SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

LAKEVIEW LOAN SERVICING, LLC,

Plaintiff,

- v -

TONY CURTIS, SECRETARY OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE #1 THROUGH #6, AND JANE DOE #1 THROUGH #6, THE LAST TWELVE NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS, TENANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON,

Defendant.

----------X

INDEX NO. 850287/2023

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74

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

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

This is an action to foreclose on a mortgage encumbering a parcel of real property located at 47 West 127 Street, New York, New York. The mortgage, dated April 9, 2008, was given by Defendant Tony Curtis ("Curtis") to non-party Mortgage Electronic Registration Systems ("MERS") as nominee for Professional Mortgage Bankers Corp. ("Bankers"). The mortgage secures a loan in the original principal amount of $928,700.00 memorialized by a note the same date as the mortgage. Plaintiff commenced this action and pled in its amended complaint, *inter alia*, that Defendant Curtis defaulted in repayment of the loan on or about March 1, 2019. Curtis answered and pled ten affirmative defenses, including lack of standing. Now, Plaintiff moves for *inter alia* summary judgment against Curtis, for a default judgment against the non-appearing parties, striking the appearing Defendant's affirmative defenses, appointing a referee to compute and to amend the caption. Curtis 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]). 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]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) as well as its strict compliance with, or demonstrate the inapplicability of, RPAPL §§1303, 1304 and 1306 (*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]).

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 specific business records must be proffered, provided 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]).

Proof of the loan documents, including the note and mortgage, was established in the first instance through the affirmation of Jodie L. Fredlund ("Frelund"), an Assistant Vice President of M&T Bank ("M&T"), servicer for Plaintiff and the annexed documents (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). Fredlund's affidavit and the loan history demonstrated the 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). Further, since Curtis failed to contradict any of the salient facts on the issues of the note, mortgage and the default, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]).

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]). Standing is evaluated when an action is commenced and may not be cured retroactively (*see eg 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, 234 AD3d 401 [1st Dept 2025]; *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]).

It is undisputed that Plaintiff is not the lender or original note holder. To the extent Plaintiff claims standing via holder status, it "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]). "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*, 175 AD3d 1513 [2d Dept 2019]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a 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]).

Here, the two indorsements of the note are contained on an allonge on a separate page. The copy of the note attached to the complaint did not reveal any indicia of firm annexation of the allonge upon visual inspection (*cf. US Bank v Hunte*, 215 AD3d 887 [2d Dept 2023]). Resultantly, Plaintiff was required to establish that the allonge was "firmly affixed" to the note (*see 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, 234 AD3d 401, 403 [1st Dept 2025]; *938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). Not every attachment can satisfy UCC §3-202[2] and Frelund offered no description of the nature of the attachment (*see 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, supra at 402; *HSBC Bank, USA, N.A. v Roumiantseva,* 130 AD3d 983 [2d Dept 2015]; *cf. U.S. Bank N.A. v Mave Hotel Invs. LLC,* 231 AD3d 607 [1st Dept 2024]), nor did she indicate "*when* she reviewed the copy of the note and allonge" (*Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1058 [2d Dept 2023]).

Reliance on the written assignments of the mortgage is also unavailing. When standing is asserted based on a series of written transfers, including assignments, demonstrating the validity of each assignment in the chain is obligatory (*see eg GRP Loan, LLC v Taylor,* 95 AD3d 1172 [2d Dept 2012]). 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]), unless that assignment expressly includes transfer of the note, or other similar language (eg. loan, indebtedness, the moneys due and owing, etc.) sufficient to transmit the note (*see eg 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]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *GRP Loan, LLC v Taylor,* supra). In this case, the necessary language concerning transfer of the note was not contained in every assignment in the series (*see 5AIF Sycamore 2, LLC v 201 EB Dev. III,* 223 AD3d 550 [1st Dept 2024]). Accordingly, Plaintiff failed to *prima facie* prove its standing (*see Federal Natl. Mtge. Assn. v* Allanah, 200 AD3d 947 [2d Dept 2021]).

On the issue of statutory pre-foreclosure notices, Plaintiff was 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]). 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 presumption that the required notice was sent and received by the projected 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]).

In this case, Plaintiff proffered the affidavit of Rachel M. Nowicki ("Nowicki"), an Assistant Vice President of M&T, who attested to knowledge of the record keeping procedures of M&T and Venture Solutions ("Venture"), M&T's purported mailing agent for pre-foreclosure notices. However, Nowicki "failed to indicate that she had familiarity with standard office mailing procedures" of Venture (*U.S. Bank N.A. v Richards*, 155 AD3d 522, 523 [1st Dept 2017]; *see also JPMorgan Chase Bank, Natl. Assn. v Gershfeld*, 187 AD3d 1003, 1004 [2d Dept 2020]). As such, she lacked the requisite knowledge to demonstrate Venture maintained and conformed to a standard office mailing procedure.

As to the branch of the 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]).

As pled, all the affirmative defenses, except the first and third, 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]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, other than standing, those defenses 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 branches of Plaintiff's motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the first and third, are stricken, and it is

ORDERED that "Doe" Defendants are stricken as the New York County Clerk will not accept a judgment for filing with a "Doe" defendant in the caption; and it is further

ORDERED that the amended caption shall read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
Lakeview Loan Servicing, LLC,

Plaintiff,

-against-

Tony Curtis; Secretary of the U.S. Department of Housing and Urban Development; United States of America o/b/o Internal Revenue Service; New York State Department of Taxation and Finance; Criminal Court of the City of New York; New York City Environmental Control Board; New York City Transit Adjudication Bureau,

Defendants.
----------X

and it is

ORDERED that this matter is set down for a status conference on **February 25, 2026 @ 11:40 am** via Microsoft Teams.

12/18/2025
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

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