

Ocwen Loan Servicing, LLC v Pacheco
2021 NY Slip Op 32959(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 850228/2015
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

INDEX NO. 850228/2015

OCWEN LOAN SERVICING, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

CARMEN PACHECO, CARMEN PACHECO, AKAM
ASSOCIATES INC, CITY OF NEW YORK TRANSIT
AUTHORITY TRANSIT ADJUDICATION BUREAU, CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD, HSBC
MORTGAGE CORPORATION (USA), DSS & DIVISION OF
LIENS AND RECOVERY, JOHN DOE #1 THROUGH JOHN
DOE #12

**DECISION + ORDER ON
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 128, 129, 130, 131, 132, 133, 134, 135, 140, 141, 301

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

The relevant facts and procedural posture of this case was laid out by the Court in its decision of this date on Motion Seq. Nos. 5 and 6.

Presently before the Court is Plaintiff’s motion for, *inter alia*, summary judgment pursuant to CPLR §3212 (Motion Seq No 2) on both causes of action, striking out the Pachecos’ answer and to appoint a referee to compute. The Pachecos’ cross-moved for: [1] summary judgment dismissing Plaintiff’s complaint, [2] dismissal of Plaintiff’s complaint based on lack of standing to foreclose on the satisfied mortgage, [3] dismissal of Plaintiff’s complaint for lack of capacity to sue because Plaintiff was not a holder of the satisfied mortgage, [4] dismissal of Plaintiff’s complaint as barred by the statute of limitations, [5] “[p]ursuant to §§201, 213[4] dismissing plaintiff’s cause of action as time-barred” [sic]; [6] “[d]ismissing plaintiff’s complaint for lack of capacity to sue, failure to state a cause of action, and for lack of documentary evidence pursuant to CPLR §§ 3211(3), (5), (1)” [sic]; [7] dismissing Plaintiff’s complaint for failure to provide disclosure and [8] precluding Plaintiff from introducing certain evidence at trial based upon failure to provide disclosure. Subsequently, Pachecos filed an amended cross-motion asserting a ninth request for relief, to wit dismissal of “plaintiff’s complaint for failure to timely file motion for summary judgment within ninety days of Order of May 19, 2016” [sic].

This motion was first submitted in 2017 and Justice Judith McMahon issued an interim decision, dated February 13, 2018, which directed the parties to appear before a Referee “to determine if Plaintiff

has [sic] possession of the note at the time the of commencement of this action.” In a decision dated September 27, 2019, the Referee answered the question in the affirmative (NYSCEF Doc No 201). Based on that finding, and the above referenced papers, the Court determines the motions as follows:

Plaintiff was required on the branch of its motion for summary judgment to establish *prima facie* proof of the mortgage, the note, and evidence of the borrower’s default (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Plaintiff was also required to demonstrate its standing since Defendants raised this affirmative defense in their answer (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]; *Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582 [2d Dept 2020]). Additionally, based on the affirmative defenses raised, Plaintiff was obliged to demonstrate its compliance with RPAPL §1303, §1304 and the requisites under paragraph 22 of the 2003 consolidated mortgage (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

With the Referee’s finding Plaintiff physically possessed the note when the action was commenced, Plaintiff established its standing (*see generally Wells Fargo Bank, N.A. v Tricario*, supra). As a result, any arguments regarding the validity and timing of the mortgage assignments are unavailing (*see JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]).

In support of the branch of the motion for summary judgment, Plaintiff submitted the affidavit of Michael Bennett (“Bennett”), an Assistant Secretary employed by Rushmore Loan Services (“Rushmore”). Bennett averred that Rushmore was the servicer and attorney-in fact for Wilmington Savings Fund Society, FSB, d/b/a Christina Trust, not individually, but as Trustee for Carlsbad Funding Mortgage Trust (“Wilmington”). Bennett states that after commencing the action, Ocwen transferred the note and mortgage at issue to Wilmington, whom he refers to as the Movant. Also annexed to the Plaintiff’s moving papers was an affirmation from Fernando C. Rivera-Maissonett, Esq., an associate at the firm acting as attorney of record for Plaintiff, Ocwen Loan Servicing, LLC. While not specifically stated, it appears Wilmington is prosecuting this action in the name of the assignor Ocwen (*see* CPLR §1018; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760 [2d Dept 2004]; *Central Fed. Sav., F.S.B v 405 West 45th St., Inc.*, 242 AD2d 512 [1st Dept 1997]).

“A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form” (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). As Bennett’s knowledge is not based upon personal knowledge of Pacheco’s account, but through the review of documents, those business records must be proffered in admissible form for the statements regarding the note, mortgage, default and compliance with RPAPL §§1303, 1304 to be established (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]).

Bennett’s affidavit laid a proper foundation for the admission of Rushmore’s records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Bennett sufficiently established that those records were received from the makers and incorporated into the records Rushmore which routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, the records Bennett relied on

were referenced and annexed to the motion (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Plaintiff established with the affidavits of Dionne Laboy, an employee of Plaintiff's counsel who performed the mailings, that strict compliance with RPAPL §1304 was accomplished prior to commencement of the action and that it substantially complied with the notice requirement under paragraph 22 of the mortgage (*see HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 670 [2d Dept 2019]; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]). The affidavit of service of the process server demonstrated that Plaintiff fulfilled the requirements of RPAPL §1303 (*see U.S. Bank, N.A. v Nathan*, 173 AD3d 1112, 1114 [2d Dept 2019]).

With respect to proof of the note, Plaintiff acknowledges that the instrument, dated July 11, 2003 and originally payable to American Home Mortgage in the principal amount of \$200,000.00, is lost. Pursuant to UCC 3-804, the owner of a lost instrument may still recover from the person liable thereunder "upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms." Here, Plaintiff attempts to satisfy this burden with an affidavit from William L. Wright, a Collateral Control Team Lead for Seterus, Inc. However, the affidavit is insufficient as the affiant does not explain who conducted the search for the lost note and when or how it was lost (*see Capital One, N.A. v Gokhberg*, 189 AD3d 978, 979 [2d Dept 2020]).

As to the Pacheco's alleged default, rather than proffer the payment records as required, Plaintiff relied on the default notice prepared by Plaintiff's counsel and sent to the Pachecos which is insufficient (*see US Bank NA v Rowe*, 194 AD3d 978 [2d Dept 2021]). The business records are the evidence of the facts asserted and, absent the documents, an affiant's statements in a foundational affidavit regarding the contents of same is hearsay (*Bank of N.Y. Mellon v Gordon*, *supra* at 205).

Accordingly, the branch of Plaintiff's motion for summary judgment on its foreclosure cause of action and for an order of reference is denied for failure to establish a *prima facie* case.

Plaintiff also seeks summary judgment on its second cause of action to set aside a purported erroneous satisfaction, dated August 27, 2003, of a mortgage, dated June 6, 1995, given by the Pachecos to secure a loan of \$65,600.00. The 1995 note and mortgage were consolidated when the Pachecos borrowed an additional \$150,000.00 from Wells Fargo November 2, 2001. A second consolidation was executed by the Pachecos on July 11, 2003 when Carmen A. Pacheco borrowed additional funds from American Home Mortgage. Both these events are noted in the satisfaction at issue.

"A mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording" (*Deutsche Bank Trust Co. v Stathakis*, 90 AD3d 983, 984 [2d Dept 2011], *citing New York Community Bank v Vermonty*, 68 AD3d 1074, 1076 [2d Dept 2009]).

Bennett's affidavit, and documents annexed thereto, evidence that the June 6, 1995 encumbrance, a first mortgage securing a loan of \$65,600.00, was erroneously discharged when Wells Fargo Home Mortgage, Inc. ("Wells Fargo") issued the satisfaction. Wells Fargo had no interest in the 1995 mortgage when it issued the discharge having assigned it, and the note, to American Home Mortgage some two months earlier on June 23, 2003 (*see CitiMortgage, Inc. v Moran*, 188 AD3d 407 [1st Dept 2020]). Moreover, "[w]here, as here, balances of first mortgage loans are increased with

second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist” (*Benson v Deutsche Bank Natl. Trust, Inc.*, 109 AD3d 495, 498 [2d 2013]). “Further, an assignment of a loan obligation means that the obligation has been transferred, not paid in full and, thus, . . . does not render the obligation satisfied and discharged” (*id.*). Accordingly, any claim that no mortgage exists capable of being foreclosed is without merit (*see Bank of Am., N.A. v. Schwartz*, ___AD3d___, 2021 NY Slip Op 06602 [2d Dept 2021]; *Wells Fargo Bank, N.A. v Douglas*, 186 A.D.3d 532 [2d Dept 2020]).

In opposition, the Pachecos failed to establish any detrimental reliance on the discharge or to otherwise raise an issue of fact (*see Fischer v Sadov Realty Corp.*, 34 AD3d 630, 631 [2d Dept 2006]; *Karan v Hoskins*, 22 AD3d 638, 638 [2d Dept 2005]; *see also Beltway Capital, LLC v Soleil*, 104 AD3d 628, 631[2d Dept 2013]).

As to the branch of Plaintiff’s motion to dismiss all the Pachecos’ affirmative defenses, CPLR §3211[b] provides that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit”. For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a “defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed” (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

The first, third, tenth, seventeenth, eighteenth, thirty-fourth, thirty-sixth, thirty-seventh, forty-fourth and forty-fifth affirmative defenses all relate, in one form or another, to Plaintiff’s standing and the existence of a foreclosable mortgage. These defenses are, therefore, duplicative and, based on this Court’s finding supra and that of the Special Referee, all these affirmative defenses are without merit.

The second, fourth, eleventh, fourteenth, fifteenth and twenty-sixth affirmative defenses regarding pre-action/acceleration notices are, based upon the Court’s ruling supra, substantively without merit.

The fifth affirmative defense, alleging fraud in the inducement, in addition to not being pled with particularity (CPLR §3016[b]), fails as the Pachecos cannot claim to have reasonably relied on representations that are plainly at odds with the terms contained in the loan documents (*see Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830 [2d Dept 2015]). Moreover, the facts establish that the Pachecos made payments on the 2003 consolidated mortgage note for nearly a decade which constitutes acquiescence and assent to the terms of the note and mortgage (*see Feinstein v Levy*, 121 AD2d 499, 500 [2d Dept 1986]).

The seventh, eighth, nineteenth, twentieth, twenty-first, twenty-second, twenty-eighth, thirtieth, thirty-fifth, forty-third, forty-sixth and forty-eighth affirmative defenses, in addition to being conclusory and totally devoid of any supporting facts (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, supra), fail to constitute excuses to a default in payment under a mortgage note (*see eg La Salle Bank Natl. Assn. v Kosarovich*, 31 AD3d 904, 906 [3d Dept 2006]; *Tribeca Lending Corp. v Bartlett*, 84 AD3d 496 [1st Dept 2011]).

The sixth, twenty-seventh and fifty-fourth affirmative defenses regarding failure to join necessary and/or indispensable parties are conclusory and substantively baseless. None of the suggested parties, as former holders of the note and mortgage, are necessary or indispensable parties.

The sixteenth, twenty-fourth, thirty-first, forty-second, forty-seventh and fifty-third affirmative defenses are duplicative as all state variations of the amount due and owing Plaintiff under the mortgage. Even a mortgagor that has defaulted in appearing in a foreclosure action can appear and contest the amount due and owing under the mortgage (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021]). Hence, such defenses are unnecessary and without merit.

The twelfth affirmative defense claiming lack of personal jurisdiction was waived when Plaintiff failed to move to dismiss pursuant to CPLR §3211[a][8] within sixty [60] days of pleading this affirmative defense (*see* CPLR §3211[e]).

The thirteenth affirmative defense that no notice of pendency has been filed in this matter or served on Defendants is both factually incorrect and states no defense. A notice of pendency is only required to be filed twenty-days before final judgment is rendered (RPAPL §1331).

The ninth, thirtieth, thirty-third, thirty-eighth, fortieth, forty-first and fifty-fourth affirmative defenses claiming unconscionability [twice], laches, usury, waiver, unclean hands and unjust enrichment are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]).

The twenty-second and twenty-third and twenty-fifth affirmative defenses failed to plead a single fact to establish the relied upon statutes are applicable. Banking Law §6-L[2][L][I] and [2][m] became effective on April 1, 2003. As such, these edicts are inapplicable to the loans made in 1995 and 2001. The 2003 mortgage note at issue was executed after the effective date of Banking Law §6-L, but the limitations relied upon by Defendants in section two thereof are only pertinent to a “high-cost home loan”. No facts to support the thresholds for applicability of the statute to the 2003 loan were stated. Indeed, as the mortgage note has a fixed interest rate of five percent, one of the two thresholds is conclusively not met (Banking Law §6-L[1][G]).

The twenty-fifth affirmative defense based on Real Property Law §254-b also fails as inapplicable. In a foreclosure action where, as here, the mortgagee has elected to accelerate the entire debt, late charges are neither sought nor recoverable (*see Reis v Decker*, 135 Misc. 2d 741 [Cty Ct Del Cty 1987] *see also GAB Mgmt. v Blumberg*, 226 AD2d 499 [2d Dept 1996]).

The thirty-ninth affirmative defense claiming breach of the implied covenant of good faith and fair dealing is improperly duplicative of the multiple breach of contract claims (*see City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]).

The forty-ninth affirmative defense alleging a violation of CPLR §3012-b fails to state a claim as it miscasts the facts. Defendants pled that Plaintiff’s counsel consulted with the personnel at Wells Fargo when the certificate expressly states counsel conferred with a representative of Plaintiff.

The fiftieth and fifty-first affirmative defenses fail to state claims as a matter of law. The claims that Plaintiff was “paid” in whole or in part by either Fannie Mae or the entities that pooled the loans does not provide sufficient notice of how this constituted a payment on behalf of Defendants so as to constitute a defense to a claim of a default in repayment.

Furthermore, Defendants raised legal arguments in support of only the standing and statute of limitations defenses in its opposition which rendered the other affirmative defenses abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The twenty-ninth affirmative defense alleges that “Plaintiff is barred by the Statute of Limitations”. Concerning the foreclosure cause of action, Plaintiff established that it timely commenced this action with the affidavits and documents submitted in support of its motion which demonstrated Plaintiff accelerated the debt for the first time with the commencement of this action (*see CPLR §214[6]; Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). In opposition, Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced. In any event, as Pachecos’ opposition is so decidedly invested in the notion that Plaintiff lacked standing, any assertion by Defendants that Plaintiff accelerated the debt would be unavailing (*see Bank of N.Y. Mellon Trust Co., N.A. v Lagasse*, 188 AD3d 775 [2d Dept 2020]).

Defendants also posit the cause of action to set aside the erroneous 2003 discharge of the 1995 mortgage is time barred. It is unassailable that this action was commenced more than six-years from issuance of the disputed discharge (CPLR §213[6]). This argument overlooks that Plaintiff established, as a matter of law, the discharge was void at its inception as Wells Fargo assigned the mortgage two months earlier to American Home Mortgage. Accordingly, “[s]ince ‘a statute of limitations cannot validate what is void at its inception,’ the statute of limitations did not act as a bar to this action” (*LNV Corp. v Sorrento*, 154 AD3d 840 [2d Dept 2020], *citing Faison v Lewis*, 25 NY3d 220, 230 [2015]).

Concerning the counterclaims, the first and twelfth counterclaims contain a blunderbuss of accusations rehashing many of the affirmative defenses but are indistinct as to what causes of action are being asserted (*see CPLR §3019[a]; see also CPLR §§3013, 3014*). As best as the Court can discern, Defendants seek, under the first counterclaim, dismissal of the complaint based upon discharge of the mortgage (*see Defendant’s First Counterclaim*, ¶8 [“Ocwen had released all interest in the mortgage”]), and, under the twelfth counterclaim, damages for “unlawful conversion” of the mortgages (*see Defendant’s Twelfth Counterclaim*, ¶114 [“plaintiff alleges this unlawful conversion has resulted in monies being owed”]). Based on the Court’s discharge of the satisfaction, the first counterclaim fails. As to the twelfth, a conversion occurs, in general, when there is “an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*Employers’ Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]). Here, this counterclaim fails as there is no allegation, nor can there be, the notes and mortgages at issue were owned or controlled by Defendants (*see City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125, 127 [1st Dept 2000]).

The second counterclaim seeks rescission of the notes at issue based upon purported violations of the Truth In Lending Act (15 USC §1601) and various implementing regulations (12 CFR §266.01, *et seq.*). This claim fails as the right of rescission in a residential mortgage loan transaction is unavailable (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 909 [2d Dept 2014]).

The third counterclaim seeks damages and attorney's fees based upon a claim the loans were usurious. Given the Court's dismissal of the affirmative defense for usury for failure to state a claim, this counterclaim fails.

The fourth counterclaim seeks a declaration that the mortgages are void as the assignments to Plaintiff are invalid. This counterclaim fails as a matter of law based upon the holdings, *supra*, that Plaintiff possessed the note and, therefore, had standing when this action was commenced.

The fifth and sixth counterclaims are based upon alleged violations of the Fair Credit Reporting Act [15 USC §1681] and the Real Estate Settlement Procedures Act [12 USC §2614]. As relief under the former, Defendants seeks statutory and punitive damages as well as attorney's fees. For the latter, Defendants request statutory damages, rescission of the loans and attorney's fees. The fifth and sixth counterclaims are entirely conclusory and lack any facts identifying the acts attributable to Plaintiff or the original lenders. This is of particular significance as Plaintiff is not the originator of the loans. Therefore, these counterclaims are inadequately pled.

The seventh counterclaim seeks monetary damages based upon alleged violations of the Truth In Lending Act (15 USC §1601) and various implementing regulations (12 CFR §266.1, *et seq.* [Regulation Z]). Plaintiff's assertion that these counterclaims are time-barred under 16 USC §1640[e] is only partially correct. Under CPLR §203[d] an otherwise untimely cause of action may be asserted as a defense or counterclaim where it relates to the transactions or occurrences contained in the complaint. Defendant therefore can use the claim "solely to offset any damage award or deficiency judgment that plaintiff may obtain in its favor" (*see California Capital Equity, LLC v IJKG, LLC*, 151 AD3d 650, 651 [1st Dept 2017]; *Delta Funding Corp. v Murdaugh*, 6 AD3d 571 [2d Dept 2004]). Accordingly, this counterclaim may be asserted for that limited purpose and the branch of the motion to dismiss same is denied.

