SHORT FORM ORDER

INDEX NO. 015440/2011

SUPREME COURT - STATE OF NEW YORK
IAS PART 30 - SUFFOLK COUNTY

PRESENT: Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE: 1-10-18 (001)
1-10-18 (002)
ADJ. DATE: 1-31-18 (001, 002)
Mot. Seq. # 001 -MotD
Mot. Seq. # 002 -MD

BANK OF AMERICA, N.A.,

Plaintiff,

-against-

JOHN J. DRAKE, VERITEXT/NEW YORK REPORTING COMPANY, LLC, EMPIRE PORTFOLIOS, INC. NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

BRYAN CAVE LLP
Attorneys for Plaintiff
1290 Avenue of the Americas
New York, NY 10104

JOHN J. DRAKE, P.C.
Attorney for Defendant
John J. Drake
44 Woody Crest Drive
Northport, NY 11768

Upon the following papers: Notice of Motion by Plaintiff, dated December 19, 2017, with supporting papers; Notice of Cross-Motion by Defendants Drake, dated February 5, 2018, with supporting papers; Affirmation in Opposition by Defendant John J. Drake, dated "December 15, 2018", with exhibits; Affirmation in Reply by Plaintiff, dated January 30, 2018, with exhibits; Affirmation in Further Support and purported Sur-reply by Defendant John J. Drake, dated February 3, 2018, verified on "February 2, 2018" and sworn to on February 5, 2018, with exhibits; and upon due consideration; it is

ORDERED that the motion (001) by the plaintiff filed in this action being Index No.: 15440/2011 for, *inter alia*, an Order awarding summary judgment in its favor and against the defendant John J. Drake, striking that defendant's answer and dismissing the affirmative defenses set forth therein; fixing the defaults of the non-answering defendants; appointing a referee; and amending the caption is determined as set forth below; and it is

ORDERED that the answer interposed by the defendant John J. Drake is stricken and the affirmative defenses asserted therein are dismissed, all with prejudice; and it is

ORDERED that the motion (002), improperly denominated as a cross motion, by the defendant John J. Drake and purportedly by non-party Sean P. Drake as Trustee of the John J. Drake Irrevocable Trust for, *inter alia*, an Order dismissing the complaint pursuant to CPLR 3211(a)(1), (3) and (7), or, in the alternative, denying plaintiff's summary judgment motion and granting leave to compel discovery is denied; and it is

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No.: 015440/2011

BANK OF AMERICA, N.A.

Plaintiff,

-against-

JOHN J. DRAKE, VERITEXT/NEW YORK REPORTING COMPANY, LLC. EMPIRE PORTFOLIOS, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

; and it is further

ORDERED that the plaintiff shall promptly serve a copy of this Order by first-class mail upon John J. Drake, P.C. counsel in this action for John J. Drake, as well as all other parties, if any, that have appeared herein and not waived further notice, and the plaintiff shall promptly file the affidavit(s) of service with the Clerk of the Court.

This is an action to foreclose a mortgage dated August 18, 2006, given by the defendant John J. Drake ("the defendant") on certain real property situate in Suffolk County. The defendant allegedly defaulted on the note, also dated August 18, 2006, by failing to make the monthly payment of principal and/or interest due on or about January 1, 2011, and each month thereafter.

After the defendant allegedly failed to cure the default in payment, the plaintiff commenced this action against the defendant and other defendants, by the filing of the lis pendens, summons and complaint on May 11, 2011. The defendant, acting as his own attorney, interposed an answer admitting some of the allegations in the complaint, and denying knowledge or information as to other allegations therein. In the answer, the defendant also asserts various affirmative defenses, including the plaintiff's alleged failure to prove the default in payment, the improper rejection of a mortgage modification application, unconscionable conduct and bad faith. The remaining defendants have neither answered, nor appeared herein, and, therefore, are all in default.

By way of further background, after the filing of the lis pendens and the commencement of the instant action (Action 1 or this action), the defendant transferred his interest in the property to Tara M. Drake, as Trustee of the John J. Drake Irrevocable Trust by deed allegedly recorded on January 18, 2012. The plaintiff then commenced a second action entitled, Bank of America, N.A. v Tara M. Drake, as Trustee of the John J. Drake Irrevocable Trust on October 10, 2014 under Index No.: 068428/2014 (Action No 2). In response, Tara M. Drake (Tara), as Trustee of the John J. Drake Irrevocable Trust (the Trust) filed an answer with counterclaims in Action 2 dated November 11, 2014, verified by the defendant as her counsel.

While the notice of pendency was in effect, Tara subsequently transferred the property to Sean P. Drake (Sean), as Trustee of the Trust by deed allegedly executed on May 14, 2015 and recorded on May 23, 2016. Upon the request of the defendant, a preliminary conference was then held on August 26, 2016. At the conference, a preliminary conference stipulation and Order was entered into between the plaintiff, the defendant and the defendant as counsel for Tara, the parties thereto agreed that Action 1 shall be "joined" with Action 2 "for all purposes" and thereafter captioned with both index numbers.

By subsequent stipulations dated October 11 and 19, 2017, so-ordered by the undersigned on January 14, 2017, the defendant, individually, and as counsel for Tara and Sean (collectively the Drake defendants) consented to the substitution of Sean for Tara as a defendant in Action 2. By said stipulations, Sean and Tara acknowledged that the property was subject to all liens without waving any "claims or defenses." However, the defendant, individually and as counsel for Sean, waived any claims or defense to the foreclosure based solely upon the transfer of the property to Sean. In the stipulations, the parties thereto recited that Action 1 and 2 were "joined," and such were collectively referred to as the "[l]itigations."

The plaintiff now moves for an Order awarding summary judgment in its favor against the defendant, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. In response, the defendant opposes the motion-in-chief and moves for an Order, among other things, dismissing the complaint pursuant to CPLR 3211(a)(1), (3) and (7), or, in the alternative, denying plaintiff's summary judgment motion and granting leave to compel discovery. Opposition and reply papers have been filed herein.

Initially, despite the incorrect form of the defendant's affidavits submitted in opposition to the motion-in-chief and in support of the dismissal motion (missing jurats, etc.), such have been considered because each document includes sworn acknowledgments (*see* CPLR 2106[a]; ***Sassower v Greenspan, Kanareck, Jaffe & Funk***, 121 AD2d 549, 504 NYS2d 31 [2d Dept 1986]). The defendant's reply to the plaintiff's opposition has also been considered; however, to the extent that the defendant purports to further bolster his opposition papers by way of an unauthorized sur-reply, same has been disregarded (*see* CPLR 2214).

The branch of the plaintiff's motion for dismissal of the counterclaims filed in Action 2 in this action is denied because the defendant never interposed any counterclaims in Action 1. Since Action 1 and 2 were joined for trial under two separate index numbers, and not consolidated in one action, the integrity of each of the original actions was preserved (*see* ***Sample v Temkin***, 87 AD3d 686, 928 NYS2d 757 [2d Dept 2011]; ***Alizio v Perpignano***, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]; ***Kelley v Galina-Bouquet***, 155 AD2d 96, 552 NYS2d 305 [1st Dept 1990]). Further, as each action retained its separate identity, any request for

relief by a party had to be made under the appropriate index number. Therefore, the only pleadings in Action 1 were the summons and complaint dated May 9, 2011, and the defendant's answer dated July 14, 2011, asserting some denials and ten enumerated affirmative defenses (without any counterclaims). Moreover, all other purported amended pleadings submitted by the moving parties and purportedly filed in Action 1 without leave of court are a nullity and have been disregarded (*see* CPLR 3025[b]). For the same reasons, to the extent that non-party Sean purports to move for any relief in this action, the same is denied because he was not a party to Action 1.

Turning to the motion-in-chief, the issue of the plaintiff's standing was waived because an objection to its standing was not asserted as an affirmative defense in the interposed answer (*see* CPLR 3211[e]; *see* ***US Bank N.A. v Nelson***, 169 AD3d 110, 93 NYS3d 138 [2d Dept 2019]; ***HSBC Bank USA v Philistin***, 99 AD3d 667, 952 NYS2d 83 [2d Dept 2012]; ***U.S. Bank Natl. Assn. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Citibank, N.A. v Swiatkowski***, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]). Nor can a fair reading of the answer be deemed to include an objection to the plaintiff's standing. To the contrary, in the answer, the defendant admitted that the plaintiff was the holder of the note and mortgage by not denying the allegations in paragraph "SEVENTH" in the complaint.

In any event, the plaintiff demonstrated its standing by submitting the affidavit of its representative, which established that the plaintiff, as the originating lender, had physical possession of the lost note affidavit at the time it commenced this action (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015][plaintiff demonstrated standing by physical possession of note at time of commencement]; ***Bethpage Fed. Credit Union v Caserta***, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017] [same]; *see also* ***Generation Mtge. Co. v Medina***, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016] [plaintiff is originating lender]; *see generally* ***Deutsche Bank Natl. Tr. Co. v Cole***, 168 AD3d 677, 91 NYS3d 224 [2d Dept 2019] [reply affidavit considered]).

Even if the defendant had interposed an affirmative defense asserting the lack of standing, the defendant 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]).

Furthermore, 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* ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009] [unsupported affirmative defenses are lacking in merit]; *see also* ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [combined affirmative defenses containing multiple 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]). It is well settled that once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (*see* ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]).

Turning to the merits of this action, 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 mortgage, the lost note affidavit 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]; ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]).

Contrary to the defendant's contentions, the plaintiff demonstrated the defendant's default in payment (*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]; *see generally* ***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 58 NYS3d 509 [2d Dept 2017] [reply affidavit considered]). The affidavits of the plaintiff's representatives, combined with the plaintiff's other submissions, show that the loan has been in default since January 1, 2011. In opposition, the defendant failed to raise a triable issue of fact (*see* ***Citigroup v Kopelowitz***, 147 AD3d 1014, 48 NYS3d 223 [2d Dept 2017]; ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *see also* ***Trustco Bank, N. A. v Labriola***, 246 AD2d 735, 667 NYS2d 450 [3d Dept 1998][reply papers considered]). Parenthetically, the mortgage provides, in sum and substance, that the lender may require immediate payment in full of all sums secured thereby if all, or any part of the property, or of any right in the property, is transferred without the lender's prior written permission.

The defendant's assertions that he was improperly denied a loan modification are without merit because a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see* ***Bank of Am., N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). Upon close review, the Court finds that the totality of the circumstances in this case do not support a finding that the plaintiff failed to negotiate in good faith (*see* ***Wells Fargo Bank, N.A. v Miller***, 136 AD3d 1024, 26 NYS3d 176 [2d Dept 2016]; ***Aurora Loan Servs., LLC v Chirinkin***, 135 AD3d 676, 22 NYS3d 876 [2d Dept 2016] [nothing in record to support the claim that the plaintiff engaged in conduct that improperly hindered the settlement process or needlessly prevented the parties from reaching a mutually agreeable resolution]).

According to the Court's records, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned before an assigned referee beginning on July 19, 2012, and lasting until February 5, 2013. On the last scheduled date, this action was released from the conference program and marked to indicate that the parties were unable to modify the loan or otherwise achieve a settlement. Accordingly, there has been compliance with CPLR 3408, and no further conference is required under any statute, law or rule.

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* ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***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]). The unsupported affirmative defenses asserted in the answer are

thus dismissed.

Contrary to the defendant's contentions, the plaintiff's motion was not premature, as the defendant offers mere hope and speculation that evidence sufficient to defeat the plaintiff's motion may be uncovered during the discovery process, and because he failed to establish that the plaintiff ignored a proper discovery demand (*see* ***U.S. Bank N.A. v Rose***, 165 AD3d 1310, 87 NYS3d 646 [2d Dept 2018]). The Court has examined the defendant's remaining contentions and finds them lacking in merit.

Thus, even when considered in the light most favorable to the defendant, 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* ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). The defendant's opposition and moving papers are also insufficient to demonstrate any *bona fide* defenses (*see* CPLR 3211 [e]; ***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]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]).

The plaintiff is therefore awarded summary judgment in its favor against the defendant (*see* ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558; *see also* ***Emigrant Bank v Myers***, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017] [unmeritorious and duplicative affirmative defenses dismissed]). The answer is stricken, and the affirmative defenses asserted therein are dismissed, all with prejudice. 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 "JOHN DOE #1" to "JOHN DOE #10" defendants, 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.

The branch of the plaintiff's motion for an Order appointing a referee to ascertain and compute is denied without prejudice, subject to a proper consolidation of Actions 1 and 2 (merging Action 2 into Action 1) in order to obviate the possibility of inconsistent results in both actions (*see generally* ***New York Annual Conference of Methodist Church v Nam Un Cho***, 156 AD2d 511, 548 NYS2d 577 [2d Dept 1989]).

Concerning the second cause of action in the complaint, the plaintiff demonstrated that the street address of the property, 44 Woodycrest Drive, Northport, New York 11768, was not set forth in the "Exhibit A" of legal description of the mortgage due to a mutual mistake of the plaintiff and the defendant, and that the substantial rights of any party to this action have not been prejudiced (*see* ***Wells Fargo Bank, N.A. v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). In this case, the mortgage otherwise contains the street address of the property as does the note, which was admitted in the answer. Moreover, this branch of the motion is unopposed. Accordingly, the relief requested with respect to the second cause of action is granted and the legal description in the mortgage is amended *nunc pro tunc* to May 11, 2011 to reflect the correct description in the submitted "Exhibit A." The judgment of foreclosure and sale, if any be entered

herein, shall include an ordered and an adjudicatory paragraph granting the declaratory relief as pleaded by the plaintiff and awarded by the terms of this decision and Order. The motion for such judgment must include a copy of this Order so as to supply the grounds for the inclusion of such relief in the judgment as well as the separate order of reference issued hereon.

Accordingly, the plaintiff's motion for summary judgment is determined as indicated above. The defendant's motion, improperly labeled a cross-motion, is denied as academic and because it is entirely without merit.

The proposed long form order, as submitted by the plaintiff, appointing a referee to compute has been marked "not signed."

Dated: May 9, 2019
Riverhead, NY

DAVID T. REILLY, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**