SHORT FORM ORDER

INDEX NO. 000078/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE: 5-15-18 (001)
5-15-18 (002)
ADJ. DATE: 6-26-18 (001, 002)
Mot. Seq. # 001 -MG
Mot. Seq. # 002 -XMD

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BANK OF AMERICA, N.A,

Plaintiff,

- against -

ALICE MC NAMARA a/k/a ALICE MCNAMARA, GOOD SAMARITAN HOSPITAL MEDICAL CENTER, CAPITAL ONE AUTO FINANCE INC., PEDRO T. RODRIGUEZ, RAMONA C. RODRIGUEZ, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA, and "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22 - 27; Answering Affidavits and supporting papers 28 - 33; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Alica McNamara, striking her answer and dismissing the affirmative defenses and the counterclaim set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption is granted; and it is

ORDERED that the plaintiff is awarded summary judgment dismissing the affirmative defenses asserted in the answer, all with prejudice; and it is

ORDERED that pursuant to CPLR 3211 (b) the counterclaim asserted in the answer is dismissed; and it is

ORDERED that the caption is amended by substituting Robert Maddox for John Doe #1, and excising the remaining fictitious defendants, John Doe #2 through John Doe #12, together with the related descriptive wording relating thereto; and it is

ORDERED that the plaintiff shall to serve a copy of this order with notice of entry upon the Clerk of this Court within thirty (30) days of the date herein; and it is

ORDERED that the plaintiff shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all other appearing parties that have 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; and it is further

ORDERED that this motion by the defendant Alice McNamara for, inter alia, an order pursuant to CPLR 3212 awarding her summary judgment dismissing the complaint insofar as asserted against her on the grounds that: (a) the plaintiff lacks standing; and (2) the plaintiff failed to demonstrate strict compliance with the notice requirements of RPAPL 1304 and the filing requirements of RPAPL 1306 is denied.

This is an action to foreclose a mortgage on certain real property known as 35 Bayview Avenue, Babylon, New York 11702. On January 23, 2006, Michael McNamara executed a fixed-rate note in favor of American Brokers Conduit ("the lender") in the principal sum of $400,000.00. To secure said note, Mr. McNamara and his wife, the defendant Alice McNamara (collectively "the defendant mortgagors"), gave the lender a mortgage also dated January 23, 2006, on the property. The mortgage was subsequently recorded in the Office of the Suffolk County Clerk's Office on February 17, 2006. By way of a series of endorsements to the note with physical delivery and a series of bank mergers and/or corporate name changes, the note was allegedly transferred to and/or acquired by Bank of America, N.A ("the plaintiff") prior to commencement.

Mr. McNamara allegedly defaulted on the note by failing to make the monthly payment of principal and interest due on or about May 1, 2009, and each month thereafter. After Mr. McNamara allegedly failed to cure the default in payment, the plaintiff's predecessor-in-interest, BAC Home Loans Servicing, LP formerly known as Countrywide Home Loans Servicing LP commenced a prior action ("the prior action") against the defendant mortgagors on April 9, 2010 under Suffolk County Index No.: 13582/2010.

On September 9, 2010, Mr. McNamara died intestate, and on February 17, 2012, Robert A. Maddox was subsequently appointed as administrator of Mr. McNamara's estate. Thereafter, the prior action was discontinued without prejudice pursuant to order dated December 12, 2012 (Spinner, J.).

The plaintiff commenced the instant in rem foreclosure action by the filing of a summons and verified complaint on January 2, 2014. Parenthetically, a deficiency judgment is not sought in the complaint. Issue was joined by the interposition of Mrs. McNamara's answer dated March 5, 2014, with an attached verification of the same date. By her answer, Mrs. McNamara denies all of the material allegations in the complaint, and asserts seventeen affirmative defenses and one counterclaim. The affirmative defenses include, among other things, the plaintiff's lack of standing, and the plaintiff's failure to prove strict compliance with the filing requirements of RPAPL 1306. The remaining defendants have not answered and, thus, all are in default.

In response, the plaintiff interposed a reply dated March 17, 2014, denying the material allegations in the counterclaims, and asserting nine affirmative defenses, alleging inter alia, the failure to state a cause of action; documentary evidence; the statute of limitations; ratification; and waiver, estoppel and/or unclean hands.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against Mrs. McNamara, striking her answer and dismissing the affirmative defenses and the counterclaim asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

Mrs. McNamara opposes the plaintiff's motion and cross moves for, inter alia, an order pursuant to CPLR 3212 awarding her summary judgment dismissing the complaint insofar as asserted against her on the grounds that: (a) the plaintiff lacks standing; and (2) the plaintiff failed to demonstrate strict compliance with the notice requirements of RPAPL 1304 and the filing requirements of RPAPL 1306. In response to the cross motion, the plaintiff has filed opposition and reply papers.

The court first turns to the cross motion for summary judgment filed by the defendant mortgagor and the standing defenses asserted in the answer. Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]).

The plaintiff established that it had standing to commence this action by submitting the affidavit of its representative, which established that the plaintiff had physical possession of the note at the time it commenced this action (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Bethpage Fed. Credit Union v Caserta***, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; ***HSBC Bank USA, N.A. v Armijos***, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; ***Silvergate Bank v Calkula Props., Inc.***, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; ***Citimortgage, Inc. v Goldberg***, 134 AD3d 880, 20 NYS3d 906 [2d Dept 2015]). In her affidavit, the plaintiff representative alleges that the plaintiff, directly or through its custodian, has had continuous possession and/or custody of the endorsed "wet-ink" note from March 23, 2006 through January 2, 2014, the date of commencement of this action. Such evidence shows that the plaintiff was the holder of the original note at the time of commencement.

The documentary evidence submitted also includes, among other things, the note transferred via a series of endorsements (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). In any event, the plaintiff demonstrated its standing as holder of the endorsed note on the date of commencement by, inter alia, annexing an endorsed copy of same to the complaint as an exhibit (*see*, ***Wells Fargo Bank, N.A. v Osias***, 156 AD3d 942, 943, 68 NYS3d 115 [2d Dept 2017]; ***U.S. Bank N.A. v Saravanan***, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Burke***, 52 Misc3d 944, 34 NYS3d 865 [Sup Ct, Suffolk County 2016] [standing demonstrated by plaintiff's attachment of a copy of the mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to commencement of the action]). Thus, the plaintiff demonstrated its prima facie burden as to its standing.

The court next turns to the branch of the cross motion for dismissal of the complaint insofar as asserted against her on the grounds that the plaintiff failed to demonstrate strict compliance with the notice requirements of RPAPL 1304 and the filing requirements of RPAPL 1306. In its form in effect at the time of the commencement of this action, RPAPL 1304 provided that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender, assignee or mortgage loan servicer commences an action against the borrower, such lender, assignee or mortgage loan servicer must send a notice to the borrower, including certain language in 14-point type. RPAPL 1304 provided that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

It has been established that the Home Equity Theft Protection Act is remedial in nature and "designed to stem the anticipated rise in so-called *mortgage rescue schemes*, and its provisions should be liberally construed in favor of equity sellers" (***Lucia v Goldman***, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009] [emphasis supplied]). Further, the legislative intent was to provide a homeowner with information necessary to preserve and protect home equity (Real Property Law 265-a[1][d]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 107). Nevertheless, "[t]he starting point in any case of statutory interpretation must, of course, always be the language itself, giving effect to its plain meaning. A court cannot amend a statute by adding words that are not there" (***Am. Transit Ins. Co. v Sartor***, 3 NY3d 71, 76, 781 NYS2d 630 [2004]).

RPAPL 1304 plainly read, requires service of the 90-day notice only on a "borrower," not a homeowner or mortgagor (*see*, RPAPL 1304). Even though RPAPL 1304 has been amended multiple times since its initial passage, a definition of "borrower" has not been added therein by the legislature, nor has "borrower" been replaced with "mortgagor" or "homeowner," despite the Appellate Division's findings in ***Weisblum*** more than seven years ago that "borrower" was not defined in the statute. "The [l]egislature is presumed to know the law in existence at the time it enacts legislation ... as well as the effect and implication of its own enactments" (***Brady v Village of Malverne***, 76 AD3d 691, 693, 907 NYS2d 68 [2d Dept 2010]).

The branch of the motion for dismissal of the complaint on the grounds that the plaintiff failed to furnish Mrs. McNamara with a 90-day pre-foreclosure notice pursuant to RPAPL 1304 is denied because she was not a signatory to the note and thus not a "borrower" entitled to such notice (*see*, ***US Bank N.A. v Levine***, 52 Misc3d 736, 36 NYS3d 786 [Sup Ct, Westchester County 2016] [provisions of RPAPL 1304 held inapplicable to fiduciary of borrower's estate]; ***Wells Fargo Bank, NA v Balk***, 50 Misc3d 1205 [A], 29 NYS3d 850 [Sup Ct, Suffolk County 2015] [RPAPL 1304 inapplicable where obligor/borrower died prior to action]; ***New York Community Bank v Jennings***, 2015 NY Misc LEXIS 3103, 2015 WL 5062168, 2015 NY Slip Op 31591 [U] [Sup Ct, Queens County 2015] [RPAPL 1304 inapplicable where both borrowers were deceased]; ***U.S. Bank v Hasan***, 42 Misc3d 1221 [A], 986 NYS2d 869 [Sup Ct, Kings County 2014] [non-obligor spouse who only signed the mortgage not deemed a "borrower" for the purposes of RPAPL 1304]; *see also*, ***U.S. Bank N.A. v Pontecorvo***, 2014 NY Misc LEXIS 5784, 2014 WL 7653336, 2014 NY Slip Op 33413 [U] [Sup Ct, Suffolk County 2014] [borrower was deceased prior to commencement; no evidence that the co-executors assumed the mortgage or obtained a new mortgage in their own names]; ***Vanderbilt Mtge. & Fin. Inc. v Davis***, 2013 NY Misc. LEXIS 4027, 2013 WL 4878361, 2013 NY Slip Op 32117 [U] [Sup Ct, Suffolk County 2013] [provisions of RPAPL 1304 and 1306 deemed inapplicable to co-executors of decedent's estate]; ***Bank of N.Y. Mellon v Roman***, 2012 NY Misc LEXIS 3064, 2012 WL 2563828, 2012 NY Slip Op 31687 [U] [Sup Ct, Queens County 2012] [provisions of RPAPL 1304 deemed inapplicable to the co-executors of borrower's estate, holding an interest in the property after his death by deed and life estate, neither of whom assumed the mortgage or obtained a new mortgage in their own names]; *cf.*, ***Aurora Loan Servs., LLC v Komarovsky***, 151 AD3d 924, 58 NYS3d 96 [2d Dept 2017] [record deemed sufficient to establish that co-signer of Consolidation, Extension and Modification Agreement was a "borrower" within the meaning of RPAPL 1304]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* [same]). Nothing in the record shows that Mrs. McNamara or the administrator of the estate of Mr. McNamara (a non-party to this action), assumed the mortgage. Accordingly, because the statute requires only that the "borrower" be given notice, and the borrower, Mr. McNamara, died more than three years prior to the commencement of the action, the 90-day notice provision of RPAPL 1304 is not applicable herein. Furthermore, this case does not involve a "mortgage rescue scheme" and neither the lender nor the plaintiff are "equity purchasers" within the meaning of HETPA (*see*, RPL 265-a [1]). For the same reasons, the filing requirement imposed by RPAPL 1306 was not required in this case.

The court next turns to the motion-in-chief. Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses "are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (***Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC***, 78 AD3d 746, 748, 911 NYS2d 157 [2d Dept 2010] [internal quotation marks omitted]; ***Vita v New York Waste Servs., LLC***,

34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]; *see*, ***Wells Fargo Bank, N.A. v Rios***, 160 AD3d 912, 74 NYS3d 321 [2d Dept 2018]; ***Bank of N.Y. v Penalver***, 125 AD3d 796, 1 NYS3d 825 [2d Dept 2015]).

On a motion pursuant to CPLR 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211(a)(7), and the factual assertions of the defense will be accepted as true (***Bank of N.Y. v Penalver***, 125 AD3d at 797; ***Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC***, 78 AD3d at 748-749). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (***Becker v Elm Air Conditioning Corp.***, 143 AD2d 965, 966, 533 NYS2d 605 [2d Dept 1988]).

Nevertheless, "[a] defense not properly stated or one that has no merit is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the endorsed note, mortgage, assignment and evidence of nonpayment (*see*, ***Bank of Am., N.A. v Cudjoe***, 157 AD3d 653, 69 NYS3d 101 [2d Dept 2018]; ***Emigrant Bank v Marando***, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; ***Emigrant Funding Corp. v Agard***, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]; ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

With respect to RPAPL 1303, the plaintiff's submissions sufficiently establish proper service of the notice upon Mrs. McNamara (*see*, ***Nationstar Mtge., LLC v Kamil***, 155 AD3d 968, 63 NYS3d 890 [2d Dept 2017]; ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]). The plaintiff's submissions include, inter alia, an affidavit of service of the RPAPL 1303 notice upon Mrs. McNamara. In this affidavit, the plaintiff's agent alleges, among other things, that she served the summons and complaint upon Mrs. McNamara pursuant to CPLR 308(1), by service of the summons and complaint, along with notice pursuant to RPAPL 1303 on colored paper, which was a different color than that of the summons and complaint. The plaintiff's agent further alleges avers that the RPAPL 1303 notice was printed in "bold fourteen point type with its title of the note [printed] in bold, twenty-point type."

The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Gillman v Chase Manhattan Bank, N. A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [compound, boilerplate defenses are in contravention of the civil practice rules]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]). Moreover, non-parties to a lender's pooling and servicing agreement or to an assignment of a mortgage lack standing to assert noncompliance therewith (*see*, ***Bank of Am., N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Bank of N.Y. Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; ***Rajamin v Deutsche Bank Natl. Trust Co.***, 757 F3d 79 [2d Cir 2014]).

Because the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Mrs. McNamara (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Mrs. McNamara to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

It was thus incumbent upon Mrs. McNamara to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer (*see*, ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d

591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

In opposition to the motion, Mrs. McNamara has offered no proof or arguments in support of any of the pleaded defenses asserted in the answer, except as noted above. The failure by Mrs. McNamara to raise and/or assert each of the remaining pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). All of the unsupported affirmative defenses asserted in the answer are thus dismissed.

The plaintiff demonstrated its standing, as indicated above. In response, Mrs. McNamara has not come forward with any evidence to raise a triable issue of fact as to plaintiff's standing (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Under the facts presented herein, the validity of the assignment of the mortgage is irrelevant to the issue of the plaintiff's standing, or to the plaintiff's entitlement to summary judgment (*see*, ***Silvergate Bank v Calkula Props., Inc.***, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]). Further, "[t]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it" (***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d at 645; *see*, UCC 3-204[2]). Moreover, where the note is affixed to the complaint, "it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date" (***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 863, 45 NYS3d 189 [2d Dept 2017] [internal quotation marks and citations omitted]). Mrs. McNamara, therefore, failed to establish the merit of the standing defenses in the answer. Accordingly, all of the affirmative defenses asserting the lack of standing are dismissed in their entirety.

Thus, even when considered in the light most favorable to Mrs. McNamara, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, ***Bank of N.Y. Mellon v Burke***, 155 AD3d 932, 64 NYS3d 114 [2d Dept 2017]; ***M&T Bank v Cliffside Prop. Mgt., LLC***, 137 AD3d 876, 26 NYS3d 601 [2d Dept 2016]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). Mrs. McNamara's opposition papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211 [e]; ***Wells Fargo Bank, N.A. v Soskil***, 155 AD3d 923, 63 NYS3d 726 [2d Dept 2017]; ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS2d 278 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The court has examined Mrs. McNamara's remaining contentions and finds that such lack merit.

The plaintiff is therefore awarded summary judgment in its favor against Mrs. McNamara (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra; see also*, ***Emigrant Bank v Myers***, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017] [unmeritorious and duplicative affirmative defenses and counterclaims dismissed]). The answer is stricken, and the affirmative defenses asserted therein are dismissed, all with prejudice.

The counterclaim asserted in the answer is also dismissed because it is not cognizable as pleaded (*see*, CPLR 3013; 3018), and because the plaintiff has demonstrated its entitlement to summary judgment (*cf.*, ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]). The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the motion for an order amending the caption, by excising the fictitious defendants, John Doe and Jane Doe #1 through #7, is granted (*see*, CPLR 1024; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the remaining defendants, Good Samaritan Hospital Medical Center, Capital One Auto Finance Inc., Pedro T. Rodriguez, Ramona C. Rodriguez, New York State Department of Taxation and Finance, United States of America and Robert Maddox (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). Accordingly, the default in answering of all of the non-answering defendants is fixed and determined.

Because the plaintiff has been awarded summary judgment against Mrs. McNamara and it has established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

Accordingly, the plaintiff's motion for summary judgment is granted. The proposed order of reference, as modified by the court, has been signed with this decision.

Dated: 7/19/18

Hon. LINDA J. KEVINS, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION