[* 1]

COPY

SHORT FORM ORDER

INDEX NO. 12114-2012

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:001: 1-21-2014; 002: 3-24-2015
Motion Sequence.: 001: MotD; 002: MD

----------X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE, FOR NEW CENTURY HOME EQUITY LOAN TRUST 2005-3,

Plaintiff,

-against-

DAVID KAUFMAN; DENISE KAUFMAN; LIBERTY MUTUAL; CLERK OF THE SUFFOLK COUNTY DISTRICT COURT; PEOPLE OF THE STATE OF NEW YORK; NYS COMMISSIONER OF TAXATION AND FINANCE; UNITED STATES OF AMERICA; "JOHN DOES" AND "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

----------X

Margolin & Weinreb Law Group LLP
By Ross Eisenberg, Esq.
Attorneys for Plaintiff
165 Eileen Way
Suite 101
Syosset, New York 11791

Charles Wallshein, Esq.
Attorney for Defendants Kaufman
115 Broadhollow Road
Suite 350
Melville, New York 11747

Upon consideration of the Notice of Motion dated December 12, 2014, seeking summary judgment in favor of the plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE, FOR NEW CENTURY HOME EQUITY LOAN TRUST 2005-3 ["the plaintiff" or "DBNTC"], an order appointing a referee to compute, and leave to amend the caption, the Affirmation of Ross Eisenberg, Esq., dated December 12, 2014, with Exhibits A-I, the Affidavit of Elizabeth A. Ostermann, sworn to on May 15, 2014, and supporting papers thereto (001), and the Notice of Cross-Motion dated February 24, 2015, on behalf of the defendants David Kaufman and Denise Kaufman [collectively "the defendants"], for an order granting leave to amend the answer sworn to on May 14, 2012, awarding the defendants summary judgment dismissing the complaint, or compelling discovery, with Exhibits A-J, the Affirmation of Charles Wallshein, Esq. in Opposition and in Support of Cross-Motion; the Affidavit of defendant David Kaufman in Opposition and Support of Cross-Motion (002); and Plaintiff's Affirmation by Ross Eisenberg, Esq., with Exhibit A, in Reply and in Opposition to Cross-Motion, and after due deliberation thereon, it is

ORDERED that Plaintiff's motion for an Order striking the defendants' answer and affirmative defenses and dismissing the counterclaim, for summary judgment pursuant to CPLR 3212, for a default judgment pursuant to CPLR 3215 and RPAPL 1321 against the non-appearing parties, 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 to amend the caption, is granted in part and denied in part; and it is further

ORDERED that so much of the plaintiff's motion for an order granting default judgment against the non-appearing parties, amending the caption, and striking the defendants' answer and affirmative defenses and dismissing the counterclaim is granted, and the plaintiff's motion is otherwise denied, with leave to renew within 120 days of the date herein, not to be extended without leave of court; and it is further

ORDERED that the defendants' cross motion is denied in its entirety; and it is further

ORDERED that the Plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that the Plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR §2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York, commenced on April 17, 2012. On April 5, 2005, defendant David Kaufman executed a note in favor of New Century Mortgage Corporation ["NCMC"]. To secure the note, defendants David Kaufman and Denise Kaufman gave NCMC a mortgage encumbering the subject property. According to the moving affirmation submitted in support of summary judgment, on or about June 24, 2005, the subject loan was pooled and securitized pursuant to the Pooling and Servicing Agreement ["PSA"] for New Century Home Equity Loan Trust 2005-3 ["the Trust"], entered into between NCMC as Issuer, NCMC as Master Servicer, and DBNTC. Although a copy of the PSA is annexed as an exhibit to the moving papers, the moving affirmation references a one-page, redacted copy of the PSA's loan schedule as proof that the subject loan was included in the pool of loans pursuant to the PSA, purportedly demonstrating the note's physical delivery to DBNTC prior to the commencement of the action in 2012. Unfortunately, the referenced loan schedule is illegible. Nevertheless, the moving affirmation asserts that DBNTC had physical possession of the subject note and mortgage as of June 24, 2005, the closing date of the PSA, and that DBNTC had the right to enforce the note as of that date.

