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SHORT FORM ORDER

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

INDEX NO.: 6943-11

PRESENT:
Hon. DANIEL MARTIN

PLAINTIFF'S ATTY:

STEIN, WIENER & ROTH, L.L.P.
One Old Country Road, Suite 113
Carle Place, N. Y. 11514

DEFENDANTS' ATTY:

MICHAEL G. WALSH, ESQ.
860 Montauk Highway, Unit 4
Water Mill, N. Y. 11976

Financial Freedom Acquisition LLC,

**Plaintiff,**

**-against-**

Sara Cecile Havemeyer, Individually and as Executrix of Estate of Sarah C. Hoge-deceased, Cynthia Ann Bartlett as heir at law, next of kin, legatee and distributee of the Estate of Sarah C. Hoge-deceased, Daphne Noel Hoge, as heir at law, next of kin, legatee and distributee of the Estate of Sarah C. Hoge-deceased, James Hamilton Hoge, as heir at law, next of kin, legatee and distributee of the Estate of Sara C. Hoge-deceased, Internal Revenue Service-United States of America, New York State Department of Taxation and Finance-Tax Compliance Division-C.O. - ATC,

"JOHN DOE", "RICHARD ROE", "JANE DOE", "CORA COE", "DICK MOE" and " RUBY POE", the six defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitious, their true name being unknown to plaintiff,

**Defendants.**

The following named papers have been read on this motion:

| | |
|---|---|
| Notice of Motion for an Order of Reference | X |
| Cross-Motion | X |
| Answering Affidavits | X |
| Replying Affidavits | X |

***ORDERED*** that this motion (002) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendants, Sarah Cecile Havemeyer and James Hamilton Hoge, and striking their joint answer and affirmative defenses; (2) 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; (3) amending the caption; and (4) awarding the plaintiff the costs of this motion, is granted solely to the extent indicated below, otherwise denied; and it is

***ORDERED*** that the plaintiff's request for the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment; and it is

***ORDERED*** that this cross motion (003) by the defendants Sarah Cecile Havemeyer, Cynthia Ann Bartlett, Daphne Noel Hoge and James Hamilton Hoge for, inter alia, an order: (1) pursuant to CPLR 3211(a)(3) dismissing the plaintiff's complaint insofar as asserted against them; or, in the alternative, (2) pursuant to CPLR 3025(b) amending their answer, is denied; and it is further

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

This is an action to foreclose a reverse mortgage on real property known as 34 Post Crossing, Southampton, NY 11968. On October 17, 1997, Sarah C. Hoge ("the decedent") executed a loan agreement and note ("the note") in favor of Transamerica HomeFirst, Inc. (Transamerica) in the maximum principal sum of $272,911.51. To secure said note, the decedent gave Transamerica a reverse mortgage ("the mortgage") also dated October 17, 1997 on the property. The note required Transamerica to advance the sums secured by the mortgage to the decedent in certain intervals set forth in the note. The mortgage and note provide that the loan is due and payable upon the decedent's death, or upon the decedent ceasing to use the property as her primary residence. By an undated, blank endorsement without recourse and an undated allonge without recourse, memorialized by a series of assignments, the note and mortgage were allegedly transferred to Financial Freedom Acquisition LLC ("the plaintiff").

By way of background, the decedent died on June 20, 2010 leaving a last will and testament dated March 6, 2008. In her will, the decedent left her entire residuary estate, after the payment of taxes and expenses, to her four children/distributees as follows: twenty (20%) percent each to Sarah Cecile Havemeyer (Havemeyer) and Cynthia Ann Bartlett (Bartlett); and thirty (30%) percent each to Daphne Noel Hoge (Daphne Hoge) and James Hamilton Hoge (James Hoge) (collectively "the Havemeyer defendants"). In the will, the decedent also nominated Havemayer as primary executrix. By Decree granting probate dated August 2, 2010 (Cyzgier, J.), the will was admitted to probate, and letters testamentary were issued to Havemeyer as executrix under file number 2010-2196.

The Havemeyer defendants allegedly defaulted on the note and mortgage by failing to pay the balance due upon the decedent's death, and each month thereafter. After the Havemeyer defendants allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on March 1, 2011. Issue was joined by the interposition of Havemeyer and James Hoge's answer verified on April 19, 2011.

By their answer, Havemeyer and James Hoge generally deny some of the allegations in the complaint, and admit other allegations, including, inter alia, the execution of the reverse mortgage by the decedent; her decedent's date of death; their default by failing to make payment due; their receipt of some correspondence from the plaintiff relating to the alleged loan balance; and Havemeyer's appointment as executrix. Havemeyer and Hoge also assert four affirmative defenses alleging, among other things, standing, unconscionable loan terms, usury, and the improper inclusion of the Havemeyer defendants, individually, as defendants herein. The remaining defendants have not answered the complaint, and notices of appearance, if any, by the non-answering defendants have not been annexed to the moving papers.

According to the records maintained by the Court's database, foreclosure settlement conferences were held in this Court's specialized mortgage foreclosure part on August 28 and September 25, 2012. At the last conference, this action was dismissed from the conference program and marked "not eligible," as the property was not owner-occupied (*see*, CPLR 3408; RPAPL 1304[5][a]). Accordingly, no further conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against Havemeyer and James Hoge, and striking their joint answer and affirmative defenses; (2) 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; (3) amending the caption; and (4) awarding the plaintiff the costs of this motion. The Havemeyer defendants oppose the plaintiff's motion and cross move for, inter alia, an order: (1) pursuant to CPLR 3211(a)(3) dismissing the plaintiff's complaint insofar as asserted against them; or, in the alternative, (2) pursuant to CPLR 3025(b) amending their answer to include Bartlett and Daphne Hoge as defendants. In response to the cross motion, the plaintiff has filed opposition/reply papers.

The Court will first address the branch of the cross motion for dismissal pursuant to CPLR 3211(a)(3). At the outset, the branch of the cross motion, for, inter alia, an order dismissing the plaintiff's complaint as against Havemeyer and James Hoge is procedurally defective as to them since it was made after joinder of issue, and service of the joint answer cut off their right to make a CPLR 3211 motion to dismiss (*see generally*, CPLR 3211[e]; ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; ***Moutafis v Osborne***, 18 AD3d 723, 795 NYS2d 716 [2d Dept 2005]). Even though CPLR 3211(c) empowers the court to treat a motion to dismiss as a motion for summary judgment, in this case, conversion is inappropriate since this action does not exclusively involve issues of law and, thus, adequate notice has not been provided to the parties (*see*, ***Moutafis v Osborne***, 18 AD3d 723, *supra*; ***Matter of Weiss v N. Shore Towers Apts., Inc.***, 300 AD2d 596, 751 NYS2d 868 [2d Dept 2002]; ***Bennett v Hucke***, 64 AD3d 529, 881 NYS2d 335 [2d Dept 2009]). In any event, the time for the Havemeyer defendants to move for

dismissal pursuant to CPLR 3211(a)(3) expired approximately two years prior to the interposition of the cross motion (*see*, CPLR 3211[e]; ***Prudco Realty Corp. v Palermo***, 60 NY2d 656, 467 NYS2d 830 [1983]; ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]).

The other branch of the cross motion, improperly denominated one for an order pursuant to CPLR 3025(d), is denied as procedurally and substantively defective (*see*, CPLR 3012[d]; *see also*, ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011]; ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Rudman***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2011]; ***Maspeth Federal Sav. & Loan Assn. v McGown***, 77 AD3d 890, 909 NYS2d 642 [2d Dept 2010]). Initially, the notice of cross motion is defective to the extent that Cynthia Bartlett and Daphne Hoge seek leave to amend the Havemeyer defendants' answer, rather than to interpose a late answer (*see*, CPLR 2214[a]; CPLR 3012[d]). Even if this branch of the motion had been properly made pursuant to CPLR 3012(d), however, the proposed amended answer has not verified by Cynthia Bartlett and Daphne Hoge , and the motion is not supported by an affidavit of merit from them (*see*, ***Karalis v New Dimensions HR, Inc.***, 105 Ad3d 707, 962 NYS2d 647 [2d Dept 2013]; ***Ogman v Mastrantonio Catering, Inc.***, 82 AD3d 852, 918 NYS2d 375 [2d Dept 2011]; ***Gross v Kail***, 70 AD3d 997, 893 NYS2d 891 [2d Dept 2010]). Additionally, while the "wherefore clause" of the previously filed joint answer contains a request that the complaint be dismissed as to the Havemeyer defendants, the answer was verified by Havemeyer and James Hoge alone, and the first two paragraphs thereof refer solely to Havemeyer and James Hoge. Further, the actual file maintained in the Office of the Suffolk County Clerk, contains only two consents to change attorney, one executed on November 28, 2011 by Sarah Havemeyer, individually, as Executrix of the decedent's estate, and another executed on February 23, 2012 by James Hoge. Since the aforementioned file does not contain any consents to change attorney by either Bartlett or Daphne Hoge, it would appear, therefore, that Cynthia Barnett and Daphne Hoge were not represented herein by prior outgoing counsel. Thus, contrary to counsel's argument, Cynthia Bartlett and Daphne Hoge are in default for failing to answer the complaint, and the plaintiff properly treated their failure to answer the complaint as such (*see*, CPLR 3215[f]).

Turning to the main motion, 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 Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. 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]). Where, as here, an answer served includes the defense of standing or lack of capacity to sue, 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]).

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, 625 NYS2d 275 [2d Dept 1995]). 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.

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***Wachovia Bank, Natl. Assn. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***U.S. Bank Natl. Assn. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***HSBC Bank USA, N.A. v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). In the instant case, the plaintiff produced the endorsed note, an allonge, the mortgage, assignments and evidence of nonpayment (*see*, ***Fed. 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*).

The plaintiff demonstrated that, as holder of the endorsed note, with an allonge containing proper endorsement, and as the assignee of the mortgage, it has standing to commence this action (*see*, ***Bank of New York v Silverberg***, 86 AD3d 274, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*). The plaintiff also submitted, inter alia, an affidavit from the plaintiff's representative, whereby it is alleged, inter alia, that the plaintiff is the owner and/or holder of the note and the mortgage, and has been in possession of same since March 19, 2009, at which time it acquired physical possession of the original collateral file for the subject mortgage loan ( *see*, ***Deutsche Bank Natl. Trust Co. v Whelan***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***U.S. Bank Natl. Assn. v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; *c.f.*, ***Homecomings Financial, LLC v Guldi***, __AD3d __, 969 NYS2d 470 [2d Dept 2013]). Additionally, the documentary evidence submitted includes, among other things, the note transferred via an endorsement in blank and an allonge (*see*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Thus, the plaintiff established that it took possession of the endorsed note with allonge prior to the commencement of the action. The plaintiff also submitted, inter alia, three

recorded assignments, all dated prior to commencement, which established that it was the owner and holder of the mortgage and note prior to commencement ( *see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Further, each of three assignments include a reference to the mortgage note (*see*, ***Chase Home Finance, LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *cf.*, ***Bank of New York Mellon Trust Co. v Sachar***, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]). Therefore, it appears that the plaintiff is the assignee of the original lender by virtue of these written assignments

Additionally, the plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the 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., Natl. Assn. 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*, ***Molino v Sagamore***, 105 AD3d 922, 963 NYS2d 355 [2d Dept 2013] [*a party claiming the defense of a contract of adhesion must show that the contract is unreasonable or unjust, or would contravene public policy, or that the contract is invalid because of fraud or overreaching* ]; ***Kraus v Mendelsohn***, 97 AD3d 641 948 NYS2d 119 [2d Dept 2012] [*contractual provisions providing for an increased interest rate on default or maturity are enforceable and do not constitute a penalty or usury* ]; ***Baron Assoc., LLC v Garcia Group Enters.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012] [*unconscionability not a defense*]; ***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* "]; ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 2007]; ***Superior Ice Rink, Inc. v Nescon Contr. Corp.***, 40 AD3d 963, 838 NYS2d 93 [2d Dept 2007]; ***Financial Freedom Acquisition LLC v Malloy***, 2012 NY Misc LEXIS 2037, 2012 WL 1576472, 2012 NY Slip Op 31160[U] [Sup Ct, Suffolk County 2012]; ***HSBC Bank USA, N.A. v Baksh***, 34 Misc3d 1242[A], 950 NYS2d 608 [Sup Ct, Queens County 2012] [*those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract*]; ***Polish Natl. Alliance v White Eagle Hall Co.***, 98 AD2d 400, 470 NYS2d 642 [2d Dept 1983] [*the definition of a necessary party pursuant to RPAPL §1311 includes, inter alia, those having "an interest in possession" and "every person entitled to reversion, remainder, or inheritance of the real property, or any interest therein or undivided share thereof*"]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Havemeyer and James Hoge (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the answering defendants 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]; ***Wash. Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Grogg v South Rd. Assocs., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]). Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]).

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, Inc. 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]). A review of the opposing papers 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]). In opposition to the motion, Havemeyer and James Hoge have offered no proof or arguments in support of any of their pleaded defenses, except as to standing, which has been asserted in, inter alia, the first affirmative defense. The failure by Havemeyer and James Hoge to raise and/or assert each of the remaining pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above ( *see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All affirmative defenses not asserted by Havemeyer and James Hoge are thus dismissed.

The assertions by Havemeyer and James Hoge as to the plaintiff's alleged lack of standing, which rest, inter alia, upon alleged defects in the endorsements and the assignments, are rejected as unmeritorious (*see*, ***OneWest Bank FSB v Carey***, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; *see also*, ***U.S. Bank Natl. Assn. v Cange***, 96 AD3d 825, *supra*; ***CWCapital Asset Mgt. v Charney-FPG 114 41st St., LLC***, 84 AD3d 506, 923 NYS2d 453 [1st Dept 2011]). The plaintiff demonstrated, as indicated above, that the original endorsed note, with an allonge affixed thereto, was physically delivered to it prior to commencement (*see*, ***U.S. Bank Natl. Assn. v Cange***, 96 AD3d 825, *supra*). In this case, the plaintiff's submission of the three recorded assignments, further memorialized the transfer of the mortgage and note to the plaintiff.

The answering defendants arguments regarding the alleged inconsistencies in the unsigned and signed copies of the note are also misplaced (*see generally*, ***Citimortgage, Inc. v Friedman***, 2013 NY Slip Op 5670 [2d Dept, Aug. 21, 2013]). The unendorsed, unsigned copy of the note, which is annexed to the recorded mortgage, is merely referenced as an exhibit, whereas the signed copy of the original note that was submitted in support of the motion contains an endorsement on its face and an allonge with an endorsement thereon. In any event, Havemeyer and Hoge have not cited any rule, statute or other authority which would require that signed copies of notes be annexed to corresponding mortgages at the time of recording.

Insofar as the answering defendants contend that the manner of conveyance of the note and mortgage may be in violation of the terms of the Trust, and related instruments, the same are without merit as they do not have standing to challenge the Trust ( *see*, ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, *supra*; ***P.A. Bldg Co. v City of New York***, 217 AD2d 417, 629 NYS2d 240 [1st Dept 1995]; *see also*, ***Aymes v Gateway Demolition Inc.***, 30 AD3d 196, 817 NYS2d 233 [1st Dept 2006]). Further, the arguments by Havemeyer and Hoge regarding the purported irregularities with the acknowledgments associated with the assignments, rife with speculation and innuendo, which appear to aimed at obscuring the issue of nonpayment, are also without merit (*see*, ***Chase Home Finance, LLC v Miciotta***, 101 AD3d 1307, *supra*; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]; ***Flushing***

***Preferred Funding Corp. v Patricola Realty Corp.***, 36 Misc3d 1240[A], 964 NYS2d 58 [Sup Ct, Suffolk County 2012]; ***Citimortgage, Inc. v Orichello***, 33 Misc3d 1230[A], 941 NYS2d 537 [Sup Ct, Dutchess County 2011]). The answering defendants' remaining contentions are without merit.

Havemeyer and James Hoge, therefore, failed to establish that their standing defense is sufficiently meritorious to defeat the plaintiff's motion for summary judgment. Thus, even when viewed in the light most favorable to the answering defendants, their submissions are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; *see*, ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; ***Cochran Inv. Co. Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the answering defendants (*see*, ***Fed. 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 joint answer interposed by Havemeyer and James Hoge is stricken, and the affirmative defenses therein are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendants, John Doe, Richard Doe, Jane Doe, Cora Doe, Dick Moe and Ruby Poe, is granted (*see*, ***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, *supra*). By its submissions, the plaintiff established the basis for this relief.

The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting OneWest Bank, FSB for the plaintiff is also granted (*see,* CPLR 1018; 3025[b]; ***Citibank, N.A. v Van Brunt Props., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *see also*, ***IndyMac Bank F.S.B. v Thompson***, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; ***Greenpoint Mtge. Corp. v Lamberti***, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; ***Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan***, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). By its submissions, which includes, inter alia, an assignment of the mortgage and note dated September 21, 2011 from the plaintiff to OneWest Bank, FSB, the plaintiff established that the latter is now the real party in interest. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of Cynthia Bartlett, Daphne Hoge, Internal Revenue Service-United States of America, New York State Department of Taxation and Finance-Tax Compliance Division-C.O.-ATC, as these defendants never interposed answers to the complaint (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all such defaulting defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against Havemeyer and James Hoge, and has established the default in answering by the above-noted defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2 Dept 2005]; ***Vt. Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia, Ltd. v Smith***, 201 AD2d 522,

607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion is determined as indicated above, and the cross motion is denied in its entirety. The proposed order appointing a referee to compute pursuant to RPAPL § 1321 has been signed concurrently herewith.

Dated: October 24, 2013
Riverhead, NY

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

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**