NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

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| JPMORGAN CHASE BANK, N.A., | Index No. 7070/14 |
| Plaintiff, | Motion Date April 6, 2017 |
| - against- | |
| PATRICK ROSEMAN, SALLY ROSEMAN, THE OFFICE OF THE CITY REGISTER OF THE CITY OF NEW YORK, | Motion Cal. No. 77 |
| Defendants. | Motion Seq. No. 5 |

The following papers read on this motion by plaintiff, pursuant to CPLR 2221(e)(2)(3), for leave to renew its prior motion for summary judgment, and upon renewal, for summary judgment in its favor; and this cross motion by defendants, Patrick Roseman and Sally Roseman, pursuant to CPLR 3211(a)(3) and 3212, to dismiss the complaint insofar as asserted against her on the ground that plaintiff lacked standing to bring this action.

| | Papers Numbered |
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| Notice of Motion - Affirmation - Exhibits..... | 1-3 |
| Notice of Cross Motion - Affirmation - Exhibits..... | 4-8 |

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

On July 14, 2008, defendants, Patrick Roseman and Sally Roseman, borrowed $389,557.00 from Ideal Mortgage Bankers, Ltd. (Ideal), and allegedly executed a purchase-money mortgage (the Ideal mortgage) on the real property known as 134-43 Hook Creek Boulevard a/k/a 247-01/247-05 135th Avenue, Rosedale, New York. Part of the mortgage proceeds were used to pay off two preexisting mortgages on the property. The Ideal mortgage was not recorded, and it is alleged that the original mortgage cannot be located, and thus is presumed lost. Plaintiff commenced this action on May 6, 2014, against the borrowers and the Office of the City Register of the City of New York, alleging that it is the current holder of the original note and Ideal mortgage, and annexed copies of the note and Ideal mortgage to the complaint. The note contains an undated endorsement to plaintiff and the mortgage is labeled as a “certified true copy” and bears an acknowledgment by a notary public qualified in

Kings County. Plaintiff originally sought a judgment (1) declaring that plaintiff holds a mortgage on the property, (2) directing defendant, Office of the City Register of the City of New York (defendant Register), to record certified copy of the lost mortgage with the same force and effect as if the original had been recorded on July 14, 2008, (3) declaring that plaintiff has an equitable lien against the property, (4) imposing a constructive trust, and (5) sounding in equitable subrogation.

In lieu of serving an answer, defendants, Roseman moved (mot. Seq. No. 1), to dismiss the complaint insofar as asserted against them, pursuant to CPLR 3211(a)(1), (3) and (7), based upon lack of standing and failure to state a cause of action to impose a constructive trust, and to cancel the notice of pendency filed against the subject property. By order dated January 12, 2015, that motion (mot. Seq. No. 1) was denied in its entirety. By order dated March 30, 2016, the Appellate Division, Second Department, modified the January 12, 2015 order of the Supreme Court, deleting the provision which denied the branch of the motion by defendants, Roseman, pursuant to CPLR 3211(a)(7), to dismiss the fourth cause of action (for imposition of a constructive trust) insofar as asserted against them, and substituting a provision which granted that branch of the motion (*JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222 [2d Dept 2016]). The order, as modified, was affirmed (*id.*). The Appellate Court determined that the face of the note indicated it was endorsed to plaintiff, and although the endorsement was undated, a copy of the note was annexed to the complaint, establishing *prima facie* that plaintiff had standing. The Appellate Court also determined that the complaint asserted the mortgage was "duly executed and delivered" and the certified copy of the mortgage annexed to the complaint was duly acknowledged by an identified notary public and thus, the mortgage appeared valid on its face (*see JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671 [2d Dept 2014]). The Appellate Court further determined that the complaint adequately pleads causes of action seeking a judgment declaring an equitable lien and equitable subrogation. The Appellate Court additionally determined that the complaint failed to state a cause of action for the imposition of a constructive trust.

A joint answer was served and filed by Jamie Lathrop, Esq. on behalf of defendants, Patrick Roseman and Sally Roseman, denying the allegations of the complaint, asserting various affirmative defenses, including ones based upon lack of standing and violation of Banking Law § 6-l. Plaintiff served a reply to the counterclaim.

