SHORT FORM ORDER

COPY

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

INDEX NO.: 5796-2013

PRESENT:
Hon. DANIEL MARTIN

MOTION DATE: 2-16-16 (002)
3-16-16 (003)
ADJ. DATE: 4-19-16 (002, 003)
Mot. Seq. #: 002-MG
003-MD

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR J.P. MORGAN MORTGAGE ACQUISITION TRUST 2007-CH5, ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-CH5,

Plaintiff,

-against-

SUSAN FRANCIS, "JOHN DOE #1" to "JOHN OE #10", the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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PLAINTIFF'S ATTY:

PARKER IBRAHIM & BERG LLC
5 Penn Plaza, Suite 2371
New York, N. Y. 10001

DEFENDANT'S ATTY:

RONALD D. WEISS P.C.
734 Walt Whitman Road, Suite 203
Melville, N. Y. 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated January 27, 2016, and supporting papers; (2) Notice of Cross Motion by the defendant Susan Francis, dated March 9, 2016, and supporting papers; (3) Opposition and Reply by the plaintiff served on April 18, 2016, and supporting papers; (4) Other: Stipulation to Adjourn dated February 10, 2016; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (#002) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Susan Francis, striking her answer, and dismissing the affirmative defenses and counterclaims asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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; and (4) amending the caption is granted solely to the extent stated below, otherwise denied; and it is

ORDERED that the plaintiff is awarded partial summary judgment dismissing the second through nineteenth affirmative defenses and the six counterclaims asserted in the defendant Susan Francis' answer, all with prejudice; and it is

ORDERED that the caption is amended by substituting Donavon Hinds, George Francis, Sanjay Francis, Robert Williams and Vincent McAnuss for the fictitious "JOHN DOE #1-5" defendants, and by excising the fictitious "JOHN DOE #6-10" defendants; and it is

ORDERED that the plaintiff shall to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is

ORDERED that the cross motion (#003) by the defendant Susan Francis, for inter alia, an order granting leave to compel discovery, reschedule foreclosure conferences and denying plaintiff's summary judgment motion is denied in its entirety; and it is

ORDERED that the moving parties shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date herein, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 3 Heritage Lane, Wheatley Heights, New York 11798 ("the property"). On January 24, 2007, the defendant Susan Francis ("the defendant mortgagor") executed an adjustable-rate note in favor of JPMorgan Chase Bank ("the lender") in the principal sum of $480,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated January 24, 2007 on the property. The mortgage was recorded on June 6, 2007.

By way of, inter alia, a series of endorsements with physical delivery, the note was allegedly transferred by the lender to Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH5, Certificates, Series 2007-CH5 ("the plaintiff"), prior to commencement. The transfer of the note to the plaintiff was memorialized by a written assignment executed on September 24, 2012, and subsequently duly recorded on November 20, 2012. The assignment specifies that it is together with "all beneficial interest" in the mortgage. Parenthetically, the defendant mortgagor acquired sole title to the property by indenture executed on January 24, 2007 by Alexander Trollinger and "Louisa Susan Ricketts now known as Susan Francis."

The defendant mortgagor allegedly defaulted on the mortgage, by failing to make the monthly payment of principal and interest due on or about August 1, 2008, and each month thereafter. Pursuant to a Trial Loan Modification Agreement "(Step One of a Two-Step Documentation Process)" ("the trial modification") effective December 1, 2009 and made between Chase Home Finance ("Chase") as lender or servicer and the defendant mortgagor as borrower, the loan payments were substantially reduced. Whereas the original note required initial monthly payments in the sum of approximately $3,545.20, the trial modification provides for, inter alia, monthly payments in the sum of approximately $3,109.61, due on or before December 1, 2009, January 1, 2010 and February 1, 2010. Thereafter, Chase determined that

the defendant mortgagor was not eligible for a Home Affordable Modification under the Home Affordable Modification Program ("HAMP"). Chase subsequently offered an in-house modification by way of letter dated June 10, 2010; however, the defendant allegedly never returned an executed copy of the Loan Modification Offer to it, and, as a result, the offer was rescinded.

After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced this action by the filing of the lis pendens, summons and complaint on February 27, 2013. Issue was joined by the interposition of the defendant mortgagor's answer dated March 26, 2013. The defendant mortgagor then moved (#001) for leave to amend her answer, but the same was resolved by stipulation dated April 25, 2015, and subsequently denied as withdrawn by long form order dated May 13, 2015 (Martin, J.).

Thereafter, the defendant mortgagor interposed an amended verified answer dated February 25, 2015. By her amended answer, the defendant mortgagor denies all of the allegations in the complaint, and asserts eighteen affirmative defenses, alleging, among other things, fraud and misrepresentation in the loan origination and servicing as well as violations of the Fair Debt Collection Practices Act ("FDCPA") (15 USC § 1692), the Real Estate Settlement Procedures Act ("RESPA") (12 USC § 2601, *et seq.*), and the Truth in Lending Act ("TILA") (15 USC § 1601, *et seq*). The defendant mortgagor also asserts six counterclaims alleging, inter alia, violations of the provisions of the FDCPA and the General Business Law § 349 (a) as well as bad faith in the negotiation of the modification agreement and/or another modification.

By her counterclaims, the defendant mortgagor ostensibly demands, among other things, damages, attorneys' fees, costs and disbursements. In response, the plaintiff interposed a verified reply dated July 10, 2015 denying the material allegations in the contained in counterclaims, and asserting eleven affirmative defenses, alleging inter alia, the failure to: state a cause of action and mitigate damages; the statute of limitations and laches; waiver, estoppel and/or unclean hands; an accord and satisfaction; an offset; and frivolous claims without reasonable basis in law or equity.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor, striking her answer and dismissing the affirmative defenses and the counterclaims asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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; and (4) amending the caption.

In support of the motion, the plaintiff submitted, inter alia, the pleadings; the endorsed note, the mortgage and the assignment; the trial modification; the affirmation from its counsel; the affidavit of amount due from Phonesay Say, a Vice President of the plaintiff; the affidavit of facts from Joseph G. Devine, another Vice President of the plaintiff; and the affidavit of mailing from Amir Cohkovic, an "MB Default Ops Specialist III" of the plaintiff.

The defendant mortgagor opposes the plaintiff's motion and cross moves for, inter alia, an order scheduling another foreclosure settlement conference and compelling the production of certain discovery. In opposition to the motion, the defendant mortgagor has submitted the affirmation of her counsel and her

own affidavit. In her opposing and moving papers, the defendant mortgagor reasserts her previously pleaded affirmative defenses and counterclaims, alleging the following: the plaintiff's lack of standing; the plaintiff/servicer's alleged bad faith in negotiating a potential loan modification; and predatory lending by the lender in the loan origination. In response to the cross motion, the plaintiff has filed opposition and reply papers.

Initially, to the extent that the defendant mortgagor's cross motion is procedurally defective to the extent that the moving papers submitted herein do not fully recite the grounds for the relief sought along with the specific provisions of the civil practice law and rules relating thereto (*see*, CPLR 2214 [a]). To the extent that the requested relief is supported by the affirmation of counsel and/or the affidavit from the defendant mortgagor, it has been considered.

Turning to the motion-in-chief, 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 Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington 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], quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the endorsed note with an endorsed allonge, the mortgage, the assignment and evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and

of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

Where, as here, an answer served includes the defense of standing, 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, *supra*). "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]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v Sullivan***, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], quoting ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911]).

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, *supra*). 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 demonstrated its standing by way of physical possession of the note prior to commencement (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). In his affidavit, Mr. Devine alleges that the endorsed note was in the lender's possession since March 9, 2007, a date being prior to

commencement, and that the lender has remained in continual possession of the note, directly or through its custodian, since that date. The documentary evidence submitted also includes, among other things, the note transferred via a series of endorsements (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]).

The plaintiff also demonstrated its standing by, inter alia, the submission of the written assignment of the mortgage and the note executed prior to commencement (*see*, ***U.S. Bank N.A. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In this case, the assignment, which was executed and recorded prior to commencement, includes a reference to "all beneficial interest" in the mortgage (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*). Such evidence demonstrates that the plaintiff holds and/or owns the original note and mortgage. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The court turns next to the issue of the plaintiff's compliance with the 90-day pre-foreclosure notice requirements of RPAPL § 1304. In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on or after January 14, 2010, the 90-day notice requirement set forth in the statute is applicable (*see*, RPAPL §1304; Laws 2008, ch 472, § 2, eff Sept 1, 2008, as amended by Laws 2009, ch 507, § 1-a, eff Jan 14, 2010). Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be

delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created 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" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

By its submissions, the plaintiff demonstrated compliance with the 90-day notice requirements of RPAPL 1304 (*see*, ***Zarabi v Movahedian***, 136 AD3d 895, 26 NYS3d 153 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]). In this case, compliance with the 90-day notice requirements of RPAPL § 1304 was demonstrated by submission of the affidavit of mailing from Amir Cohkovic, the affidavit of facts from Joseph G. Devine, and by the lender or servicer's business records detailing a standard of office practice or procedure designed to ensure that said items were properly addressed and mailed (*see*, ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*). Thus, a presumption of receipt arises (*see*, ***Viviane Etienne Med. Care v Country-Wide Ins. Co.***, 25 NY3d 498, 14 NYS3d 283 [2015]).

By her first affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, she has not cross moved to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has demonstrated that the complaint sets forth a valid cause of action for, among other things, foreclosure and sale. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see*, ***Old Williamsburg Candle Corp. v Seneca Ins. Co., Inc.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

The plaintiff demonstrated that it provided the required TILA and HUD-1 disclosures to the defendant mortgagor at the loan origination, both of which are executed and dated January 24, 2007 (*see*, ***HSBC Bank USA v Picarelli***, 36 Misc3d 1218 [A], 959 NYS2d 89, *affd on other grounds by* 110 AD3d 1031, 974 NYS2d 90 [2d Dept 2013] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]). Parenthetically, the defendant mortgagor's signature placed on the HUD-1 Acknowledgment is a representation by her that "[she] reviewed the HUD-1 Settlement Statement and that the creditors listed and the amounts to be paid in connection with the loan transaction are correct." The TILA statement also contains a representation by the defendant mortgagor

that "[she] hereby acknowledge[s] reading and receiving a complete copy of this disclosure." Furthermore, the notice of right to cancel dated and executed on January 24, 2007 contains an acknowledgment of receipt of two copies of said notice and one copy of the TILA.

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., N.A. 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*, ***Gillman v Chase Manhattan Bank, N. A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [an alleged violation of TILA does not constitute an affirmative defense to a defendant's default in payment]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]; ***Deutsche Bank Natl. Trust Co. v Campbell***, 26 Misc3d 1206 [A], 906 NYS2d 779, 2009 NY Slip Op 526780 [U] [Sup Ct, Kings County 2009] [a disclosure violation of the Real Estate Settlement Procedures Act, 12 USC § 2601, *et seq.*, does not constitute a valid defense to a mortgage foreclosure]).

Further, a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan (***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]), and "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*see*, ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]). Moreover, non-parties to a lender's pooling and servicing agreement lack standing to assert noncompliance therewith (*see*, ***Bank of Am. N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Bank of N.Y. Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; *see also*, ***Griffin v DaVinci Dev., LLC***, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 2007] [those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract]).

Turning to the counterclaims, the essential elements of a cause of action for fraud are "representation of a material existing fact, falsity, scienter, deception, and injury" (***Channel Master Corp. v Aluminum Ltd. Sales, Inc.***, 4 NY2d 403, 407, 176 NYS2d 259 [1958]). A party that has fraudulently induced another to enter into a contract may be liable in tort for damages (*see*, ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Sabo v Delman***, 3 NY2d 155, 164 NYS2d 714 [1957]). To establish a cause of action for fraudulent inducement in conjunction with the action for breach of contract, the plaintiff must show that defendant breached a duty distinct from his contractual

duties, not simply that he failed to fulfill promises of future acts (*see*, ***Weitz v Smith***, 231 AD2d 518, 647 NYS2d 236 [2d Dept 1996]). Thus, a plaintiff must present proof that (1) the defendant made material representations that were false; (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff; (3) the plaintiff justifiably relied on the defendant's representations; and (4) the plaintiff was injured as a result of the defendant's representations (***Channel Master Corp. v Aluminum Ltd. Sales, Inc.***, 4 NY2d 403, *supra* at 407; ***113-14 Owners Corp. v Gertz***, 123 AD2d 850, 851, 507 NYS2d 464 [2d Dept 1986]). Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016 (b) (***Black v Chittenden***, 69 NY2d 665, 668, 511 NYS2d 833 [1986]; ***Priolo Communications v MCI Telecom. Corp.***, 248 AD2d 453, 454, 669 NYS2d 376 [2d Dept 1998]).

A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance, and damages, an allegation that the defendant had a duty to disclose material information and that it failed to do so (***High Tides, LLC v DeMichele***, 88 AD3d 954, 957, 931 NYS2d 377 [2d Dept 2011]). "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the element of scienter upon the part of the defendant, his [or her] knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his [or her] confidence in the defendant and therefore to relax the care and vigilance he [or she] would ordinarily exercise in the circumstances" (***Brown v Lockwood***, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]).

Where a cause of action is based on a misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; *see*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]). To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (***Paramount Film Distrib. Corp. v State of New York***, 30 NY2d 415, 421, 334 NYS2d 388 [1972]). Further, a person may be deemed to be unjustly enriched if she has received a benefit, the retention of which would be unjust based upon the circumstances surrounding the transfer of property and the relationship of the parties (***Sharp v Kosmalski***, 40 NY2d 119, 122, 386 NYS2d 72, 75 [1976]).

To the extent that the defendant mortgagor alleges fraud in the inducement, generally, a representation by a lender that a borrower can afford to repay a prospective loan is an expression of opinion of present or future expectations, which is not actionable and cannot form the basis for a claim against the lender (*see*, ***Goldman v Strough Real Estate***, 2 AD3d 677, 770 NYS2d 94 [2d Dept 2003]; ***Crossland Sav., F.S.B. v SOI Dev. Corp.***, 166 AD2d 495, 560 NYS2d 782 [2d Dept 1990]). Furthermore, the legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors (*see*, ***Standard Fed. Bank v Healy***, 7 AD3d 610, 777 NYS2d 499 [2d Dept 2004]; *see also*, ***Walts v First Union Mtge. Corp.***, 259 AD2d 322, 686 NYS2d 428 [1st Dept 1999]).

To the extent that the defendant mortgagor's counterclaims sound in fraud and misrepresentation, the same lack merit as a matter of law because she failed to allege that the plaintiff or the lender owed her

a fiduciary duty with respect to her future ability to afford the mortgage (*see generally*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, *supra*; ***Schwatka v Super Millwork, Inc.***, 106 AD3d 897, 965 NYS2d 547 [2d Dept 2013]; ***Levin v Kitsis***, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]). Additionally, the defendant mortgagor's general factual assertions do not satisfy the pleading requirements of fraud (*see*, ***Abdourahamane v Public Stor. Institutional Fund***, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014]; ***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; ***Jones v OTN Enter., Inc.***, 84 AD3d 1027, 922 NYS2d 810 [2d Dept 2011]; ***High Tides, LLC v DeMichele***, 88 AD3d 954, *supra*). In any event, to the degree that the counterclaims are based upon fraud and misrepresentation, they are untimely (*see*, CPLR 213 [8]; ***Williams-Guillaume v Bank of Am., N.A.***, 130 AD3d 1016, 14 NYS3d 466 [2d Dept 2015]; ***Pike v New York Life Ins. Co.***, 72 AD3d 1043, 901 NYS2d 76 [2d Dept 2010] ***Ricca v Valenti***, 24 AD3d 647, 807, NYS2d 123 [2d Dept 2005]).

With respect to the defendant mortgagor's affirmative defense and counterclaim asserting violations of the FDCPA, the plaintiff established, prima facie, that the FDCPA does not apply to it inasmuch as it acquired the right to service the defendant's loan prior to his default (*see*, ***JPMorgan Chase Bank, N.A v Mantle***, 134 AD3d 903, 23 NYS3d 258 [2d Dept 2015]). Under the FDCPA an entity cannot be a debt collector unless the debt it attempts to collect is in default (***Alibrandi v Fin. Outsourcing Servs.***, 333 F3d 82, 88 [2d Cir. 2003]). Also, prevailing authority holds that the FDCPA does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or a note (***United Cos. Lending Corp. v Candela***, 292 AD2d 800, 801-802, 740 NYS2d 543 [4th Dept 2002]).

To the extent that the defendant mortgagor alleges that the lender extended an unaffordable loan to her, "the fact that the [defendant mortgagor] sought and received a loan [she] could not afford does not mean that [she] can now proceed on a Section 349 claim against the party that made [her] mistake possible (*see*, ***Hayrioglu v Granite Capital Funding, LLC***, 794 FSupp2d 405, 413 [US Dist Ct, ED NY 2011]). Moreover, a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan (***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]).

The plaintiff also demonstrated that the terms of the subject mortgage loan were fully set forth in the loan documents, and that no deceptive act or practice occurred in this case (*see*, ***Disa Realty, Inc. v Rao***, 137 AD3d 740, 25 NYS3d 677 [2d Dept 2016]; ***Shovak v Long Is. Commercial Bank***, 50 AD3d 1118, 858 NYS2d 660 [2d Dept 2008]). Moreover, the defendant mortgagor cannot claim to have been misled by an inaccurate statement of income in the subject loan application because she was aware of her own income (*see*, ***Deutsche Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]).

The fifth counterclaim, which recites certain provisions of GBL § 349, fails to state a cause of action because, among other things, there are no allegations of improper actions by the lender that had a "broad impact on consumers at large" (***Golden Eagle Capital Corp. v Paramount Mgmt. Corp.***, 88 AD3d 646, 931 NYS2d 632 [2d Dept 2011]). In any event, to the extent that the fifth counterclaim is based upon violations of GBL § 349, which carry a statute of limitations of less than six years, the same is also time-barred (*see*, 28 USC § 1658 [b]; CPLR 214 [2]; ***Gaidon v Guardian Life Ins. Co. of Am.***, 96 NY2d 201, 727 NYS2d 30 [2001]; ***Williams-Guillaume v Bank of Am., N.A.***, 130 AD3d 1016, *supra*).

To the extent that any of the counterclaims are based upon alleged violations of RESPA, the same are untimely because any claims under that damages under that statute must be brought within one year of the claimed statutory violation (*see*, 12 USC § 2614; ***Moll v US Life Title Ins. Co.***, 654 F Supp 1012 [SDNY 1987]). Notably, "[t]o have a viable cause of action under RESPA . . . individuals must show not only the failure to comply with the provisions of Section 2605, but also actual damages to the borrower as a result of the failure, as set forth in 2605(f)(1)(A), as well as any additional damages that the court may allow in the case of a pattern or practice of noncompliance with the requirements of Section 2605, in an amount not to exceed 1,000 dollars" (***Midouin v Downey Sav. & Loan Assoc., F.A.***, 834 F Supp 2d 95, 112 (EDNY 2011) [internal quotation marks and citations omitted]). Further, dismissal of a claim under 12 USC § 2605 is appropriate where the complaint "merely prays for relief without specifying the injury [plaintiff] suffered" (***Midouin v Downey Sav. & Loan Assoc., F.A.***, 834 F Supp 2d 95, 112 (EDNY 2011) [internal quotation marks and citations omitted]).

To the extent that the affirmative defenses and the counterclaims are based upon an alleged violations of the FDCPA, such lack merit. The defendant mortgagor makes no claim that the plaintiff wrongfully reported negative information to a credit reporting bureau at a time when the plaintiff had failed to provide her, despite a demand, with a detailed breakdown of the exact amount owed to the plaintiff (15 USC § 1692a [6]). In this case, the defendant mortgagor also makes no allegation that the plaintiff "in the process of collecting [its] own debts, used any name other than [its] own which would indicate that a third person [was] collecting or attempting to collect such debts" (15 USC § 1692a [6]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses or the counterclaims asserted in the answer, except those noted above. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses and the counterclaims asserted in the answer in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the unsupported affirmative defenses and the counterclaims asserted in the answer are thus dismissed.

In her affidavit, the defendant mortgagor alleges that she was given three foreclosure conferences, but that this matter was released from the foreclosure conference part. The defendant made several attempts to apply for a modification and made three payments of approximately $3,109.61, for months of December 2009, January 2010 and February 2010. According to the defendant mortgagor, she was denied a modification because she deposited a substantial amount of funds into her bank account that were controlled by her as executor of her uncle's estate, but which she did not inherit. She further alleges that she signed and returned a copy of the proposed permanent modification application. The defendant mortgagor requests an opportunity for another modification to save her home.

The plaintiff demonstrated its standing, as indicated above. The court finds that none of the defendant mortgagor's assertions give rise to a question of fact as to the plaintiff's standing (*see*, ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]; ***Peak Fin. Partners, Inc. v Brook***, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; ***Bankers Trust Co. v Hoovis***, 263 AD2d 937, 694 NYS2d 245 [3d Dept 1999] *cf.*, ***Countrywide Home Loans, Inc. v Gress***, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]).

Even if the plaintiff presently lacked standing, the validity of the mortgage itself would not be thereby vitiated (*see*, ***Homar v American Home Mtge. Acceptance, Inc.***, 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]). Moreover, the absence of standing on the part of a plaintiff is not an actionable wrong (*see*, ***U.S. Bank, NA v Reed***, 38 Misc3d 1206 [A], 2013 NY Misc LEXIS 6, 2013 WL 49817, 2013 NY Slip Op 50004 [U] [Sup Ct, Suffolk County 2013, slip op, at 5]; *see also*, ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]). In any event, the documentary evidence submitted by the plaintiff conclusively establishes the validity of the subject mortgage and note (*see*, ***Jahan v U.S. Bank Natl. Assn.***, 127 AD3d 926, 9 NYS3d 65 [2d Dept 2015]; ***Acocella v Bank of N.Y. Mellon***, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]).

Moreover, the defendant mortgagor's speculation and conclusory contentions questioning the intent of the parties to the assignments, which appear aimed at obscuring the issue of nonpayment, are also without merit (*see*, ***Finance v Abundant Life Church, U.P.C., Inc.***, 122 AD3d 918, 998 NYS2d 387 [2d Dept 2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]). The defendant mortgagor, therefore, failed to establish the merit of the standing defenses in the answer. Accordingly, all of the affirmative defenses asserting the lack of standing and/or capacity to sue as well as an improper assignment of the mortgage are dismissed.

To the extent that the defendant mortgagor alleges in her opposing or moving papers that the lender committed violations of the provisions of 6-l or 6-m of the Banking Law, any potential affirmative defenses based upon these grounds were waived because such were not specifically asserted in the answer (*see*, CPLR 3013; 3018). In any event, to the extent the defendant mortgagor asserts that the plaintiff violated Banking Law § 6-1, she has failed to demonstrate that the mortgage loan was a "high-cost" home loan, as the term was defined in this section as of the date of origination (*see*, Banking Law § 6-l [1] [d]; former Banking Law § 6-l [e] [i] [L 2002, ch 626, § 1, eff. April 1, 2003]). The protections against predatory lending found in the Home Equity Theft Prevention Act (HEPTA) (*see*, Real Property Law § 265-a) and Banking Law § 6-l are not applicable in this case. The $480,000 mortgage was executed on January 27, 2007, before the February 2007 effective date of the Home Equity Theft Prevention Act, and the amount of the loan exceeded the then applicable $300,000 monetary limit of Banking Law § 6-l (*see*, ***Endeavor Funding Corp. v Allen***, 102 AD3d 593, 958 NYS2d 300 [1st Dept 2013]). Prior to the amendment (effective October 14, 2007 [L 2007, ch 552, § 2]) to former Banking Law § 6-l (e) (i) (L 2007, ch 552, § 1), mortgage loans in principal amounts exceeding $300,000.00 were not covered by the statute (*see*, L 2002, ch 626, § 4; Banking Law § 6-1; ***Lewis v Wells Fargo Bank, N.A.***, 134 AD3d 777, 22 NYS3d 461 [2d Dept 2015]; ***Endeavor Funding Corp. v Allen***, 102 AD3d 593, *supra*; ***Community Preserv. Corp. v Sahara Realty Dev., LLC***, 2011 NY Misc LEXIS 734, 2011 WL 766384, 2011 NY Slip Op 30437 [U] [Sup Ct, Suffolk County 2011]; ***Sebrow v Fairmont Funding, LTD.***, 2011 NY Misc LEXIS 5997, 2011 WL 6738763, 2011 NY Slip Op 33271 [U] [Sup Ct, Queens County 2011]; ***Alliance Mtge. Banking Corp. v Dobkin***, 19 Misc 3d 1121 [A], 862 NYS2d 812 [Sup Ct, Nassau County 2008]). Moreover, section 6-m of the Banking Law was not enacted until August 5, 2008, and it only applies to loans consummated on or after September 1, 2008 (*see*, Laws of 2008, Ch. 472, § 28 [c], eff. Sep. 1, 2008]). In response, the defendant mortgagor failed to raise a triable issue of fact. Accordingly, the ninth affirmative defense is dismissed.

To the extent that the eleventh affirmative defense is based upon an alleged TILA violation, the defendant mortgagor admitted in the answer that a TILA statement was given to her, but that "[she] never reviewed the [TILA] statement at the closing with anyone who could explain to [her] the nature and amount of their [sic] future payments" (Answer ¶¶ 62) (*see*, ***HSBC Bank USA v Picarelli***, 36 Misc3d 1218 [A], *supra*). In any event, the defendant mortgagor failed to come forward with any proof to show that any material written representations or disclosure made to her were in conflict with the terms of the note and mortgage (*see*, ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; ***U.S. Bank N.A. v Pia***, 73 AD3d 752, 901 NYS2d 104 [2d Dept 2010]). Accordingly, the eleventh affirmative defense is dismissed.

With respect to the sixth counterclaim for reasonable attorneys' fees, RPL§ 282 provides that mortgage agreements affecting residential real property, which allow a prevailing lender to recover attorneys' fees and/or expenses in a foreclosure proceeding, read reciprocally allows a prevailing borrower to recover attorneys' fees and/or expenses in an action to enforce a mortgagee's covenant or agreement, or upon prevailing in a defense or counterclaim in an action commenced by the mortgagee against the mortgagor (*see*, RPL § 282; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]). The subject property is residential, but the defendant mortgagor makes no claim that plaintiff failed to perform any covenant or agreement on its part to be performed under the mortgage. In any event, the sixth counterclaim is not cognizable as pleaded (*see*, CPLR 3013; 3018). Therefore, the sixth counterclaim is dismissed.

To the extent that defendant mortgagor moves for discovery and/or dismissal of the complaint on the grounds that the plaintiff failed to negotiate with her in good faith pursuant to CPLR 3408, the same is denied because a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see*, ***Bank of Am., N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). The mere fact that the plaintiff refused to consider a reduction in principal or interest rate, does not establish that it was not negotiating in good faith (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638). Further, "[n]othing in CPLR 3408 requires [the] plaintiff to make the exact offer desired by [the] defendant[] [mortgagor], and [the] plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638).

In any event, the court finds that the totality of the circumstances in this case, do not support a finding that the plaintiff failed to negotiate in good faith (*see*, ***Deutsche Bank Natl. Trust Co. v Twersky***, 135 AD3d 895, 24 NYS2d 193 [2d Dept 2016]; ***US Bank, N.A. v Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *see also*, ***BAC Home Loans Servicing, LP v Mostafa***, 2013 NY Misc LEXIS 5988, 2013 WL 6846509, 2013 NY Slip Op 33199 [U] [Sup Ct, Queens County 2013, slip op, at 9] [holding that HAMP only requires participating servicers to consider eligible loans for modification but does not require servicers to modify eligible loans]; ***JP Morgan Chase Bank, N.A. v Ilardo***, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct 2012] [holding that HAMP does not create an entitlement to modification]).

The defendant mortgagor's request for an order restoring this action to this court's mortgage

foreclosure part for an additional settlement conference is denied because it is without merit (*see*, ***JPMorgan Chase Bank, N.A v Mantle***, 134 AD3d 903, *supra*). According to the court's records, a settlement conference was conducted or adjourned before this court's specialized mortgage foreclosure part on July 22, September 25 and December 2, 2014. A representative of the plaintiff attended and participated in the conferences. On the last date, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, there has been compliance with CPLR 3408, and no further conference is required under any statute, law or rule. In any event, the defendant mortgagor failed to establish that she has a genuine interest in negotiating a trial loan modification (*see*, ***JPMorgan Chase Bank, N.A v Mantle***, 134 AD3d 903, *supra*; ***Nationstar Mtge., LLC v Saintval***, 2016 NY Misc LEXIS 3657, 2016 WL 6081860, 2016 NY Slip Op 31881 [U] [Sup Ct, Suffolk County 2016]).

Additionally, the defendant mortgagor otherwise failed to demonstrate the merits of her request for a conference by submitting any evidence of a pending loan modification (*see*, ***Deutsche Bank Natl. Trust Co. v. Kent***, 2013 NY Misc LEXIS 4921, 2013 WL 5823056, 2013 NY Slip Op 32661 [U] [Sup Ct, Suffolk County 2013]). The defendant mortgagor's allegations that she was holding estate funds as a fiduciary, an admission that she improperly co-mingled estate funds (*see*, SCPA § 719; ***Matter of Flaum v Birnbaum***, 191 AD2d 227, 594 NYS2d 247 [1st Dept 1993]; ***Matter of Kaskawitz***, 25 Misc3d 1228 [A], 906 NYS2d 771 [Sup Ct, Westchester County 2009]), are insufficient to demonstrate that she was improperly denied a permanent loan modification. Further, even though the defendant mortgagor alleges that she sent the plaintiff's prior servicer an executed permanent modification agreement, an allegation which is vigorously refuted by the plaintiff's representative, she has failed to produce a copy of same. Moreover, the defendant mortgagor is not entitled to any other court conference for the purpose of having the plaintiff present the note, since the plaintiff has already provided a copy in accordance with CPLR 4518 (a).

Contrary to the defendant mortgagor's contentions, the instant motion for summary judgment made by the plaintiff imposed an automatic stay of discovery (*see*, CPLR 3214 [b]; ***Schiff v Sallah Law Firm, P.C.***, 128 AD3d 668, 7 NYS3d 587 [2d Dept 2015]). In any event, the defendant mortgagor failed to demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see*, CPLR 3212 [f]; ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; ***Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***JP Morgan Chase Bank v Agnello, N.A.***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Loancare, a Div. of FNF Servicing, Inc. v Fox***, 2015 NY Misc LEXIS 27, 2015 WL 162359, 2015 NY Slip Op 30005 [U] [Sup Ct, Suffolk County 2015]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (***Lee v T.F. DeMilo Corp.***, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]).

The branch of the defendant mortgagor's cross motion for an order, ostensibly, pursuant to CPLR 3124 compelling the production of certain discovery documents is denied because it is neither supported by an affirmation evidencing a good-faith effort made by counsel to resolve the issues raised therein (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]; ***Ponce v Miao Ling Liu***, 123 AD3d 787, 996

NYS2d 548 [2d Dept 2014]; ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]; ***Zorn v Bottino***, 18 AD3d 545, 794 NYS2d 659 [2d Dept 2005]), nor an order scheduling discovery. In any event, this branch of the defendant mortgagor's motion has been rendered academic by the above determination.

Even when considered in the light favorable to the defendant mortgagor, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, ***Retained Realty, Inc. v Syed***, 137 AD3d 1099, 26 NYS3d 889 [2d Dept 2016]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). The defendant mortgagor's moving and opposition papers are also insufficient to demonstrate any bona fide defenses or counterclaims (*see*, CPLR 3211 [e]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, *supra*; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The court has examined the defendant mortgagor's remaining contentions and finds that such lack merit.

Notably, the answering defendant did not deny having received the loan proceeds and having defaulted on the subject loan payments in an affidavit made by her (*see*, ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also*, ***Stern v Stern***, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). In any event, the affirmation of the defendant mortgagor's attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see*, ***Matter of Ziomek***, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; ***Barcov Holding Corp. v Bexin Realty Corp.***, 16 AD3d 282, 792 NYS2d 408 [1st Dept 2005]; *see also*, ***US Natl. Bank Assn. v Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

The plaintiff is therefore awarded partial summary judgment in its favor as indicated above (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*). Except for the first affirmative defense, wherein the defendant mortgagor asserts the failure to state of cause of action, the remaining affirmative defenses asserted in the answer are dismissed. All of the counterclaims are dismissed in their entirety. The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the instant motion for an order pursuant to CPLR 1024 amending the caption by Donavon Hinds, George Francis, Sanjay Francis, Robert Williams and Vincent McAnuss for the fictitious "JOHN DOE #1-5" defendants, and by excising the fictitious "JOHN DOE #6-10" is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the defendants Donavon Hinds, George Francis, Sanjay Francis, Robert Williams and Vincent McAnuss (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***U.S. Bank, N.A. v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d

647 [2d Dept 2011]). Accordingly, the default in answering of all of the non-answering defendants is fixed and determined.

Because the plaintiff has been awarded summary judgment against the defendant mortgagor and has established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

The proposed order of reference, as modified by the court, has been signed with this decision.

Dated: May 18, 2017
Riverhead, NY

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

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