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SHORT FORM ORDER

INDEX NO. 22839-2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 004: 8-20-2015 / 005: 10/22/2015
Adjourned Date: 2-17-2016
Motion Sequence.: 004: MD / 005: MotD

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AURORA LOAN SERVICES LLC and NATIONSTAR MORTGAGE LLC,

Plaintiff,

-against-

MANFRED SCHELLER, CHERYL MENDENHALL, ET AL.,

Defendants.

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Akerman LLP
By Erica R. Stein, Esq.
Attorneys for Plaintiff
666 Fifth Avenue - 20th Floor
New York, NY 10103

Charles Wallshein, Esq.
By Claire Talwar, Esq.
Attorney for Defendants Scheller & Mendenhall
115 Broadhollow Road, Suite 350
Melville, NY 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants dated July 21, 2015, and supporting papers; (2) Affirmation in Opposition of plaintiff dated August 13, 2015, and supporting papers; (3) Notice of Motion by the plaintiff dated October 7, 2015, and supporting papers; (including Memorandum of Law); (4) Affirmation in Opposition by the defendant, dated January 18, 2016 (inadvertently reflected as January 18, 2015), and supporting papers; and (5) Affirmation in further support of motion by the plaintiff, dated March 8, 2016, and supporting papers (including Memorandum of Law); it is

ORDERED that the motion (#004) by the defendants, Scheller and Mendenhall, for an order compelling discovery or an order imposing sanctions upon the plaintiff for failing to respond to the defendants' discovery demands is denied; and it is further

ORDERED that those portions of the separate motion (#005) by the joint plaintiffs for a substitution of Aurora Loan Servicing, LLC, by Nationstar Mortgage, LLC, are considered under CPLR 1018 and 1003 and are granted to the extent that the court, pursuant to CPLR 1003, drops Aurora Loan Servicing, LLC, as a party plaintiff to this action, thereby leaving Nationstar Mortgage, LLC, as the sole plaintiff and it directs that the caption be amended to reflect this change; and it is further

ORDERED that those portions of the motion (#005) by the plaintiffs for an order discontinuing the 2009 action commenced by Aurora Loan Services, LLC, which has been merged by consolidation into the subsequently commenced 2013 action by Nationstar Mortgage, LLC, are granted only to extent that the 2009 complaint is deemed withdrawn and thus dismissed as academic; and it is further

ORDERED that those portions of the plaintiffs' motion in which Nationstar seeks summary judgment dismissing the affirmative defenses and counterclaims asserted in the amended answers of the mortgagor defendants and for an award of summary judgment on the complaints is considered under CPLR 3212 and RPAPL § 1321 and are granted as to the 2013 complaint against said defendants; and it is further

ORDERED that those portions of the plaintiffs' motion wherein Nationstar seeks default judgments on its 2013 complaint against the remaining defendants who were served with process and an order appointing a referee to compute are considered under CPLR 3215 and RPAPL § 1321 and are granted only as to the 2013 complaint.

The procedural caste of this consolidated mortgage foreclosure action as it now pends before this court is more than unusual. First filed was a an action bearing Index No. 22389/2009 by Aurora Loan Servicers, LLC., to foreclose an April 28, 2006 mortgage in the amount of $999,999.00 given by the Scheller/Mendenhall defendants to Lehman Brothers Bank, FSB, to secure a mortgage note of that date which was likewise given. The plaintiff, Aurora Loan Servicing, LLC [hereinafter "Aurora"], claimed ownership of the note and mortgage under a June 8, 2009 written assignment of said note and mortgage by a nominee [MERS] of the original lender that was duly recorded in the office of the Suffolk County Clerk on July 28, 2009. None of the defendants served with process appeared by answer or by motion in response to the plaintiff's service of the summons and complaint.

A settlement conference of the type contemplated by CPLR 3408 was initially scheduled for July 16, 2010 and held on August 16, 2010 by quasi-judicial personnel assigned to the specialized mortgage foreclosure conference part of this court. Defendant, Manfred Scheller, participated in said conference personally, or by counsel, the Lanin Law P.C., who filed a notice of appearance for said defendant on August 16, 2010. That conference culminated in a marking of the action "not eligible" for the conference due to the nature and size of the loan and the fact that the mortgaged premises were not the homes or residences of the borrower defendants.

The action was immediately released from the conference part and assigned to the civil case inventory of Part 21. A motion returnable on June 10, 2010 by plaintiff Aurora for the appointment of referee on the default of all defendants pursuant to RPAPL § 1321was held in abeyance pending release of the matter from the conference part and was marked submitted on August 25, 2010. Said motion was denied, without prejudice, by order dated April 4, 2011 due to the plaintiff's purported failure to comply with certain administratively imposed vouching requirements.

The action lay dormant until March 8, 2012 when defendant Scheller, represented by new counsel, and defendant Mendenhall, jointly served an "amended answer" to the complaint. The plaintiff, without objection, served a reply to the counterclaims advanced in that answer. In June of 2012, defendant, Cheryl Mendenhall, filed a petition in bankruptcy and the action was marked stayed on August 3, 2012. Defendant Mendenhall obtained a discharge in October of 2012 and the case was closed in December of 2012. The automatic stay of the 2009 action was marked lifted in January of 2014 upon the interposition of a motion by defendant, Manfred Scheller, described below, and a series of conferences began which continued until October 22, 2015.

Meanwhile, a separate action to foreclose the lien of the same mortgage that was the subject of the pending 2009 foreclosure action was commenced on July 11, 2013 by Nationstar Mortgage, LLC, under Index Number 061765/2013. Therein, the plaintiff Nationstar claimed an ownership interest in the note and mortgage due to its possession of a duly indorsed note on the date of filing. In response to the plaintiff's service of the summons, complaint and other initiatory papers, only defendant, Manfred Scheller, appeared by answer dated July 12, 2013. A reply to the four counterclaims set forth in said answer was served by the plaintiff, Nationstar. Four settlement conferences were conducted pursuant to CPLR 3408 without success.

As indicated above, in January of 2014, defendant Scheller moved (#002), by Order to Show Cause on papers bearing the Index No. of the prior 2009 action, for an order compelling acceptance of

a second amended answer to the complaint served in that action and for an order consolidating the two actions. Counsel for the plaintiff, Nationstar, who had been substituted for Aurora's counsel in August of 2013 in the 2009 action, appeared in opposition by cross moving papers (#003), in which, Nationstar, as successor-in-interest to Aurora, sought an order dismissing or discontinuing the 2009 action.

By order dated May 22, 2014, the court granted the defendant's motion and denied the plaintiff's cross motion. An amended answer dated January 27, 2014 in the 2009 action was attached to the moving papers and served in June of 2014, to which the plaintiffs, Aurora and Nationstar, jointly served amend counterclaim replies in February of 2015. [1] The court went on to direct a true consolidation of the actions under Index No. 22839/2009 and amended the caption for all future proceedings to be titled as follows: *Aurora Loan Services, LLC and Nationstar Mortgage, LLC, Plaintiffs, v Manfred Scheller, Cheryl Mendenhall, et. al.*

Notwithstanding the forgoing directives, both defendants, Scheller and Mendenhall, sought by motion (#004) with separate double captions returnable on August 20, 2015, an order compelling the plaintiff to furnish responses to their outstanding discovery demands and to produce certain custodial agreements referred to in a servicing agreement covering the defendants' mortgage loan. While there is some evidence that this motion may have been decided at conferences by the court previously presiding over this action, no writing that conforms to the requirements of CPLR 2219 has been put before this court. Accordingly, this court, having read and considered the defendants' submissions in support of their application and the opposing papers of the plaintiff, hereby finds that this motion (#004) was rendered academic by the plaintiff's service of adequate responses (*see* ***PNC Bank, Natl. Ass'n v Campbell***, 142 AD3d 1148, 38 NYS3d 236 [2d Dept 2016]; ***Palmieri v Piano Exchange, Inc.***, 124 AD3d 611, 1 NYS3d 315 [2d Dept 2015]) and that outstanding materials, if any, are neither relevant nor material to the defense or prosecution of the claims interposed in this consolidated foreclosure action (*see* ***Wells Fargo Bank v Charlaff***, 134 AD3d 1099, 24 NYS3d, 317 [2d Dept 2015] ***Bank of America Natl. Ass'n v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***U.S. Bank Nat. Ass'n v Carnivale***, 138 AD3d 1220, 29 NYS3d 643 [3d Dept 2016]; ***Rajamin v Deutsche Bank Natl. Trust Co.***, 757 F.3d 79, 87 [2d Cir.2014]; *see also* ***Altonen v Kmart of N.Y. Holdings, Inc.***, 94 AD3d 920, 942 NYS2d 363 [2d Dept 2012]).

In view of the foregoing, the motion (#004) by the defendants for an order compelling the production of documents and other disclosure material is denied.

Left for consideration is the motion by the plaintiffs, Aurora and Nationstar, for summary judgment dismissing all affirmative defenses asserted in the answers served by the borrower defendants and for summary judgment on the complaints served and filed herein. The plaintiffs further seek to substitute Nationstar as the plaintiff on the 2009 complaint into which, the 2013 action was consolidated and for a discontinuance of the 2009 action. The motion is opposed in an affirmation of defense counsel who contends as follows: that the plaintiffs' proofs are insufficient to establish the plaintiffs compliance with the contractual notice of default requirements, the defendants' default in payment and the standing of plaintiffs to prosecute their claims. Defense counsel next contends that the defendants' standing defenses are meritorious and warrant a finding that both plaintiffs lack standing to prosecute their claims for foreclosure and sale. Finally, defense counsel contends that the motion is premature due to outstanding discovery. The plaintiff served reply papers and the motion was marked submitted in

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[1] An identical answer bearing the Index number of the 2013 action also dated January 27, 2014 was prepared by the defendants' attorney and it has been put before the court as an attachment to the defendants' opposing papers.

January of 2016 following the transfer of the action to this court.

The plaintiffs' demands for an order substituting Nationstar Mortgage, LLC for Aurora Loan Servicing, LLC, is granted to the extent that the court, pursuant to CPLR 1003, hereby drops Aurora Loan Servicing, LLC, as a party plaintiff thereby leaving Nationstar Mortgage, LLC, as the sole plaintiff. This application was not opposed by the answering defendants. There was thus no rebuttal of the plaintiffs' claims that Aurora no longer has any interest in the mortgage debt as recited in the loan documents. In addition, the relief granted will bring some degree of clarity to this unduly complex and protracted consolidated action. The caption of this action is thus amended to delete Aurora as a party plaintiff and all future proceedings shall be captioned accordingly. The plaintiffs' alternate request for a dismissal of the 2009 action is also not opposed by the defendants and it is granted to the extent that the 2009 complaint is deemed withdrawn and thus dismissed as academic.

The remaining portions of the plaintiffs' motion (#005) for accelerated judgments on their complaints are denied as academic with respect to Aurora's 2009 complaint and the defendants' amended answer thereto, as all things asserted in such answer are contained in the amended answer served in response to the 2013 complaint. However, the court grants the request for summary judgment on the 2013 complaint and an award of summary judgment dismissing the affirmative defenses and counterclaims advanced in the answer served in response thereto. The court further grants the request for default judgments based upon the defaults in answering of all other defendants joined by service of process in the 2013 action. Also granted is the application in the 2013 action for the appointment of a referee to compute amounts due under the terms of the note and mortgage.

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 a default under the terms thereof (*see* ***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]; ***Loancare v Firshing***, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 77, 10 NYS3d 255 [2d Dept 2015]). Finally, a plaintiff seeking summary judgment should establish that none of the affirmative defenses asserted in the answer or by any defendant have merit (*see* ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; ***Central Mtge. Co. v McClelland***, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; ***Bank of New York v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 985 NYS2d 254 [2d Dept 2014]; ***Mendell Group, Inc. v Prince***, 114 AD3d 732, 980 NYS2d 519 [2d Dept 2014]; ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]).

Where these matters are established, 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 the answer or otherwise available to the defendant (*see* ***Jessabell Realty Corp. v Gonzalez*** 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; ***Redrock Kings, LLC v Kings Hotel, Inc.***, 109 AD3d 602, 970 NYS2d 804 [2d Dept 2013]; ***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]). If a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movants' papers may be deemed admitted as 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 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]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses waived due to abandonment (*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]).

Here, the moving papers established, prima facie, that none of the affirmative defenses asserted in the amended answer dated January 27, 2014 purportedly served in response to the Nationstar's 2013 complaint by the defendants are meritorious. Most of the nineteen pleaded affirmative defenses asserted therein were waived and abandoned by the defendants' failure to assert them in opposition to the plaintiffs' joint motion. Those that were not, are the Second Affirmative defense, which sounds in culpable conduct on the part of the plaintiff Nationstar; the Fifth affirmative defense which charges that plaintiff with non-compliance with a contractual condition precedent; and the Eleventh through Fifteenth and the Nineteenth Affirmative defenses all of which challenge the standing of Nationstar to prosecute its claims for foreclosure and sale. Accordingly, the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Sixteenth, Seventeenth and Eighteenth affirmative defenses contained in the January 27, 2014 answer are dismissed pursuant to CPLR 3212(b).

The lack of merit in the defendants' Second affirmative defense alleging "culpable conduct" on the part of the plaintiff is readily apparent. Defenses premised upon the "culpable conduct" of a plaintiff are generally creatures of the law of torts which has no application to this foreclosure action. It is well settled that a mortgage foreclosure action is a contractually based, equitable action, in rem. Therein, the plaintiff seeks, by the foreclosure of the mortgage lien, to collect the contractual mortgage debt, not from the mortgagor directly, but from the land that the mortgagor posted as security for the debt (*see* ***Jo Ann Homes v Dworetz***, 25 NY2d 112, 302 NYS2d 799 [1969]). [2] However, the equitable attributes of a foreclosure action do not remove it from its governance by the contractual law of New York and by the Contract Clause of the United States Constitution (*see* ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept.2013]; *see also* ***PHH Mtge. Corp. v Hepburn***, 128 AD3d 659, 10 NYS3d 102 [2d Dept 2015]; ***Citibank, N.A. v Barclay***, 124 AD3d 174, 999 NYS2d 375 [1st Dept 2014]). The Second affirmative defense of asserting culpable conduct on the part of the plaintiff is thus no defense at all to the claim for foreclosure and sale. Accordingly, it is dismissed pursuant to CPLR 3212(b).

The lack of merit in the Fifth affirmative defense, which sounds in the plaintiff's purported failure to comply with the contractual default notice requirements, is also apparent since there is no denial of receipt of this notice by either of the answering defendants (*see* ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]). Defense counsel thus challenges the quality of the plaintiff's proof with respect the issue of compliance. A similar claim as to a failure of proof is posited by defense counsel with respect to the asserted standing defense, which is advanced in the Eleventh through Fifteenth and the Nineteenth Affirmative defenses set forth in the defendants' answer to the 2013 complaint. Defense counsel further contends that the plaintiff's submissions are insufficient to establish a default in payment which occurred as alleged in the complaints served and filed herein. The court, however, rejects these contentions.

A business record will be admissible if that record "was made in the regular course of any

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2 In some cases, the action becomes in personam in nature as to some defendants as it may allow the plaintiff to collect the debt from those personally obligated to pay under the terms of the note or bond which the mortgage was given to secure. However, the judicially directed sale must bring insufficient proceeds to satisfy the debt and the court must have in personam jurisdiction over said the targeted obligors (*see* RPAPL § 1371).

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]). 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] [emphasis added]; *quoting* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012] *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]).

Appellate case authorities have thus held that a loan servicer may testify as to payment defaults, notice compliance, standing and other matters relevant to a foreclosing plaintiff's prima facie case, by relying upon records it maintains in the regular course of its business as servicer of the subject mortgage loan (*see* ***US Bank N.A. v Ehrenfeld***, 2016 NY Slip Op 07639 [2d Dept 2016]; ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***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* ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Aames Capital Corp. v Ford***, 294 AD2d 134, 740 NYS2d 880 [1st Dept 2002]). It is also established law that an assignee or other transferee of the loan documents may rely upon the business records of the loan originator or other predecessors in interest to establish such transferee's claims for recovery of amounts due from the debtor so long as it establishes that it relied upon those records in the regular course of its business (*see* ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]; *see also* ***Portfolio Recovery Assoc., LLC v Lall***, 127 AD3d 576, 8 NYS3d 101 [1st Dept 2015]). Finally, proof of the mailing of statutory or contractual notices may be established 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 (*see* ***Nassau Insurance Co. v Murray***, 46 NY2d 828, 414 NYS2d 117 [1978]; ***Flagstar Bank v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.***, 114 AD3d 33, 977 NYS2d 292 [2d Dept 2013], *aff'd*. 25 NY3d 498, 14 NYS3d 283 [2015]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD.2 679, 680, 729 NYS2d 776 [2d Dept 2001]).

This court's review of the affidavits submitted in support of the motion, which include the affidavits of employees of both, Aurora Loan Servicer, LLC and of Nationstar Mortgage, LLC, reveal that they conform to the requirements of CPLR 4518(a) (*see* ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, *supra*; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*). All of the defense counsel's challenges to the character and quality of the affidavits of merit, particularly, the Nationstar affidavit, are rejected as unmeritorious.

Morever, upon a review of the substantive contents of such affidavits, the court finds that Nationstar's affiant sufficiently demonstrated the plaintiff's compliance with the mailing of the RPAPL § 1304 default notices to the defendants, which they do not challenge, by due proof of standard business practices employed in the mailings of such notices which suffices to satisfy the contractual default notice requirements (*see* ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 725, 965 NYS2d 516 [2d Dept 2013]). In addition, the Nationstar affidavit sufficiently established the default in payment by the defendants on June 1, 2009, which is consistent with the allegations of default set forth in both complaints (*see* ***Emigrant Bank v Marando***, ___ AD3d ___, 2016 WL6089224 [2d Dept 2016]; ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, *supra*).

The court further finds that the Nationstar affidavit of merit established by due proof that Nationstar had constructive possession of the mortgage note on July 1, 2012 when it acquired ownership of the records facility in Nebraska that was formerly owned by Aurora and that Nationstar had physical possession of the note on May 15, 2013, which was several weeks prior to the commencement of this action in July of 2013. Under current appellate case authorities, there are several ways a foreclosing plaintiff may establish its standing. One is by due proof that the plaintiff was in possession of the note on a day certain prior to the commencement of the action (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank Natl. Ass'n v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Well Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]).

Where a pre-commencement, note possession date is established by the plaintiff, it is unnecessary to give factual details of the note's delivery in order to establish that possession was obtained prior to the commencement of the action on a particular date (*see* ***JPMorgan Chase Bank, Nat. Ass'n v Weinberger***, 142 AD3d 643, *supra*). Indeed, the establishment the plaintiff's possession of the mortgage note on a date prior to the commencement of the action is so conclusive that it renders, unavailing, all claims of defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]) and claims of defects in the chain of mortgage assignments (*see* ***Deutsche Bank National Trust v Naughton***, 137 AD3d 1199, *supra*; ***Deutsche Bank Nat. Trust v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Moreover, the plaintiff's pre-commencement possession of a note indorsed in blank defeats the claim that the plaintiff lacks standing because Freddy Mac is the owner by purchase of beneficial interests in the note (see ***Wells Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [2d Dept 2015]).

Measured by the forgoing standard, the court finds that Nationstar adduced due and sufficient proof of its standing by the affidavit of its employee which was sufficient to establish that the plaintiff had physical possession of the subject note, indorsed in blank, on a date prior to the commencement of the action. The defendants' claims that Nationstar's proof was insufficient to establish its standing are thus rejected as lacking in merit as are defense counsel's claims that the affirmative defense of standing remains a substantively viable defense to the plaintiff's claims for foreclosure and sale (*see e.g.*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***U.S. Bank, N.A., v Askew***, 138 AD3d 402, *supra*; ***Deutsche Bank Natl. Trust Co. v Naughton***, 137 AD3d 1199; *supra*; ***Wells Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, *supra*; ***Wells Fargo Bank, N.A. v. Burke***, 52 Misc. 994, 34 NYS3d 865 [Sup. Ct. Suffolk County 2016]). Accordingly dismissal of the Eleventh through Fifteenth and the Nineteenth Affirmative defenses pursuant to CPLR 3212(b) is warranted.

The moving papers of the plaintiffs also established that none of the four counterclaims asserted in the amended answers served by the defendants to both complaints have merit (*see* ***Citimortgage Inc. v Pugliese***, ___ AD3d ___, 2016 WL 5795577 [2d Dept 2016]; ***Bank of New York Trust Co., N.A. v Chiejina***, 142 AD3d 570, 36 NYS3d 512 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Naughton***, 137 AD3d 1199; *supra*; ***Bank of America Natl. Ass'n v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, *supra*; ***Rajamin v Deutsche Bank Natl. Trust Co.***, 757 F3d. 79 [2d Cir. 2014]). Accordingly, the counterclaims asserted in such answers are dismissed pursuant to CPLR 3212(b).

The court rejects defense counsel's claim that the plaintiffs' motion is premature due to the absence of discovery. The defendants failed to satisfy the threshold requirement of demonstrating that

the disclosure items sought are material and necessary to the establishment of a bona fide defense or viable counterclaim possessed by the defendants (*see* ***CitiMortgage, Inc. v Guillermo***, ___ AD3d ___, 2016 WL 6089227 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Vasiliou***, 127 AD3d 1351, 8 NYS3d 672 [3d Dept 2015]).

The moving papers further established Nationstar's entitlement to the summary judgment on its complaint by producing the mortgage and the unpaid note, and evidence of the default and due proof of its standing to prosecute its claims for foreclosure and sale (*see* ***CitiMortgage, Inc. v Pugliese***, ___ AD3d ___, 2016 WL 5795577 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Argent Mtge. Co., LLC v 35 Plank Road Realty Corp.***, 131 AD3d 909, 15 NYS3d 473 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; ***Central Mtge. Co. v McClelland***, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; ***Jessabell Realty Corp. v Gonzalez***, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; ***Bank of New York Mellon Trust Co v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]). No questions of fact were raised tending to rebut the plaintiff's prima facie showing of its entitlement to the summary judgments requested for the reasons set forth above.

The moving papers also established the defaults in answering on the part of the remaining defendants following due service of the 2013 summons, complaint and other initiatory papers as well as the plaintiff's possession of viable claims for foreclosure and sale against them (*see* CPLR 32125[f]; ***Deutsche Bank Natl. Trust Co. v Patrick***, 136 AD3d 970, 25 NYS3D 364 [2d Dept 2016]; ***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 defaults in answering by the remaining defendants joined herein by service of process to the 2013 complaint, 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]).

Submit Order of Reference upon a copy of this order.

DATED: November 21, 2016

C. RANDALL HINRICHS
J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION