SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 850116/2020

MOTION DATE _____

MOTION SEQ. NO. 008

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR INDYMAC INDX MORTGAGE LOAN TRUST 2006-AR39, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR39,

Plaintiff,

- v -

DOUGLAS DAVIS, WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR INDENTURE TRUSTEE TO CITIBANK, N.A., AS INDENTURE TRUSTEE OF SACO I TRUST 2006-12, MORTGAGE-BACKED NOTES, SERIES 2006-12, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 232

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

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

In this action, Plaintiff seeks to foreclose on a mortgage encumbering residential real property located at 259 West 131st Street, New York, New York. The mortgage, dated July 18, 2006, was given by Defendant Douglas Davis ("Davis") to non-party Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for non-party Luxury Mortgage Corp., ("Luxury") to secure an indebtedness with an original principal amount of $1,430,000.00. The loan is memorialized by a note dated the same day as the mortgage. Plaintiff commenced this action alleging that Davis defaulted in repayment of the loan that became due on November 1, 2019. Defendant Davis answered and pled nine affirmative defenses, including lack of standing and failure to comply with RPAPL §1304. Now, Plaintiff moves for summary judgment against the appearing Defendant, to strike his answer and affirmative defenses, for a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption. Defendant opposes 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 mortgagor's 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]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]), as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg 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 a cause of action for foreclosure 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 precise set of business records must be proffered, so 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 by an affirmation from Claribel Lopez ("Lopez"), a Contract Management Coordinator of PHH Mortgage Corporation ("PHH"), servicer for Plaintiff. Lopez avers that the affidavit is based on personal review of Nationstar's business records. Lopez's affidavit laid a proper foundation for the admission PHH's records into evidence under CPLR §4518 by sufficiently showing that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record[s][were] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] [were] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Lopez established that those records were received from the makers and incorporated into the records PHH kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Lopez were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). PHH's authority to act on Plaintiff's behalf was established with submission of a limited power of attorney, dated July 11, 2019 (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

Lopez's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *see also Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that 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]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). In this case, Plaintiff annexed

a copy of the note to the complaint, endorsed by the original lender, in blank on its face, which is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]; *Bank of NY v Knowles*, supra at 597). In any event, annexed to Lopez's affidavit were two written assignments of the mortgage, both dated before the action was commenced. Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012]), both assignments provide the mortgage was transferred with the "indebtedness". This language sufficiently established conveyance of the note and rendered any issues concerning the allonges and physical delivery of the note irrelevant (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *GRP Loan, LLC v Taylor,* 95 AD3d 1172 [2d Dept 2012]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. Further, since none of the salient facts on these issues were contradicted by any of the appearing defendants, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]). To the extent, Defendants assert the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing more than speculation to support that Plaintiff is in exclusive possession of facts to support its defenses (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

Plaintiff was also required to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). While RPAPL §1304 does not specify the proof necessary to demonstrate compliance therewith, the Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing . . . or . . . by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). "In other words, there are two methods by which a plaintiff can demonstrate the requisite mailings" (*U.S. Bank N.A. v. Romano*, 231 AD3d 1079, 1080 [2d Dept 2024]).

Proof of actual mailing may be shown with an affidavit of mailing or domestic return receipts with attendant signatures (*see eg US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]). Evidence of a satisfactory office practice can raise a rebuttable presumption that the required notice was sent and received by the addressee (*Cit Bank N.A. v Schiffman*, supra). A practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). Proof from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). An affidavit from the person who performed the mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Regarding the mailing of these notices, Lopez attested to personal knowledge of PHH's standard mailing procedure, described the procedure in adequate detail and attached PHH's records (*see United States Bank Trust, N.A. v Mehl,* 195 AD3d 1054 [2d Dept 2021]; *Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]).

Concerning the adequacy of the notice itself, Defendant posits that an issue of fact exists based upon a discrepancy between the claimed default date in the complaint and in the RPAPL §1304 notice sent. To be compliant with RPAPL §1304, the notice served must "contain all of the mandatory language and information set forth in the version of RPAPL 1304(1) in effect at the time plaintiff commenced this action" (*HSBC Bank USA, N.A. v. Ji Youn Min*, ___AD3d___, 2025 NY Slip Op 02269 [1st Dept 2025]). Where the complaint and RPAPL §1304 notice contain disparate default dates, this raises a triable issue of fact as the sufficiency of the notice which cannot be cured on reply (*U.S. Bank N.A. v Cox*, 203 AD3d 1206, 1209-1210 [2d Dept 2022]). In this case, Plaintiff pleads in the complaint that the default occurred when Defendant failed to remit payment on November 1, 2019, and thereafter. However, the notice sent by Plaintiff, dated October 25, 2019, states the Defendant has been in default for 84 days. This raises an issue of fact as to the propriety of the RPAPL §1304 notice (*see Green Tree Servicing, LLC v Helmsorig*, 227 AD3d 1053 [2d Dept 2024]). Plaintiff's reliance on *Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2d Dept 2015] for authority is misplaced. In that case, evidence reconciling a conflict in the default date was accepted to prove the mortgagor's default as part of Plaintiff's *prima facie* case cause of action for foreclosure, not compliance with RPAPL §1304 (*id.* at 878).

As to the branch of Plaintiff's motion to dismiss 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]).

All the affirmative defenses, except the ninth related to RPAPL §1304, are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is 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]). To the extent that no specific legal argument was proffered in support of a particular affirmative defense or claim, they 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 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]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its foreclosure claim against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the affirmative defenses, except the ninth related to RPAPL §1304, pled by the appearing Defendant are dismissed; and it is further

ORDERED that the Defendants captioned as "JOHN DOE" are hereby stricken from the caption, and it is further

ORDERED that this matter is set down for a status conference on **August 14, 2025 @ 10:40 am** via Microsoft Teams.

6/24/2025
DATE

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

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