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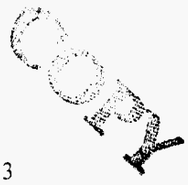
SHORT FORM ORDER

INDEX NUMBER: 27927-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY



Present: **Hon. EMILY PINES**
J. S. C.

Original Motion Date: 10-22-13
Motion Submit Date:
Motion Sequence No.: 001-MotD

[ ] FINAL
[x] NON FINAL

---X

WELLS FARGO BANK, N.A. SUCCESSOR BY MERGER TO WACHOVIA MORTGAGE, F.S.B. F/K/A WORLD SAVINGS BANK, FSB,
1100 Corporate Center Drive
Raleigh, NC 27607,

Plaintiff,

- against -

RICHARD C. KRISTALL, FELICE NASSHORN KRISTALL, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming or lien upon the mortgaged premises.),

Defendants.
---X

Attorney for Plaintiff

DRUCKMAN LAW GROUP PLLC
242 Drexel Avenue, Suite 2
Westbury, N. Y. 11590

Attorney for Defendant

ALAN S. WALENDOWSKI, P.C.
Defendants - Richard C. Kristall
Felice Nasshorn Kristall
532 Broadhollow Road, Suite 144
Melville, N. Y. 11747

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 14; Replying Affidavits and supporting papers 15 - 18; Other stipulation; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Richard C. Kristall and Felice Nasshorn Kristall, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated below; and it is

ORDERED that the plaintiff is directed to file proof of filing of an additional or a successive notice of pendency with the proposed judgment of foreclosure (*see*, CPLR 6513; 6516[a]; ***Aames Funding Corp. v Houston***, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***Horowitz v Griggs***, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); and it is

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 21 Gleason Drive, Dix Hills, New York 11746. On July 13, 2007, the defendants Richard C. Kristall and Felice Nasshorn Kristall (the defendant mortgagors) executed an adjustable-rate "pick-a-payment" note in favor of World Savings Bank, FSB (the lender) in the principal sum of $568,000.00. The note provides for a maximum negative amortization in the sum of $710,000.00, 125% of the original principal note amount. To secure said note, the defendant mortgagors gave the lender a mortgage also dated July 13, 2007 on the property. By way of a series of bank mergers, the note and the mortgage were allegedly transferred to and/or acquired by the plaintiff, Wells Fargo Bank, N.A, successor by merger to Wachovia Mortgage, F.S.B. (Wachovia) formerly known as World Savings Bank, FSB prior to commencement.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on September 14, 2009, and each month thereafter. After the defendant mortgagor allegedly failed to cure their default, the plaintiff

commenced the instant action by the filing of a lis pendens, summons and verified complaint on August 29, 2011.

Issue was joined by the interposition of the defendant mortgagor's joint verified answer sworn to on August 29, 2011. By their answer, the defendant mortgagors generally deny all of the material allegations set forth in the complaint. In the answer, the defendant mortgagors also assert three affirmative defenses, alleging, inter alia, waiver, laches or unclean hands; violation of New York State Banking Laws or the federal Truth in Lending Act (TILA) (15 USC § 1601, *et seq*); and the lack of standing.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on April 4, 2013 and continuing through to June 18, 2013. A representative of the plaintiff attended and participated in these conferences. On the last conference date, the parties were unable to reach a settlement and, as a result, this action was referred as an IAS case. Accordingly, no further conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their answer and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption. In response, the defendant mortgagor has filed opposition papers consisting of, inter alia, the affirmation of his counsel.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644

NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***U.S. Bank, N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the note, the mortgage and evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Furthermore, the plaintiff submitted an affidavit from its officer wherein it is alleged that the plaintiff was the holder of the note and the mortgage at the time of commencement, and at all times thereafter by virtue of a bank merger with the lender (*see*, Banking Law § 602; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the defendant mortgagors' answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]). Further, "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (***Home Sav. of Am., FSB v Isaacson***, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]).

Since the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

A review of the opposing papers submitted by the defendant mortgagors shows that the same are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see*, CPLR 3211[e]; ***American Airlines Fed. Credit Union v Mohamed,*** 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***U.S. Bank Trust N.A. Trustee v Butti***, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]; *see also*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagors have offered no proof or arguments in support of any of their pleaded defenses, except as to the plaintiff's lack of standing. The failure by the defendant mortgagors to raise and/or assert each of their remaining pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the defendant mortgagors' unsupported affirmative defenses are thus dismissed.

Rejected as unmeritorious are the challenges by the defendant mortgagors to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the defendant mortgagors' contentions, the affidavit of the plaintiff's officer submitted in support of the motion contains sufficient allegations as to the plaintiff's possession of the note prior to commencement and comports with the requirements of CPLR 3212 (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Trustco Bank, N.A. v Labriola***, 246 AD2d 735, 667 NYS2d 450 [3d Dept 1998]). In her affidavit, the plaintiff's officer alleges that she reviewed all of the books, records and documents kept by the plaintiff related to this action, and authenticates them as coming directly from the subject loan file and kept in the ordinary course of business.

The assertions by the defendant mortgagors as to the plaintiff's alleged lack of standing, which rest, inter alia, upon the alleged failure by the plaintiff's officer to detail the nature of the relationship between it and the original lender are also rejected as unmeritorious (*see*, Banking Law § 602; ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]; ***Ladino v Bank of Am.***, 52 AD3d 571, *supra*). By its submissions, the plaintiff demonstrated that it merged with Wachovia formerly known as the lender in 2009, more than one year before the commencement of this action. Banking Law § 602, which governs the effect of a merger, provides that the receiving bank "shall be considered the same business and corporate entity" as the bank that merged into it and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank. Thus, no formal assignment is required to effect a transfer of the assets of the merged bank, and the plaintiff is not required to submit proof that the subject loan was assigned in order to establish its entitlement to summary judgment (***Ladino v Bank of Am.***, 52 AD3d 571, *supra* at 572-573). In the complaint, the plaintiff alleges that it is the successor by merger to Wachovia, which was formerly known as the lender. Moreover, the plaintiff submitted a consent to change attorney document sworn to on February 27, 2012, whereby the plaintiff acknowledged that it is the successor by merger to Wachovia, which was formerly known as the lender. The aforementioned documents were authenticated by the plaintiff's officer, as noted above.

Moreover, at least three other courts have recognized that the plaintiff is the successor by merger to Wachovia with respect to loans made by Wachovia and/or Wachovia Bank and/or the lender, and having standing to prosecute foreclosure actions (*see*, ***Wells Fargo Bank v Jenkins***, 40 Misc3d 1235 (A), 975 NYS2d 713 [Sup Ct, Queens County 2013] [finding that Wells Fargo Bank merged with and into Wachovia Bank effective November 1, 2009]; ***Pratap v Wells Fargo Bank, N.A.***, ___F Supp2d___, 2014 US Dist LEXIS 110002, 2014 WL 3884413 [US Dist Ct, ND Cal 2014]; ***O'Connor v Wells Fargo, N.A.***,No. CV-14-00211 DMR, 2014 US Dist LEXIS 91337, 2014 US Dist LEXIS 91337, 2014 WL 3058373, US Dist Ct, ND Cal. 2014 [judicial notice taken that World Savings Bank, FSB, changed its name to Wachovia Mortgage, FSB effective December 31, 2007, and then merged into Wells Fargo Bank, N.A. in November 2009]). In any event, the plaintiff's officer specifically alleged that the plaintiff was in possession of the note and the mortgagee of record on the date of commencement (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Such evidence demonstrates that the plaintiff holds the original note and mortgage. In response, the defendants have not supplied any documentary evidence which would raise a question of fact as to whether the plaintiff is not the lawful holder of the note and mortgage (*see*,

Peak Fin. Partners, Inc. v Brook, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; *cf.*, ***Countrywide Home Loans, Inc. v Gress***, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). The defendant mortgagors, therefore, failed to establish the merit of their defenses based upon the plaintiff's alleged lack of standing.

Notwithstanding the general denials in the answer, the submissions by the defendant mortgagors failed to raise a triable issue of fact rebutting the plaintiff's showing or as to the merit of their affirmative defenses (*see*, ***NYCTL 1998-2 Trustee v 2388 Nostrand Corp.***, 69 AD3d 594, 892 NYS2d 188 [2d Dept 2010]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, *supra*; ***Wolf v Citibank, N.A.***, 34 AD3d 574, 824 NYS2d 176 [2d Dept 2006]; ***McCann v Cronin***, 276 AD3d 472, 713 NYS2d 695 [2d Dept 2000]; ***Trustco Bank, N.A. v Labriola***, 246 AD2d 735, *supra*). Notably, absent from the opposing papers are any allegations by the defendant mortgagors that they did not receive the proceeds of the loan transaction, or any allegations by them denying their default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagors, their submissions are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; *see*, ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***U.S. Bank N. A. v Slavinski***, 78 AD3d 1167, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagors' answer is stricken, and the affirmative defenses set forth therein are dismissed in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the name of the fictitious named defendant, John Doe, is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. These submissions include an affidavit from its agent that there are no "John Doe" defendants/occupants at the residence. All future proceedings shall be captioned accordingly.

Wells Fargo Bank, N.A. v Kristall
Index No.: 27927-11

The branch of the motion wherein the plaintiff seeks an order amending the caption by excising "the name of the [d]efendant Kevin Kristall who is deceased" is denied (*see generally*, ***Neighborhood Hous. Servs. of N. Y. City, Inc. v Meltzer***, 67 AD3d 872, *supra*). The moving papers are devoid of any allegations concerning an individual by the name of "Kevin Kristall," and no person by that name was ever named or served as a defendant in this action. Furthermore, as noted above, the plaintiff submitted evidentiary proof that there are no occupants in the property other than the defendant mortgagors.

Since the plaintiff has been awarded summary judgment against the defendant mortgagors, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as set forth above. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: September 8, 2014
Riverhead, New York

Emily Pines

Hon. EMILY PINES
J. S. C.