Defendant, Register, defaulted in answering and appearing, and plaintiff thereafter obtained an order dated October 7, 2015, without opposition, granting it leave to enter a default judgment against defendant, Register.

Plaintiff served and filed a note of issue and certificate of readiness on January 6, 2016. Plaintiff subsequently moved (mot. Seq. No. 4), pursuant to CPLR 3212, for summary judgment against defendants, Roseman, and to dismiss the affirmative defenses and counterclaim asserted by defendants, Roseman. Precious Williams, Esq., appearing on behalf of defendant, Sally Roseman, cross-moved, pursuant to CPLR 3211(a)(3) and 3212, to dismiss the complaint

insofar as asserted against defendant, Sally Roseman, on the ground that plaintiff lacked standing to bring this action. By order dated December 22, 2016, the motion by plaintiff and the cross motion by defendants, Roseman, were denied, without prejudice, to renewal based upon proper papers, including proof of proper service of the motion papers. The court determined that plaintiff had failed to demonstrate it properly served the counsel of record for defendant, Patrick Roseman, with a copy of its motion papers, and to the extent defendants, Sally Roseman and Patrick Roseman, were no longer represented by the same counsel, defendant, Sally Roseman, had failed to show defendant, Patrick Roseman, was properly served with a copy of her cross motion.

A consent to change form has been filed on February 7, 2017, whereby Precious Williams, Esq., has been substituted as attorney of record for defendants, Patrick Roseman and Sally Roseman.

Plaintiff moves for leave to renew its prior motion (mot. Seq. No. 4), and upon renewal, for summary judgment against defendants, Roseman, and to dismiss the affirmative defenses and counterclaim of defendants, Roseman. Defendants, Roseman, oppose plaintiff's motion, and cross-move for summary judgment dismissing the complaint insofar as asserted against them. Plaintiff opposes the cross motion by defendants, Roseman. Defendant, Register, has not appeared in relation to the motion or cross motion.

That branch of the motion by plaintiff for leave to renew its prior motion (motion Seq. No. 4) is granted.

It is well-established that the proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Where standing is put into issue by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see Deer Park Associates v Town of Babylon*, 121 AD3d 738 [2d Dept 2014]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]).

In an action, pursuant to RPAPL Article 15, to compel the determination of a claim to real property, a plaintiff must establish an estate or interest in the property at the time of commencement (*see* RPAPL 1501; *Soscia v Soscia*, 35 AD3d 841 [2d Dept 2006]). Here, plaintiff's claimed interest in the property is as the holder of the Ideal mortgage, notwithstanding the original Ideal mortgage has not been recorded and is presumed lost.

The Recording Act *(see* Real Property Law §§ 290 and 291) imposes a ministerial duty upon the Register of the county of recording and indexing instruments affecting real property (*see* Real Property Law § 290[4]; General Construction Law § 42; *see also Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90, 97 [2006]). A conveyance, including a mortgage, is

recordable upon being duly acknowledged by the person executing the conveyance, but the recording officer has no duty to accept it if an acknowledgment is defective (*see* Real Property Law § 291).

Equitable declaratory relief under the common-law, however, is available to the owner of a deed or mortgage that was not recorded due to its loss or destruction, upon evidence of the due execution of the lost instrument and of its contents by proof of a certified copy thereof or other clear and convincing proof (*see Argent Mortg. Co., LLC v 35 Plank Road Realty Corp.*, 131 AD3d 909 [2d Dept 2015]; *O'Brien v Town of Huntington*, 66 AD3d 160 [2d Dept 2009]; *La Capria v Bonazza*, 153 AD2d 551, 553 [2d Dept 1989]; *see also Edwards v Noyes*, 65 NY 125 [1875]).[1] Where the plaintiff is not the original lender listed on the lost mortgage indenture, proof of the plaintiff's ownership interest in the mortgage debt is also required, as such interest is not established by the mortgage indenture itself (*see Astoria Bank v Verzo*, Sup Ct, Suffolk County, October 13, 2015, Whelan, J., index No. 24323/2014). Because a mortgage loses its priority to a subsequent mortgage or deed where the subsequent mortgagee or purchaser is a good-faith encumbrancer or purchaser for value, and records its mortgage or deed first without actual or constructive knowledge of the prior mortgage (*see* Real Property Law § 291; *see Rite Capital Group, LLC v LMAG, LLC*, 91 AD3d 741, 743 [2d Dept 2012]; *2 Lisa Ct. Corp. v Licalzi*, 89 AD3d 721, 722 [2d Dept 2011]; *Washington Mut. Bank, FA v Peak Health Club, Inc.*, 48 AD3d 793, 797 [2d Dept 2008]), the owners of all interests recorded subsequent to the date of execution of the mortgage, now lost, are necessary parties to the action.

In support of its motion for summary judgment, plaintiff offers copy of the verified pleadings, affirmations dated May 4, 2016, of its co-counsel Joyce A. Davis, and Brian Scibetta, an affidavit of Matthew Dudas, an employee of plaintiff, a copy of a replacement deed, the note and certified copy of the Ideal mortgage, a settlement statement with a certification addendum, the Citibank and Fremont mortgages, dated August 2, 2007 and February 9, 2007, respectively, satisfactions of those mortgages issued by MERS, and recorded on August 5, 2008 and August 1, 2008. According to the settlement statement from the closing, proceeds of the subject mortgage loan totaling $318,144.78 ($254,916.00 + $63,228.78 = $318,144.87) were allocated to satisfy then-existing mortgage liens against the property. Satisfactions of mortgage of the Citibank and Fremont mortgage liens were issued by MERS, and recorded on August 5, 2008 and August 1, 2008, respectively. In his affidavit, Mr. Dudas states that he has reviewed plaintiff's business records maintained in the course of its regularly conducted servicing activities, including related to the mortgage loan made to defendants, Roseman, and that based upon such review, the original mortgage was never recorded, and cannot be located. He also

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[1] Equity also will intervene at the request of a purchaser of realty, when he or she, by some accident or misfortune, has lost the deed and has no record title to the purchased land, to compel the vendor to execute another deed so as to clothe the purchaser with the record title (*see Kent v Church of St. Michael*, 136 NY 10, 16 [1893]; *Goldberg v Rand*, 37 Misc 2d 87 (Sup Ct, Kings County 1962]).

states that plaintiff was in physical possession of the original note from July 31, 2008 through June 23, 2014, when it was transferred to plaintiff's co-counsel, Buckley Madole, P.C. Mr. Scibetta states in his affirmation that his law office received custody of the original note on or about June 25, 2014, and maintains custody of it at the firm's office in Iselin, New Jersey.

Based upon these submissions, plaintiff has established, *prima facie*, that it had standing to bring this action based upon its physical possession of the note prior to the commencement of the action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 359–360 [2015]; *Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099 [2d Dept 2015]). Defendants, Roseman, have failed to provide any proof to call into question this evidence or to entitle them to dismissal of the complaint insofar as asserted against them based upon lack of standing. Their assertion that the Ideal mortgage never was assigned to plaintiff, is irrelevant (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d at 359–360; *Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099). As previously explained by the Appellate Division, " '[e]ither a written assignment of the underlying note or the physical delivery of the note ... is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident' " (*YMJ Meserole, LLC v 98 Meserole St., LLC*, 133 AD3d 848, 849 [2d Dept 2015]) (*JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222, 1223). The first affirmative defense asserted by defendants, Roseman, based upon lack of standing is without merit.

Likewise, there is no merit to the fourth affirmative defense of defendants, Roseman, that plaintiff must prove it is a holder in due course of the note, for an indorsement in blank becomes payable to the bearer and may be negotiated by delivery alone until specially indorsed (*see* UCC 3-204 [2]), and a 'bearer' is a person in possession of a negotiable instrument (*see* UCC 1-201 [b] [5]) (*see JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]).

Defendants, Roseman, claim plaintiff lacked capacity to sue. They, however, failed to raise lack of capacity as an affirmative defense in their answer or in a timely motion to dismiss the complaint (*see* CPLR 3211[a][3]; CPLR 3211[e]), and consequently waived such defense, pursuant to CPLR 3211(e), (*see Security Pacific Nat. Bank v Evans*, 31 AD3d 278 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). In any event, defendants, Roseman, have failed to allege or prove that plaintiff lacked power to appear and bring its claim to the court (*see e.g. Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]; *Caprer v Nussbaum*, 36 AD3d 176, 181-182 [2d Dept 2006]). Rather, they claim plaintiff lacked an interest in the mortgage sufficient to declare it holds the mortgage and is entitled to the recording of the copy of the mortgage, impress an equitable lien, or obtain equitable subrogation. Such claim is the equivalent of a defense predicated upon lack of standing (*see Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). Again, plaintiff has established *prima facie* that it has standing to bring this action, and defendants, Roseman, have failed to rebut such showing. That branch of the motion by plaintiff to dismiss the first and fourth affirmative defenses asserted by defendants, Roseman, based upon lack of standing and the claim that plaintiff is not a holder in due course is granted. The cross motion

by defendants, Roseman, pursuant to CPLR 3211(a)(3) and 3212, to dismiss the complaint insofar as asserted against them based upon lack of standing is denied.

To the extent plaintiff seeks to direct the Register to record a copy of the Ideal mortgage as an original with the same force and effect as if the original had been recorded on July 14, 2008, or alternatively, to declare an equitable lien and equitable subrogation, defendants, Roseman, contend the signatures on copy of the note and Ideal mortgage annexed to the complaint are forgeries.

The certificate of acknowledgment annexed to the Ideal mortgage raises a presumption of due execution of the mortgage (*see Albany County Sav. Bank v McCarty*, 149 NY 71, 80 [1896]; *Beshara v Beshara*, 51 AD3d 837, 838 [2d Dept 2008]; *Paciello v Graffeo*, 32 AD3d 461, 462 [2d Dept 2006]). The presumption may be overcome after being weighed against evidence adduced to show that the subject instrument was not duly executed (*see ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801, 803 [2d Dept 2012], quoting *Son Fong Lum v Antonelli*, 102 AD2d 258, 260–261 [2d Dept 1984], *affd* 64 NY2d 1158 [1985]). However, "a certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing so as to amount to a moral certainty" (*John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620, 621 [2d Dept 2008] [citations and internal quotation marks omitted]; *see Beshara v Beshara*, 51 AD3d 837, 839). In addition, with respect to the note herein, which lacks a certificate of acknowledgment, "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383–384 [2004])," (*TD Bank, N.A. v Piccolo Mondo 21st Century, Inc.*, 98 AD3d 499 [2d Dept 2012]).

Defendants, Roseman, offer the affidavit of defendant, Sally Roseman, as proof that the note and Ideal mortgage are forged. In her affidavit, defendant, Sally Roseman, admits that she executed a note and mortgage on or about July 14, 2008, in favor of defendant Ideal, but indicates that it was in an original principal amount of $440,000.00. Defendant, Sally Roseman, states that when she reviewed the signatures on the note and mortgage included with the complaint, she "knew" such signatures were not hers or her husband's, but "to be completely certain," she showed them to her husband who agreed their signatures were forged. Such affidavit is conclusory and unsubstantiated, and therefore, insufficient to raise an issue of fact relative to the authenticity of the Rosemans' signatures on the loan documents. Defendants, Roseman, have failed to present a copy of the note and mortgage admitted to have been signed by defendant, Sally Roseman, or any other proof to show the copy of the note and certified copy of the Ideal mortgage annexed to the complaint are not true copies of the loan documents she executed. Defendant, Sally Roseman, clearly is an interested witness, and defendants, Roseman, offer no additional evidence, such as an affidavit of a handwriting expert, or a lay person who was present at the execution of the note or mortgage or who was otherwise familiar with their handwriting, to substantiate their claim of forgery and rebut the presumption of due execution of the mortgage by defendants, Roseman, by virtue of the certificate of

acknowledgment. Notably, defendant, Patrick Roseman, (also an interested witness) has not submitted his own affidavit in opposition to plaintiff's motion or in support of the cross motion. Furthermore, even if the signatures of defendants, Roseman, on the note and Ideal mortgage were forged, forgery does not constitute a defense to the cause of action for equitable subrogation where mortgage loan proceeds are used to pay off pre-existing mortgage liens (*see Federal Nat. Mortg. Assn v Woodbury*, 254 AD2d 182 [1st Dept 1998]; *Great Eastern Bank v Chang*, 227 AD2d 589 [2d Dept 1996], *lv dismissed* 88 NY2d 1064 [1996]).

Defendants, Roseman, assert Ideal has been directed to cease and desist from engaging in the business of a mortgage banker, pursuant to an order of the New York State Superintendent of Banks, and plaintiff should not be permitted to record a copy of the Ideal mortgage or to declare an equitable lien and equitable subrogation. They, however, have failed to demonstrate the Ideal mortgage loan was made in violation of that order, or otherwise is rendered invalid thereby. Defendants, Roseman, submit a copy of the order of the Superintendent which is cut off on the right-hand margin and consequently, is an incomplete copy. In any event, it appears, from the incomplete copy, that the order relates to activities which occurred after the making of the Ideal mortgage loan, and hence, cannot serve as a basis for denying plaintiff relief herein.

To the extent plaintiff seeks to direct the Register to record the photocopy of the Ideal mortgage as an original with the same force and effect as if the original had been recorded on July 14, 2008, article 9 of the Real Property Law provides that a properly recorded mortgage is superior to subsequently recorded mortgages (*see* Real Property Law §§ 290–291). "The statute was enacted to protect purchasers with an interest in real property without record notice of prior encumbrances and to create a public record to meet this end (*see Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 20 [1979])" (*Gletzer v Harris*, 12 NY3d 468, 473 [2009]). Liens are similarly recorded (*see* CPLR 5203). Plaintiff has failed to present a title and lien search to show that there are no persons or entities having recorded interests against the subject property subsequent to the making of the Ideal mortgage loan. Plaintiff therefore cannot obtain the drastic remedy of directing the recording of a photocopy of the Ideal mortgage *nunc pro tunc* as of July 14, 2008, or alternatively, declaring that the debt is secured by an equitable lien against the property *nunc pro tunc* as of that date, since such relief would violate and undermine the purpose of New York State's recording statute (*see* Real Property Law § 291; *Wells Fargo Bank, NA v Perry*, 23 Misc 3d 827 [Sup Ct, Suffolk County 2009] and cases cited therein).

To the degree plaintiff alternatively seeks to declare that, pursuant to the doctrine of equitable subrogation, it holds a first priority lien against the property in the amount of $318,144.78, plus interest at the legal rate,[2] insofar as the proceeds from the Ideal mortgage

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[2] The court notes that in event equitable subrogation is found to be available to plaintiff, it would be entitled to interest based upon the respective interest rates, pursuant to the notes secured by the Citibank and Fremont mortgages, and not at the legal rate of interest (*see Surface v Stewart*, 58 AD3d 715 [2d Dept 2009]; *Wagner v Maenza*, 223 AD2d 640 [2d Dept 1996];

were used to satisfy the Citibank and Fremont mortgage loans, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the rights of the senior lienholder (*see King v Pelkofski*, 20 NY2d 326, 333 [1967]; *Wagner v Maenza*, 223 AD2d 640 [2d Dept 1996]; *Zeidel v Dunne*, 215 AD2d 472 [2d Dept 1995]). Again, plaintiff has failed to establish that there are no subsequent encumbrancers or purchasers who would be adversely affected by virtue of the imposition of a first priority lien against the property, pursuant to the doctrine of equitable subrogation. Because the original Ideal mortgage is unrecorded, and because the satisfactions of mortgage for the Citibank and Fremont mortgages make no reference to the Ideal mortgage, constructive notice of the Ideal mortgage cannot be imputed to any subsequent encumbrancer or purchaser.

Under such circumstances, summary judgment against defendants, Roseman, is unwarranted. That branch of the motion by plaintiff for summary judgment against defendants, Roseman, is denied.

With respect to that branch of the motion by plaintiff to dismiss the affirmative defenses asserted by defendants, Roseman, plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2d Dept 2006]; *see Ramanathan v Aharon*, 109 AD3d 529, 531 [2d Dept 2013]).

That branch of the motion by plaintiff to dismiss the second affirmative defense asserted by defendants, Roseman, in their answer based upon failure to mitigate damages is granted. Mitigation of damages is not an affirmative defense herein where plaintiff seeks declaratory and equitable relief, and no award of damages (*see US Bank Nat. Assn. v McPherson*, 35 Misc 3d 1219[A] [Sup Ct, Queens County 2012]).

That branch of the motion by plaintiff to dismiss the third affirmative defense asserted by defendants, Roseman, in their answer based upon the expiration of the applicable statutes of limitations and "administrative filing periods" is granted. A declaratory judgment action is governed by the six-year catch-all statute of limitations set forth in CPLR 213(1), unless the nature of underlying action reveals that dispute could have been resolved through specific action or proceeding for which there is prescribed limitations period (*see* CPLR 213[1]; *Walter v Starbird-Veltidi*, 78 AD3d 820 [2d Dept 2010]). No specific action or proceeding exists for the recording of a copy of the mortgage to act as replacement for the lost mortgage, for which there is a prescribed limitations period. To the extent plaintiff seeks to declare an equitable lien and equitable subrogation, a cause of action to impose an equitable lien is subject to a six-year Statute of Limitations period (*see* CPLR 213[1]). Even assuming for the purpose of plaintiff's motion that its claims accrued on July 14, 2008 when the Ideal mortgage loan was made, the action is timely commenced (CPLR 213[1]).

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*Whitestone Sav. & Loan Assn. v Moring*, 286 App Div 1042 [2d Dept 1955]).

With respect to the branch of the motion by plaintiff to dismiss the sixth affirmative defense and counterclaim asserted by defendants, Roseman, based upon violation of Banking Law § 6-l, Banking Law § 6–l "imposes limitations and prohibits certain 'practices for high-cost home loans' " (*Aries Fin., LLC v 12005 142nd St., LLC*, 127 AD3d 900, 901 [2d Dept 2015], quoting Banking Law § 6–l [2]). A "high-cost home loan" is defined by Banking Law § 6–l(1)(d) as a home loan in which the terms of the loan exceed one or more of certain thresholds (see Banking Law § 6-l [1][g]). Banking Law § 6-l provides for a private action against the lender or mortgage broker for violation of the section, and that a borrower may obtain a judgment awarding monetary damages, injunctive, declaratory and equitable relief, and reasonable attorneys' fees (*see* Banking Law § 6-l [7] and [8]). The statute also provides that the violation of Banking Law § 6-l may result in rescission of the mortgage loan transaction, and that rescission may be raised as an affirmative claim or defense, and the remedy of rescission is available as a defense without time limitation (*see* Banking Law § 6-l [11]). To the degree defendants, Roseman, seek recoupment and actual and statutory damages based upon violation of Banking Law § 6-l, they have failed to state a cause of action against plaintiff. Plaintiff was not the original lender or mortgage broker of the mortgage loan (*see* Banking Law § 6-l [10]) and makes no claim herein to enforce the Ideal mortgage loan based upon a default more than 60 days or in foreclosure (*see* Banking Law § 6-l[l3]).

To the degree defendants, Roseman, seek to declare the note and mortgage void and unenforceable, plaintiff asserts that the counterclaim is time-barred, pursuant to the applicable six-year statute of limitations (see Banking Law § 6-l[6]). Plaintiff, however, failed to raise the expiration of the statute of limitations as an affirmative defense in its reply, or in a pre-answer motion to dismiss. It therefore has waived the defense based upon expiration of the statute of limitations (*see* CPLR 3211[a][5], 3211[e]; *MidFirst Bank v Ajala*, 146 AD3d 875 [2d Dept 2017]). To the extent plaintiff's reply purportedly reserves the right to assert further defenses, plaintiff also has failed to move for leave to amend its reply to assert the affirmative defense based upon the expiration of the applicable statute of limitations (*see* CPLR 3025[b]).

Plaintiff has failed to make a *prima facie* demonstration that the Ideal mortgage loan was not a home loan entitled to protection against the specified prohibited practices for "high-cost home loans," or that Ideal did not violate section 6-l of the Banking Law in making the loan. Under such circumstances, that branch of the motion by plaintiff to dismiss the sixth affirmative defense and counterclaim asserted by defendants based upon violation of Banking Law § 6-l is granted only to the extent of dismissing the portion of the sixth affirmative defense and counterclaim for recoupment and actual and statutory damages based upon violation of Banking Law § 6-l.

Dated: June 12, 2017

DARRELL L. GAVRIN, J.S.C.