JPMS Specialty Mtge., LLC v Lucido
2017 NY Slip Op 31151(U)
May 26, 2017
Supreme Court, Suffolk County
Docket Number: 22791/13
Judge: Thomas F. Whelan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

MEMO DECISION & ORDER

COPY

INDEX No. 22791/13

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 11/14/14
SUBMIT DATE: 5/12/17
Mot. Seq. #001 - Mot D
CDISP Y____ N X

JPMS SPECIALTY MORTGAGE, LLC f/k/a WM SPECIALTY MORTGAGE LLC,

Plaintiff,

-against-

SUSAN LUCIDO, ANTHONY LUCIDO, VICTORIA LUCIDO and "JOHN DOE #1-5" and "JANE DOE #1-5", said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

FEIN, SUCH & CRANE, LLP
Attys. For Plaintiff
1400 Old Country Rd. - Ste. C103
Westbury, NY 11590

DONNA M. FIORELLI, PC
Attys. For Defendants Lucido
11 Clinton Ave.
Rockville, Centre, NY 11570

Upon the following papers numbered 1 to 7 read on this motion for accelerated judgments and appointment of referee, among other things ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ________; Answering papers 5-6 ; Reply papers 7 ; Other ________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for accelerated judgments against the defendants served with process and the deletion of the remaining unknown defendants together with a caption amendment to reflect these changes and a separate order appointing a referee to compute, is considered under CPLR 3212, 3215, 1024, 1003 and RPAPL § 1321 and is granted only with respect to the plaintiff's pleaded claims for foreclosure and sale; and it is further

ORDERED that the remaining portions of this motion (#001) wherein in the plaintiff seeks an order directing the Suffolk County Clerk to record a December 30, 2009 mortgage loan modification agreement and a Tax Law § 255 Affidavit purportedly attached to the moving papers, is considered under CPLR 3212 and 3215(f) and is denied.

The plaintiff commenced this action in August of 2013 to foreclose the lien of an August 29, 2006 mortgage executed by the three Lucido defendants named in the caption set forth above in favor of New Century Mortgage Corporation to secure a $291,650.00 mortgage note executed likewise that same day. According to the complaint, to which the loan documents and a certificate of merit in the form required by CPLR 3102-b were attached at the time of filing, the obligor/mortgagor defendants defaulted in their payment obligations on January 1, 2010.

In response to plaintiff's service of the summons, complaint and other initiatory papers upon the obligor/mortgagor defendants, they appeared herein by counsel and served an answer containing thirteen affirmative defenses. All other defendants served with process defaulted in answering the summons and complaint.

By the instant motion (#001), the plaintiff moves for summary judgment dismissing the affirmative defenses asserted in the answer served by the obligor/mortgagor defendants and for an award of summary judgment on its complaint against said defendants. In addition, the plaintiff moves for default judgments against the remaining defendant served with process, including Elizabeth Lucido who was served as Jane Doe #1. The identification of the true name of such defendant as contemplated by CPLR 1024 and the deletion of the remaining unknown defendants is also requested along with a caption amendment to reflect these party changes. The plaintiff further seeks an order appointing a referee to compute amounts due under the terms of the subject note and mortgage. Finally, the plaintiff seeks summary judgment on its demand for an order directing the Suffolk County Clerk to record a December 30, 2009 mortgage loan modification agreement, which bears only the signatures of defendants, Susan Lucido and Anthony Lucido, together with the recording of a Tax Law § 255 Affidavit purportedly attached to the moving papers.

The plaintiff's motion (#001) is opposed by the defendants in the form of an affirmation of their counsel. Therein, defense counsel asserts as opposition only the pleaded standing defense that was separately stated as the Tenth affirmative defense in the answer served. However, defense counsel goes on to challenge the quality and nature of the plaintiff's proof and contests the plaintiff's entitlement to the relief demanded due to its purported failure to establish compliance with the pre-action, ninety day notice requirements imposed by RPAPL § 1304. The plaintiff addressed such oppoistion in reply

papers. For the reasons set forth below, the plaintiff's motion (#001) is granted to the extent set forth below.

It is well settled that a foreclosing plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see* ***HSBC Mtge. Servs., Inc. v Royal***, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; ***OneWest Bank, FSB v DiPilato***, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Where the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***U.S. Bank Natl. Ass'n v Cruz***, ___ AD3d___, 2017 WL 690579 [2d Dept 2017]; ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 77, 10 NYS3d 255 [2d Dept 2015]). Moreover, where the answer served contains affirmative defenses and/or counterclaims, a plaintiff seeking summary judgment should establish that none of the affirmative defenses asserted in the answer have merit (*see* ***Bank of New York Mellon v Vytalingam***, 144 AD3d 1070, 42 NYS3d 274 [2d Dept 2016]; ***Prompt Mtge. Providers of North America, LLC v Singh***, 132 AD3d 833, 18 NYS3d 668 [2d Dept 2015]; ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 909, 985 NYS2d 897 [2d Dept 2014]; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 996, 985 NYS3d 254 [2d Dept 2014]; ***Bank of New York v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]).

Once the plaintiff makes all necessary showings, it becomes incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in his/her answer or otherwise available to him/her (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). The failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]). Moreover, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal pursuant to CPLR 3211 and 3212 (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3D 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]).

[* 4]

Here, the plaintiff's moving papers sufficiently demonstrated, prima facie, that none of the affirmative defenses asserted in the answer served by the obligor/mortgagor defendants have merit. Since, as indicated above, the defendants failed to assert any of their pleaded defenses except their standing defense, which is separately set forth as the Tenth affirmative defenses in the answer, all other pleaded defenses have been waived by abandonment and are thus dismissed pursuant to CPLR 3212(b) (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, *supra*; ***Starkman v City of Long Beach***, 106 AD3d 1076, *supra*). The plaintiff is thus entitled to summary judgment dismissing all of the affirmative defenses asserted in the answer, other than the Tenth, as they were not raised in opposition to the plaintiff's motion.

With respect to the issue of the plaintiff's standing, controlling appellate case authorities have repeatedly held that in determining the standing of a foreclosing plaintiff, it is the mortgage note that is the dispositive instrument, not the mortgage indenture. This result is mandated by the principal/incident rule which provides that because a mortgage is merely the security for the debt, the obligations of the mortgage pass as an incident to the passage of the note (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). For standing to exist, the plaintiff must be the owner, holder, or assignee of the mortgage note at the time of the commencement of the action (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 361, *supra*; ***Aurora Loans Services, LLC v Mandel***, ___ AD3d___, 2017 WL 1068846 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Romano***, 147 AD3d 1021, 48 NYS3d 237 [2d Dept 2017]; ***U.S. Bank Natl. Ass'n v Saravanan***, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*).

It is now clear that there are several ways in which a foreclosing plaintiff may establish its standing to prosecute its claim for foreclosure and sale and any one will suffice so as to render the others irrelevant and immaterial to the establishment of standing. One such way is where the plaintiff demonstrates that it is the holder of the mortgage note within the contemplation of the Uniform Commercial Code and was so at the time of the commencement of the action. Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an endorsement in blank or bears a special endorsement payable to the order of the plaintiff (*see* UCC 1–201; 3–202; 3–204; ***Hartford Acc. & Indem. Co. v American Express Co.***, 74 NY2d 153, 159 [1989]). Notably, the holder of an instrument, whether or not it is the owner, may enforce payment in his own name (*see* UCC 3–301]; ***Wells Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]).

A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1–201[b][21]; *see* ***U.S. Bank Natl. Ass'n v Cruz***, 147 AD3d 1103, 147 NYS3d 459 [2d Dept 2017]; ***US Bank, N.A. v Zwisler***, 46AD3d

213, 2017 WL 422317 [2d Dept 2017]; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016]). "'Bearer' means ... a person in possession of a negotiable instrument" (UCC 1-201[b][5]), and where the note is endorsed in blank, it may be negotiated by delivery alone (*see* UCC 3-202[1], 3-204[2]). "An endorsement in blank specifies no particular endorsee and may consist of a mere signature" and "[a]n instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed (UCC 3-204[2])" (***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, *supra*). A special endorsement, which may appear on the face of the note or by allonge attached thereto, is considered a written assignment of the note (*see* ***Deutsche Bank Trust Co. Americas v Garrison***, 46 AD3d 185, 2017 WL 424740 [2d Dept 2017]).

Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank or specially endorsed in its favor, a plaintiff is only required to demonstrate that it had physical possession of the note prior to commencement of the action (*see* ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 45 NYS3d 189 [2d Dept 2017]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*). Where the note is endorsed in blank, it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date because such a note is payable to the bearer thereof. A plaintiff in possession of a blank endorsed note is thus without obligation to establish how it came into possession of the instrument in order to enforce it (*see* UCC 3-204[2]; *see also* ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 86, *supra*; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, *supra* quoting ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*). In addition, because a signature on a negotiable instrument is presumed to be genuine or authorized (*see* UCC 3-307[1][b]), the plaintiff is not required to submit proof that the person who endorsed the subject note, in blank or especially in favor of the plaintiff, was authorized to do so (*see* ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]).

Evidence of the plaintiff's holder status prior to the commencement of the action may be derived from the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b (*see* ***Deutsche Bank Trust Co. Americas v Garrison***, 46 AD3d 185, *supra*; ***U.S. Bank Natl. Ass'n v Saravanan***, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, *supra*; ***Nationstar Mtge., LLC v Weisblum***, 143 AD3d 866, 39 NYS3d 491, 494 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2015]; *see also* ***Deutsche Bank Natl. Trust Co. v Umeh***, 145 AD3d 497, 41 NYS3d 882 [1st Dept 2016]). Indeed, the establishment of the plaintiff's actual possession of a duly endorsed note or its constructive possession through an agent prior to the commencement of the action is so conclusive that it renders, unavailing,

all claims of content defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]). It further renders unavailing, all claims as to the invalidity of mortgage assignments or defects in the chain of several mortgage assignments (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra;* ***Pennymac Corp. v Chavez***, 144 AD3d 1006, *supra;* ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, *supra;* ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra;* ***Deutsche Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***US Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Here, the plaintiff's submissions established, prima facie, that the plaintiff was the holder of the subject mortgage note on the date of the commencement of this action, as such submissions included copies of the complaint in which the plaintiff asserted factual allegations regarding its possession of the duly endorsed mortgage note at the time of the commencement of the action. The plaintiff further established that copies of the note endorsed in blank by allonge were attached to the complaint when filed with the court as was a certificate of merit of the type contemplated by CPLR 3012-b. Due proof of the plaintiff's standing due to its holder status was thus sufficiently demonstrated. The defendants' challenges to the affidavit of merit attached to the moving papers are thus without efficacy. Accordingly, the plaintiff is awarded summary judgment dismissing the Tenth affirmative defense asserted in the answer of the obligor/mortgagor defendants and summary judgment on its complaint against these answering defendants (*see* CPLR 3212; ***Deutsche Bank Trust Co. Americas v Garrison***, 46 AD3d 185, *supra*; ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 86, *supra*; ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, *supra*; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, *supra*; ***JPMorgan Chase Bank, Nat. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*).

The court further finds that defense counsel's challenges to both the form and substance of the plaintiff's proof of the issuance and mailing of the RPAPL § 1304 notice are also unavailing. Contrary to contentions of defense counsel, the affidavit of merit submitted by Heather Craft, a Vice President of JPMorgan Chase National Association [Chase], the loan servicer of the plaintiff, comports with the requirements of CPLR 4519 and demonstrates the plaintiff's compliance with the ninety day notice requirements imposed by RPAPL § 1304.

It is well settled law that a business record will be admissible if that record "was made in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (***One Step Up, Ltd v Webster Bus. Credit Corp.***, 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518[a]).

As with other hearsay exceptions, the business records exception grew out of considerations of necessity and trustworthiness -- the necessity for alternatives to permit large and small businesses to

prove debts by their records of account, and the unusual degree of trustworthiness and reliability of such records owing to the fact that they were kept regularly, systematically, routinely and contemporaneously (***People v Kennedy*** 68 NY2d 569, 579-580, 510 NYS2d 853 [1986]; *citing* 5 Wigmore, Evidence §§ 1421, 1422, 1546 [Chadbourn rev 1974]; *see also*, Note, Business Records Rule: Repeated Target of Legal Reform, 36 Brooklyn L Rev 241). The element of unusual reliability is supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation (*id., citing* McCormick, Evidence § 306 [Cleary 3d ed.]). The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise (*id.*, citing Williams v Alexander, 309 NY 283, 286 [1955]).

These concepts constitute the foundational elements of CPLR 4518(a) as the statute requires that the record be made in the regular course of business -- essentially, that it reflect a routine, regularly conducted business activity and that it be needed and relied on in the performance of functions of the business. In addition, it must be the regular course of such business to make the record (a double requirement of regularity) essentially requiring that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record and that the record be made at or about the time of the event being recorded so that recollection be fairly accurate and the habit or routine of making the entries assured (*id.*, at 580; *see also* ***One Step Up, Ltd v Webster Bus. Credit Corp.***, 87 AD3d 1, *supra*).

The key to admissibility of a business record is thus that it carries the indicia of reliability ordinarily associated with business records (*see* ***People v Cratsley***, 86 NY2d 81, 91, 629 NYS2d 992 [1995]; ***One Step Up, Ltd. v Webster Bus. Credit Corp.***, 87 AD3d 1, *supra*; ***Corsi v Town of Bedford,*** 58 AD3d 225, 231–232, 868 NYS2d 258 [2008], *lv. denied* 12 NY3d 714, 2009 WL 1770158 [2009]). While "the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (***Deutsche Bank Natl. Trust Co. V Monica*** 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *quoting* ***State v 158th Street & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012) *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, *supra*). That there is no requirement that the affiant have personal knowledge of every entry is clear particularly where there is a business relationship between the entities entering and maintaining the records and those incorporating and relying upon them in the regular course of their business (*see* ***Citibank, NA v Abrams***, 144 AD3d 1212, 40 NYS3d 653 [3d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 739, *supra*;

HSBC Bank USA, N.A. v Sage, 112 AD3d 1126, 1127, 977 NYS2d 446 [2013]; ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 ADd3d 418, 941 NYS2d 144 [1st Dept 2012]).

It has thus been held that an employee of the plaintiff or its loan servicer may testify as to payment defaults, notices thereof, note possession and other matters relevant to a foreclosing plaintiff's prima facie case upon the affiant's review of business records (*see* ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Naughton***, 137 AD3d 1199, *supra*; ***Deutsche Bank Natl. Trust Co. v Abdan***, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; *see also* ***Citibank, NA v Abrams***, 144 AD3d 1212, 40 NYS3d 653 [3d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, *supra*; ***Aames Capital Corp. v Ford***, 294 AD2d 134, 740 NYS2d 880 [1st Dept 2002]), including materials generated by predecessors-in-interest (*see* ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*; ***Portfolio Recovery Assoc., LLC v Lall***, 127 AD3d 576, 8 NYS3d 101 [1st Dept 2015]; ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 AD3d 418, *supra*; ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, *supra*). Moreover, a transferee or assignee of an original lender or intermediary predecessor may rely upon the business records of the original lender to establish its claims for recovery of amounts due from the debtor so long as the plaintiff establishes that it received and relied upon those records in the regular course of its business (*see* ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 ADd3d 418, *supra*; *see also* ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*; ***Portfolio Recovery Assoc., LLC v Lall***, 127 AD3d 576, *supra*). These results are predicated upon CPLR 4518(a) which does not require a person to have personal knowledge of each of the facts asserted in the affidavit of merit put before the court as evidence of the plaintiff's standing or its compliance with notice requirements and/or the defendant's default in payment (*see* ***Citibank v Abrabms***, 144 AD3d 1212, *supra*; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*).

Here, the plaintiff's submissions established that the loan servicer, JPMorgan Chase, National Association ["Chase"] issued and mailed the RPAPL § 1304 notice to each of the three borrowers in accordance withe the dictates of that statute. The affidavit Heather Craft, a Vice President of Chase, includes factual averments as to her familiarity with the record keeping procedures of Chase, its procedure for maintaining such records and its reliance thereon in the ordinary course of its business as a loan servicer. Based upon her review of those business records, with which she is personally familiar, Ms. Craft avers that content compliant RPAPL § 1304 notices dated February 7, 2013, were sent to each of the three obligor/mortgagors at the mortgaged premises by first class mail and by certified mail. The court thus finds that the factual averments advanced in the affidavit of merit satisfied the requirements of the business records exception to the hearsay rule set forth in CPLR 4519 and demonstrated the plaintiff's compliance with RPAPL § 4519. The USPS tracking records showing

arrival of the certified mailings on February 11, 2013 and delivery on February 15, 2013 after delivery notices were left at the mailing address of each notice are attached to the reply papers submitted by the plaintiff are further evidence of the plaintiff's compliance with the mandates of RPPAL § 1304. Accordingly, the court rejects the defendants' challenges to the plaintiff's proof on this issue.

In contrast, the plaintiff's submissions failed to demonstrate any entitlement to the other relief demanded on this motion, namely, an order directing the Suffolk County Clerk to record a December 30, 2009 mortgage loan modification agreement, which bears only the signatures of defendants, Susan Lucido and Anthony Lucido, and to record a Tax Law § 255 Affidavit that is purportedly attached to the moving papers. While these demands for relief are set forth in the complaint served, they are not set forth as a separate cause action targeting the signatories to this loan modification agreement or those who executed the original loan documents or even the Suffolk County Clerk, who was not joined as a party defendant to this action. These demands are thus unsupported by any factual averments from which the court may discern the plaintiff's possession of a plausible claim for the relief sought and no copy of any proposed Tax Law § 255 Affidavit is attached to the moving papers.

Moreover, this December 30, 2009 loan modification agreement was executed only by defendants, Susan Lucido and Anthony Lucido. It is thus devoid of any evidence of the plaintiff assent to be bound thereby personally or through its servicing agent, Chase, or the assent of the third obligor/mortgagor under the original loan documents, namely, Victoria Lucido. In addition, the three Lucido signatories to the original loan documents that are purportedly modified by the December 30, 2009 writing, defaulted in making the payment due on January 1, 2010, which was the stated effective date of the loan modification agreement, thereby vitiating any effect it might have otherwise had. These circumstances, coupled with the fact that the plaintiff cites no statutory or other authority for the granting of the relief requested, warrants a denial thereof.

Those portions of the plaintiff's motion (#001) wherein it seeks an order identifying the true name of the person served as unknown defendant Jane Doe #1, namely Elizabeth Lucido, and the deletion of the remaining unknown defendants are granted pursuant to CPLR 1024 an 1003. The plaintiff's further demand for a caption amendment to reflect these changes is also granted.

The remaining portions of the plaintiff's motion (#001), wherein it seeks a default judgment against Elizabeth Lucido, who was served as an unknown defendant at the mortgaged premises are granted pursuant to CPLR 3215 and RPAPL § 1321. The moving papers established the default in answering on the part this newly identified defendant pursuant to CPLR 1024 and the facts constituting viable claims for foreclosure and sale against her (*see* CPLR 3215[f]; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***U.S. Bank, N.A. v Razon***, 115 AD3d 739, 740, 981 NYS2d 571 [2d Dept 2014]). Accordingly, the defaults of all such defendants are hereby

fixed and determined. Since the plaintiff has been awarded summary judgment against the answering defendants and has established a 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; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]).

Proposed Order of Reference, as modified by the court to reflect the issuance and terms of this memo decision and order has been marked signed.

DATED: May 26, 2017

THOMAS F. WHELAN, J.S.C.