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SHORT FORM ORDER

INDEX No. 10260-10

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

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/20/13
ADJ. DATES
Mot. Seq. # 002 - MotD
CDISP Y____ N x___

JPMORGAN CHASE BANK, Plaintiff, -against- KRISTOS KATSABANIS, PATRICIA KATSABANIS a/k/a PATRICIA LYNNE KATSABANIS, ET ALS, Defendants.	McCABE, WEISBERG, et. al. Atty. For Plaintiff 145 Huguenot St. - Ste. 210 New Rochelle, NY 10801 RICHARD J. SULLIVAN, ESQ. Atty. For Def. Kristos Katsabanis PO Box 582 Pt. Jefferson, NY 11777 PATRICIA KATSABANIS Defendant Pro Se 89 Orienta Ave. Lake Grove, NY 11755

Upon the following papers numbered 1 to 12 read on this motion by the plaintiff for accelerated judgments and the appointment o fa referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 9-10 ____; Replying Affidavits and supporting papers 11-12 ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for accelerated judgments on its complaint and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is granted only to the extent set forth below.

The plaintiff commenced this action in March of 2010 to foreclose a May 30, 2006 mortgage given on real property situated in Suffolk County by defendants, Kristos Katsabanis and Patricia Katsabanis, to secure a mortgage note of the same date executed solely by Kristos Katsabanis. The plaintiff alleges that a default in payment occurred on November 1, 2009 and that such default continues to date.

Issue was joined by service of an answer by the note obligor/mortgagor defendant, Kristos Katsabanis dated April 9, 2010. Therein, this answering defendant asserts six affirmative defenses, the first of which challenges the standing of the plaintiff. Contrary to the contentions of the plaintiff, defendant. Patricia Katsabanis, who executed the mortgage but not the mortgage note, did not join in the answer of her co-defendant mortgagor husband, Kristos Katsabanis.

By the instant motion, the plaintiff moves for summary judgment dismissing the answer served by the obligor/mortgagor defendant and for summary judgment in favor of the plaintiff on its complaint against the said defendant. The plaintiff seeks this same relief against Patricia Katsabanis although she did not file an answer. The plaintiff further seeks a default judgment against the "remaining defendants" and an order identifying John Doe as Gabriel "Doe" and the deletion of the remaining unknown defendants together with the appointment of a referee to compute. For the reasons stated below, the motion is decided as follows.

The remedy of summary judgment is governed by the provisions of CPLR 3212. Pursuant to CPLR 3212(a), summary judgment is not a remedy available against those who have not answered as the joinder of issue is a necessary condition precedent for the issuance of such relief (*see* ***Gaskin v Harris***, 98 AD3d 941, 950 NYS2d 751 [2d Dept 2012]; ***Shaibani v Soraya***, 71 AD3d 1121, 898 NYS2d 72 [2d Dept 2010]). To obtain an accelerated judgment against a party in default, one must move pursuant to CPLR 3215 and satisfy the requirements imposed by CPLR 3215(f) (*see* ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]).

Here, the moving papers failed to establish the plaintiff's entitlement to summary judgment against Patricia Katsabanis. A review of the record here reflects that issue was not joined with respect to Patricia Katsabanis because the only answer served was the April 9, 2010 answer of the mortgagor defendant, Kristos Katsabanis. The plaintiff's motion is thus denied with respect to defendant Patricia Katsabanis.

The plaintiff's application for summary judgment dismissing the answer served by defendant Kristos Katsabanis and for summary judgment on the plaintiff's complaint in so far as it is asserted against him is also denied. "Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact" (***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010], *quoting* ***HSBC Bank USA v Merrill***, 37 AD3d 899, 900, 830 NYS2d 598 [2d Dept 2010]; *see* ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]). Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must further establish its standing to succeed on a motion for summary judgment (*see* ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]).

Although the plaintiff's moving papers included copies of the mortgage and the note executed by defendant, Kristos Katsabanis, and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***U.S. Bank Natl. Assn. v Denaro,*** 98 AD3d 964, *supra*; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]), they failed to establish that the plaintiff was possessed of the requisite standing to prosecute its claims at the time of the commencement of this action. It is now well settled law that the standing of foreclosing plaintiffs, acting, appearing personally or by their servicers (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept2013]), is measured by their ownership, holder status or possession of the note

and mortgage at the time of the commencement of the action (*see* ***US Bank of NY v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]; ***US Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Under the principal/incident rule, a mortgage may not stand separate from the note evidencing the principal debt or obligation because the mortgage is merely security therefor (*see* ***Weaver Hardware Co. v Solomovitz***, 235 NY 321, 331–332, 139 NE 353 [1923]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***US Bank of NY v Silverberg***, 86 AD3d 274, 280, *supra*). Accordingly, a mortgage passes as an incident of the note upon such note's written assignment, physical delivery or its indorsement and delivery (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, 969NYS2d 82 [2d Dept 2012]; ***One West Bank FSB v Carey***, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In all cases wherein the plaintiff is one other than the original mortgage lender, a valid transfer of the note, which effects a valid transfer of the mortgage under the principal/incident rule, will resolve the standing issue in favor of the plaintiff (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra*; ***One West Bank FSB v Carey***, 104 AD3d 444, *supra*; ***US Bank Natl. Ass'n v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, *supra;* ***Bank of New York Mellon Trust Co. NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]).

Holder status of a note and mortgage is established where the plaintiff possesses the mortgage note which bears, on its face or by allonge, a special indorsement payable to the order of the plaintiff or where it takes possession of a mortgage note that contains an indorsement similarly affixed (*see* UCC §1-201[20]; §3-202; §3-204; §9-203[g]; ***Spielman v Manufacturers Hanover Trust Co.***, 60 NY2d 221, 469 NYS2d 69 [1983]; ***Citimortgage, Inc. v Friedman***, 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]; ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept. 2007]; ***First Trust Natl. Ass'n v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd,* 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]). New York's Uniform Commercial Code (UCC) §1-201(20) defines "holder" as "a person who is in possession of a document of title, an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." A person becomes the holder of an instrument through its negotiation to him or her (*see* UCC §3-202[1]). Where the instrument is payable to order, it is negotiated by delivery and all necessary indorsements and where it is payable to bearer by virtue of an indorsement in blank or otherwise, delivery alone is sufficient (*see id.*). Delivery is defined as the "voluntary transfer of possession" and is thus an act of volition (UCC §1-201[14]). Constructive delivery of an instrument such as a promissory note to an agent has long been recognized as constituting a valid transfer by delivery (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra*; ***Depew Dev., Inc. v AT&A Trucking Corp.***, 210 AD2d 974, 621 NYS2d 242 [4th Dept 1994]; ***Wolfin v Security Bank***, 170 AD 519, 156 NYS 474, 476 [1915]; *see also* ***Corporacion Venezolana de Fomento v Vintero Sales Corp.***, 452 F.Supp. 1108 [SDNY 1978]). The essential element of a constructive delivery is that it be made with the unmistakable intention of transferring title to the instrument (*see id* at 1117).

To establish its standing in the face of the answering defendant's pleaded challenge thereto, the plaintiff, who was not the loan originator, relies upon two alternate theories. The first rests upon a written assignment of mortgage executed by a nominee of the original the lender bearing a date of

March 6, 2010, which predates the commencement of this action by ten days. Since, however, this assignment does not contain an assignment of the note or the indebtedness represented thereby, it constitutes a mere assignment of the mortgage which is a nullity because it violates the principal and incident rule (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]). The plaintiff's reliance upon this assignment as evidence of its standing is misplaced since the note was not transferred to the plaintiff thereunder.

As a second basis for the establishment of its standing, the plaintiff relies upon an indorsement in blank appearing on the face of the note. The indorsement was executed by the original mortgagor, American Brokers Conduit, which ceased operations in 2007, according to the plaintiff. Delivery of such note to the plaintiff at any time let alone prior to the commencement of this action is not alleged in the affidavit of merits executed by a vice president of the plaintiff, who states only that "Chase is the holder of the note" (*see* affidavit of Grant Stephenson attached to the plaintiff's moving papers). Since there are no allegations, let alone proof, that the note bearing the indorsement in blank was delivered to plaintiff prior to commencement of the action, the plaintiff' reliance upon the indorsement to establish its standing is misplaced (*see* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]; ***HSBC Bank USA v Hernandez***, 92 AD3d at 844, 939 NYS2d 120 [2d Dept 2012]; *compare* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra* [custodian safeguarded original documents in a secure location]; ***US Bank Natl. Ass'n v Weinman***, 2013 WL 1625138, --- NYS2d — [Sup Ct Suffolk County 2013, Whelan, J.] [delivery to a custodial agent]; ***Citimortgage, Inc. v Ivey***, 2013 WL 4496778, --- NYS2d — [Sup Ct Suffolk County 2013, Whelan, J.] [affidavit of a Default Specialist of delivery prior to commencement of the action]; ***HSBC Bank USA v Avila***, 2013 WL 5606741, --- NYS2d — [Sup Ct Suffolk County 2013, Pastoressa, J.] [affidavit of representative of holder status since commencement of action]; ***US Bank Natl. Ass'n v Mosquera***, 2013 WL 3961676, --- NYS2d — [Sup Ct Queens County 2013, Weiss, J.] [affidavit of officer of note delivery prior to commencement]).

The plaintiff thus failed to establish that it has the requisite standing to prosecute its claims for foreclosure and sale, which warrants a denial of those portions of this motion wherein it demands summary judgment on its complaint against the sole answering defendant, Kristos Katsabanis. However, in light of the above caselaw, leave to renew or move again for this relief or for an order certifying this action as trial ready is hereby granted to the plaintiff.

The plaintiff is, however, entitled to an order fixing the defaults in answering of the remaining defendants, including, the co- mortgagor defendant Patricia Katsabanis and defendant Gabriel "Doe" who was served as John Doe. The moving papers sufficiently demonstrated the plaintiff's service of the summons and complaint upon these defendants and the defendant Commissioner of Social Services of Suffolk County, their defaults in answering and the facts constituting the plaintiff's possession of cognizable claims sounding in foreclosure and sale (*see* CPLR 3215[f]; ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 71, 760 NYS2d 727 [2003]; ***Fried v Jacob Holding, Inc***., ____ AD3d ____, 970 NYS2d 260 [2d Dept 2013]).

The unresolved issue of the plaintiff's standing does not preclude the court from fixing the defaults of these defendants since standing is not an element of the plaintiff's claim for foreclosure and sale. Instead, the issue of standing is merely a non-jurisdictional, affirmative defense which must be

timely raised by a defendant possessed of such defense or it is waived (*see* CPLR 3211[e]; CPLR 3018[b]; ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Bank of New York v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; ***U.S. Bank Natl. Ass'n. v Denaro***, 98 AD3d 964, *supra*; ***U.S. Bank v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept2011]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 244, 837 NYS2d 247 [2d Dept 2007]).

A plaintiff without standing, like a plaintiff whose claim is stale under an applicable statute of limitations or potentially precluded by other affirmative defenses, may thus prevail in the prosecution of its claim (*see* ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, *supra*; ***De Oleo v Charis Christian Ministries, Inc.***, 94 AD3d 541, 942 NYS2d 340 [1st Dept. 2012]; ***Horst v Brown***, 72 AD3d 434, 900 NYS2d 13 [1st Dept 2010]; ***Orix Fin. Serv., Inc. v Hayes***, 56 AD3d 377, 867 NYS2d 332 [1st Dept 2008]). It is only in those cases wherein the defendant timely raises the issue of the plaintiff's standing in a pre-answer motion to dismiss or as an affirmative defense in an answer, will the plaintiff be put to the task of establishing its standing (*see* ***U.S. Bank, Natl. Ass'n. v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***US Bank Natl. Ass'n. v Madero***, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, *supra*). Here, the defendants in default waived the defense of standing by failing to raise it in a pre-answer motion or in an answer timely served and such waiver may not be asserted as a ground for vacatur of their defaults (*see* ***Citibank, N.A. v Swiatkowski***, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; ***CitiMortgage Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The defaults in answering of defendants, Patricia Katsabanis, the Commissioner of the Department of Social Services of Suffolk County and Gabriel "Doe", served herein as John Doe, are thus fixed and determined for purposes of CPLR 3215 (b), (c), and (f).

Those portions of the instant motion wherein the plaintiff seeks the appointment of a referee to compute amounts due under the mortgage is denied, without prejudice, as premature. The appointment of such referee is only appropriate when all issues material to the plaintiff's claim for foreclosure and sale have been resolved in favor of the plaintiff by awards of accelerated judgments against all defendants or verdict (*see* RPAPL 1321; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Scharaga v Schwartzberg***, 149 AD2d 578, 540 NYS2d 451[2d Dept1989]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]). Since summary judgment against the sole answering defendant, Kristos Katsabanis, has not been awarded, these issues have not been resolved in favor of the plaintiff as is contemplated by RPAPL 1321. The appointment of referee to compute is thus premature.

The plaintiff's demand for an order partially identifying John Doe as Gabriel "Doe" is granted pursuant to CPLR 1024. Also granted is the plaintiff's request for an order dropping the remaining unknown defendants as party defendants (*see* CPLR 1003). The caption of this action is hereby amended to reflect these changes and all future proceedings shall be captioned accordingly.

In view of the foregoing, the instant motion (#002) by the plaintiff is granted only to the limited extent set forth above. The proposed Order appointing a referee to compute that was attached to the

moving papers has been marked "not signed".

DATED: 10/16/13

THOMAS F. WHELAN, J.S.C.