Wells Fargo Bank, N.A. v Benitez
2016 NY Slip Op 32564(U)
December 14, 2016
Supreme Court, Suffolk County
Docket Number: 13-15433
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 - SUFFOLK COUNTY

INDEX NO.: 13-15433

PRESENT:
Hon. DANIEL MARTIN

MOTION DATE: 1-11-16
ADJ. DATE: _____
Mot. Seq. #: 001 -MotD

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Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Veronica Benitez a/k/a Veronica E. Benitez, "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 an interest or lien upon the mortgaged premises,

Defendants.

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PLAINTIFF'S ATTY:

SHAPIRO, DICARO & BARAK, LLC
175 Mile Crossing Boulevard
Rochester, New York 14624

DEFENDANT'S ATTY:

GUERRERO LAW OFFICES, P.C.
1836a Fifth Avenue
Bay Shore, New York 11706

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	X

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Veronica Benitez, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent indicated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that the caption is amended by substituting Martha Mancilli, Jorge Cineneces and Hugo Cineneces for the fictitious defendant, "JOHN DOE", and excising the remaining descriptive wording; and it is

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

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall 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 1574 Lincoln Boulevard, Bay Shore, New York 11706 ("the property"). On August 20, 2007, the defendant Veronica Benitez ("the defendant mortgagor") executed a fixed-rate note for electronic signature ("the eNote") in favor of AmTrust Bank ("the lender") in the principal sum of $358,000.00. The note reflects that it is a Federal National Mortgage Association ("Fannie Mae") uniform instrument. To secure said eNote, the defendant mortgagor gave the lender a mortgage also dated August 20, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") acted solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was recorded on September 4, 2007.

By way of an electronic record transfer, the eNote was allegedly transferred to Wells Fargo Bank, N.A. ("the plaintiff") prior to commencement, and memorialized by an assignment of the mortgage by MERS executed on September 9, 2011. Thereafter, the assignment was duly recorded in the Office of the Suffolk County Clerk on September 26, 2011.

The defendant mortgagor allegedly defaulted on the mortgage, by failing to make the monthly payment of principal and interest due on or about August 1, 2010, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on June 13, 2013.

Issue was joined by the interposition of the defendant mortgagor's answer with an attached verification sworn to on August 3, 2013. By her answer, the defendant mortgagor denies all of the material allegations in the complaint, and asserts nine affirmative defenses, alleging, among other things, the plaintiff's lack of standing and its failure to comply with the notice provisions of the mortgage and RPAPL § 1304. The remaining defendants have not answered the complaint and, thus, all are in default.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor, striking her answer and dismissing the affirmative defenses asserted 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 opposition to the motion, the defendant mortgagor has submitted the affirmation of her counsel. In her opposing papers, the defendant mortgagor re-asserts her previously pleaded affirmative defenses of the plaintiff's alleged lack of standing and its alleged failure to comply with the notice provisions of the mortgage and RPAPL § 1304. In response, the plaintiff has filed reply papers.

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]).

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]). 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 its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on or after January 14, 2010, the 90-day notice requirement set forth in the statute is applicable (*see*, RPAPL §1304; Laws 2008, ch 472, § 2, eff Sept 1, 2008, as amended by Laws 2009,

ch 507, § 1-a, eff Jan 14, 2010). Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly (Allstate Ins. Co.)***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

The plaintiff's submissions are insufficient to demonstrate evidentiary proof of compliance with RPAPL § 1304 (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*). The plaintiff submitted neither affidavits of service of the 90-day notice allegedly sent by Wells Fargo Home Mortgage ("WFHM") upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

Under the facts presented, the statements set forth in the affidavit of Jessica Suzanne Phillips, a Vice President of Loan Documentation from the plaintiff, regarding the 90-day pre-foreclosure notices, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*). Although Ms. Phillips alleges that the subject notices were mailed to the defendant mortgagor, she did not set forth sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notices; nor did she identify the individuals who allegedly did so. Further, it is noted that Ms. Phillips' affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life***

Ins. Co. of N.Y., 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*).

Additionally, the plaintiff's affiant neither specified the exact business records upon which she relied in her affidavit; nor did she allege that she is familiar with WFHM's record keeping practices and procedures to insure that items are properly addressed and mailed and, thus, she did not attempt to lay a foundation for their admissibility (*see*, CPLR 4518 [a]; ***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]; ***Palisades Collection, LLC v Kedik***, 67 AD3d 1329, 890 NYS2d 230 [2d Dept 2009]; *see also*, ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). Furthermore, the affiant did not assert that she has personal knowledge of the defendant mortgagor's payment history since the time of the default (*see*, ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]). To the extent that the statements made by the affiant are based documents that were in the possession of the lender or WFHM prior to the alleged transfer of the note and the mortgage to the plaintiff, these records constituted hearsay (*see generally*, ***People v Goldstein***, 6 NY3d 119, 810 NYS2d 100 [2005]). The mere filing of papers received from other entities, "even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, because such papers simply are not made in the regular course of the recipient, who is in no position to provide the necessary foundation testimony" (***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 494, 495, 834 NYS2d 239 [2d Dept 2007] [internal quotation marks omitted]). Because the plaintiff's representative failed to lay a proper foundation for the admission of the records relating to the alleged service of the 90-day pre-foreclosure notices, under the business records exception to the hearsay rule (*see*, CPLR 4518 [a]), those of her assertions that were based on these records are inadmissible (*see*, ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*). Therefore, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law with respect to the 90-day notices (*see*, ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*).

The court turns next to the issue of the plaintiff's standing. 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, *supra* at 911 [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]).

Regarding the eNote submitted by the plaintiff, an eNote is a "transferable record," as that term is defined under 15 USC § 7021 (a) (1). "Except as otherwise agreed, a person having control of a transferable record is the holder" (15 USC § 7021 [d]). New York's Uniform Commercial Code also defines "holder" as "the person in control of a negotiable electronic document of title" (UCC § 1-201 [b] [21] [C]). "A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred" (15 USC § 7021 [b]). "Delivery, possession, and endorsement are not required to obtain or exercise any of the rights" of a holder of a transferable record such as an eNote (15 USC § 7021 [d]). "[R]easonable proof" that a person seeking to enforce a transferable record has control of such record "may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record" (15 USC § 7021 [f]).

The plaintiff's submissions are insufficient to demonstrate its standing as the controller or holder of the eNote at the time of commencement because it neither annexed the eNote transfer registry with its motion, nor included the details of the transfer or assignment from the lender to the plaintiff or Fannie Mae in the affidavit of Ms. Phillips (*see*, 15 USC § 7021; *cf.*, ***New York Community Bank v McClendon***, 138 AD3d 805, 29 NYS3d 507 [2d Dept 2016]). Further, the "eNote Certificate of Authentication" submitted herein is insufficient to demonstrate that the plaintiff maintains the single authoritative copy of the note described in 15 USC § 7021 (c) (1). Thus, the plaintiff did not demonstrate that it was entitled to enforce the eNote as holder or that it controlled the eNote by showing that a system employed for evidencing the transfer of interests in the eNote reliably established that the eNote had been transferred to it at, or prior to, the time of commencement (*see*, 15 USC 7021 [b]; *cf.*, ***New York Community Bank v McClendon***, 138 AD3d 805, *supra*).

Under the facts presented herein, however, the validity of the purported assignment of the mortgage by MERS is irrelevant to the issue of the plaintiff's standing, or to the plaintiff's entitlement to summary judgment (*see*, ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corporation v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]; *see also*, ***New York Community Bank v McClendon***, 138 AD3d 805, *supra*). Moreover, the defendant mortgagor, a non-party to the assignment of the mortgage, lacks standing to challenge the validity thereof (*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]; ***Rajamin v Deutsche Bank Natl. Trust Co.***, 757 F3d 79 [2d Cir 2014]; ***Kokirtsev v Wells Fargo N.A.***, 2014 US Dist LEXIS 109443, 2014 WL 3888301 [EDNY, Feb. 3, 2014, No. 12-CV-06056 (ERK/SMG)]; *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]; *cf.*, ***Deutsche Bank Natl. Trust Co. v Tanibajeva***, 132 AD3d 430, 17 NYS3d 399 [1st Dept 2015]).

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses 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*, ***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]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [an alleged violation of TILA does not constitute an affirmative defense to a defendant's default in payment]; ***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]; ***Deutsche Bank Natl. Trust Co. v Campbell***, 26 Misc3d 1206 [A], 906 NYS2d 779, 2009 NY Slip Op 526780 [U] [Sup Ct, Kings County 2009] [a disclosure violation of the Real Estate Settlement Procedures Act, 12 USC § 2601, *et seq.*, does not constitute a valid defense to a mortgage foreclosure]). Further, a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan (***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]), and "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*see*, ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]).

The court next turns to the opposing papers filed by the defendant mortgagor. 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]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses in the answer, except those noted above. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses in the answer in opposition to the 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*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the unsupported affirmative defenses set forth in the answer are thus stricken, except for the first affirmative defense which is surplusage (*see*, ***Old Williamsburg Candle Corp. v Seneca Ins. Co. Inc.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). Accordingly, the second, third, fifth, sixth, seventh, eighth and ninth

affirmative defenses are stricken.

The court next turns to the ancillary relief requested by the plaintiff. The branch of the instant motion for an order pursuant to CPLR 1024, amending the caption by substituting Martha Mancilli, Jorge Cineneces and Hugo Cineneces for the fictitious defendant, "JOHN DOE", and excising the remaining descriptive wording is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***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.

By its moving papers, the plaintiff established the default in answering on the part of the defendants Martha Mancilli, Jorge Cineneces and Hugo Cineneces (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA 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 defendants is fixed and determined.

In light of the foregoing, and pursuant to CPLR 3212 (g), the court finds that the sole remaining issues of fact relate to the plaintiff's standing as the holder and/or controller of the electronic eNote and proper service of the 90-day pre-foreclosure notices pursuant to RPAPL § 1304. The branch of the plaintiff's motion for an order striking the affirmative defenses asserting standing and compliance with the notice requirements of RPAPL 1304 is denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein. The plaintiff's renewed motion, if any, shall include proof by way of affidavits of service or affidavits from one with personal knowledge, together with business records, that detail a standard of office practice or procedure with respect to the 90-day pre-foreclosure notices as well as proof in admissible form as to the eNote transfer registry/history.

In view of the above determination, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: DECEMBER 14, 2016
Riverhead, NY

Hon. DANIEL MARTIN, A.J.S.C.

_____ **FINAL DISPOSITION** ___x___ **NON-FINAL DISPOSITION**