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SHORT FORM ORDER

INDEX No. 09605/2013

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: 10/21/15
SUBMIT DATE: 11/27/15
Mot. Seq. 002 - MG
CDISP: NO

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

DANA BROWN, RUSSELL BROWN, III, BROOKHAVEN MEMORIAL HOSPITAL, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, TOWN SUPERVISOR, TOWN OF ISLIP, JPMORGAN CHASE BANK, NA, "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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ROSICKI, ROSICKI & ASSOC.
Attys. For Plaintiff
26 Harvester Ave.
Batavia, NY 14020

KLEMANOWICZ, HOLMQUIST
Attys. For Defendant Brown
300 Old Country Rd.
Mineola, NY 11501

Upon the following papers numbered 1 to 9 read on this renewed motion for accelerated judgments, substitution of parties and an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ____; Answering papers 6-7; Reply papers 8-9; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this renewed motion (#002) by the plaintiff for accelerated judgments on its complaint, the deletion of certain party defendants and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is granted.

The plaintiff commenced this action in April 2013 to foreclose the single lien of consolidated mortgages given by the Brown defendants. A first note and mortgage was given to RBC Mortgage Company on September 9, 2003 which secured the principal indebtedness of a note of the same date in the amount of $235,000.00. A second gap note was executed by the Brown defendants in favor of the plaintiff on May 11, 2007 to secure a gap mortgage executed by them on the same day in the amount of $105,057.60. The Browns also executed on that date a consolidated mortgage note in favor of the plaintiff in the principal amount of $329,000.00, which note stated on the face thereof that it "amends, restates in their entirety and is given in substitution for the notes described in Exhibit A of the New York Consolidation, Extension and Modification Agreement dated the same date as this Note". The first note and mortgage of September 9, 2003 and the gap note and mortgage of May 11, 2007 were the subject of the Consolidation, Extension and Modification Agreement [CEMA] of May 11, 2007 between the plaintiff and the Brown defendants, to which the consolidated note referred. A consolidated mortgage indenture was also prepared and dated May 11, 2007, but the same was not executed by the Brown defendants.

In its complaint, the plaintiff alleges that the Brown defendants defaulted in their payment obligations on May 1, 2011 and that such default remains uncured. Following service of the summons and complaint, defendant Russell Brown, III appeared herein by answer and therein challenged the plaintiff's standing to prosecute its claims for foreclosure and sale.

The plaintiff previously moved for the relief sought herein in September of 2014. The action was then assigned to the case inventory of another Justice of this court but was transferred to this court in January of 2015. Determination of the plaintiff's motion was held in abeyance pending conclusion of the settlement conference procedures required by CPLR 3408. By order dated May 14, 2015, this court denied the plaintiff's motion due its failure to establish possession of the notes prior to the commencement of the action. At a recent conference before the court held in accordance with the court's order of May 14, 2015, the plaintiff applied for and was granted leave to renew its prior motion pursuant to CPLR 2221.

By this renewed motion (#002), the plaintiff seeks the relief sought in its original motion. The plaintiff claims to have remedied the defects in its prior motion by the attachment of a new affidavit of "possession" in which an employee of the plaintiff's assignee states that the original note was physically in the possession of the plaintiff on May 11, 2007, the date of the defendants' execution of the gap note and mortgage in favor of the plaintiff, the CEMA and the consolidated note in the full amount of the monies owing to the plaintiff. The motion is opposed by answering defendant, Russell Brown, in an affirmation by his counsel. Therein, defense counsel challenges the plaintiff's proof as to its receipt of the first note and the admissibility of the affidavit of merit on which the plaintiff relies. The plaintiff disputes the contentions of defense counsel in the reply papers of its counsel.

For the reasons stated below the motion is granted.

Entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff 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 (*see* ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n. v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). Where, as here, 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]; ***Loancare v Firshing***, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 77, 10 NYS2d 255 [2d Dept 2015]). A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, ***Wells Fargo Bank, NA v Parker***, 125 AD3d 848, 5 NYS3d 130 [2d Dept 2015]; ***U.S. Bank N.A. v Guy***, 125 AD3d 845, 5 NYS3d 116 [2015]).

Proof that the plaintiff was in possession of the note on a day certain prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra;* ***Loancare v Firshing***, 130 AD3d 787, *supra*; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). Alternatively, standing may be established by due proof of the particulars of note delivery to the plaintiff prior to the commencement of the action (*see* ***Deutsche Bank Nat. Trust v Weiss***, 133 AD3d 704, 2015WL 7270431 [2d Dept 2015]; ***Flagstar Bank, FSB v. Anderson***, 129 A.D.3d 665, 12 NYS3d 119 [2d Dept 2015]; ***Bank of America, N.A. v Paulsen***, 125 AD3d 909, 6 NYS2d 68 [2d Dept 2015]; ***Deutsche Bank Natl. US Bank Nat. Ass'n v Faruque,*** 120 AD3d 575, 991 NYS2d 631[2d Dept 2014]; ***Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]; ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). Delivery of the note to a custodial agent of the plaintiff on a date prior to the commencement of the action will also suffice to establish the standing of a foreclosing plaintiff under the foregoing rule (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]).

Here, the new affidavit of possession submitted by the plaintiff's assignee in which she averred that the plaintiff had possession of the first note on May 11, 2007, the date on which the plaintiff advanced new monies to the defendants under the terms of a gap note and mortgage, the consolidated note and the CEMA sufficiently established the admissibility of the affiant's statements under the business records exception to the hearsay rule (*see* ***Portfolio Recovery Assoc., LLC v Lall***, 127 AD3d 576, 8 NYS2d 101 [1st Dept 2015]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; ***K&K Enter. Inc. v Stemcor USA Inc.***, 100 AD3d 415, 954 NYS2d 512 [1st Dept 2012]; ***Landmark Capital Inv., Inc. v Li–Shan Wang***, 94 ADd3d 418, 941 NYS2d 144 [1st Dept 2012]; ***Merrill Lynch Bus. Fin. Serv., Inc. v Trataros Constr.***, 30 AD3d 336, 819 NYS2d 223 [1st Dept 2006]). The court thus finds that the standing of the plaintiff was duly established by the proof submitted on this renewed motion for accelerated judgments. The challenges to the plaintiff's standing advanced in the opposing papers of defendant Russell Brown are thus rejected as unmeritorious as is his pleaded standing defense.

The moving papers also sufficiently established, prima facie, the necessary elements of claim for foreclosure and sale as they included copies of the notes, the mortgages and the CEMA and due proof of a default in payment on the part of the Brown defendants. The plaintiff's submissions also included a prima facie demonstration that the remaining affirmative defenses asserted in the answer of defendant Russell Brown, are without merit. No question of fact was raised with respect to theses matters as the answering defendant did not assert them in his opposing papers (*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]; *see also* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enter., 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]).

The court thus awards the plaintiff summary judgment dismissing all of the affirmative defenses asserted in the answer of defendant, Russell Brown, and summary judgment on the plaintiff's complaint against said defendant.

Those portions of the plaintiff's motion wherein the plaintiff seeks an order identifying the first name of John Doe #1 to be Monica Doe and the deletion of the remaining unknown defendants, an order substituting Bayview Loan Services, LLC for the plaintiff and caption amendments to reflect these changes are granted, there being no opposition.

The moving papers further established the default in answering on the part of the remaining defendants served with process, including two persons served as unknown defendants, none whom served answers to the plaintiff's complaint and the plaintiff's entitlement to default judgments against them (*see* ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 2015 WL 361008 [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 defendant and has established defaults in answering by the remaining defendants joined herein by service of process, 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]; ***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]).

Proposed Order of Reference, as modified by the court to reflect the terms of this order, has been marked signed simultaneously herewith.

Dated: December 16, 2015

THOMAS F. WHELAN, J.S.C.