Citimortgage, Inc. v Bedrossian
2017 NY Slip Op 32697(U)
March 21, 2017
Supreme Court, Suffolk County
Docket Number: 69168/14
Judge: Thomas F. Whelan

MEMO DECISION & ORDER

ORIGINAL

INDEX No. 69168/14

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/20/15
SUBMIT DATE 3/3/17
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD
Mot. Seq. # 003 - MD
CDISP Y____ N X__

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CITIMORTGAGE, INC.,

Plaintiff,

-against-

ROBERT BEDROSSIAN and "JOHN DOE" and/or "JANE DOE" #1-10, inclusive, the last ten names being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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ACKERMAN, LLP
Attys. For Plaintiff
666 Fifth Ave.
New York, NY 10103

GENEVIEVE LANE LOPRESTI
Atty. For Defendant Bedrossian
3958 Merrick Rd.
Seaford, NY 11783

Upon the following papers numbered 1 to 22 read on this motion for summary judgment and appoint referee, among other things, cross motion for default judgment and motion to extend time to reply ; Notices of Motion/Order to Show Cause and supporting papers 1-3; 9-10 ; Notice of Cross Motion and supporting papers: 4-8 ; Opposing papers: 11/14; 15-16 ; Reply papers 17; 18 ; Other 19 (memorandum); 20 (memorandum); 21-22 (memorandum) ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the plaintiff for, among other things, summary judgment, caption amendment and the appointment of a referee to compute, is granted in its entirety, and it is further

ORDERED that the cross motion (#002) by defendant, Robert Bedrossian, for, among other things, a judgment of default on the counterclaims in the amended answer pursuant to CPLR 3215, is denied in its entirety, and it is further

ORDERED that the separate motion (#003) by the plaintiff for, among other things, an extension of its time to reply to the counterclaims pursuant to CPLR 2004, is denied as academic and unnecessary, and it is further

ORDERED that the proposed Order submitted by the plaintiff, as modified, is signed simultaneously herewith; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

This foreclosure action was commenced by filing on October 30, 2014. The matter was reassigned to this Part pursuant to Administrative Order No. 27-17, dated February 28, 2017 and submitted for decision on March 3, 2017. In essence, on August 10, 2007, defendant, Robert Bedrossian, borrowed $194,200.00 from the plaintiff's predecessor-in-interest and executed a promissory note and mortgage. On November 26, 2013, the defendant borrowed an additional $2,659.86 from plaintiff's related entity and executed a note and mortgage for said sum. Additionally, on that same date, defendant consolidated the two mortgages through a consolidation, extension and modification agreement (CEMA) with a new principal balance in the amount of $180,931.00. Since April 1, 2014, the defendant has failed to pay the monthly installments due and owing. Only the defendant, Robert Bedrossian, has answered this action. In his answer, defendant alleged eighteen affirmative defenses and five counterclaims. Plaintiff timely filed and served a reply to the counterclaims.

However, an issue has arisen as to defendant's claim that he served an amended answer with eight additional counterclaims. Such has lead to additional motion practice. The Court will address these additional motions first, since their outcome may undermine the initial moving papers. Defendant, Robert Bedrossian, has cross moved (#002) for a judgment of default on the counterclaims in the amended answer pursuant to CPLR 3215, which he claims was timely amended. Plaintiff has opposed that motion and moved separately (#003) to extend its time to reply to the counterclaims pursuant to CPLR 2004, if necessary.

The summons and complaint were filed October 30, 2014 as NYSCEF Doc. No. 1.[1] Defendant mailed its answer with five counterclaims, dated December 12, 2014, which was received by plaintiff's prior counsel on December 17, 2014. Plaintiff's current counsel filed the verified reply to counterclaims dated January 12, 2015, the same date, as NYSCEF Doc. No. 15. Pursuant to

[1] The Court may take judicial notice of the electronic Court records of NYSCEF (*see* ***Perez v New York City Hous. Auth.***, 47 AD3d 505, 850 NYS2d 75 [1st Dept 2008]).

CPLR 3025(a), defendant could amend his answer "once without leave of court ... within twenty days after service of a pleading responding to it." Therefore, defendant had until February 1, 2015 to do so. Plaintiff demonstrates that although an amended verified answer with eight additional counterclaims was dated January 31, 2015, it was not received by plaintiff's counsel until February 25, 2015. Nor was it or an affidavit of service timely filed. The Court agrees with plaintiff that the untimely amended answer with additional counterclaims is a nullity.

This is an e-filed case. Pursuant to CPLR 2103(b)(7), service of papers shall be made upon a party's attorney "by transmitting the papers to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule and, unless such rule shall otherwise provide, such transmission shall be upon the party's written consent..." The court system has created the New York State Courts Electronic Filing System (NYSCEF) for the email filing of papers in authorized actions.

Ever since March 31, 2014, pursuant to Administrative Order of the Chief Administrator of the Courts (*see* AO64/14, March 25, 2014) and every subsequent administrative order thereafter, Suffolk County has required the mandatory electronic filing of all papers in foreclosure actions. The mandatory electronic filing program in foreclosure actions in Suffolk County is governed by 22NYCRR §202-bb. The filing and service of all documents in an action that has been commenced electronically shall be by electronic means (*see* 22NYCRR §202.5-bb[a][1]; 22NYCRR §202.5-bb[c][1]). Here, the record reveals that the amended answer with additional counterclaims was not filed until April 27, 2015 as NYSCEF Doc. No. 22. Such a filing is untimely pursuant to CPLR 3025(a).

Even if defendant seeks to argue that 22NYCRR §202.5-b(f)(2)(ii) may be applicable, which it is not since that involves the consent program that does not exist in Suffolk County (*see* 22NYCRR §202.5-b[b]), and that other CPLR service methods are available, that provision still requires "that proof of that service shall be filed electronically." Moreover, pursuant to 22NYCRR §202.5-b(d)(4), "[w]here a document has been filed electronically pursuant to this section, the official record shall be the electronic recording of the document stored by the County Clerk." Here, the amended answer with additional counterclaims was not timely filed and affidavit of service has never been filed.

In ant event, the affidavit of service which has finally been provided is more than suspect since it is dated March 6, 2015, more than a month after the claimed service by mail. Even more incredible, in her affirmation of July 3, 2016, defendant's counsel attaches a claimed affidavit of service for the amended answer with counterclaims that is now dated February 2, 2015, but a review of same shows that it claims to serve a "verified amended complaint." In the sworn July 3, 2016 affirmation, counsel claims she only recently was able to utilize the e-filing system (*see* par. 7) but she did file the amended answer on April 27, 2015, more than a year earlier.

Since the amended answer with the additional counterclaims violated the mandatory e-filing rules established by the Chief Administrator of the Courts, as authorized by the State Legislature in

CPLR 2103(b)(7), the document is deemed untimely and a nullity. Additionally, mail service not received by plaintiff's counsel until February 25, 2015 further demonstrates untimely service, even under the pre-mandatory e-filing service system.

Moreover, even on the merits, the Court agrees that defendant's motion is untimely since proceedings to seek a default were not commenced within one year, pursuant to CPLR § 3215(c). Defendant claims that mail service occurred on February 1, 2015 and that a Reply was due on February 21, 2015. However, defendant did not seek a default until the instant cross motion was filed on March 8, 2016 as NYSCEF Doc. No. 52. Therefore, even on the merits, the defendant's application must be denied. The Appellate Division, Second Department has instructed that in cases wherein no motion is interposed within the one year time limitation period, avoidance of a dismissal of the pleading as abandoned requires the party to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and must demonstrate a potentially meritorious cause of action (*see* ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 308, 926 NYS2d 546 [2d Dept 2011]; *see also* ***Kohn v Tri-State Hardwoods, Ltd.***, 92 AD3d 642, 937 NYS2d 865, 866 [2d Dept 2012]; ***115-41 St. Albans Holding Corp. v Estate of Harrison***, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; ***Cynan Sheetmetal Prods., Inc. v B.R. Fries & Assoc., Inc.***, 83 AD3d 645, 919 NYS2d 873 [2d Dept 2011]; ***First Nationwide Bank v Pretel***, 240 AD3d 629, 659 NYS2d 291 [2d Dept 1997]).

Here, the defendant has not demonstrated either a reasonable excuse for the delay in moving for leave to enter a default judgment nor a potentially meritorious cause of action. As to the new counterclaims set forth in the amended answer, no fiduciary duty is owed to the defendant that necessitates a claim for an accounting (sixth counterclaim). A challenge to standing is not a counterclaim but an affirmative defense that must be pled as such (seventh counterclaim). In any event, this issue will be addressed below. Defendant has not set forth a factual predicate for his claim of fraud (eighth, ninth and eleventh counterclaims). The record is devoid of what the misleading statements were that he claims to have relied upon, who made the statements, how he relied upon them and what injuries he suffered as a result thereof. Such claims cannot be pled with conclusory allegations.

Defendant does not possess a claim under the Federal Truth in Lending Act, 15 U.S.C. § 1601 *et. seq.* ("TILA"). Such was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices" (15 U.S.C. § 1601[a]). TILA provides that a borrower whose loan is secured by her "principal dwelling" and has not been provided the required disclosures has the right to rescind the loan (*see* 15 U.S.C. § 1635[a]) by sending a notice or recision to the creditor as defined in 15 U.S.C. § 1602(g).

However, the TILA recision remedy does not apply to a "residential mortgage transaction" (*see* 15 U.S.C. § 1635[e]), which is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition ...

of such dwelling" (15 U.S.C. § 1602[x]; in accord 12 C.F.R. § 226.23[f]). Since the subject loan fits squarely within the definition of a residential mortgage transaction, the recision remedy provided by TILA is not available to the defendant in this case (*see* ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; ***Gustavia Home, LLC v Rice***, 2016 WL, 6683473 [E.D.N.Y. 2016]; ***Ledgerwood v Ocwen Loan Serv., LLC***, 2015 WL 7455505 [E.D.N.Y. 2015]; ***Grimes v Fremont General Corp***., 785 F.Supp2d 269 [2011]). Moreover, a damage claim is time-barred by the one-year statute of limitations (*see* 15 U.S.C. § 1640[e]). Finally, for the various reasons set forth in plaintiff's reply memorandum of law, dated April 8, 2016, (*see* pp. 13-15), defendant's claims under the Fair Credit Reporting Act (FCRA) and the Fair Debt Collection Practices ACT (FDCPA) are devoid of merit.

Therefore, the cross motion (#002) by defendant, Robert Bedrossian, for, among other things, a judgment of default on the counterclaims in the amended answer pursuant to CPLR 3215, is denied in its entirety. Additionally, the separate motion (#003) by the plaintiff for, among other things, extending its time to Reply to the Counterclaims pursuant to CPLR 2004, is denied as academic and unnecessary. That leaves the motion (#001) by the plaintiff for, among other things, summary judgment on its foreclosure complaint.

As noted above, defendant's answer alleged eighteen affirmative defenses and five counterclaims. In the moving papers, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses and counterclaims of the answer. With regard to compliance with RPAPL §1304, plaintiff has established its prima facie burden with the submission of the detailed affidavit of Adam Gantner, a Business Operations Analyst employed by the plaintiff, the servicer of the mortgage loan in question. He explained CitiMortgage's practices and procedures, with specific factual allegations.

The affidavit was based upon his personal knowledge of the business records maintained in the regular course of CitiMortgage's business as a loan servicer and, as he swore to, CitiMortgage's reliance on its own loan servicing procedures and records in the ordinary course to conduct its business as a loan servicer. He explained that the pre-action 90-day notice was mailed to defendant by regular and certified mail on May 23, 2014. He also attached to his affidavit, not only copies of the 90-day notice, but the required Proof of Filing Statement to the New York State Banking Department, pursuant to RPAPL §1306, which is offered as proof to the state agency that the mailing occurred on May 23, 2014, pursuant to the Step One Filing requirement. The relevant portions of the correspondence log is also attached. He also set forth the required mailing of the mortgage default notice on May 6, 2014. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see* ***HSBC Bank USA, Natl. Assn. v Espinal***, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Cox***, __ AD3d __, 2017 WL 986239 [2d Dept 2017]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (*see* ***Flagstar Bank v Bellafiore***, 94

AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832,880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses and counterclaims predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses or counterclaims in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

In opposition, defendant raises only three claims, standing to commence the action (First, Second, Ninth and Fourteenth Affirmative Defenses), TILA claims (First and Second Counterclaims) and a denial of receipt of the required mailing of the mortgage default notice (Fifth Affirmative Defense). Therefore, the Court dismisses the Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, Thirteenth, Fifteenth, Sixteenth, Seventeenth, and Eighteenth Affirmative Defenses, and the Third, Fourth and Fifth Counterclaims as abandoned.

The Court rejects the First, Second, Ninth and Fourteenth Affirmative Defenses (standing). One of the various methods that standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***U.S. Bank v Ehrenfeld,*** 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank Natl. Ass'n v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d129 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Additionally, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that

it had possession of the note prior to commencement of the action, has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*see* ***JPMorgan Chase Bank, N.A. v Venture,*** __ AD3d __, 2017 WL 803115 [3d Dept 2017]; ***Deutsche Bank Trust Co. v Garrison***, 146 AD3d 185, 46 NYS3d 185 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 142 AD3d 861, 45 NYS3d 189 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Umeh***, 145 AD3d 497, 41 NYS3d 882 [1st Dept 2016]; ***Nationstar Mtge., LLC v Weisblum***, 143 AD3d 866, 39 NYS3d 491, 494 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Webster***, 142 AD3d 636, 37 NYS3d 283 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Federal Natl. Mtge. Ass'n v Yakaputz II, Inc.***, 141 AD3d 506, 507, 35 NYS3d 236, 237 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Kobee***, 140 D3d 1622, 32 NY3d 767 [2d Dept 2016]; ***JPMorgan Chase Bank, N.A. v Roseman***, 137 AD3d 1222, 29 NYS3d 380 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2015]).

Appellate case authorities have repeatedly held that in determining the standing of a foreclosing plaintiff, it is the mortgage note that is the dispositive instrument, not the mortgage indenture. This result is mandated by the long standing principal incident rule which provides that because a mortgage is merely the security for the debt, the obligations of the mortgage pass as an incident to the passage of the note (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*). A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Loancare v Firshing***, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see* ***id., Wells Fargo Bank, NA v Parker***, 125 AD3d 8485 NYS3d 130 [2d Dept 2015]; ***U.S. Bank NA v Guy***, 125 AD3d 845, 5 NYS3d 116 [2015]).

The plaintiff may also establish its standing by demonstrating that it is the holder of the mortgage note within the contemplation of the Uniform Commercial Code. Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an endorsement in blank or bears a special endorsement payable to the order of the plaintiff (*see* UCC 1–201; 3–202; 3–204; ***Hartford Acc. & Indem. Co. v American Express Co.***, 74 NY2d 153, 159 [1989]). A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1–201[b][21]). Notably, the holder of an instrument whether or not he is the owner may ... enforce payment in his own name (*see* UCC 3–301]; ***Wells Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]). "'Bearer' means ... a person in possession of a negotiable instrument" (UCC 1–201[b][5]), and where the note is endorsed in blank, it may be negotiated by delivery alone (*see* UCC 3–202[1], 3–204[2]). "An endorsement in blank specifies no particular endorsee and may consist of a mere signature" and "[a]n instrument payable to order and endorsed in blank becomes payable to bearer

and may be negotiated by delivery alone until specially endorsed (UCC 3–204[2])" (***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, *supra*).

Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank, a plaintiff is only required to demonstrate that it had physical possession of the note prior to commencement of the action (*see* ***Deutsche Bank Natl. Trust Co. v Brewton***, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*). In such cases "'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date'" since a plaintiff in possession of a note endorsed in blank is thus without obligation to establish how it came into possession of the instrument in order to be able to enforce it (*see* UCC 3–204[2]; ***Pennymac Corp. v Chavez***, ___ AD3d ___, 2016 WL 6885443 [2d Dept 2016], *quoting* ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d at 645, *supra*). In addition, because "a signature on a negotiable instrument 'is presumed to be genuine or authorized' (*see* UCC 3–307[1][b]), the plaintiff is not required to submit proof that the person who endorsed the subject note to the plaintiff on behalf of the original lender was authorized to do so" (***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]). Moreover, the apparent invalidity of any written assignments of mortgage are thereby rendered irrelevant to the issue of standing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*).

Indeed, the establishment of the plaintiff's actual possession of the mortgage note or its constructive possession through an agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, claims of content defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]). It further renders unavailing, all claims of content defects in the chain of mortgage assignments (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, *supra*; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Deutsche Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***US Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust v Whalen***, 107 AD3d 931, *supra*).

The affidavit of Adam Gantner, unequivocally avers that, based upon his review of the records maintained by the servicer with which he is personally familiar, and kept and relied upon as a regular business practice and in the ordinary course of loan servicing business, the plaintiff came into possession of the original note endorsed in blank before the commencement of the action. Such proof was sufficient to establish the plaintiff's standing due to it status as the holder of the mortgage note prior to the commencement of this action. In addition, the plaintiff's attachment of the note endorsed in blank to the complaint filed at the commencement of this action together with the affidavit of merit and the allegations asserted in the complaint furnished further proof of the plaintiff's possession of the note at the time of the commencement of this action. Here, plaintiff has demonstrated possession of the note prior to the commencement of the action (*see* ***Hudson City Sav. Bank v Genuth***, __ AD3d __, 2017 WL 776890 [2d Dept 2017]; ***HSBC Bank USA v Espinal***, 137 AD3d 1079, *supra*; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Therefore, the First, Second, Ninth and Fourteenth Affirmative Defenses are dismissed.

The purported failure on the part of the foreclosing plaintiff to serve the defendant with a contractual notice of default and cure that is required by certain provisions of the mortgage indenture (Fifth Affirmative Defense), is rejected. Here, the affidavit of Adam Gantner, an employee of the servicer, the entity which did the mailing on May 6, 2014, demonstrates compliance with the notice provision of the mortgage. Simple denial of receipt is insufficient to overcome the presumption of mailing that attaches to plaintiff's proof (*see* ***OneWest Bank, FSB v Simpson***, __ AD3d __, 2017 WL 986432 [2d Dept 2017]).

For the reasons set forth above, the Court dismisses the TILA claims (First and Second Counterclaims).

The defendant challenges the plaintiff's proof as substantively insufficient and procedurally defective by reason of its failure to comport with the requirements of the business records exception to the hearsay rule. The substantive challenges are rejected under the case authorities regarding standing cited above, while the procedural challenges are rejected for the reasons outlined below.

A business record will be admissible if that record "was made in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (***One Step Up, Ltd. v Webster Bus. Credit Corp.***, 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518[a]). While "the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (***Deutsche Bank Natl. Trust Co. v Monica,*** 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *quoting* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012] *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]).

Appellate case authorities have thus held that a loan servicer may testify as to payment defaults and other matters relevant to a foreclosing plaintiff's prima facie case on records it maintains in the regular course of its business as servicer of the subject mortgage loan (*see* ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Abdan***, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; *see also* ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Aames Capital Corp. v Ford***, 294 AD2d 134, 740 NYS2d 880 [1st Dept 2002]). It is also established law that an assignee or other transferee of the loan documents may rely upon the business records of the loan originator or other predecessors in interest to establish such transferee's claims for recovery of amounts due from the debtor so long as it establishes that it relied upon those records in the regular course of its business (*see* ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]; *see also* ***Portfolio Recovery Assoc., LLC v Lall***, 127 AD3d 576, 8 NYS3d 101 [1st Dept 2015]).

That there is no requirement that the affiant have personal knowledge of every entry is clear particularly where there is a business relationship between the entities entering and maintaining the records and those incorporating and relying upon them in the regular course of their business (*see* ***Citibank, NA v Abrams***, 144 AD3d 1212, 1216, 40 NYS3d 653 [3d Dept 2016] ["Polk was entitled to rely on the loan records in addressing the issue of possession, as CPLR 4518[a] does not require a person to have personal knowledge, ..."]; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 739, *supra*; ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 1127, *supra*; *see* ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 ADd3d 418, *supra* ["Plaintiff established its entitlement to judgment as a matter of law by relying in part on the original loan file prepared by its assignor. Plaintiff relied on these records in its regular course of its business"]).

Here, as set forth above from the affidavit of Adam Gantner, he is personally familiar with plaintiff's regular business practice, he describes the practice and swears that the regular practice was adhered to with respect to this loan in default. He explains that the records were produced from the electronic records created and maintained by plaintiff as the loan servicer. Therefore, plaintiff relied upon the records in its regular course of business and such reliability is key to its admissibility (*see* ***Corsi v Town of Bedford,*** 58 AD3d *at* 231–232, 868 NYS2d 258 [2d Dept 2008], *lv. denied* 12 NY3d 714, 883 NYS2d 797 [2009]; ***Matter of Carothers v GEICO Indem. Co.***, 79 AD3d at 865, 914 NYS2d 199 [2d Dept 2010]).

It is the Court which must determine the threshold requirement for admissibility (*see* ***People v Kennedy,*** 68 NY2d at 576, 510 NYS2d 853 [1986]). The Court of Appeals in ***Bossuk v Steinberg***, 58 NY2d 916, 919, 460 NYS2d 509 (1983) held that there was no need to produce the person who did the actual mailings since "[t]he proof of the Sheriff's regular course of business in this regard sufficed." In ***Hospital for Joint Diseases v Elrac, Inc.***, 11 AD3d 432, 433, 783 NYS2d 612 (2d Dept 2004), the Second Department held that an affidavit based upon records maintained by an insurer in the ordinary course of business did constitute admissible evidence ("Personal knowledge of such documents, their history, or specific content are not necessarily required of a document custodian"). Various cases, particularly in the Second Department, have held that such business records are admissible (*see* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]; ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; ***Burrell v Barreiro***, 83 AD3d 984, 922 NYS2d 465 [2d Dept 2011]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, 761 NYS2d 54 [1st Dept 2003]; ***We're Assocs. Co. v Rodin Sportswear Ltd.***, 288 AD2d 465, 734 NYS2d 104 [2d Dept 2001]; ***Spangenberg v Chaloupka***, 229 AD2d 482, 645 NYS2d 514 [2d Dept 1996]).

Here, plaintiff's employee, Adam Gantner, the recipient of the records, can establish personal knowledge of the maker's business practices and procedures, "and the records themselves actually evince the facts for which they are relied upon (citations omitted)" (***Citigroup v Kopelowitz***, 147 AD3d 1014, __ NYS3d __ [2d Dept 2017]). Therefore, this Court holds that the records relied upon, in the affidavit of Adam Gantner, are admissible pursuant to the business records rule. Rejected as unmeritorious is defendant counsel's claim that the plaintiff's affidavit of merit is insufficient due to a lack of personal knowledge on the part of the affiant, who is an employee of the plaintiff.

Therefore, the Court denies the cross motion (#002) by defendant, Robert Bedrossian, in its entirety, denies the separate motion (#003) by the plaintiff for an extension of time as academic and unnecessary, and grants plaintiff's motion (#001) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 3/21/17

THOMAS F. WHELAN, J.S.C.