The eighth and ninth counterclaims attempt to assert a claim for "slander of title" based upon the commencement of this action and the concomitant filing of the *lis pendens*. Defendants also posit that splitting the mortgages caused a "stain" on title to the premises. "The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*Brown v Bethlehem Terrace Associates*, 136 AD2d 222, 224 [3d Dept 1988]). The cause of action also requires a showing of malice (*see eg Regan v Lanze*, 42 AD2d 831 [4th Dept 1973]) and must be pleaded with specificity (*see CPLR §3016[a]*). The statement in the notice of pendency that this action was pending is undeniably true and cannot satisfy the first element (*id.*; *see also Sopher v Martin*, 243 AD2d 459 [2d Dept 1997]). With the finding Plaintiff had standing to commence this action, it cannot be shown Plaintiff acted with a reckless disregard for the truth or falsity of its claims when it commenced this action (*see Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756 [3d Dept 2005]; *see also Vollbrecht v Jacobson*, 40 AD3d 1243, 1247 [3d Dept 2007]). Further, the counterclaim does not adequately particularize the special damages allegedly sustained. A claim of slander of title does not arise until a prospective sale is lost based upon the false cloud on title (*see Hanbidge v Hunt*, 183 AD2d 700, 701 [2d Dept 1992]). Here, Defendants offer no specifics as to the prospective buyer, the contract of sale, or what profit was lost (*see Kriger v Industrial Rehabilitation Corp.*, 8 AD2d 29, 33 [1st Dept 1959]). The claim regarding splitting the mortgages is entirely conclusory and incomprehensible. As such, the eighth and ninth counterclaims fail.

The tenth counterclaim fails as a matter of law since it does not plead any apparent cause of action or legal theory. Rather, it seems to simply be a request for a declaration that Defendants own the property free of any encumbrance.

The eleventh counterclaim appears to allege two discrete claims: [1] that “unconscionable, immoral, inequitable and unconscientious conduct” by Plaintiff in its dealings with Defendants’ loan modification application caused “injury and damages” and precludes the equitable remedy of foreclosure, and [2] Defendants are entitled to enforcement of a promise by Plaintiff to provide a HAMP loan modification. The first claim sounding in unconscionable or inequitable conduct fails as these doctrines are shields, not swords which may not be used as a basis for affirmative recovery (*see eg Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 606 [2d Dept 1987]). As to the second claim, the Court is without authority to compel Plaintiff to modify Defendants’ note and mortgage (*see eg CIT Bank, N.A. v Singh*, 191 AD3d 758, 760 [2d Dept 2021]; *PNC Bank, N.A. v Campbell*, 142 AD3d 1147, 1148 [2d Dept 2016]).

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted without opposition (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff’s motion to amend the caption is granted without opposition (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

The branch of Plaintiff’s motion to extend time to serve Defendant Board of Managers 350 East 62nd Street Condominium is granted without opposition and the time to complete same is extended for an additional 120 days from the date of e-filing of this decision (*see generally CPLR §306-b; Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]).

Branches “a” through “f” of Defendants’ cross-motion for summary judgment and dismissal of Plaintiff’s complaint are denied based upon the foregoing determinations of the Court.

Branches “g” and “h” of Defendants’ motion for dismissal or preclusion based upon Plaintiff’s failure to provide disclosure is granted only to the extent that Plaintiff shall provide a response to the demand, as relevant based upon the determinations herein, within 60 days of e-filing of this decision.

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for summary judgment on its cause of action for foreclosure is denied, and it is

ORDERED that the branch of Plaintiff’s motion for summary judgment on its cause of action to discharge the satisfaction is granted and the Office of the City Register of the New York City Department of Finance is directed to vacate the satisfaction of mortgage dated August 27, 2003 (CRFN: 2003000390486) recorded for the property located at 350 East 62nd Street, Unit 1A, New York, New York (Block 1436, Lot 1202), and it is

ORDERED that all the affirmative defenses and counterclaims contained in answer of Defendant Carmen A. Pacheco and Carmen J. Pacheco are dismissed, except the second counterclaim for the limited purpose stated, and it is

ORDERED that Defendants' cross motion is denied, except that Plaintiff shall provide a response to the demand, as relevant based upon the determinations herein, within 60 days of e filing of this decision.

This matter is set down for a status conference on **March 3, 2022 @ 11:00 am** via Microsoft Teams.

12/23/2021

DATE



FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE