Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

x

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CSAB MORTGAGE-BACKED TRUST 2006-1, CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-1,

Plaintiff(s)

-against-

SONIA G. YANEZ, CACH, LLC, HSBC BANK NEVADA, N.A., CAPITAL ONE BANK, ZEIDA JIMENEZ, EQUABLE ASCENT FINANCIAL LLC, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOSE SALAZAR MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR SAXON EQUITY MORTGAGE BANKERS, LTD., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY CRIMINAL COURT, "JOHN DOE # to "JOHN DOE #10".

Defendant(s)

x

Index Number 10705/ 2012

Motion Date: September 12, 2016

Motion Cal. No. 162

Motion Seq. No. 3

The following papers number 1 - 16 read on this motion by plaintiff for an Order :(1) pursuant to CPLR §3212, for summary judgment against defendant Sonia G. Yanez and dismissing the answer of defendant Yanez; (2) pursuant to CPLR §3211(b), to dismiss the affirmative defenses asserted by defendant Yanez in her answer; (3) for leave to amend the caption substituting Anaunys Cerderos, Victor Ortiz, Juana Hernandez and Wilson "Doe" in

place and stead of defendants "John Doe #1" through "John Doe #4," and deleting reference to defendant Jose Salazar and defendants "John Doe #5" through "John Doe #10,"; (4) for leave to enter a default judgment against all non-appearing and non-answering defendants, and (5) for leave to appoint a referee to ascertain the sums due and owing plaintiff; and this cross-motion by defendant Yanez; (1) pursuant to CPLR §3211(a)(3), to dismiss the complaint insofar as asserted against her; (2) to compel plaintiff to toll the accumulation of interest and fees on the subject mortgage loan from May 21, 2012, and (3) for an award of reasonable attorneys' fees, costs and disbursements.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-8
Notice of Cross Motion - Affidavits - Exhibits	9-14
Answering Affidavits - Exhibits	15-16

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

Plaintiff commenced this action on May 21, 2012, seeking to foreclose on a mortgage given by defendant Sonia G. Yanez on the real property known as 51-20 101st St., Corona, New York to secure payment of a note, evidencing a loan in the original principal amount of $647,250.00, plus interest from Saxon Equity Mortgage Bankers, Ltd. (Saxon). In its complaint, plaintiff alleges that it is the holder of the note and mortgage and that the mortgage was assigned from Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Saxon to plaintiff by assignment of mortgage dated August 23, 2011. Plaintiff also alleges that defendant Yanez defaulted under the note and mortgage by failing to pay the monthly installment payment due on April 1, 2011, and as a consequence, plaintiff elects to accelerate the mortgage debt. Plaintiff further alleges it complied with RPAPL 1304 and RPAPL 1306.

Defendant Yanez served an answer denying certain allegations of the complaint, asserting various affirmative defenses, including lack of standing, and interposing counterclaims. The remaining defendants are in default in appearing or answering the complaint. It is unclear whether plaintiff served a reply to the counterclaims interposed by defendant Yanez.

A residential foreclosure conference was held on May 1, 2013. By order of the same date, the court found that the case met the criteria for the Residential Foreclosure Part, but defendant Yanez had defaulted in appearing at the conference. Plaintiff was directed to appear at a preliminary conference to be held on June 13, 2013. By preliminary conference

order dated June 13, 2013, the court directed that any motion for summary judgment be made no later than 120 days after the filing of the note of issue. By compliance conference order dated September 17, 2013, plaintiff was directed to file a note of issue by December 20, 2013. Plaintiff filed a note of issue on December 4, 2013, which was subsequently vacated by order dated March 2, 2015.

Plaintiff previously moved for summary judgment against defendant Yanez, which motion was denied without prejudice to renewal (*see* order dated June 30, 2015). The Court noted that the affidavit of Simbarashe Wayne Mwayi, the Vice President of Loan Documentation of Wells Fargo Bank, N.A., d/b/a America's Servicing Co. (Wells Fargo), which had been offered in support of plaintiff's motion, indicated that Wells Fargo was the servicing agent for plaintiff. The court determined that plaintiff had failed to annex a power of attorney or other documentation establishing the authority of Wells Fargo to act as the servicing agent for plaintiff with regard to the subject mortgage.

That branch of the motion by plaintiff for leave to amend the caption substituting Anaunys Cerderos, Victor Ortiz, Juana Hernandez and Wilson "Doe" in place and stead of defendants "John Doe #1" through "John Doe #4," and deleting reference to defendant Jose Salazar and defendants "John Doe #5" through "John Doe #10," is granted. Plaintiff caused Anaunys Cerderos, Victor Ortiz, Juana Hernandez and Wilson "Doe," sued herein as defendants "John Doe #1," "John Doe #2," "John Doe #3," and "John Doe #4," respectively, to be served with process. Plaintiff named Jose Salazar as a party defendant based upon an alleged subordinate lien, but has since determined that such lien has expired or otherwise has been extinguished. Plaintiff also has determined that defendants "John Doe #5" through "John Doe #10" are unnecessary party defendants.

It is ORDERED that the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CSAB MORTGAGE-BACKED TRUST 2006-1, CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-1, No.: 10705/2012

Plaintiff(s)

-against-

SONIA G. YANEZ, CACH, LLC, HSBC BANK NEVADA, N.A., CAPITAL ONE BANK, ZEIDA JIMENEZ, EQUABLE ASCENT FINANCIAL LLC, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR SAXON EQUITY MORTGAGE BANKERS, LTD., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY CRIMINAL COURT, ANAUNYS CERDEROS, VICTOR ORTIZ, JUANA HERNANDEZ and WILSON "DOE,"

Defendant(s)

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With respect to that branch of the motion by plaintiff for summary judgment against defendant Yanez, a foreclosure plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1080 [2d Dept 2010]). In addition, where, as here, standing is at issue, the plaintiff must prove its standing to be entitled to relief (*see Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 681, 684 [2d Dept 2016]; *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 628 [2d Dept 2014], *affd* 25 NY3d 355 [2015]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). A plaintiff has standing in a

mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d at 684). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [3d Dept 2015]).

In support of its motion, plaintiff offers, among other things, an affirmation of regularity, copy of the pleadings, affidavits of service, the mortgage, and note, the assignment of mortgage dated August 23, 2011, a 30-day notice of default, a 90-day pre-foreclosure notice, and certain business records, and an affidavit from Armenia L. Harrell, a Vice President of Loan Documentation of Wells Fargo, d/b/a America's Servicing Co. Plaintiff does not submit a power of attorney, but rather submits a copy of a pooling and servicing agreement dated as of May 1, 2006 among Credit Suisse First Boston Mortgage Securities Corp., DLJ Mortgage Capital, Inc., Wells Fargo, Select Portfolio Servicing, Inc. and U.S. Bank, N.A. to show that Wells Fargo was designated servicer for plaintiff in relation to the subject mortgage loan.

On the question of standing, the plaintiff contends that the note was delivered to it and endorsed in blank by its predecessor, and it was in physical possession of the note at the time the action was commenced.

The copy of the note attached to the complaint bears an undated endorsement in blank by Mark Wolf, President of Saxon. The copy of the note attached as "Exhibit I," annexed to the affidavit of Ms. Harrell, however, lacks any endorsement. Rather, the copy of the exhibit submitted to the Court bears an original handwritten notation that reads "Need Copy endorsed in blank" on the last page of the note. That copy of the note also bears stamps indicating "I HEREBY CERTIFY THAT THIS IS A TRUE & ACCURATE COPY OF THE ORIGINAL," over an illegible signature. The stamps are missing from the version of the note attached to the complaint. This submission of two different copies of the note by plaintiff in support of its motion for summary judgment fails to eliminate a triable issue of fact as to whether plaintiff was in possession of the original note at the time the action was commenced (*see Deutsche Bank Nat. Trust Co. v Webster*, 142 AD3d 636 [2d Dept 2016]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2016]).

To the extent plaintiff relies upon the assignment of mortgage executed on August 23, 2011 to establish standing, that assignment does not specifically assign the note. Rather, it assigns the mortgage with "all moneys now owing or that may become hereafter become due or owing in respect thereof." Such quoted language is insufficient to assign the note or the underlying obligation (*see Bank of America Nat. Assn. v Rosario*, 2014 WL 6991647,

2014 NY Misc LEXIS 5263 [Queens County, Sup Ct] [order of the undersigned]; *Deutsche Bank Nat. Trust Co. v McRae*, 27 Misc 3d 247 [Sup Ct, Albany County 2010]; *cf.* Real Property Law § 258 [*see* Schedule "O"] [statutory form of assignment of mortgage]; *Matter of Stralem*, 303 AD2d 120 [2d Dept 2003]). Because the assignment transferred only the mortgage, it is inadequate to demonstrate that the note also was assigned at that time (*see Deutsche Bank Nat. Trust Co. v Weiss*, 133 AD3d 704 [2d Dept 2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 666 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 767 [2d Dept 2015]; *US Bank N.A. v Faruque*, 120 AD3d 575, 577 [2d Dept 2014]). The pooling and servicing agreement that is submitted with plaintiff's motion papers also fails to demonstrate either the existence of a written assignment of the note, or the delivery of the note endorsed in blank, by Saxon to plaintiff prior to the commencement of the action.

Under such circumstances, plaintiff has failed to establish, prima facie, that it had standing to commence this action (*see Deutsche Bank Nat. Trust Co. v Webster*, 142 AD3d 636; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2016]). Those branches of plaintiff's motion pursuant to CPLR §3212 for summary judgment against defendant Yanez and to appoint a referee to compute the sums due and owing under the note and mortgage are denied.

To the extent defendant Yanez cross-moves to dismiss the complaint insofar as asserted against her, based upon plaintiff's alleged lack of standing, she should have cross-moved pursuant to CPLR §3212 since issue has already been joined (*see Rich v Lefkovits*, 56 NY2d 276 [1982]; *JP Morgan Chase Bank v Johnson*, 129 AD3d 914 [2d Dept 2015]). Defendant Yanez has made no specific request for treatment of that branch of her cross-motion to dismiss the complaint insofar as asserted against her based upon lack of standing, and does not indicate that the issue of lack of standing is a purely legal one rather than one implicating questions of fact (*see JP Morgan Chase Bank v Johnson*, 129 AD3d 914).

Furthermore, a party does not carry his or her burden in moving for summary judgment by merely pointing to gaps in the opponent's proof, but must affirmatively demonstrate the merit of his or her claim or defense (*see Montemarano v Atlantic Exp. Transp. Group, Inc.*, 123 AD3d 675 [2d Dept 2014]; *Fotiou v Goodman*, 74 AD3d 1140 [2d Dept 2010]; *Vittorio v U–Haul Co.*, 52 AD3d 823 [2d Dept 2008]; *Velasquez v Gomez*, 44 AD3d 649, 650–651 [2d Dept 2007]). Defendant Yanez has not demonstrated, prima facie, that plaintiff was not the holder or assignee of the subject mortgage and the underlying note at the time this action was commenced. Accordingly, that branch of the cross-motion by defendant Yanez to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211(a)(3) based upon lack of standing is denied.

With respect to that branch of the motion pursuant to CPLR §3211(b) by plaintiff to

strike the affirmative defenses asserted by defendant Yanez in her answer, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2d Dept 2006]; *see Bank of New York v Penalver*, 125 AD3d 796 [2d Dept 2015]; *see Ramanathan v Aharon*, 109 AD3d 529, 531 [2d Dept 2013]). When reviewing a motion to dismiss an affirmative defense, the pleadings are liberally construed in favor of the party asserting the defense and that party is given the benefit of every reasonable inference (*see Bank of N.Y. v Penalver*, 125 AD3d 796; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]).

Plaintiff has failed to show the first affirmative defense asserted by defendant Yanez based upon lack of standing is without merit as a matter of law. Thus, that branch of the motion by plaintiff pursuant to CPLR §3211(b) to dismiss the first affirmative defense is denied.

That branch of the motion by plaintiff pursuant to CPLR §3211(b) to dismiss the second affirmative defense based upon the doctrine of unclean hands is granted. "The doctrine of unclean hands is used only to bar the grant of equitable relief to a party who is 'guilty of immoral, unconscionable conduct and even then only "when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (citations omitted)' (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]; *see Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1399 [4th Dept 2011]; *Columbo v Columbo*, 50 AD3d 617, 619 [2d Dept 2008])" (*Wells Fargo Bank v Hodge*, 92 AD3d 775 [2d Dept 2012]). Defendant Yanez has failed to allege or demonstrate plaintiff engaged in "immoral or unconscionable" conduct which was directly related to the subject note and mortgage or caused the default in payments thereunder to support the defense of unclean hands (*see Wells Fargo Bank v Hodge*, 92 AD3d 775 [2d Dept 2012]).

With respect to that branch of the motion by plaintiff pursuant to CPLR 3211(b) to dismiss the third and fourth affirmative defenses asserted by defendant Yanez based upon an alleged violation of the federal Truth in Lending Act (15 USC § 1641[f]) (the TILA), and the Home Ownership and Equity Protection Act of 1994 (15 USC § 1639) (the HOEPA), defendant Yanez alleges that Saxon, the originator of the mortgage loan, failed to disclose properly the loan's prepaid finance charges and additional mandatory disclosures under the TILA and the HOEPA. She also alleges that Saxon violated the HOEPA by extending credit to her based upon the value of her collateral and not on her ability to repay the mortgage loan.

Generally, the TILA and its implementing regulations, 12 CFR 226.1 *et seq.* (Regulation Z), require that a consumer in a closed-end credit transaction be provided written

material disclosures of certain terms relating to the subject transaction, including, among other things, the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule (*see* 15 USC § 1638). The HOEPA is an amendment to the TILA, which imposes additional truth-in-lending disclosure requirements when a borrower is involved in a "high cost" loan transaction (*see Palmer v GMAC Commercial Mortg.*, 628 F Supp 2d 186, 189 [D DC 2009]; *Bryant v Mortg. Capital Res. Corp.*, 197 F Supp 2d 1357, 1360 n 4 [ND Ga 2002]). Plaintiff offers a copy of the TILA disclosure statement dated January 18, 2006, executed by defendant Yanez, disclosing the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and other disclosures (*see* 12 CFR 226.23[a][3] n 48). Defendant Yanez has failed to raise any issue of fact as to whether these disclosures were inadequate or erroneous. By executing the TILA statement, defendant Yanez acknowledged receipt of a completed copy of such statement prior to consummation of the loan. Defendant Yanez, furthermore, has failed to allege that the subject mortgage loan is a type of high-cost mortgage loan within the meaning of 15 USC § 1602(bb)(1). That branch of the motion by plaintiff pursuant to CPLR §3211(b) to dismiss the third and fourth affirmative defenses asserted by defendant Yanez in her answer is thereafter granted.

The fifth affirmative defense asserted by defendant Yanez is based upon her claim that plaintiff has not "duly or properly recorded" the assignments and as such lacks standing to sue. The recording of an assignment is not a prerequisite to commencement of a foreclosure action (*see Bankers Trust Co. of California, N.A. v Sciarpelletti*, NYLJ, March 20, 2002, at 25, col 4 [Sup Ct, Westchester County, Lefkowitz, J.]; *see* Tax Law § 258). In any event, the assignment dated August 23, 2011 was recorded on September 6, 2011. Thus, that branch of the motion by plaintiff pursuant to CPLR 3211(b) to dismiss the fifth affirmative defense asserted by defendant Yanez in her answer is granted.

Defendant Yanez claims as a sixth affirmative defense in her answer that America's Servicing Company (ASC) is plaintiff's servicing agent with respect to the subject mortgage loan, and that it made various representations to her that she might be entitled to a repayment plan, loan modification, short sale or deed in lieu of foreclosure. Defendant Yanez alleges she relied upon such representations and applied for assistance, repeatedly gathering and submitting documentation at ASC's request. According to defendant Yanez, plaintiff, through ASC, acts in a manner which is "inequitable, oppressive, unjust, egregious, unconscionable and otherwise vexation" in dealing with her. These allegations are insufficient to support a defense based upon fraud or misrepresentation, or unconscionable conduct. That branch of the motion by plaintiff pursuant to CPLR 3211(b) to dismiss the sixth affirmative defense asserted by defendant Yanez in her answer is granted.

That branch of the cross-motion by defendant Yanez to compel plaintiff to toll the

accumulation of interest and fees on the subject mortgage loan from May 21, 2012 is denied. Although "[i]n an action of an equitable nature, the recovery of interest is within the court's discretion" (*Dayan v York*, 51 AD3d 964, 965 [2d Dept 2008]), the exercise of that discretion is governed by the particular facts in each case, including any wrongful conduct by either party (*see U.S. Bank Natl. Assn. v Williams*, 121 AD3d 1098 [2d Dept 2014]; *Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002]; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995], *lv to appeal dismissed* 87 NY2d 968 [1996]; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]). In this case, defendant Yanez has failed to prove plaintiff engaged in wrongful conduct, warranting forfeiture of interest simply by virtue of its claim of standing supported by submission of copies of two versions of the note and the pooling and servicing agreement. In addition, defendant Yanez has failed to demonstrate that plaintiff has assessed "late fees" for nonpayment of installments claimed to be due following the acceleration of the mortgage debt, in violation of the subject note and mortgage (*see generally Green Point Sav. Bank v Varana*, 236 AD2d 443 [2d Dept 1997]).

That branch of the cross motion by defendant Yanez for an award of reasonable attorneys' fees, costs and disbursements is denied (*see* Real Property Law § 282; *Berkshire Bank v Tedeschi*, No 11 Civ 767 [LEK/CFH], 2013 WL 1291851, at *14, 2013 US Dist LEXIS 43214 [ND NY March 27, 2013]) (*cf. Katz v Miller*, 120 AD3d 768 [2d Dept 2014]).

That branch of the motion by plaintiff for leave to enter a default judgment against the non-appearing defendants is denied at this juncture.

Dated:

DEC 2 1 2016

J.S.C.

FILED
JAN 13 2017
COUNTY CLERK
QUEENS COUNTY