By their answer, the defendants generally deny the material allegations set forth in the complaint, and assert twenty-three, largely boilerplate, affirmative defenses and one counter-claim. The defendants' opposition to the plaintiff's application for summary judgment and related relief and in support of their cross-motion for leave to amend their answer, to dismiss the complaint, and to compel discovery is limited solely to the argument that the plaintiff lacked standing to commence the action.

In support of its motion, the plaintiff provided an affidavit of merit and amounts due from Elizabeth A. Ostermann, an officer of the plaintiff's loan servicing agent, Carrington Mortgage Services,

LLC as Servicer and Attorney-in-Fact for DBNTC, sworn to on May 15, 2014 ["the Ostermann affidavit"]. Ostermann avers that Carrington Mortgage Services, LLC ["CMS"], is the Servicer and Attorney-in-Fact for DBNTC. Annexed to the Ostermann affidavit is a Limited Power of Attorney, sworn to on April 14, 2010, wherein DBNTC appointed CMS as successor servicer to NCMC, as DBNTC's true and lawful Attorney-in-Fact. The Ostermann affidavit attests that her affidavit is based upon Ostermann's review and examination of the records relating to the borrowers' loan kept and maintained in the regular course of business of CMS as Servicer and Attorney-in-Fact for the plaintiff. Based upon CMS's records the affiant attests, inter alia, that defendants breached their obligations by failing to tender the installment which became due and payable on February 1, 2011, and by failing to tender subsequent installments. The plaintiff elected to accelerate the mortgage debt and declared all sums secured thereby due and payable. A copy of the subject note executed by David Kaufman with an allonge endorsed in blank was annexed to the Ostermann affidavit.

In addition, the Ostermann affidavit asserts that by written assignment of the mortgage dated December 21, 2011, New Century Liquidating Trust, successor-in-interest to New Century Mortgage Corporation ["NCLT"], assigned the defendants' mortgage "[together] with the bond, or note, or obligation described in said mortgage, and the monies due and to grow due thereon with the interest" to the plaintiff, DBNTC. The written assignment was recorded in the Office of the Suffolk County Clerk on January 31, 2012. The affiant asserts that DBNTC is the owner and holder of the subject mortgage and note.

A plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the default (*see* ***Deutsche Bank Natl. Trust Co. v. Abdan***, 131 A.D.3d 1001, 1002, 16 N.Y.S.3d 459 [2d Dept 2015]). Where, as here, the plaintiff's standing has been placed in issue by the defendants' answer, the plaintiff also must prove its standing as part of its prima facie showing (*see* ***JPMorgan Chase Bank, N.A. v. Mantle***, 134 A.D.3d 903, 904, 23 N.Y.S.3d 258 [2d Dept 2015]). In a foreclosure action, a plaintiff has standing if it is the holder, or the assignee, of the underlying note at the time the action is commenced (*see* ***Aurora Loan Servs., LLC v. Taylor***, 25 N.Y.3d 355, 361-362, 12 N.Y.S.3d 612, 34 N.E.2d 363 [2015]; ***U.S. Bank Nat. Ass'n v. Cox***, 148 A.D.3d 962, 49 N.Y.S.3d 527, 529 [2d Dept 2017]). "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" (*see* ***Aurora Loan Servs., LLC v. Taylor***, 25 N.Y.3d at 361-362; ***Dyer Trust 2012-1 v. Global World Realty, Inc.***, 140 A.D.3d at 828, 33 N.Y.S.3d 414 [2d Dept 2016]; ***Deutsche Bank Trust Co. Americas v. Garrison***, 147 A.D.3d 725, 46 N.Y.S.3d 185, 187 [2d Dept 2017]).

Here, the plaintiff sought to establish standing by virtue of both the 2011 assignment from NCLT to DBNTC, and DBNTC's possession of the note since the note's securitization by the terms of the PSA dated June 24, 2005, respectively. Notably, the Ostermann affidavit made no reference to the date when DBNTC came into possession of the subject note, either in terms of its physical delivery to the plaintiff or in relation to the PSA which, although included as an exhibit to the moving papers, contained an illegible loan schedule. The Ostermann affidavit did, however, include a copy of the assignment of mortgage from NCLT as Assignor to DBNTC as Assignee, executed by an officer of CMS as Attorney-in-Fact for NCLT. Beneath that signature was a notation of a Power of Attorney recorded on September 8, 2011 in LIBER D00012672; PAGE 201.

Prescinding from the issue of whether the Osterman affidavit, the inclusion of the pooling and servicing agreement, the loan schedule, and a copy of the endorsed note were sufficient to establish DBNTC's standing by physical delivery of the note prior to the commencement of the action, the "Assignment of Mortgage" executed on December 21, 2011, whereby NCLT assigned the mortgage to DBNTC "[together] with the bond, or note, or obligation described in said mortgage, and the monies due and to grow due thereon with the interest" was sufficient to demonstrate DBNTC's status as an assignee of the note as of the date the action was commenced (*see* ***U.S. Bank Nat. Ass'n v. Akande***, 136 A.D.3d 887, 890, 26 N.Y.S.3d 164, 167 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v. Walker***, 141 A.D.3d 986, 989, 35 N.Y.S.3d 591, 594 [3d Dept 2016]).

In opposition, the defendants failed to raise a triable issue of fact. As mortgagees whose loan is owned by a trust, the defendants do not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the relevant pooling and servicing agreement (*see* ***Bank of Am. N.A. v. Patino***, 128 A.D.3d 994, 995, 9 N.Y.S.3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v. Erobobo***, 127 A.D.3d 1176, 1178, 9 N.Y.S.3d 312 [2d Dept 2015]). The opposition/cross motion also raised the issue of whether CMS as Attorney-in-Fact for NCLT had authority to assign the note and mortgage to DBNTC. In its opposition to the cross motion and in reply, the plaintiff provided a copy of a Limited Power of Attorney dated June 16, 2008, whereby NCLT, as successor to NCMC, gave CMS a limited power of attorney to, among other things, execute mortgage assignments (*see* ***Cent. Mortg. Co. v. Jahnsen***, ___ A.D.3d ___, 2017 WL 1658560 [2d Dept 2017] [inclusion of evidence submitted for first time in reply properly considered where offered in response to specific allegations first raised in opposition papers]; *see also* ***Citimortgage, Inc. v. Espinal***, 134 A.D.3d 876, 879, 23 N.Y.S.3d 251, 254 [2d Dept 2015] [same]). That CMS served as power of attorney for both parties to the assignment, NCLT and DBNTC, respectively, does not undermine its validity (***Wells Fargo Bank, N.A. v. Walker***, 141 A.D.3d at 989). Notably, on January 5, 2011, defendant David Kaufman entered into a loan modification agreement with CMS re-stating the new principal balance on the subject note and reserving CMS's rights under or remedies on the note and mortgage (*see id*; *see also* ***Wells Fargo Bank v. Zelaya***, 47 Misc. 3d 1228(A), 18 N.Y.S.3d 582 [N.Y. Sup. Ct. 2015] [Whelan, J.]). The Court has considered the defendants' remaining arguments as to standing and finds them to be without merit. The plaintiff otherwise demonstrated, prima facie, the note, the mortgage, and evidence of the defendants' default (*see* ***Deutsche Bank Nat. Trust Co. v. Abdan***, 131 A.D.3d 1001, 1002, 16 N.Y.S.3d 459 [2d Dept 2015), *leave to appeal denied*, 26 N.Y.3d 917, 47 N.E.3d 92 [2016]).

Paragraph 5 (c) of the complaint alleges that the plaintiff was in compliance with sending the 90 day notice as required by RPAPL §1304. Where, as here, the plaintiff in a residential foreclosure action alleges in its complaint that it has served a notice pursuant to RPAPL 1304 on a borrower, in support of a motion for summary judgment, the plaintiff must "prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (***Aurora Loan Servs., LLC v. Weisblum***, 85 A.D.3d 95, 106, 923 N.Y.S.2d 609 [2d Dept 2011]; *see* ***Bank of N.Y. Mellon v. Aquino***, 131 A.D.3d 1186, 1187, 16 N.Y.S.3d 770 [2d Dept 2015]; ***Citibank, N.A. v. Wood***, ___ A.D.3d ___, 2017 WL 1903218, at *1 [2d Dept 2017]); ***JPMorgan Chase Bank, Nat. Ass'n v. Kutch***, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235, 236 [2d Dept 2016]).

The Ostermann affidavit averred that CMS "sent the required 90 day Notice of Intent to Foreclose by registered, certified mail and by first class mail by depositing same in an official depository under the exclusive control and custody of the United States Postal Service." A copy of the referenced letter was attached as an exhibit to the moving papers. Ostermann's unsubstantiated and conclusory statement was insufficient to establish that the required RPAPL 1304 notice was mailed to the defendants by first class and certified or registered mail (***JPMorgan Chase Bank, Nat. Ass'n v. Kutch***, 142 A.D.3d at 537). Ostermann did not aver that she was familiar with CMS's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (***CitiMortgage, Inc. v. Pappas***, 147 A.D.3d 900, 47 N.Y.S.3d 415, 417 [2d Dept 2017]). Because the plaintiff has failed to establish that it strictly complied with RPAPL 1304, so much of the plaintiff's motion for an order granting summary judgment and an order of reference is denied without prejudice and with leave to renew within 120 days of the date of this order.

Plaintiff has submitted sufficient proof to establish, *prima facie*, that the remaining affirmative defenses set forth in the defendants' answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v. Feller***, 64 A.D.3d 672, 884 NYS2d 83 [2d Dept. 2009]). In opposition, the defendant failed to raise a triable issue of fact as to any bona fide defense to foreclosure. Thus, the remaining affirmative defenses and the counterclaim are hereby stricken.

In their Notice of Cross-Motion dated February 24, 2015, the defendants seek leave to amend their previously filed Answer dated May 14, 2012, in part upon the ground that the defendants have changed their legal representation. The defendants' present counsel states that the amended answer expands the original answer by adding affirmative defenses including the factual bases (*sic*) for the original Answer's allegation that the Plaintiff lacks standing. The Court has reviewed both defense counsel's arguments in his affirmation, as well as the proposed Amended Answer (Exhibit B, Defendants' Notice of Cross-Motion). As set forth above, the Court finds that the defendants' argument that the plaintiff does not have standing to proceed in the subject action is without merit. That branch of the cross motion for leave to amend the answer is denied, as the proposed amendments are either patently devoid of merit or their belated addition would prejudice the plaintiff. Moreover, the defendants have failed to offer a reasonable excuse for the nearly three year delay between the original answer in 2012 and their notice of cross motion in 2015 (*see* ***Aurora Loan Servs., LLC v. Baritz***, 144 A.D.3d 618, 620-21, 41 N.Y.S.3d 55 [2d Dept 2016]).

With regard to the defendants' request for discovery, the defendants have not made a satisfactory showing of the evidence sought which would create an issue of fact (*see* ***Cent. Mortg. Co. v. Jahnsen***, ___ A.D.3d ___, 2017 WL 1658560 [2d Dept 2017]; ***Dyer Trust 2012-1 v. Glob. World Realty, Inc.***, 140 A.D.3d 827, 829, 33 N.Y.S.3d 414, 416 [2d Dept 2016]). The defendants' cross motion is denied in its entirety.

The proposed order appointing a referee to compute has been marked "not signed".

DATED: June 9, 2017

C. RANDALL HINRICHS, JSC

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION