JP Morgan Mtge. Acquisition Corp. v Olivieri
2017 NY Slip Op 31816(U)
July 18, 2017
Supreme Court, Suffolk County
Docket Number: 8056/2012
Judge: C. Randall Hinrichs
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 8056/2012

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: 3-21-16
Adjourned Date: 5-13-16
Motion Sequence Number: 001-MotD

JP MORGAN MORTGAGE ACQUISITION CORP.,

Plaintiff,

-against-

JAMES A. OLIVIERI A/K/A JAMES OLIVIERI A/K/A JAMES A. OLIVERI, MERS AS NOMINEE FOR RSB CITIZENS, N.A., RSB CITIZENS N.A., APPROVED OIL CO., ASSET ACCEPTANCE LLC, SUN BRITE POOL SERIES, INC., "JOHN DOE" #1-10 AND "JANE DOE" #1-10 the last names being fictitious and unknown to plaintiff the persons and parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest or lien upon the mortgaged premises.

Defendants.

DRUCKMAN LAW GROUP PLLC
Attorneys for Plaintiff
242 Drexel Avenue
Westbury, New York 11590

COOPER, PAROFF & COOK, LLP
Attorneys for Defendant Olivieri
80-02 Kew Gardens Rd, Ste. 300
Kew Gardens, New York 11415

Upon the following papers on this motion for summary judgment and an order of reference: proposed order of reference, affirmation of plaintiff's counsel Maria Sideris, Esq., dated February 22, 2016, with supporting exhibits A-F; affirmation in opposition of defendant's counsel Henry M. Graham, Esq., dated April 18, 2016, with supporting exhibits A-H; affirmation in reply of plaintiff's counsel Maria Sideris, Esq., dated May 5, 2016, with supporting exhibits; Stipulation of Adjournment dated March 18, 2016; and upon due consideration and deliberation; and now it is

ORDERED that this motion (#001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant James A. Olivieri, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent stated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that the caption is amended by substituting Ana Olivieri for the fictitious defendant "JANE DOE #1," and by discontinuing this action against the remaining fictitious defendants, "JOHN DOE #10" and "JANE DOE #2-10"; and it is

ORDERED that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------x

JP MORGAN MORTGAGE ACQUISITION CORP.,

Plaintiff,

Index Number:
8056-2012

-against-

JAMES A. OLIVIERI A/K/A JAMES OLIVIERI A/K/A JAMES A. OLIVERI, MERS AS NOMINEE FOR RSB CITIZENS, N.A., RSB CITIZENS N.A., APPROVED OIL CO., ASSET ACCEPTANCE LLC, SUN BRITE POOL SERIES, INC. and ANA OLIVIERI,

Defendants.

----------x

and it is

ORDERED that pursuant to CPLR 3211 (b) the first counterclaim and the cause of action, which is asserted in the second counterclaim, for an award of counsel fees relating to the defendant mortgagor's defense of the plaintiff's prior foreclosure action against him are dismissed, with prejudice; and it is

ORDERED that the plaintiff shall serve a copy of this order amending the caption and dismissing the first counterclaim and the cause of action, which is asserted in the second counterclaim, for an award of counsel fees relating to the prior foreclosure action upon the Calendar Clerk of this Court; and it is further

ORDERED that the plaintiff 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 it 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 8E Ram Pasture Road, Hampton Bays, New York 11946 ("the property"). On February 16, 2007, the defendant James A. Olivieri ("the defendant mortgagor") executed an interest-only, fixed-rate note in favor of Greenpoint Mortgage Funding, Inc. ("the lender") in the principal sum of $641,150.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated February 16, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was recorded on April 12, 2007.

By way of an undated, blank endorsement without recourse, the note was allegedly acquired by JP Morgan Mortgage Acquisition Corp. ("the plaintiff") prior to commencement, but on a date not disclosed to the court. Also, the alleged transfer of the note to the plaintiff was memorialized by an assignment of mortgage executed by a representative of MERS on June 9, 2009, and subsequently duly recorded on July 21, 2009. Thereafter, the note and mortgage were allegedly transferred by the plaintiff to Wilmington Trust, National Association, not in its individual capacity, but solely as Trustee for VM Trust Series 3, A Delaware Statutory Trust by way of, inter alia, an assignment of the mortgage and "all interest, all liens and any rights due or to become due thereof" executed on January 7, 2015. This assignment was subsequently duly recorded on January 21, 2016.

By way of background, after an alleged default in payment, EMC Mortgage Corporation ("EMC") on behalf of the plaintiff or another owner/holder and the defendant mortgagor entered into a repayment agreement ("the forbearance agreement") dated June 4, 2009. Pursuant to the forbearance agreement, the defendant mortgagor acknowledged total arrears in the sum of approximately $65,687.94, and a future balloon payment in the sum of $69,096.90 due on or about December 15, 2009. Further, pursuant to the forbearance agreement, the defendant mortgagor was to make an initial down payment of $6,000.00 on or before June 4, 2009 as well as subsequent payments in the sum of $3,165.72 on the 15th of each month beginning July 15, 2009 and ending December 15, 2009.

Notwithstanding the forbearance agreement, the plaintiff commenced a prior foreclosure action against the defendant mortgagor entitled, ***JP Morgan Mortgage Acquisition Corp. v Olivieri***, under Suffolk County Index Number 23136-2009 ("the prior action"), by the filing of a lis pendens, summons and complaint on or about June 12, 2009. Thereafter, the defendant mortgagor moved to dismiss the prior action on the ground that he was not properly served with process, and on the ground and that the prior action was "frivolous." The issues raised by that motion were subsequently resolved, however, by way of a written stipulation dated "December 18, 2009," whereby the defendant mortgagor and the plaintiff agreed to discontinue the prior action and all counterclaims. Pursuant to the stipulation, the defendant mortgagor's motion was denied as withdrawn by order dated December 16, 2009 (Jones Jr., J.).

The defendant mortgagor allegedly defaulted on the mortgage by failing to make the monthly payments due thereunder on or about December 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on March 13, 2012. Issue was joined by the interposition of the defendant mortgagor's answer dated May 14, 2012. The remaining defendants have not answered the complaint, and, thus, all are in default.

In the answer, the defendant mortgagor asserts two affirmative defenses, alleging, the lack of personal jurisdiction due to improper service of process upon him, and the plaintiff's failure to demonstrate a proper chain of title, deemed to be a defense based upon the alleged lack of standing. By his counterclaims, the defendant mortgagor asserts a claim for monetary damages and attorneys' fees because of the plaintiff's alleged failure to honor the forbearance agreement. In response to the counterclaims, the plaintiff interposed a reply dated August 30, 2012. In the reply, the plaintiff denies the material allegations in the counterclaims, and asserts eight affirmative defenses, including, inter alia, the failure to state a claim; waiver, estoppel and laches; and the failure to mitigate damages.

Thereafter, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or continued beginning on

November 30, 2012 and lasting until July 9, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program because the parties were unable to modify the loan or otherwise reach a settlement. Accordingly, there has been compliance with CPLR 3408; no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and the 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-in-chief, the plaintiff submitted, among other things, the endorsed note, mortgage, and assignments; the pleadings; an affirmation from counsel; an affidavit in support from Ilana Zion, a Foreclosure Litigation Specialist from New Penn Financial LLC doing business as Shellpoint Mortgage Serving ("Shellpoint"), the plaintiff's servicer; a 90-day pre-foreclosure notice from Acqura Loan Services dated "April 21, 2011," and addressed to the defendant mortgagor at the property.

In opposition to the motion, the defendant mortgagor submits, among other things, an affirmation of counsel, and his own affidavit, sworn to on November 4, 2009, which was submitted in support of his dismissal motion in the prior foreclosure action. The defendant mortgagor reasserts his previously pleaded first affirmative defense and his first counterclaim. The defendant mortgagor also requests that sanctions be imposed against the plaintiff. In response, the plaintiff submitted reply papers.

Pursuant to a stipulation dated March 18, 2016, the plaintiff and the defendant mortgagor agreed to adjourn these motions to May 13, 2016. Thereafter, this action was transferred from the inventory of the Honorable William B. Rebolini, J.S.C., to this IAS Part pursuant to Administrative Order No. 57-16 dated October 12, 2016 (Hinrichs, J.).

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]).

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 (***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]).

With respect to the first affirmative defense, the affidavit of service by the plaintiff's agent constituted prima facie evidence of proper service of the summons and complaint upon the defendant mortgagor pursuant to CPLR 308(2), and his mere allegations that he was "not properly served" is insufficient to rebut the presumption of proper service created by the affidavit (*see*, ***Carver Fed. Sav. Bank v Supplice***, 109 AD3d 572, 970 NYS2d 706 [2d Dept 2013]; ***ACT Props., LLC v Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). In any event, the first affirmative defense was waived because the defendant mortgagor failed to move to dismiss the complaint against him on this ground within 60 days after serving the answer (*see*, CPLR 3211 [e]; ***Generation Mtge. Co. v Medina***, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016]; ***Putnam County Sav. Bank v Mastrantone***, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]). Therefore, the first affirmative defense is dismissed.

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]).

The plaintiff failed to establish, prima facie, that it had standing because it did not demonstrate that the note was physically delivered to it prior to the commencement of this action (*see*, ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***US Bank N.A. v Faruque***, 120

AD3d 575, 991 NYS2d 630 [2d Dept 2014]). In her affidavit, Ms. Zion alleges, inter alia, that the proposed substitutee, "Wilmington Trust, directly or through an agent, has possession of the promissory note." She also alleges that the note is endorsed in blank and that "[p]laintiff is the assignee of the [m]ortgage." Ms. Zion further alleges, ostensibly referring to Wilmington, that [p]laintiff came into possession of the note on October 10, 2014." Ms. Zion, however, did not provide any factual details concerning when the plaintiff received physical possession of the note, and, thus, the plaintiff failed to establish that it had physical possession of the note prior to commencing this action (*see*, ***Bank of Am., N.A. v Paulsen***, 125 AD3d 909, 6 NYS3d 68 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]). Furthermore, even though Ms. Zion alleges, among other things, that her affidavit is based upon personal knowledge and that she reviewed "the books and records maintained by Shellpoint[] as well as those of the prior servicer in the ordinary course of business in servicing this loan[,]" she neither specified the exact business records upon which she relied in her affidavit; nor did she allege that she is familiar with the plaintiff's or the prior unnamed servicer's record keeping practices and procedures and, thus, she did not attempt to lay a foundation for their admissibility (*see*, CPLR 4518 [a]; ***Deutsche Bank Natl. Trust Co. v Brewton***, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; ***Aurora Loan Servs., LLC v Mercius***, 138 AD3d 650, 29 NYS3d 462 [2d Dept 2016]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]).

Additionally, the note submitted herein by the plaintiff contains an undated, blank endorsement, and if MERS was not the owner of the note, as it appears, it would have lacked the authority to assign the note to the plaintiff. Absent an effective transfer of the note, the assignment of the mortgage to the plaintiff would be a nullity (*see*, ***US Bank N.A. v Faruque***, 120 AD3d 575, *supra*).

The plaintiff also failed to demonstrate its prima facie case as to the alleged default in payment because Ms. Zion did not assert that she has personal knowledge of the defendant mortgagor's payment history since the time of the default (*see*, ***Citibank N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]). To the extent that the statements made by the plaintiff's representatives are based documents that were in the possession of the lender or another servicer prior to the alleged transfer of the note and the mortgage to the plaintiff, these records constituted hearsay (*see generally*, ***People v Goldstein***, 6 NY3d 119, 810 NYS2d 100 [2005]). The mere filing of papers received from other entities, "even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, because such papers simply are not made in the regular course of the recipient, who is in no position to provide the necessary foundation testimony" (***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 494, 495, 834 NYS2d 239 [2d Dept 2007] [internal quotation marks omitted]). Parenthetically, the court notes that a copy of an authenticated or recorded power of attorney from the plaintiff to the Shellpoint is not annexed to the plaintiff's moving papers.

Moreover, the plaintiff's submissions are insufficient to demonstrate evidentiary proof of proper service of the 90-day pre-foreclosure default notices upon the defendant mortgagor (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, *supra*). The plaintiff submitted neither affidavits of service of the 90-day notices upon the defendant mortgagor, nor affidavits from one with personal knowledge of the mailings (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

Under the facts presented, the statements set forth in the affidavit of Ms. Zion regarding the 90-day pre-foreclosure notices, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). Although Ms. Zion alleges that the subject notices were mailed to the defendant mortgagor, she did not set forth sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notices; nor did she identify the individuals who allegedly did so. Further, it is noted that Mr. Zion's affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 776 [2d Dept 2001]).

The court next turns to the counterclaims asserted in the answer. The plaintiff established that the first counterclaim for sanctions and/or monetary damages due to purported improper and/or frivolous actions by the plaintiff and/or its predecessors and/or its agents, by enforcing available remedies in the prior action is not cognizable (*see*, ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, ***Gottlieb v City of New York***, 2013 NY Misc. LEXIS 4407, 2013 WL 552202, 2013 NY Slip Op 32340 [U] [Sup Ct, Queens County 2013], *affd* 129 AD3d 724, 10 NYS3d 542 [2d Dept 2015]; ***Dickman v Verizon Commc'ns, Inc.***, 876 FSupp2d 166 [US Dist Ct, ED NY 2012]). Furthermore, even if the plaintiff improperly commenced the prior action shortly after the execution of the forbearance agreement and the partial payment of some arrears, the prior action was eventually discontinued on the consent of the defendant mortgagor (*see*, ***Black v White & Case***, 280 AD2d 407, 721 NYS2d 44 [1st Dept 2001] [the doctrine of judicial estoppel prevents a defendant from taking an inconsistent position which defendant had taken in another action]). In any event, the defendant mortgagor received the benefit of five scheduled settlement conferences in this action, and he never moved for a bad faith hearing while the conferences were pending. Under these circumstances, the defendant mortgagor is thus barred by the application of the doctrine of laches from pursuing his first counterclaim (*see generally*, ***Chase Manhattan Mtge. Corp. v Anatian***, 22 AD3d 625, 802 NYS2d 743 [2d Dept 2005]). Accordingly, the defendant mortgagor's first counterclaim is dismissed in its entirety.

To the extent that the defendant mortgagor demands an award of reasonable attorneys' fees in the successful defense of this action, the second counterclaim states a cause of action (*see*, RPL § 282; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]); however, the portion of the second counterclaim for attorneys' fees incurred by the defendant mortgagor in the prior foreclosure action is dismissed in light the stipulation whereby the defendant mortgagor consented to a discontinuance of the prior action and all counterclaims.

The court notes that the defendant mortgagor's affidavit in opposition includes a request for sanctions. Because the affirmative relief sought in the opposing papers was not made pursuant to a proper cross motion under CPLR 2215, the same is denied as procedurally deficient (*see*, ***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]). In any event, the evidence in the record for this case does not warrant the imposition of sanctions against the plaintiff (*see*, ***JP Morgan Chase Bank, N.A. v Butler***, 129 AD3d 777, 12 NYS3d 145 [2d Dept 2015]). Moreover, as noted above, the defendant mortgagor may not request sanctions for the plaintiff's alleged improper actions in the prior action.

The plaintiff is therefore awarded partial summary judgment in its favor as indicated above. The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the instant motion for an order amending the caption by substituting Ana Olivieri for the fictitious defendant "JANE DOE #1," and by discontinuing this action against the remaining fictitious defendants, "JOHN DOE #10" and "JANE DOE #2-10" 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.

In view of the foregoing, and pursuant to CPLR 3212 (g), the court finds that the sole remaining issues of fact relate to the plaintiff's standing, the payment history for the subject loan and proof of proper service of the 90-day notice pursuant to RPAPL § 1304. Therefore, the branch of the plaintiff's motion for an order striking the second affirmative defense is denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein. The remainder of the ancillary relief in the moving papers is denied without prejudice at this juncture, with leave to renew within 120 days of the date herein.

Accordingly, the plaintiff's motion is determined as indicated above, and the proposed order submitted by the plaintiff has been marked "not signed."

DATED: July 18, 2017

C. Randall Hinrichs

Hon. C. RANDALL HINRICHS
J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION