleged attempts to obtain a loan modification are unavailing because 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 [the] [Serafin] defendants, 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*). The court also finds that the totality of the circumstances in this case, do not support a finding that the plaintiff failed to negotiate in good faith (*see*, ***U.S. Bank, N.A. v Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 20, 966 NYS2d 108 [2d Dept 2013] ["it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties"]).

The Serafin defendants' request for a restoration of this action to a foreclosure conference calendar for an additional settlement conference is denied. According to the records maintained by the court's computerized database, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned before this court's specialized foreclosure part beginning on September 29, 2009 and lasting until November

30, 2010. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program because the parties were unable to reach an agreement modifying the loan or otherwise settling this action. Accordingly, there has been compliance with CPLR §3408, and no further conference is required under any statute, law or rule. Thereafter, additional conferences were held on July 20, 2012 as well as on May 22, and June 19, 2013 before Part 21 (Spinner, J.), however, the parties were again unable to settle this action.

The Serafin defendants also failed to demonstrate the merits of their request for another conference 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]; *see also*, ***BAC Home Loans Servicing, LP v Mostafa***, 2013 NY Misc LEXIS 5988, 2013 WL 6846509, 2013 NY Slip Op 33199 [U] [Sup Ct, Queens County 2013] [holding that HAMP only requires participating servicers to consider eligible loans for modification but does not require servicers to modify eligible loans]; ***JP Morgan Chase Bank, N.A. v Ilardo***, 36 Misc3d 359, 373–77, 940 NYS2d 829 [Sup Ct 2012] [holding that HAMP does not create an entitlement to modification]). Moreover, the Serafin defendants are not entitled to any other court conference for the purpose of having the plaintiff present the note, since the plaintiff has already provided a copy in accordance with CPLR 4518 (a).

Contrary to the Serafin defendants' contentions, the instant motion for summary judgment made by the 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]). Additionally, the Serafin defendants failed to demonstrate that they 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 branch of the Serafin defendants' motion for an order, ostensibly, pursuant to CPLR 3124 compelling the production of certain documents is denied because it is neither supported by an affirmation of good-faith evidencing an effort to resolve the issues raised therein (*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]), nor an order scheduling discovery. In any event, the Serafin defendants' motion has been rendered academic by the above determination dismissing the affirmative defenses asserted in the answer. The court also notes that the Serafin defendants have not moved for specific discovery relating the plaintiff's alleged compliance with the RPAPL § 1304, as originally enacted.

The court turns next to the ancillary relief requested in plaintiff's moving papers. The branch of the instant motion for an order pursuant to CPLR 1024 amending the caption by excising the remaining fictitious defendants, "John Doe #1" to John Doe 10," 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 remaining defendants, Nicole Torres, CSGA LLC, Lauren Marzlock, MRC Receivables Corp. and The Big M Corporation doing business as Mandee (*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.

In light of the foregoing, and pursuant to CPLR §3212(g), the court finds that the sole remaining issue of fact is whether the plaintiff was required to comply with the notice requirements of RPAPL § 1304 in effect at the time this action was commenced, and if so, whether it complied therewith; the trial of this action shall be limited to these issues. In view of these open questions, the proposed order submitted by the plaintiff has been marked "not signed."

Counsel are directed to appear ready to confer with the court on the readiness of this matter for the trial on the limited issue framed above at the conference scheduled herein for **March 8, 2017.**

DATED: Feb. 2, 2017

C. RANDALL HINRICHS
J.S.C.

**[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION**