SHORT FORM ORDER **INDEX NO. 611017/2017**

SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: **Hon. C. RANDALL HINRICHS**
Justice of the Supreme Court

Motion Date: 10-11-2018
Adjourned Date: 11-15-2018
Motion Sequence: 001:MotD

x

CERASTES, LLC,

Plaintiff,

-against-

DUNA M. ROMULUS; KAYNE J. LABISSIERE; "JOHN DOE" AND "MARY DOE" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,

Defendants.

x

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Upon the following papers: Notice of Motion by Plaintiff, dated September 17, 2018, Affirmation of Annette Gershovich, Esq., Affidavit in Support of John Ross, Portfolio Manager of Land Home Financial Services, purported Attorney-in-Fact for Plaintiff, with supporting papers; Affirmation in Opposition of Carlo M. Fusco, Esq., counsel for Defendants Duna M. Romulus and Kayne J. Labissiere, dated October 25, 2018, Affidavit in Opposition of Duna M. Romulus, sworn to on October 25, 2018, Affidavit in Opposition of Kayne J. Labissiere, sworn to on October 25, 2018, with supporting papers; Affirmation of Annette Gershovich, Esq.. Plaintiff's counsel in Reply, dated October 20, 2018; stipulation of adjournment; and upon due consideration; it is

ORDERED that this motion (#001) by the plaintiff for, among other things, summary judgment on the complaint insofar as asserted against the defendants Duna M. Romulus and Kayne J. Labissiere is granted solely to the extent indicated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that, except for the nineteenth affirmative defense, the remaining affirmative defenses asserted in the defendants' answer are dismissed with prejudice, and it is

ORDERED that, pursuant to CPLR 3211(b), the defendants' counterclaims are dismissed with prejudice; and it is

ORDERED that the caption is amended by substituting "MARY JOSEPH", "JOSEPH CLAUDY", "REBECCA JOSEPH", "CARLINE JOSEPH", "MARIO MEDINA", "ALBA MEDINA", "JUAN NUNEZ", and "SARAI ABILA" for the fictitious "JOHN DOE" and "MARY DOE" defendants; and it is

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

CERASTES, LLC,

Plaintiff,

Index Number:
611017-2017

-against-

DUNA M. ROMULUS; KAYNE J. LABISSIERE; MARY JOSEPH, JOSEPH CLAUDY, REBECCA JOSEPH, CARLINE JOSEPH, MARIO MEDINA, ALBA MEDINA, JUAN NUNEZ, and SARAI ABILA

Defendants.

; and it is

ORDERED that the plaintiff shall serve a copy of this order amending the caption and dismissing the counterclaims upon the Calendar Clerk of this Court of this I.A.S. Part; and it is further

ORDERED that counsel for the plaintiff shall serve a copy of this order with notice of entry pursuant to CPLR 2103(b)(1), (2), (3), (6) or (7) upon counsel for the defendants Duna M. Romulus and Kayne J. Labissiere, and by first-class mail upon all other appearing parties that have not waived further notice within thirty (30) days of the date of this order, and counsel shall promptly file the affidavit(s) of service with the Clerk of the Court.

The plaintiff commenced this action to foreclose a mortgage given by Duna M. Romulus to Citicorp Trust Bank, FSB (CTB) dated August 18, 2003. The mortgage was given to secure a fixed-rate note also given by Romulus to CTB in the sum of $250,593.91, encumbering a residence at 18 Cordello Avenue, Central Islip, NY 11722. The mortgage was subsequently duly recorded on October 29, 2003. Thereafter, Romulus allegedly deeded her interest in the property to the defendant Kayne J. Labissiere by deed dated March 23, 2009, which was subsequently recorded on April 2, 2009.

By an undated endorsement, the CTB allegedly transferred the note to CitiMortgage, Inc. (CitiMortgage). By a second undated endorsement in blank, CitiMortgage, allegedly transferred the note to Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC its Trustee formerly known as MCM Capital Partners, LLC (Ventures). By the first allonge, along with a specific endorsement, Ventures allegedly transferred the note to OHA Newbury Ventures, L.P. (OHA). By the second allonge, along

with a specific undated endorsement, OHA allegedly transferred the note to Trifera. By the third allonge, along with an undated endorsement in blank with physical delivery, Trifera allegedly endorsed the note to the plaintiff. The transfer of the note to the plaintiff was subsequently memorialized by a series of assignments of the mortgage that were thereafter recorded in the Suffolk County Clerk's Office.

Romulus allegedly defaulted on the note by failing to make the monthly payments due on or about March 23, 2014, and each month thereafter. Thereafter, the plaintiff commenced this action against Romulus and Labissiere (the defendants), among others, by the filing of the summons and complaint on June 13, 2017.

In response to the complaint, the defendants interposed a joint answer, asserting the lack of personal jurisdiction over the defendants, the lack of standing and improper charges to the defendants' account. The defendants also assert two counterclaims. In response to the counterclaims, the plaintiff interposed a reply.

The plaintiff now moves for summary judgment on the complaint insofar as asserted against the defendants, and an order fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. In support of the motion, the plaintiff submitted, inter alia, the affidavit in support of John Ross, Portfolio Manager of Land Home Financial Services, Inc. (LHFS) the purported Attorney-in-Fact for the plaintiff, the affirmation of the plaintiff's attorney, Annette Gershovich, Esq. and various exhibits.

In opposition to the motion, the defendant submitted, among other things, the affirmation from his counsel, Carlo M. Fusco, Esq., the affidavit in opposition of Duna M. Romulus, the affidavit in opposition of Kayne J. Labissiere and various exhibits. In reply, the plaintiff submitted, among other things, the affirmation from its counsel, Annette Gershovich, Esq. and various exhibits. By stipulation dated October 1, 2018, the plaintiff and the defendants agreed that the motion be adjourned to November 1, 2018.

The court turns first to the twenty second affirmative defense whereby the defendants assert the lack of personal jurisdiction over them. By its submissions, the plaintiff demonstrated that the defendants were properly served pursuant to CPLR 308(4) (*see* ***Florestal v Coleman-Florestal***, 124 AD3d 578, 2 NYS3d 153 [2d Dept 2015]). In opposition, the defendants mere denial of service is insufficient to raise a triable issue of fact (*see* ***Wells Fargo Bank, N.A. v Cherot***, 102 AD3d 768, 957 NYS2d 886 [2d Dept 2013]). In any event, the defendants waived the defense of lack of personal jurisdiction by failing to move to dismiss on that ground within 60 days of serving their answer (*see* CPLR 3211 [e]; ***Wells Fargo Bank, N.A. v Sasson***, 167 AD3d 818, 90 NYS3d 72 [2d Dept 2018]; ***Wells Fargo Bank, N.A. v Cajas***, 159 AD3d 977, 73 NYS3d 223 [2d Dept 2018]; ***Generation Mtge. Co. v Medina***, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016]).

The defendants' request to restore the action to the court's specialized foreclosure conference part, made without the benefit of a cross motion, is denied because it is procedurally deficient (*see* CPLR 2215; ***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]), and meritless (*see* ***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]). The plaintiff's submissions and the court's records reflect that the defendants received the benefit of two settlement conferences, the last of which was marked to indicate that a settlement could not be achieved. In response, the defendants have not demonstrated that they have a genuine interest in securing a loan modification (*see* ***JPMorgan Chase Bank, N.A v Mantle***, 134 AD3d 903, 23 NYS3d 258 [2d Dept 2015]). In any event, because the defendants do not reside at the property, which is being utilized as rental property, CPLR 3408 is inapplicable (*see* CPLR 3408[a]; RPAPL 1304[6][a][iii]; ***HSBC Bank USA, N. A. v Ozcan***, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). Moreover, Labissiere, who is a non-signatory to the loan instruments, is without standing to assert any defenses personal to Romulus (*see* ***Citimortgage, Inc. v Etienne***, 172 AD3d 808, 101 NYS3d 59 [2d Dept 2019]; ***Brandywine Pavers, LLC v Bombard***, 108 AD3d 1209, 970 NYS2d 653 [4th Dept 2013]).

The court turns next to the standing defenses asserted in the answer. The plaintiff established, prima facie, that it had standing by demonstrating that it had physical possession of the note at the time it commenced the action, as evidenced by the e-filing of a copy of the endorsed note, along with the endorsed allonges to the e-filed complaint (*see* ***U.S. Bank, N.A. v Nathan***, 173 AD3d 1112, 104 NYS3d 144 [2d Dept 2019]; *see also* ***Wells Fargo Bank, N.A. v Ballard***, 172 AD3d 1440, 102 NYS3d 229 [2d Dept 2019]).

In response, the defendants have not come forward with any evidence to raise a triable issue of fact as to plaintiff's standing (*see* ***Deutsche Bank Natl. Trust Co. v Cardona***, 172 AD3d 1313, 99 NYS3d 668019 [2d Dept 2019]; ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]). "There 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]). In this case, 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]).

Further, contrary to the contention of the defendants, in order to meet its prima facie burden, the plaintiff was not required to submit proof that the person who endorsed the note to the plaintiff on behalf of Trifera was authorized to do so. A signature on a negotiable instrument "is presumed to be genuine or authorized" (UCC 3-307 [1] [b]; ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, 1074, 42 NYS3d 302 [2d Dept 2016]; *see* UCC 3-104 [2] [stating that UCC art 3 applies to notes]). Because the defendants only speculate that Alex Phillips, an "Authorized Representative" of Trifera may not have been authorized to sign the last allonge, his signature is presumed authorized and the plaintiff was not required to submit any proof of authorization (*see* ***Goldman Sachs Mtge. Co. v Mares***, 166 AD3d 1126, 1130, 87 NYS3d 665 [3d Dept 2018]; ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073). Moreover, the endorsement on the last allonge was executed by a representative of Trifera itself (*cf.* ***U.S. Bank Tr., N.A. v Rose***, 176 AD3d 1012, 110 NYS3d 700 [2d Dept 2019]).

The plaintiff failed to establish, through admissible evidence, that Romulus defaulted in the repayment of the note (*see* CPLR 4518[a]; ***Federal Natl. Mtge. Assn. v Brottman***, 173 AD3d 1139, 105 NYS3d 487 [2d Dept 2019]; ***Bank of N.Y. Mellon v Gordon***, 171 AD3d 197, 97 NYS3d 286 [2d Dept

2019]). In his affidavit, Ross avers that Romulus failed to make the payment that was due for March 23, 2014, and by failing to make subsequent installments. He avers: "The business records, such as transaction and payment histories, that were created by prior holders and/or servicers of the loan have been integrated into [LHFS's] business records and were kept and relied upon as a regular business practice and in the ordinary course of business conduct by [LHFS]." He also alleges that he has "personal knowledge of the procedures for integrating prior servicer records." Ross did not specifically allege, however, that he has personal knowledge of the payment history based upon LHFS' and/or the prior servicers' records for the (unspecified) period of time that LHFS acted as servicer for the subject loan (*see* ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]). In any event, because Ross failed to actually attach or otherwise incorporate any of LHFS's and/or the prior servicers' business records to his affidavit, his averment as to Romulus' default constitutes inadmissible hearsay and lacks probative value (*see* ***Bank of N.Y. Mellon v Gordon***, 171 AD3d 197). Furthermore, the purported unrecorded power of attorney document attached to the Ross affidavit is not in admissible form because it is neither sworn to nor acknowledged and Ross has not authenticated it (*see* CPLR 4518; ***B & H Fla. Notes LLC v Ashkenazi***, 149 AD3d 401, 51 NYS3d 59 [1st Dept 2017]).

The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses 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]; ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [dismissal of boilerplate defenses lacking in merit]). Further, the allegations in the complaint are sufficient to state a cause of action to foreclose a mortgage.

The plaintiff also established that the counterclaims, sounding in fraud and misrepresentation, lack merit as a matter of law because the defendants failed to allege that the plaintiff owed Romulus, the borrower, a fiduciary duty with respect to her future ability to afford the mortgage (*see* ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 897 NYS2d 103 [2d Dept 2010]). Additionally, the defendants' general factual assertions do not satisfy the pleading requirements of fraud (*see* ***Abdourahamane v Public Stor. Institutional Fund***, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014]). In any event, to the degree that the counterclaims are based upon fraud and misrepresentation relating to the origination of the loan, such are untimely (*see* CPLR 213[8]; ***Williams-Guillaume v Bank of Am., N.A.***, 130 AD3d 1016, 14 NYS3d 466 [2d Dept 2015]).

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]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]).

In opposition to the motion, the defendants offered no proof or arguments in support of any of the pleaded defenses in the answer, except as noted above. Therefore, except for the nineteenth affirmative defense, for which the plaintiff's proof is insufficient, the remaining affirmative defenses asserted in the defendants' answer are dismissed with prejudice (*see* ***Emigrant Bank v Myers***, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017][unmeritorious and duplicative affirmative defenses dismissed]). The defendants' unsupported counterclaims are also dismissed with prejudice.

The branch of the motion for an order amending the caption is granted (*see* CPLR 1024). The plaintiff also established the default in answering on the part of the non-answering defendants, Mary Joseph, Joseph Claudy, Rebeca Joseph, Carline Joseph, Mario Medina, Alba Medina, Juan Nunez, and Sarai Abila (*see* RPAPL 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]). Accordingly, the default in answering of all of the non-answering defendants is fixed.

In light of the outstanding issues of fact, the remainder of the ancillary relief sought by the plaintiff is denied at this juncture. In view of the foregoing, and pursuant to CPLR 3212(g), the court finds that the sole remaining issue of fact relates to the payment history of the subject loan. The plaintiff's renewal motion, if any, shall include, a copy of the papers submitted with this motion and a copy of this order.

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

Dated: Feb. 6, 2020

C. Randall Hinrichs

HON. C. RANDALL HINRICHS, J.S.C.

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