SHORT FORM ORDER **INDEX NO.: 37489/2010**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motions Submit Date: 08/03/17
Motion Seq 002 MG
Motion Seq 004 MD; RTH

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BANK OF AMERICAN, NATIONAL ASSOCIATION,

Plaintiff,

-against-

MELVIN KANAN a/k/a MELVIN H. KANAN, 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 of lien upon the mortgage premises),

Defendants.

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PLAINTIFF'S COUNSEL:
Aldridge Pite LLP
40 Marcus Drive, Suite 200
Melville, New York 11747

DEFENDANTS' COUNSEL:
Young Law Group, PLLC.
80 Orville Drive, Suite 100
Bohemia, New York 11716

Concerning the parties' motions, the Court considered the following:

1. Notice of Motion & Affirmation in Support dated July 6, 2015 and supporting papers;
2. Notice of Cross-Motion & Affirmation in Support & in Opposition dated May 16, 2017 and supporting papers;
3. Reply Affirmation in Further Support dated July 25, 2017; it is

ORDERED that this motion by the plaintiff for, *inter alia*, an order awarding summary judgment in its favor and against the answering defendant, striking the unmeritorious affirmative defenses in defendant's answer and treating it as a limited notice of appearance, appointing a referee and amending the caption is **granted**; and it is

ORDERED that the caption is amended by excising the names of the fictitious defendants "JOHN DOE"; and it is

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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BANK OF AMERICAN, NATIONAL ASSOCIATION

Plaintiff, **Index No.:37489/2010**

-against-

MELVIN KANAN a/k/a MELVIN H. KANAN,

Defendant.

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and it is

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

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon defendant pursuant to CPLR 2103 (b) (1), (2) or (3), and by regular mail upon all other parties, if any, who have appeared herein and not waived further notice within thirty (30) days of the date herein, and it shall promptly file the affidavits of service with the Clerk of the Court.

ORDERED that counsel for defendant is directed to serve a copy of this decision and order with notice of entry **no later than 10 days** prior to the scheduled foreclosure status conference; and it is further

ORDERED that counsel for the parties are hereby directed to appear for a foreclosure status conference before this Court on June 27, 2018.

This is an action to foreclose a mortgage on premises more commonly known and referred to as 86 East Lake Drive, Montauk, Suffolk County New York 11954. Defendant Melvin Kanan (hereinafter "defendant" or "borrower") executed a promissory note dated November 30, 2006 in favor of the Mortgage Electronic Registration System ("MERS"), as nominee for the Wells Fargo Bank, NA, agreeing to pay $ 910,000.00 at 6.5% annual interest rate. The note was secured by a mortgage of the same date on the subject property which was recorded with the Suffolk County Clerk on December 18, 2006, recorded at Liber 21437, page 347. The promissory note bore an undated endorsement in blank.

Plaintiff alleges that the note was then subsequently transferred by assignment by from MERS as nominee for Wells Fargo Bank, NA to Bank of America, NA in an instrument dated September 28, 2010, recorded by the County Clerk on November 5, 2010 at Liber 22006, page 73. The note was then subsequently transferred again by assignment dated February 6, 2015 from Bank of America, NA as attorney-in-fact to Wells Fargo Bank, NA to Pennymac Loan Servicing Corporation, recorded by the County Clerk on March 20, 2015 at Liber 22576, page

282.

This action commenced with plaintiff's filing of a summons, complaint and notice of pendency on October 8, 2010, premised upon defendant's alleged default of his obligation to render timely monthly payments under the note and mortgage due on or about February 1, 2010. Defendant by counsel joined issue serving an answer with one sole affirmative defenses challenging plaintiff's standing or capacity to sue on November 10, 2010.

The proponent on a motion of summary judgment 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, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

The law of standing in foreclosure litigation within the Second Department is well settled by this point. A plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (***Hudson City Sav. Bank v Genuth***, 148 AD3d 687, 688–89, 48 NYS3d 706, 708 [2d Dept 2017]). Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by [a] defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (***Deutsche Bank Tr. Co. Americas v Garrison***, 147 AD3d 725, 726, 46 NYS3d 185, 187 [2d Dept 2017]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept. 2011][where an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief]).

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note. "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" (***DLJ Mortg. Capital, Inc. v Pittman***, 150 AD3d 818, 819, 56 NYS3d 120, 121–22 [2d Dept 2017]; ***Dyer Tr. 2012-1 v Glob. World Realty, Inc.***, 140 AD3d 827, 828, 33 NYS3d 414, 416 [2d Dept 2016]; ***U.S. Bank Nat. Ass'n v Saravanan***, 146 AD3d 1010, 1011, 45 NYS3d 547, 548 [2d Dept 2017]). Where plaintiff traces its standing as a holder of a negotiable instrument bearing an endorsement in blank, as the plaintiff does here, there is no requirement to establish how plaintiff came into possession of the instrument in order to be able to enforce it (***Wells Fargo Bank, NA v***

Thomas, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]).

The Second Department has also clearly determined that "[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" ... "in the absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment" ... thus making it "sufficient if the assignor has, in some fashion, *manifested an intention to make a present transfer of his rights to the assignee*" (***Deutsche Bank Nat. Tr. Co. v Romano***, 147 AD3d 1021, 1023, 48 NYS3d 237, 240 [2d Dept 2017][emphasis in original, internal citations omitted]).

In a foreclosure action, plaintiff establishes *prima facie* entitlement to judgment as a matter of law on its complaint by producing the mortgage, the unpaid note, and evidence of default (***Prompt Mortg. Providers of N. Am., LLC v Singh***, 132 AD3d 833, 834, 18 NYS3d 668, 669 [2d Dept 2015]) and by demonstrating that defendant's asserted affirmative defenses lack merit (***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 998, 985 NYS2d 254, 255 [2d Dept 2014]). Here, defendant supports its application supplying the Court with copies of the assignments. Plaintiff further annexes to its moving papers a copy of the promissory note bearing an undated endorsement in blank. Moreover, plaintiff relies upon the affidavit from Jeffrey Gutierrez, Loan Document Specialist for servicer Pennymac Loan Servicing Corp. dated June 25, 2015. Gutierrez, the affiant, testifies that he has personal knowledge of his employer's computerized records keeping system which entails a loan history of defendant's mortgage comprised of "acts, transactions, payments, communications, escrow account activity, disbursements, etc." By virtue of the service's affidavit, plaintiff traces back its physical possession of the note to November 30, 2006 with assignment from MERs as nominee for originator Wells Fargo Bank, NA to plaintiff. Thus, plaintiff argues it had demonstrated its standing to sue for foreclosure having demonstrated a chain of custody and possession of the promissory note in question prior to commencement of this action on October 8, 2010.

Defendant for his part cross-moves to dismiss the complaint for lack of plaintiff's standing. In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Nonnon v. City of New York***, 9 NY3d 825, 827; ***Leon v. Martinez***, 84 NY2d 83, 87–88; ***Paolicelli v. Fieldbridge Assoc., LLC***, 120 AD3d 643, 644; ***Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.***, 131 AD3d 601, 603 [2d Dept 2015]). Nonetheless, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (***Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.***, 132 AD3d 811, 812 [2d Dept 2015]).

In support of his application, defendant argues that plaintiffs lacks standing insofar as the servicer's affidavit constitutes inadmissible hearsay. Defendant further argues that standing is not established where a copy of the note did not accompany the summons, complaint and notice of pendency commencing the action. Further, defendant contends that plaintiff's note bearing an undated indorsement alone is insufficient to confer standing on the plaintiff. Lastly, defendant attacks the validity of the servicer's affidavit arguing it does not comport with the notarization requirements for documents notarized and executed outside New York under Real Property Law § 299.

Taking each of defendant's arguments in turn, this Court is unpersuaded that plaintiff lacks standing to sue and therefore defendant's motion must be unsuccessful.

Contrary to defendant's claims, plaintiff commenced the instant action prior to CPLR 3012-b's requirements for the attachment of a copy of the note to the pleadings and notice of pendency (***Bank of New York Mellon v Izmirligil***, 144 AD3d 1063, 1066, 42 NYS3d 270, 273 [2d Dept 2016][the Legislature manifested a clear intent to apply the certificate of merit requirement of CPLR 3012–b only to those actions commenced on or after August 30, 2013]). Moreover, a copy of the note was supplied to the Court and served on the defendant in connection with pending applications presently before the Court.

Moreover, although it is true the service affidavit was both executed and notarized in California, our courts have repeatedly held that plaintiff's failure to strictly comply with CPLR 2309(c) or RPL § 299's certificate of conformity have not been deemed a fatal defect or jurisdictional in nature, since such a certification may be provided *nunc pro tunc* deemed (***U.S. Bank Nat. Ass'n v Dellarmo***, 94 AD3d 746, 748, 942 NYS2d 122, 124 [2d Dept 2012]; ***Midfirst Bank v Agho***, 121 AD3d 343, 351, 991 NYS2d 623, 629–30 [2d Dept 2014][even if the bank's affidavit was not accompanied by a certificate of conformity, such absence is universally as not in and of itself, a fatal defect]).

The servicer's affidavit is not inadmissible hearsay as defendant suggests and thus may be considered as indicia of plaintiff's standing to sue. A foreclosure plaintiff adequately establishes standing on summary judgment with submission *prima facie* entitling it to judgment as a matter of law with production of the note, mortgage, and an affidavit of someone with direct, firsthand and personal knowledge of the records keeping practices of noteholder or servicer kept, created or maintained in the regular course of business(*see e.g.* ***Citigroup v Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223, 225 [2d Dept 2017][contrary to the appellants' contentions, Say's affidavit was sufficient proof of their default because the business records he relied upon satisfied the admissibility requirements of CPLR 4518(a), and the records themselves actually evinced the facts underlying the appellants' default; ***Citibank, N.A. v Cabrera***, 130 AD3d 861, 861, 14 NYS3d 420, 421 [2d Dept 2015][a proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures]; *but see* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 1296, 956 NYS2d 196, 200 [3d Dept 2012][mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business]).

Here, plaintiff has dispatched with its burden of proof submitted a note bearing the endorsement in blank, the duly recorded assignment evidencing a chain of custody of the note and evidencing possession prior to commencement, all corroborated by the servicer's affidavit which properly constitutes an admissible business record pursuant to CPLR 4518.

Lastly, defendant's argument that the endorsement in blank alone is insufficient lacks merit in view of all the above. The law of standing in foreclosure litigation within the Second

Department is well settled by this point. A plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (***Hudson City Sav. Bank v Genuth***, 148 AD3d 687, 688–89, 48 NYS3d 706, 708 [2d Dept 2017]). Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by [a] defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (***Deutsche Bank Tr. Co. Americas v Garrison***, 147 AD3d 725, 726, 46 NYS3d 185, 187 [2d Dept 2017]). The Second Department has also clearly determined that "[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" … "in the absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment" … thus making it "sufficient if the assignor has, in some fashion, *manifested an intention to make a present transfer of his rights to the assignee*" (***Deutsche Bank Nat. Tr. Co. v Romano***, 147 AD3d 1021, 1023, 48 NYS3d 237, 240 [2d Dept 2017][emphasis in original, internal citations omitted]). Considering this precedent, defendant fails to meet his burden disturbing the inference arising from plaintiff's evidentiary submissions demonstrating standing and entitling it to judgment as a matter of law.

Given all of the above, it is clear that based on plaintiff's demonstration of *prima facie* entitlement to judgment as a matter of law having established standing, defendant was then burdened with establishing to lay bare his proof to raise a triable issue of fact concerning standing (***Mendel Group, Inc. v Prince***, 114 AD3d 732, 733, 980 NYS2d 519, 520 [2d Dept 2014]). This defendant has not done. Accordingly, defendant's motion to dismiss the complaint for plaintiff's lack of standing is **denied**. Plaintiff's motion for summary judgment and an order of reference appointing a referee to compute the amounts due and owing on the promissory note is **granted**.

Plaintiff's proposed order of reference, as modified by the Court, has been signed simultaneously with the issuance of this order.

The foregoing constitutes the decision and order of this Court.

Dated: April 23, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**