SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

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EMIGRANT BANK AS ASSIGNEE OF EMIGRANT MORTGAGE COMPANY, INC.,

Plaintiff,

- v -

GARY FLOM, SVITLANA FLOM, ONESTONE LENDING LLC,BOARD OF MANAGERS OF ONE RIVERSIDE PARK CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ATLANTIC SPECIALTY INSURANCE COMPANY, VENIAMIN NILVA, 625 W 55 LLC,624 WEST 47TH STREET LLC,JOHN DOE #1 THROUGH JOHN DOE #20 (SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF PREMISES BEING FORECLOSED HEREIN, INCLUDING, WITHOUT LIMITATION, TENANTS OR OTHER OCCUPANTS WHO MAY HAVE SOME INTEREST

Defendant.

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INDEX NO. 850031/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This is an action is to foreclose on a mortgage encumbering a parcel of real property located at 20 West 64th Street, Apt 27K, New York, New York. The mortgage secures a loan with an original principal amount of $2,200,000.00 which is memorialized by an adjustable-rate note. The note and mortgage, both dated November 30, 2015, were given by Defendants Gary and Svitlana Flom ("Flom") to the original lender, non-party Emigrant Mortgage Company, Inc. ("Emigrant Mortgage"). Plaintiff, Emigrant Bank ("Emigrant Bank") commenced this action on February 2, 2019, alleging Defendants defaulted in making installment payments under the note beginning on or about March 6, 2018. Flom Defendants answered and pled twenty-seven [27] affirmative defenses, including standing and RPAPL §1304.

Now, Plaintiff moves for, *inter alia*, summary judgment against Flom Defendants, striking their answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Flom Defendants oppose the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*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]). "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]). Plaintiff was also required to demonstrate its standing since Flom 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]). Likewise, Plaintiff was obliged to demonstrate its strict compliance with RPAPL §1304 as well as its substantial compliance with the requisites under paragraph 22 of the 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]; *Deutsche Bank Natl. Trust Co. v Pariser,* 207 AD3d 518 [2d Dept 2022]; *Wells Fargo Bank, N.A. v McKenzie,* 186 AD3d 1582, 1584 [2d Dept 2020]).

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]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Maryann Monteserrato ("Monteserrato"), an Assistant Vice President of Plaintiff. Monteserrato averred that she had personal knowledge of "Emigrant's books and records", including those of the Mortgagors' account, as well as the preparation and recordation of same. Annexed to her affidavit were certain of the records referenced. Also annexed was an affidavit from Aaron Smals ("Smalls") purporting to attest to service of the notice pursuant to RPAPL §1304 along with an alleged copy of the notice sent.

Monteserrato's affidavit laid a proper foundation for the admission of Emigrant Bank's records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). However, her affidavit was insufficient to establish a foundation under CPLR §4518 for admission of the business records the former holder or servicer of the note and mortgage, to wit Emigrant Mortgage, as she did not attest to having familiarity with the record keeping practices of Emigrant Mortgage (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Further, Monteserrato did not attest the records of the prior holder of the note were received from the maker, incorporated into the records Emigrant Bank kept and that her employer routinely relied on such records in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]).

Here, the records proffered to demonstrate the note, mortgage, Defendants' alleged default, as well as service of the RPAPL §1304 and paragraph 22 default notices, all facially indicate they are records of Emigrant Mortgage, not Plaintiff, Emigrant Bank. As such, none of the records are admissible and fail to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v* Allanah, 200 AD3d 947 [2d Dept 2021]).

Concerning Plaintiff's standing, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action which contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As to the latter two circumstances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]).

The most common basis relied on in foreclosure actions, holder status, "is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). Evidence of the nature of the attachment is required (*see One Westbank FSB v Rodriguez*, 161 AD3d 715 [1st Dept 2018]), since not every appendment can satisfy the statutory requisite (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015][Paperclip not a firm annexation]). Attachment of a properly endorsed note to the complaint or proof by affidavit may be sufficient to establish, *prima facie*, that the plaintiff was the holder of the note at the time of commencement (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]; *US Bank NA v Garcia*, 183 AD3d 506 [1st Dept 2020]; *Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]).

Here, Plaintiff claims holder status by transfer of physical possession of the note with an allonge from Emigrant Mortgage to Emigrant Bank. Montserrado asserts that she personally confirmed that Plaintiff was in possession of the note prior to commencement and a copy of the note with an allonge was annexed to Montserrado's affidavit. However, the allonge purporting to transfer the instrument is on a separate page, is undated and reveals no discernable evidence of firm attachment from a visual inspection. Resultantly, Plaintiff was required to establish the allonge was "firmly affixed" to the original note (*see Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). As Montserrado's affidavit and Plaintiff's other submissions are silent on this issue, Plaintiff has only demonstrated "mere physical possession of a note at the commencement of a foreclosure action [which] is insufficient to confer standing or to [prove] plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]).

As to the branch of Plaintiff's motion to dismiss all Defendants' 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 and nineteenth affirmative defenses, which are directed to the legal sufficiency of Plaintiff's complaint, are unnecessary as a general matter since dismissal cannot be effectuated without a

motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The second affirmative defense, alleging the action is barred by the statute of limitations, is conclusory and meritless. 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 (*cf. U.S. Bank N.A. v Salvodon*, 189 AD3d 925 [2d Dept 2020]; *21st Mtge. Corp. v Balliraj*, 177 AD3d 687 [2d Dept 2019]).

The third, fifth, sixth, seventh, eighth, tenth, eleventh, eighteenth, and twenty-seventh affirmative defenses claiming novation, modification, equitable estoppel, waiver, failure to satisfy conditions precedent unclean hands, repayment/modification, predatory lending, breach of the implied covenant of good faith, unjust enrichment and breach of contract 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 fourth affirmative defense of mitigation is unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]) as the amount due is not a defense to summary judgment (*see eg Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233 [2d Dept 2018]).

The seventh, twentieth and twenty-sixth affirmative defenses are unnecessary as they relate to the amount due and owing 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]).

The ninth affirmative defense that Plaintiff lacks standing is, based on the foregoing findings of the Court, presently viable.

The twelfth affirmative defense based upon alleged violations of the Real Estate Settlement Procedures Act [12 USC §2614] is entirely conclusory and lacking in any facts identifying the acts attributable to Plaintiff or the original lender. This is of particular significance as Plaintiff is not the originator of the loan.

The fourteenth affirmative defense based upon the Home Ownership and Equity Protection Act of 1994 ("HOEPA") (*see* 15 USC § 1639) is inadequately pled. HOEPA is an amendment to the TILA, which imposes additional truth-in-lending disclosure requirements when a borrower is involved in a "high cost" loan transaction (*see Palmer v GMAC Commercial Mortg.*, 628 F Supp 2d 186, 189 [D DC 2009]). Defendants failed to plead a basis for applicability of this statute or the precise violation thereunder.

The fifteenth affirmative defense that Plaintiff violated yet unidentified statutes is incomprehensible and inadequately pled.

The sixteenth affirmative defense fails as "documentary evidence is not by itself an affirmative defense, but merely one way in which a defense may be raised or proven" (*see Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993]).

The twenty-first affirmative defense alleging Plaintiff lacks capacity as it is not authorized to do business in New York was established by Plaintiff to be without basis in fact.

The twenty-second affirmative defense claiming failure to join necessary parties is insufficiently pled as the parties not joined and their interests are not identified.

The twenty-third affirmative defense that Plaintiff's lien it subordinated to other liens of record is not a viable defense to foreclosure for a mortgagor. Indeed, only parties with subordinate, not superior, liens are necessary parties to a foreclosure action (*see* RPAPL §1311).

The twenty-fourth and twenty-fifth affirmative defenses that relate to contract default notice and RPAPL §1304 are, based on the foregoing findings of the Court, presently viable.

Defendants' opposition to dismissal of the affirmative defenses was entirely conclusory and, by failing to raise specific legal arguments in rebuttal, those affirmative defenses found insufficient were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*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 (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

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

ORDERED that the branch of the motion for a default judgment against the non-appearing parties is granted, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the ninth, twenty-fourth and twenty-fifth are dismissed, and it is

ORDERED, that defendants John Doe #1 through John Doe #20 are hereby dismissed from this action, and it is

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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Emigrant Bank as assignee of Emigrant Mortgage Company, Inc,

Plaintiff,

Index No. 850031/2019

-against-

Gary Flom a/k/a Gary B. Flom, Svitlana Flom, Onestone Lending LLC, Board of Managers of One Riverside Park Condominium, New York State Department of Taxation and Finance, Atlantic Specialty Insurance Company, Veniamin Nilva, 625 W 55 LLC, 624 West 47th Street LLC,

Defendants.

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This matter is set down for a status conference on **February 9, 2023 @ 10:40 am** via Microsoft Teams.

12/9/2022
DATE

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

CHECK ONE:		CASE DISPOSED		NON-FINAL DISPOSITION	X		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE