SHORT FORM ORDER

COPY

INDEX
NO.: 4631-2013

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY

PRESENT: Hon. ANDREW G. TARANTINO JR.
Acting Supreme Court Justice

MOTION DATE: 8-7-14 (001)
9-12-14 (002)
ADJ. DATE: 10-14-14 (001, 002)
Mot. Seq. # 001-MG
Mot. Seq. # 002-XMD

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007-CH5, ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-CH5

Plaintiff,

-against-

HAZEL WILLIAMS, RICHARD WILLIAMS PEOPLE OF THE STATE OF NEW YORK EQUABLE ASCENT FINANCIAL LLC SCHWERTNER STATE BANK MANTIS FINANCIAL LP C/O TRACTENBERG, RODES & FREIDBERG LLP MARRAN OIL LLC, LVNV FUNDING LLC, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, JOHN T. MATHER MEMORIAL HOSPITAL, PALISADES ACQUISITION XVI, LLC "JOHN DOE #1 to "JOHN DOE #10," the last 10 names being fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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RICHARD WILLIAMS
Defendant
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Upon the following papers numbered 1 to 26 read on this motion for summary judgment and cross motion for leave to amend answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 21 ; Answering Affidavits and supporting papers 22 - 24 ; Replying Affidavits and supporting papers ____; Other Stipulation 25 - 26 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Hazel Williams, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted; and it is

ORDERED that this cross motion (002) by the defendant Hazel Williams, for, among other things, an order pursuant to CPLR 3025 (b) for leave to interpose an amended answer, and denying the plaintiff's motion for summary judgment is denied in its entirety; and it is

ORDERED that the caption is amended by excising the defendant Schwerter State Bank Mantis Financial LP c/o Trachtenberg, Rodes & Friedberg, LLP and the fictitious defendants John Doe #1 -10; 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, 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 33 Geraldine Avenue, Amityville, NY 11701 ("the property"). On March 27, 2007, the defendant Hazel Williams executed a note in favor of JPMorgan Chase Bank, N.A. ("the lender") in the principal sum of $387,000.00. To secure said note, Hazel Williams and Richard Williams (collectively "the defendant mortgagors") gave the lender a mortgage also dated March 27, 2007, on the property. The mortgage was subsequently duly recorded in the Suffolk County Clerk's Office on May 9, 2007. By way of an undated endorsement, the note was allegedly transferred from the lender to the plaintiff, Deutsche Bank National Trust Company, as Trustee of the J.P. Morgan Mortgage Acquisition Trust 2007-CH5, Asset Backed Pass-Through Certificates, Series 2007-CH5. The transfer of the note from the lender to the plaintiff was memorialized by an assignment of the mortgage and "all beneficial interest" thereunder executed on September 24, 2012. Thereafter, the assignment was duly recorded in the Suffolk County Clerk's Office on November 20, 2012.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on October 1, 2008, and each month thereafter. After the defendant mortgagors allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on February 14, 2013.

Issue was joined by service of Hazel Williams' verified answer sworn to on March 5, 2013. By her answer, Ms. Williams generally denies all of the allegations in the complaint, and asserts seventeen affirmative defenses and two counterclaims, alleging, inter alia, the following: damages caused by the plaintiff's culpable conduct; equitable estoppel; breaches of the pooling and servicing agreement; unclean hands; claims barred by public policy; unjust enrichment; defective title to the note and mortgage; the lack of standing; fraud and misrepresentation in the loan origination; unconscionability; the lack of personal jurisdiction; and the failure to state a cause of action and name Mortgage Electronic Registration Systems, Inc. (MERS) as a necessary defendant.

By her counterclaims, Ms. Williams demands, inter alia, a rescission of the mortgage and a declaratory judgment that the plaintiff is not the owner of the mortgage. In its reply dated April 17, 2013, the plaintiff denies all of the allegations contained in the counterclaims, and asserts nine affirmative defenses, alleging, inter alia, the following: the failure to state a claim and make a legally sufficient tender; counterclaims barred by a defense based upon documentary evidence; no compensable damages; the doctrines of waiver, laches, ratification, release and unclean hands; equitable subrogation; and the lack of standing to assert the counterclaims. The remaining defendants have neither answered nor appeared herein, and thus, are in default.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against Ms. Williams, striking her answer and dismissing the affirmative defenses and the counterclaims 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.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]).

Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007];

First Trust Natl. Assn. v Meisels, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either 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" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v Sullivan***, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], *quoting* ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911]).

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201(5) (*see*, UCC 3-104; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see*, UCC § 3-202; § 3-204; § 9-203[g]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, *supra*). Furthermore, UCC § 9-203(g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

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 with an endorsed allonge, the mortgage, the assignment 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, *supra*). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

The plaintiff also demonstrated that, as holder of the endorsed note and as the assignee of the mortgage and note, it has standing to commence this action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*). Furthermore, the plaintiff submitted, inter alia, the affidavit from a representative of its servicer, JPMorgan Chase Bank, N.A., wherein it is alleged that the plaintiff, directly or through its agent, was in possession of the original note, at the time of filing of the complaint, and that the same was attached to the complaint (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***US Bank N.A. v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Additionally, the documentary evidence submitted by the plaintiff includes, among other things, the note transferred via an endorsement in blank (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover, the plaintiff submitted, among other things, the written assignment, which memorialized the transfer of the note and mortgage to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). An examination of the assignment shows that it includes a reference to the plaintiff's "beneficial interest" under the mortgage (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*). In any event, the plaintiff annexed copies of the endorsed note, the mortgage, and the assignment to the complaint as exhibits (*see*, ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Bank of N.Y. Mellon Trust Co., NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]). Such evidence demonstrates that the plaintiff holds the original note. Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage and note by virtue of the written assignment. 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 and the counterclaims set forth in Ms. Williams' 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*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items]; ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] ["a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms"]; ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [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]). Furthermore, non-parties to a lender's pooling and servicing agreement lack standing to assert noncompliance therewith (*see*, ***Bank of Am., N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Bank of N.Y. Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; *see also*, ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 2007] [those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract]). Moreover, "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 Ms. Williams (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Ms. Williams 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]).

Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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]).

Ms. Williams opposes the motion and cross moves for, inter alia, an order: (1) pursuant to CPLR 3025 (b) for leave permitting her to interpose an amended answer asserting additional counterclaims for, inter alia, declaratory relief pursuant to Article 15 of Real Property Actions and Proceedings Law as well as damages for the plaintiff's purported lack of good faith in appearing at conferences mandated by CPLR 3408; and (2) denying the plaintiff's motion for summary judgment.

Concerning standing, Ms. Williams by her counsel asserts that the affidavit of the plaintiff's representative is insufficient to establish, its prima facie entitlement to summary judgment because,

inter alia, the details of the physical delivery of the note are missing and the allegations contained therein are without personal knowledge and thus hearsay. In connection with Ms. Williams' standing argument, counsel contends that the plaintiff's documentary evidence violated the terms of the subject trust agreement based upon his own examination of the subject loan file. Counsel also avers that Ms. Williams did not move sooner to amend her answer because his office did not have an opportunity to conduct discovery prior to service of the plaintiff's motion. Based upon the foregoing, Ms. Williams argues that she should be permitted to amend her answer to add claims for relief pursuant to Article 15 of the RPAPL quieting title and for bad faith in negotiating a loan modification pursuant to CPLR 3408.

A review of the opposing papers submitted by Ms. Williams 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]; ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *see also*, ***CWCapital Asset Mgt. v Charney-FPG 114 41st St., LLC***, 84 AD3d 506, 923 NYS2d 453 [1st Dept 2011]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In opposition to the motion, Ms. Williams has offered no proof or arguments in support of any of the pleaded defenses in the answer, except those relating to the plaintiff's alleged lack of standing and purported bad faith in negotiating a loan modification pursuant to CPLR 3408. The failure by Ms. Williams to raise and/or assert each of the remaining pleaded defenses in the answer 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 unsupported affirmative defenses contained in the answer are thus dismissed.

Rejected as unmeritorious are Ms. Williams' challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to Ms. Williams' contentions, the affidavit of the plaintiff's representative is legally sufficient and comports with the requirements of CPLR 3212 (*see*, ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; ***Fleet Bank v Pine Knoll Corp.***, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also*, ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *cf.*, ***Citibank N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). Ms. Williams' assertion that the affidavit is hearsay because the affiant did not personally service her account is also unavailing in light of the affiant's unchallenged assertion of personal knowledge of the defendant mortgagors' default in payment (***Charter One Bank, FSB v Leone***, 45 AD3d 958, *supra*). In her affidavit, the plaintiff's affiant alleges that she reviewed the records and documents kept by the plaintiff related to this action, and represents that they were kept in the ordinary course of business and made at or near the time of the transactions or events by or from a person with personal knowledge. The plaintiff's affiant further alleges that the lender's records that relate to the subject loan, which were reviewed and relied upon for the statements in her affidavit, include images of the note, the lender's electronic servicing system, and images of correspondence to Ms. Williams.

Turning to the branch of the cross motion for an order pursuant to CPLR 3408 granting an order for leave to amend the answer, the assertions by Ms. Williams concerning the plaintiff's alleged lack of standing, which rest, inter alia, upon the alleged defective title are misplaced (*see*, ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]). As noted above, the plaintiff demonstrated that it was the holder of the note at the time of commencement by the submission of, inter alia, the affidavit of its officer and by submitting a copy of the endorsed note that was attached to the complaint (*see*, ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, *supra*; *see also*, ***HSBC Bank USA v Baptiste, N.A.***, 128 AD3d 773, 10 NYS3d 255 [2d Dept 2015]). Even if the plaintiff presently lacked standing to commence an action to foreclose the subject mortgage, the validity of the mortgage itself is not thereby vitiated (*see*, ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, *supra*). Furthermore, even if the plaintiff lacked standing, the absence of standing on the part of a plaintiff is not an actionable wrong, as it does not constitute bad faith, frivolous, unconscionable, fraudulent or oppressive conduct (*see*, ***U.S. Bank v Reed***, 38 Misc3d 1206 [A], 2013 NY Misc LEXIS 6, 2013 WL 49817, 2013 NY Slip Op 50004 [U] [Sup Ct, Suffolk County 2013, slip op, at 5]; *see also*, ***Deutsche Bank Nat. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]). In any event, the documentary evidence submitted by the plaintiff conclusively establishes the validity of the subject mortgage and note, and Ms. Williams is not entitled to the prospective relief demanded in the proposed amended counterclaims (*see*, ***Jahan v U.S. Bank Natl. Assn.***, 127 AD3d 926, 9 NYS3d 65 [2d Dept 2015]; ***Acocella v Bank of N.Y. Mellon***, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]). The remaining contentions advanced by Ms. Williams in opposition to the plaintiff's motion and in support of the cross motion are similarly without merit.

Notably, in her affidavit Ms. Williams does not deny that she received the loan proceeds and that she defaulted on the subject loan payments (*see*, ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also*, ***Stern v Stern***, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). Thus, even when considered in the light favorable to Ms. Williams, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS3d 619 [2d Dept 2015]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *see also*, ***Barcov Holding Corp. v Bexin Realty Corp.***, 16 AD3d 282, *supra*). The plaintiff, therefore, is awarded summary judgment in its favor against Ms. Williams (*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 answer is stricken; the affirmative defenses and the counterclaims 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 Schwerter State Bank Mantis Financial LP c/o Trachtenberg, Rodes & Friedberg, LLP and the fictitious defendants John Doe #1 -10 is granted (*see*, ***Deutsche Bank Nat. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***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. All future proceedings shall be captioned accordingly.

In response, Ms. Williams has not shown any valid basis to argue that the subject note and mortgage produced herein by the plaintiff were not the actual loan instruments executed by her (*see*, ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). Ms. Williams also has not supplied any documentary evidence that would raise a question of fact as to whether the plaintiff is not the lawful owner or 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]). Further, Ms. Williams ratified the mortgage and note by making payments for approximately a year and a half prior to the default in payment (*see*, ***Citibank, N.A. v Silverman***, 84 AD3d 425, 922 NYS2d 56 [1st Dept 2011]).

Ms. Williams' arguments regarding the purported irregularities with the endorsements on the allonges associated with the assignment of the note and mortgage, rife with speculation and innuendo, which appear to be aimed at obscuring the issue of nonpayment, are also without merit (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]; *see also*, ***Wells Fargo Bank, NA v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]; ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, *supra*).

Ms. Williams' conclusory and self-serving contentions concerning her alleged attempts to obtain a loan modification and her arguments concerning the plaintiff's failure to negotiate in good faith and/or alleged bad faith pursuant to CPLR 3408, are unavailing because a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see*, ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). The mere fact that the plaintiff refused to consider a reduction in principal or interest rate, does not establish that it was not negotiating in good faith (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638). Further, "[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by defendants, and plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638; *see*, ***Bank of Am., N.A. v Lucido***, 114 AD3d 714, *supra*).

The court also finds that the totality of the circumstances in this case, do not support a finding that the plaintiff failed to negotiate in good faith (*see*, ***U.S. Bank, N.A. v Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 20, 966 NYS2d 108 [2d Dept 2013] ["it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties"]). In compliance with CPLR 3408, a settlement conference was conducted before the specialized foreclosure conference part on January 21, 2014. The conference was re-scheduled to April 15, 2014, and on that date this case was dismissed from the conference program because the parties were unable to modify the loan or otherwise settle this action. A representative of plaintiff attended and participated in the settlement conferences. Accordingly, no further conference is required under any statute, law or rule.

By its moving papers, the plaintiff established the default in answering on the part of the remaining defendants, Richard Williams, People of the State of New York, Equable Ascent Financial LLC, Marran Oil LLC, LVNV Funding LLC, Clerk of the Suffolk County District Court, John T. Mather Memorial Hospital, and Palisades Acquisition XVI, LLC (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***U.S. Bank, N.A. v Razon***,115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of the above-noted remaining defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against Ms. Williams and has established the default in answering by the remaining defendants, 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]. Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

Accordingly, the motion for, inter alia, summary judgment is granted, and the cross motion is denied as set forth above. The proposed order appointing a referee to compute, as modified by the court, has been signed concurrently herewith.

Dated: OCT 5 2015

Hon. ANDREW G. TARANTINO, A.S.C.J.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**