First Horizon Home Loans, a Div. of First Tennessee Bank N.A. v Burgan
2017 NY Slip Op 31198(U)
May 22, 2017
Supreme Court, Suffolk County
Docket Number: 21025/2009
Judge: C. Randall Hinrichs

COPY

MEMO DECISION & ORDER

INDEX NO. 21025/2009

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:002: 1-18-2015; 003: 2-26-2015
Adjourned Date: 3-17-2017
Motion Sequence: 002: RTC; 003 - MD

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FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
400 Horizon Way, Irving, TX 75063

Plaintiff,

-against-

MARYANN BURGAN, AMERICAN EXPRESS, EILEEN M. VALENTI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TEACHERS FEDERAL CREDIT UNION, UNIFUND CCR PARTNERS ASSIGNEE OF CITIBANK, UNITED STATES OF AMERICA ACTING THROUGH THE IRS,

JOHN DOES (said names 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 December 9, 2014, and supporting papers; (2) Notice of Cross Motion by the defendant, dated February 13, 2015, and supporting papers; (3) Reply Affirmation in Further Support of Summary Judgment and in Opposition to Cross Motion by the plaintiff, dated April 16, 2015, and supporting papers; and (4) Reply Affidavit by the defendant, dated May 19, 2015, and supporting papers; it is

ORDERED that this motion (#002) by the plaintiff for summary judgment dismissing the affirmative defenses asserted in the answer of the obligor/mortgagor defendant and an award of summary judgment in favor of the plaintiff on its complaint against such defendant, default judgments against the remaining defendants served with process, the identification of the true name of a defendant served as an unknown defendant and the appointment of a referee to compute and a substitution of the named plaintiff by its assignee is considered under CPLR 3212, 3215, 1024 and RPAPL § 1321 and

is granted only to the extent that partial summary judgment dismissing the First, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth affirmative defenses set forth in the defendant Burgan's amended answer is awarded to the plaintiff as set forth below; and it is further

ORDERED that the cross motion (#003) by defendant, Maryann Burgan, for summary judgment dismissing the plaintiff's complaint on the grounds that the plaintiff lacks standing to prosecute its claims for foreclosure and sale is considered under CPLR 3212 and is denied; and it is further

ORDERED, that a pre-trial conference shall be held herein on **June 28, 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 the purpose of which shall be to ready this matter for trial by the scheduling of discovery proceedings limited to the issue of the plaintiff's standing and the issue of the defendant's default in payment.

The plaintiff commenced this action to foreclose the lien of an April 7, 2004 mortgage given by defendant Burgan to Flagstar Bank, FSB to secure a mortgage note of the same date in the principal amount of $275,000.00 likewise given by said defendant. According to the complaint, the loan went into default on August 1, 2008 and the plaintiff commenced this action in June of 2009. In response to the plaintiff's service of the summons, complaint and other initiatory papers, defendant Burgan appeared herein by answer that was superceded by an amended answer. Therein, defendant Burgan asserted twelve affirmative defenses, three of which challenge the standing of the plaintiff.

By the instant motion (#002), the plaintiff seeks summary judgment dismissing the affirmative defenses asserted in the answer of defendant Burgan together with an award of summary judgment in its favor on its complaint against said defendant and the other relief outlined above. Defendant Burgan opposes the plaintiff's motion in cross moving papers (#003) in which she seeks summary judgment dismissing the plaintiff's complaint on the pleaded standing defenses that are set forth separately in the Second, Third and Fourth Affirmative Defenses contained in her answer and the affirmative defense of "no default" set forth as the Sixth Affirmative Defense.

First considered is the cross motion (#003) by defendant Burgan for summary judgment dismissing the plaintiff's complaint as determination thereof may render the plaintiff's motion, academic. However, this court's review of the cross moving papers and exhibits attached thereto reveals otherwise. The law is clear that a party moving for summary judgment may not rely on perceived gaps in the plaintiff's proof to sustain its prima facie burden of establishing an entitlement to judgment as a matter of law (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS3d 200 [2d Dept 2013]; *see also* ***Cox v Consolidated Edison, Inc.***, 125 AD3d 923, 5 NYS3d 147 [2d Dept 2015]; ***Collado v Jiacono***, 126 AD3d 927, 928, 6 NYS3d 116 [2d Dept 2015]; ***Martinez v 1261 Realty Co., LLC***, 121 AD3d 955, 995 NYS2d 581 [2d Dept 2014]; ***Strough v Incorporated Village of West Hampton Dunes***, 98 AD3d 607, 949 NYS2d 737 [2d 2012]; ***Velasquez v Gomez***, 44 AD3d 649, 843 NYS2d 368 [2d Dept 2007). It is equally clear that a movant's failure to make a prima facie showing of entitlement to judgment as a matter of law requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Zarabi v Movahedian***, 136 AD3d 895, 26 NYS3d 153 [2d Dept 2016]; ***BAC Home Loans Servicing, LP v Bixby***, 135 AD3d 1009, 24 NYS3d 232 [3d Dept 2016]).

Here, the cross moving papers contain no proof in admissible form that the plaintiff lacks standing to prosecute its claims for foreclosure and sale or that there was no default in her payment obligations. Instead, she merely points to gaps, inconsistencies or perceived failures in the plaintiff's proofs regarding these issues. Accordingly, the defendant's cross motion (#003) for summary judgment dismissing the plaintiff's complaint is denied.

Next considered are those portions of the plaintiff's motion-in-chief (#002) in which it seeks summary judgment dismissing the affirmative defenses set forth in the answer of defendant Burgan and an award of summary judgment in favor of the plaintiff on its complaint.

It is well settled that a foreclosing plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see* ***HSBC Mtge. Servs., Inc. v Royal***, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 689, 986 NYS2d 843 [2d Dept 2014]). Where the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Loancare v Firshing***, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 77, 10 NYS3d 255 [2d Dept 2015]). Finally, a plaintiff seeking summary judgment should establish that none of the affirmative defenses asserted in the answer or by any defendant have merit (*see* ***Bank of New York Mellon v Vytalingam***, 144 AD3d 1070, 42 NYS3d 274 [2d Dept 2016]; ***Prompt Mtge. Providers of North America, LLC v Singh***, 132 AD3d 833, 18 NYS3d 668 [2d Dept 2015]; ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 909, 985 NYS2d 897 [2d Dept 2014]; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 996, 985 NYS3d 254 [2d Dept 2014]; ***Bank of New York v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]).

Once the plaintiff makes all necessary showings, it becomes incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in his/her answer or otherwise available to him/her (***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]). Moreover, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of elemental facts are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3D 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]).

Here, the plaintiff's submissions were sufficient to establish a prima facie showing that the First, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth affirmative defenses set forth in the amended answer

are without merit. In response, the defendant failed to address these defenses, let alone, establish the merit of any one of them or that a question of fact exists with respect thereto. Under these circumstances and in light of the defendant's interposition of her own application for summary judgment, the defendant's claim that the plaintiff's motion (#002) is premature and should be denied for want of discovery proceedings is rejected as unmeritorious (*see* CPLR 3212[f]; ***CitiMortgage, Inc. v Guillermo***, 143 AD3d 852, 39 NYS3d 86 [2d Dept 2016]). The plaintiff is thus awarded summary judgment dismissing the First, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Affirmative Defenses set forth in the defendant's amended answer (*see* ***Katz v Miller***, 120 AD3d 768, *supra*; ***Becher v Feller***, 64 AD3D 672, 677, *supra*; ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, *supra*; ***Starkman v City of Long Beach***, 106 AD3d 1076, *supra*).

The plaintiff's moving papers also established, prima facie, that the Sixth Affirmative Defense set forth in the defendant's answer is also without merit. In such defense, the defendant claims that because the plaintiff assigned the note and mortgage to the Federal National Mortgage Association (Fannie Mae) subsequent to the commencement of this action, the defendant cannot be charged with a default in payment. This result is allegedly mandated by one of Fannie Mae's guidelines that requires third party loan servicers and/or other third parties to pay Fannie Mae any amounts claimed to be owing under the loan documents. Although defendant Burgan raised this defense in her cross moving papers, she failed to demonstrate that it was meritorious or that any question of fact exists with regard thereto. In this regard, the court notes that post action assignments of notes and mortgages are not unusual in secondary mortgage markets (*see* RPL § 275), and the Fannie Mae guidelines upon which the defendant relies operate only upon third party servicers and other third parties. Accordingly, the post action July 27, 2010 written assignment of the note and mortgage, which post dates the default in payment date, cannot serve to eradicate a mortgagor's default in payment under the terms of the controlling loan documents. The Sixth Affirmative Defense set forth in the amended answer is thus dismissed pursuant to CPLR 3212(b) for want of merit. The defendant's claim that an award of summary judgment dismissing the Sixth Affirmative Defense is premature is rejected for the reasons set forth above.

In contrast, the court finds that the plaintiff's moving papers were insufficient to establish, prima facie, that the plaintiff is possessed of the requisite standing to prosecute its claim for foreclosure and sale on the grounds advanced in the Second Affirmative Defense (no standing, because, among other things, the plaintiff is not the holder of the note and mortgage), the Third (no full chain of title to the note and mortgage) and the Fourth Affirmative Defense (defective written assignments).

Appellate case authorities have repeatedly held that in determining the standing of a foreclosing plaintiff, it is the mortgage note that is the dispositive instrument, not the mortgage indenture. This result is mandated by the long standing principal/incident rule which provides that because a mortgage is merely the security for the debt, the obligations of the mortgage pass as an incident to the passage of the note (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). For standing to exist, the plaintiff must be the owner, holder, or assignee of the mortgage note at the time of the commencement of the action (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 361, *supra*; ***Aurora Loans Services, LLC v Mandel***, ___ AD3d___, 2017 WL 1068846 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Romano***, 147 AD3d 1021, 48 NYS3d 237 [2d Dept 2017] ***U.S. Bank Natl. Ass'n v Saravanan***, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*;)

It is now clear that there are several ways in which a foreclosing plaintiff may establish its standing to prosecute its claim for foreclosure and sale and that any one will suffice so as to render the others irrelevant and immaterial to the establishment of standing. For example, an original lender having continuous possession of the mortgage note from the loan's origination through the date of the commencement of the foreclosure action is the owner and thus has standing to prosecute its claim for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Generation Mtge. Co. v Medina***, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016]; ***Wachovia Mtge. Corp. v Lopa***, 129 D3d 830, 13 NYS3d 97 [2d Dept 2015]; *see also* ***CitiMortgage, Inc. v Pugliese***, 143 AD3d 659, 38 NYS3d 576 [2d Dept 2016]. Said original lender may be the holder of the note where it indorsed such note in blank and continues to hold it at the time of commencement of the action (*see* UCC 1–201; 3–202; 3–204).

A foreclosing plaintiff's standing may rest upon due proof that at the time of the commencement to of the action, it was the assignee of the subject note and mortgage under a written assignment of the note by the owner thereof at the time of the execution of the written assignment (*see* ***U.S. Bank Natl. Ass'n. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*; ***Peak Fin. Partners, Inc., v Brook***, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]).

Standing may also be established by demonstrating that through one or a succession of several mergers, the plaintiff gained actual or constructive possession of the note on the effective date of the merger which was prior to the commencement of the foreclosure action (*see* Banking Law § 602; ***TD Bank, N.A. v Mandia***, 133 AD3d 590, 20 NYS3d 83 [2d Dept 2015]; ***PNC Bank, Natl. Ass'n v Klein***, 125 AD3d 953, 5 NYS3d 439 [2d Dept 2015]; ***JP Morgan Chase Bank, Natl. Ass'n v Russo***, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014]; ***JP Morgan Chase Bank, Natl. Ass'n v Shapiro***, 104 AD3d 411, 959 NYS2d 918 [1st Dept 2013]; ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 N.Y.S.2d 350 [2011]; ***Ladino v Bank of America***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also* ***Wells Fargo Bank, N.A. v Moore***, 599 Fed. Appex 600 [7th Circ. 2015 "*The surviving entity in a corporate merger acquires all of its predecessors' rights (and obligations) as a matter of law; there is no need for document-by-document assignments*"]).

Due proof of the physical delivery of the note to the plaintiff or its agent prior to commencement of a foreclosure action is also sufficient to transfer the mortgage obligation and create standing to foreclose (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***US Bank Natl. Ass'n v Ehrenfeld***, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016], *supra*; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]; ***U.S. Bank Natl. Ass'n v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Well Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*; ***Bank of N.Y. Mellon Trust Co. NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]). Indeed, the establishment of the plaintiff's actual possession of the mortgage note or its constructive possession through an agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, all claims of defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, *supra*). It further renders unavailing, all claims of defects in the chain of mortgage assignments (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***CitiMortgage, Inc. v McKinney*** 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016], *supra*; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Deutsche Flagstar Bank, FSB v Mendoza***, 139

AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***US Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

The plaintiff may also establish its standing by demonstrating that it is the holder of the mortgage note within the contemplation of the Uniform Commercial Code. Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an endorsement in blank or bears a special endorsement payable to the order of the plaintiff (*see* UCC 1–201; 3–202; 3–204; ***Hartford Acc. & Indem. Co. v American Express Co.***, 74 NY2d 153, 159 [1989]). Notably, the "holder of an instrument whether or not he is the owner may ... enforce payment in his own name" (*see* UCC 3–301]; ***Well Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]).

A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or payable to the order of an identified person that is the person in possession" (UCC 1–201[b][21]; *see* ***U.S. Bank Natl. Ass'n v Cruz***, 147 AD3d 1103, 47 NYS3d 459 [2d Dept 2017]; ***US Bank, N.A. v Zwisler***, 147 AD3d 804, 46 NYS3d 21391 [2d Dept 2017]; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016]). 'Bearer' means ... a person in possession of a negotiable instrument" (UCC 1–201[b][5]), and where the note is endorsed in blank, it may be negotiated by delivery alone (*see* UCC 3–202[1], 3–204[2]). "An endorsement in blank specifies no particular endorsee and may consist of a mere signature" and "[a]n instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed (UCC 3–204[2])" (***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]). A specially endorsed note is negotiated by a further endorsement by the party to whom the note was made payable by the special endorsement and such note may be considered to be the equivalent of a written assignment of the note (*see* ***Deutsche Bank Trust Co. Americas v Garrison***, 147 AD3d 725, 46 NYS3d 185 [2d Dept 2017]). Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank or specially endorsed in its favor, a plaintiff is only required to demonstrate that it had physical possession of the note endorsed in blank or indorsed to it or to its order prior to commencement of the action (*see* ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 45 NYS3d 189 [2d Dept 2018]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*).

Here, the plaintiff relies, in the first instance, upon a written assignment of mortgage that was executed by Mortgage Electronic Registration Systems., Inc. [MERS], as nominee of the original lender on January 20, 2009. This assignment does not, however, include an assignment of the note, which as indicated above, is the dispositive instrument (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Deutsche Bank Natl. Trust Co. v. Weiss***, 133 AD3d 704, 21 NYS3d 126 [2d Dept 2015]; ***Bank of America, N.A. v Paulsen***, 125 AD3d 909, 6 NYS3d 68 [2d Dept 2015]. The plaintiff thus failed to demonstrate, prima facie, its standing under the terms of the January 20, 2009 written assignment of mortgage.

In its effort to establish its standing, the plaintiff next relies upon a separate page allonge endorsement in blank executed by First Horizon Home Loan Corporation which is preceded by a special endorsement by the original lender in favor of that same entity, the First Horizon Home Loan Corporation. The plaintiff's counsel characterizes this endorsement in blank as having been made by the "lender, First Horizon Home Loan Corporation" (*see* ¶ 31 of the affirmation of Richard Fay, Esq.,

in support of the motion). However, this characterization is incorrect since the record reflects that Flagstar Bank, FSB was the original lender (*see* note dated April 7, 2004 attached as Exhibit A of the moving papers). The plaintiff further relies upon the affidavit of an employee of Seterus, Inc., the subservicer of the Federal National Mortgage Agency (Fannie Mae), to whom, the plaintiff allegedly transferred the note and mortgage under the terms of a written assignment dated July 27, 2010. Therein, the affiant, Nathan Abeln, avers that, upon his review of the records kept by his employer, Seterus, Inc., including the "historic records of the plaintiff, First Horizon Home Loans, A Division of First Tennessee Bank National Association", said plaintiff took delivery of the note on June 1, 2004, and that the note remained in its possession through the date of the commencement of this action (*see* ¶ 6 of the affidavit of Nathan Abeln attached as Exhibit A to the moving papers). However, such averment is not in admissible form since Mr. Abeln did not state that he reviewed the records of the separate entity, First Horizon Home Loan Corporation, to whom the note had been specially endorsed by the original lender and subsequently endorsed in blank by said special endorsee (*see* CPLR 4518; ***Zuniga v BAC Home Loans Servicing, L.P.***, 147 AD3d 882, 47 NYS3d 374 [2d Dept 2017]).

Even if it were otherwise, questions of fact regarding the plaintiff's possession of the note at the time of the commencement of this action were not eliminated since Mr Abeln did not address the fact that the note was specially endorsed by the original lender in favor First Horizon Home Loans Corporation, a corporate entity other than the plaintiff, and thereafter endorsed by such entity in blank on an allonge (*see* ***US Bank, N.A. v Zwisler***, 147 AD3d 804, *supra*). The court thus finds that the plaintiff failed to establish, prima facie, that it was possessed of the requisite standing to prosecute its claims for foreclosure and sale against answering defendant Burgan, by the tender of due proof in admissible form sufficient to eliminate all questions of fact on the standing issue. Those portions of the plaintiff's motion wherein it seeks summary judgment dismissing the Second, Third and Fourth Affirmative Defenses set forth in the answer of defendant Burgan are thus denied.

The court further finds that the plaintiff failed to establish, as a matter of law by the tender of due proof in admissible form sufficient to eliminate all questions of fact, that the defendant defaulted in her payment obligations on August 1, 2008 as alleged by the plaintiff in its complaint. In this regard, the plaintiff submitted the affidavit of Catherine Williams, a second employee of Fannie Mae's subservicer, Seterus Inc. In her November 21, 2014 affidavit, she avers that based upon her review of the record maintained by Seterus, Inc., in its regular course of a business, the defendant defaulted in her payment obligations on *December 1, 2008,* a date subsequent to the August 1, 2008 date alleged in the complaint. Morever, the affidavit of Ms. Williams does not comport with the dictates of CPLR 4518 in as much as the affiant did not state that she reviewed the records of the plaintiff or those of First Horizon Home Loan Corporation, an apparent predecessor-in-interest of the plaintiff by merger, assignment or otherwise, and that she was either personally familiar with the record keeping practices of such entities (*see* ***HSBC Mtge. Services, Inc. v Royal***, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]), or that her employer, Seterus, Inc., incorporated those records into its own records or routinely relied upon them in the ordinary course of its business (*see* ***U.S. Bank, Natl. Ass'n v Noble***, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]; *see also* ***Deutsche Bank Natl. Trust Co. v Monica,*** 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *quoting* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012) *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]; *see also* ***Citibank, N.A v Abrams***, 144 AD3d 1212, 40 NYS3d 653 [3d Dept 2016]; ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]).

In view of the foregoing, the court denies, without prejudice, those portions of the plaintiff's motion wherein it seeks summary judgment on its complaint against defendant Burgan and default judgments against the other defendants served with process, including one served as unknown defendant "John Doe", together with an order identifying the name of that person pursuant to CPLR 1024. Also denied without prejudice, is the request for an order appointing a referee to compute, since two of the elemental facts which constitute the plaintiff's claim for foreclosure and sale, namely, the plaintiff's standing and the defendant's default in payment, have not been adjudicated in favor of the plaintiff (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994];***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]).

Finally, the court denies the remaining portions of the plaintiff's motion (#002) wherein it seeks a substitution of itself by its purported assignee, the Federal National Mortgage Agency (Fannie Mae). While the written assignment of mortgage issued by the plaintiff on July 27, 2010 in favor of Fannie Mae contains assignments of both the note and the mortgage, there is no conclusive proof that the plaintiff was the owner, holder or assignee of the mortgage note on the date of the execution of said assignment (*see* ***Arch Bay Holdings, LLC v Albanese***, 146 AD3d 849, 45 NYS3d 506 [2d Dept 2017]; *see also* ***Woori America Bank v Global Universal Group Ltd.***, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; ***Aurora Loan Services, LLC v Lopa***, 130 AD3d 952, 15 NYS3d 105 [2d Dept 2015]). Accordingly, the granting of this relief is premature at this time.

The proposed Order of Reference attached to the moving papers has been marked "not signed" by the court.

DATED: May 22, 2017

C. RANDALL HINRICHS, J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION