SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC IMSC MORTGAGE LOAN TRUST 2007-ARI, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-ARI UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2007,

Plaintiff,

-against-

MARSHA MUSCO, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR COUNTRYWIDE HOME LOANS, INC., ITS SUCCESSORS AND ASSIGNS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, AND "JOHN DOE #1" THROUGH "JOHN DOE #10",

Defendants.

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TRIAL PART 9

Present:
Hon. Anthony I. Giacobbe

DECISION and ORDER

Index No. 130050/2010

Motion Nos. 001, 002

The following papers numbered 1 to 3 were fully submitted on the 13th day of July, 2012:

Plaintiff's Notice of Motion for Summary Judgment Striking the Answer and for the Appointment of a Referee with supporting papers (dated March 11, 2010)	1
Notice of Cross Motion by Defendant Marsha Musco for Leave to Amend her Pro Se Answer and Affidavit in Opposition to Motion for Summary Judgment with supporting papers (dated April 9, 2012)	2
Plaintiff's Affirmation in Opposition to Cross Motion with supporting papers (dated June 8, 2012)	3

Upon the foregoing papers, plaintiff's motion (No. 001) for summary judgment striking the answer of defendant Marsha Musco and appointing a referee to compute is granted; the cross motion (No. 002) of defendant Marsha Musco for leave to amend her

pro se answer is denied.

In this foreclosure action involving premises located at 1475 Arden Avenue, Staten Island, New York, defendant homeowner, Marsha Musco, appeared *pro se* and interposed a verified answer, dated January 21, 2010, asserting only the following as defenses: (1) that she was never notified of the foreclosure action, and (2) that when she attempted to modify her loan in April of 2009 and again in July of 2009, plaintiff was uncooperative and never provided a response to her modification applications. On or about May 7, 2010, the matter was assigned to the Foreclosure Conference Part of this Court, where nine settlement conferences were conducted pursuant to CPLR 3408 without resolution. Nearly a year-and-a-half later, on September 30, 2011, the final settlement conference was held, and at its unsuccessful conclusion, the action was released to Trial Part 9 to proceed to foreclosure.

In moving for summary judgment and to strike the responsive pleading of defendant Musco ("defendant"), plaintiff submits copies of the subject mortgage, the related note indorsed to plaintiff, and an assignment of the mortgage dated December 4, 2009. Also submitted is a copy of the notice of default, dated October 15, 2009, and the affidavit of Kristin Kemp, assistant vice president of One West Bank, F.S.B. (plaintiff's servicer and attorney-in-fact), who attests that the information contained therein "pertaining to the execution of the note and mortgage, payment and default records" was obtained from plaintiff's books and records which are in her custody. More particularly, Ms. Kemp attests, *inter alia*, to plaintiff's possession of the original note bearing an endorsement prior to the commencement of this action and that Indymac Mortgages

Services, a Division of OneWest Bank mailed the notice of default to defendant on October 15, 2009. According to Ms. Kemp, a review of the origination documents for the subject loan reveals that it does not qualify as either a "subprime", "non-traditional" or "high cost" home loan within the meaning of RPAPL 1304 or Banking Law §6-l(d) and, therefore, the pre-commencement notice requirements of RPAPL 1303 and 1304 do not apply in this case.

It is well settled that on a motion for summary judgment in an action to foreclose a mortgage, a plaintiff/mortgagee establishes its prima facie right to judgment as a matter of law through the production of the relevant mortgage, the unpaid note and an affidavit attesting to the mortgagor's default (*see*, *Flagstar Bank v. Bellafiore*, 94 AD3d 1044 [2nd Dept. 2012]; *HSBC Bank USA, NA v. Schwartz*, 88 AD3d 961 [2nd Dept. 2011]; *Coppa v. Fabozzi*, 5 AD3d 718 [2nd Dept. 2004]). Consonant with this principle, plaintiff Deutsche Bank has established its entitlement to judgment as a matter of law (*see*, *JP Morgan Chase Bank, N.A. v. Agnello*, 62 AD3d 662 [2nd Dept. 2009]; *EMC Mtge. Corp. v. Riverdale Associates*, 291 AD2d 370 [2nd Dept. 2002]).

With this established, the burden of proof shifted to the defendant to lay bare her proof and demonstrate the existence of a material question of fact by offering admissible evidence in support of the general denial and defenses alleged in her pro se answer (*see, Aames Funding Corp. v. Houston*, 44 AD3d 692 [2nd Dept. 2007], *lv denied*, 10 NY3d 704 [2008]; *Charter One Bank, FSB v. Houston*, 300 AD2d 429 [2nd Dept. 2002], *lv dismissed*, 99 NY2d 651 [2003]; *Barcov Holding Corp. v. Bexin Realty Corp.*, 16 AD3d 282 [1st Dept. 2005]). In connection with the foregoing, the cross-moving defendant

seeks leave to amend her verified answer to include certain other defenses, affirmative defenses and counterclaims not previously interposed, *e.g.*, plaintiff's purported lack of standing; its failure to provide her with two copies of the 90-day pre-foreclosure notice as required by RPAPL 1304; and its failure to satisfy the pleading requirements of RPAPL 1306. In addition, defendant asserts that the subject assignment of mortgage, by MERS, was the product of robo-signing and, thus, invalid; that MERS was never an actual "holder" and had no authority to assign the mortgage and note absent a power of attorney or corporate resolution; and that these deficiencies result in "breaks in the chain of title" to her mortgage. Among defendants other proposed defenses and counterclaims are the allegations (1) that the plaintiff trust purchased a non-performing loan and brought suit 30 days later in violation of the Pooling and Servicing Agreement and IRS regulations, and (2) that plaintiff's predecessors in interest engaged in deceptive business practices in violation of General Business Law §349.

"In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit []. Where, however, an application for leave to amend is sought after a long delay and the case has been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious []. The court's exercise of discretion in determining such an application will not be lightly disturbed []" (*T & V Constr. Inc. v. Calapai*, 90 AD3d 908, 909 [2nd Dept. 2011] [internal quotation marks and citations omitted]; *see*, *Countrywide Funding Corp. v. Reynolds*, 41 AD3d 524 [2nd Dept. 2007]).

In the matter at bar, defendant attributes her delay in seeking leave to amend her answer to plaintiff's failure to negotiate in good faith and conduct a timely review of her documents while she appeared for settlement conferences in the Foreclosure Conference Part. According to defendant, she was led to believe that plaintiff would ultimately offer her a loan modification, and was unaware of her defenses to this action when she answered the complaint 2½ years ago. Finally, she contends that the granting of leave to amend her answer would not prejudice plaintiff.

The motion for leave to amend the answer is denied.

At the outset, it is worth mentioning that the cross-moving defendant has neither alleged nor submitted documentation supportive of her financial ability to obtain a loan modification at any time during the pendency of this matter, including while it was pending in the Foreclosure Conference Part. Moreover, notwithstanding defendant's conclusory claim of "bad faith" during settlement negotiations, a hearing on that issue apparently was never ordered by the justice presiding in the Foreclosure Conference Part. Similarly unavailing is defendant's claim of ignorance of the law and/or defenses to the action (*see, Garal Wholesalers, Ltd. v. Raven Brands, Inc.*, 82 AD3d 1041 [2nd Dept. 2011]; *U.S. Bank N. A. v. Slavinski*, 78 AD3d 1167 [2nd Dept. 2010]). Finally, since it is undisputed that the unpaid principal balance of the subject loan is $498,000.00 plus interest from July 1, 2009, together with late charges, advances for real estate taxes and insurance, defendant's claim that plaintiff would not be prejudiced by any further delay in these proceedings is unsustainable.

In view of the foregoing, it is the opinion of this Court that defendant has failed

to proffer a reasonable excuse for the pronounced delay in seeking leave to amend her answer (*see e.g.*, *T & V Constr. Inc. v. Calapai, supra*). Similarly of no avail are the defenses and counterclaims she belatedly seeks to interpose.

Turning first to the issue of standing, it is well established that "[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 753 [2nd Dept. 2009]). In this regard, "[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident [of the note]" (*id*. at 754; *see, Bank of N.Y. v. Silverberg*, 86 AD3d 274 [2nd Dept. 2011]; *U.S. Bank, N.A. v. Madero*, 80 AD3d 751 [2nd Dept. 2011]; *see also, Mortgage Electronic Registration Systems, Inc. v. Coakley*, 41 AD3d 674 [2nd Dept. 2007]).

In opposing the cross motion, plaintiff has sufficiently demonstrated, by the submission of evidentiary proof in the form of an affidavit by Barbara Campbell, a vice president of Deutsche Bank National Trust Company (hereinafter, "Deutsche Bank"), attesting on the basis of her review of records maintained in the ordinary course of business, that the trustee received defendant's original note on or about April 26, 2007, which was prior to the closing date of the plaintiff trust (June 28, 2007). In addition, Ms Campbell further attests, that Deutsche Bank received the original recorded mortgage and title policy on or about August 25, 2007. Thus, prior to the commencement of this action, plaintiff was both in physical possession of the

promissory note and the holder of the mortgage, which passed as an inseparable incident to the debt (*see, LaSalle Bank N.A. v. Ahearn*, 59 AD3d 911 [3rd Dept. 2009]; *Mortgage Electronic Registrations Systems, Inc. v. Coakley, supra*).

It is well settled that an assignment of mortgage does not have to be in writing and can be effected, as here, through its physical delivery to Deutsche Bank (*see, LaSalle Bank N.A. v. Ahearn, supra*). In the case at bar, absent any authority to the contrary, the subsequent written assignment of mortgage dated December 4, 2009 by a MERS representative pursuant to a Corporate Resolution dated March 19, 2009 may have been redundant, but it in no way invalidated the actual physical delivery of the original note and mortgage to the plaintiff trustee which occurred previously. It is also worthy to note that defendant's mortgage specifically provides MERS with the requisite authority to exercise any of lender's rights granted by said mortgage, or take any action required by the lender with reference thereto (*cf.*, *Bank of N.Y. v. Silverberg, supra*). Thus, the proposed defenses and counterclaims challenging, *e.g.*, the validity of the written assignment of mortgage by MERS, are devoid of merit.

Defendant's remaining proposed defenses and counterclaims, *e.g.*, that her loan is either a high-cost, non-traditional or subprime home loan within the meaning of RPAPL 1304 or Banking Law §6-l(d), and that plaintiff's predecessor-in-interest engaged in deceptive business practices, constitute bare legal conclusions and are lacking in either evidentiary facts or documentary proof in support thereof.

In view of defendant's failure to demonstrate the existence of a material issue of fact requiring a trial (*see, Aames Funding Corp. v. Houston, supra*; *Charter One Bank*

FSB v. Houston, supra), plaintiff is entitled to the entry of summary judgment (*see*, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, it is

ORDERED, that the branch of plaintiff's motion which is for summary judgment and to strike the verified answer interposed by defendant Marsha Musco is granted, and the answer is hereby stricken; and it is further

ORDERED, that the branch of plaintiff's motion which is for the appointment of a referee to compute is also granted, and the proposed Order of Reference annexed to plaintiff's moving papers will be signed in conformity with the instant Decision and Order and following a review of such proposed Order of Reference; and it is further

ORDERED, that plaintiff's request to amend the caption herein to the extent of severing and striking the names of defendants "JOHN DOE #l" through "JOHN DOE #10" and to discontinue this action as against these parties is granted, and the within caption shall be amended in accordance herewith and the action discontinued as against these defendants; and it is further

ORDERED, that the cross motion of defendant Marsha Musco for leave to amend her verified answer is denied; and it is further

ORDERED, that the Clerk enter judgment and mark his records accordingly.

E N T E R,

Dated: September 7, 2012

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J.S.C.