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SHORT FORM ORDER **INDEX No. 602190/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

***PRESENT*:**

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION ADJ DATE: 01/07/17
Mot. Seq. #: 002 – MD
Mot. Seq. #: 003 – MD
Mot. Seq. #: 004 – MG
Mot. Seq. #: 005 – MD
Mot. Seq. #: 006 – MD
Mot. Seq. #: 007 --MD

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2004-WMC1 ASSET-BACK CERTIFICATES, SERIES 2004-WMC1;

Plaintiff,

- against -

JOHN MECCA, and JOHN DOES AND JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to Plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

Attorneys for Plaintiff:
Clarfield Okon Salomone Pincus, P.L.
By: Karen Wilson-Robinson, Esq.
425 RXR Plaza
Uniondale, New York 11556

Defendant: *Pro Se*
John Mecca
119 Whittier Drive
Kings Park, New York 11754

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ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the answering defendants, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is **granted**; and it is

ORDERED that the caption is amended by excising the names of the fictitious defendants "JOHN DOE 1 " through "JOHN DOE #20 ; and it is

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST
2004-WMC1 ASSET-BACK CERTIFICATES,
SERIES 2004-WMC1

Plaintiff,

-against-

JOHN MECCA.

Defendant;

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and it is

ORDERED that the plaintiff shall serve a copy of this order amending the caption 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 upon defendant pursuant to CPLR 2103 (b) (1), (2) or (3), and by regular mail upon all other parties, if any, who have appeared herein and 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 premises more commonly known and referred to as 19 Whittier Drive, Kings Park, Suffolk County, New York 11754. Defendant John Mecca ("defendant" or "Mecca") executed a promissory note dated August 6, 2004 in favor of the Coastal Capital Corporation d/b/a the Mortgage Shop agreeing to repay $342,000 at an annual interest rate of 6.99 percent. The note was secured by a mortgage of the same date on the subject property which was recorded with the Suffolk County Clerk on August 30, 2004. The note bears an undated endorsement to WMC Mortgage Corp. by Coastal Capital, and a further undated endorsement in blank by WMC Mortgage. Thereafter, the mortgage was transferred to

plaintiff Deutsche Bank National Trust Company, as trustee for Soundview Home loan Trust 2004-WMC1 asset-backed certificates Series 2004-WMC1 ("plaintiff") on December 24, 2004.

Defendant allegedly defaulted on his obligation to render his monthly payment under the mortgage to plaintiff on July 1, 2008, and thus plaintiff commenced the instant mortgage foreclosure action with filing and service of the Summons and Complaint and Notice of Pendency on March 4, 2015. Issue was joined by the interposition of on April 13, 2015 by defendant *pro se*. By his Answer, Mecca asserted various affirmative defenses.

This matter was before the Court on April 6, 2016, defendant having moved seeking an order compelling discovery, to wit, that plaintiff produce original copies of the note, mortgage and assignment in question in this litigation. The matter was conferenced before the undersigned and after hearing argument by the parties, the Court denied defendant's motion on the record as moot with plaintiff's presentation and service on defendant of copies of the requested documentation, i.e. copies of the note, mortgage and assignments previously demanded by defendant.

Since then presently pending before the Court are several motions made by defendant seeking to renew and reargue the Court's dismissal of defendant's discovery motion pursuant to CPLR 2221, to dismiss the Complaint pursuant to CPLR 3211 and a motion by plaintiff opposing defendant's renewal/reargument efforts as well as seeking summary judgment and an order of reference pursuant to RPAPL 1321.

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (*see* ***Matter of Swingearn***, 59 AD3d 556, 873 NYS2d 165). A motion for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]). A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). Further, even where a motion for reargument is technically untimely under CPLR 2221(d)(3), a court has discretion to reconsider its prior ruling (*see* CPLR 2004; ***Itzkowitz v. King Kullen Grocery Co., Inc.***, 22 AD3d 636, 638, 804 NYS2d 350; *Garcia v. The Jesuits of Fordham,* 6 AD3d 163, 165, 774 NYS2d 503; ***HSBC Bank USA, N.A. v. Halls***, 98 AD3d 718, 950 NYS2d 172, 174 (2d Dept. 2012]). This kind of motion is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked (*see* ***McGill v. Goldman***, 261 AD2d 593, 594, 691 NYS2d 75). Even if the new affidavits supporting the old argument somehow transmuted the appellants' cross motion into one for renewal, it would have been properly denied for their failure to give a reasonable explanation for omitting this so-called new matter on the original motion (*see* CPLR 2221[e][3]; ***Kingston v. Brookdale Hosp. and Med. Ctr.***, 4 AD3d 397, 398, 771 NYS2d 385; ***Sherman v. Piccione***, 304 AD2d 552, 757 NYS2d 112; *Malik v. Campbell,* 289 AD2d 540, 735 NYS2d 793; ***Simon v. Mehryari***, 16 AD3d 664, 665, 792 NYS2d 543, 545 (2d Dept. 2005]).

Although a motion to renew is generally based upon the discovery of material facts which were unknown to the movant at the time of the original motion, it is well settled that the requirement is a flexible one and a court, in its discretion, may grant renewal upon facts known

to the moving party at the time of the original motion (***Citibank, N.A. v Olson,*** 204 AD2d 381, 382, 612 NYS2d 54 [2d Dept 1994][citations omitted]).

Here, defendant's motion papers assert no new facts or point to no new controlling precedent or arguments not previously heard and determined by the Court. As previously mentioned, the Court has already heard and determined defendant's motion seeking to compel discovery, ruling that plaintiff's proffer of certified original documents requested by defendant mooted his application and complied with his previous discovery demands. Rather, the branch of defendant's motion seeking renewal or reargument merely rehashes old arguments set forth in the original motion previously denied. More important, despite plaintiff's offer to allow defendant to physically inspect plaintiff's file containing the original documents, defendant has made no explanation for his refusal to cooperate with plaintiff on its offer. Defendant failed to present new facts not offered on his original application that would change the prior determination, and he did not set forth a **reasonable justification** for his failure to submit factual information in the first instance (*see* ***Dervisevic v Dervisevic,*** 89 AD3d 785, 932 NYS2d 347 [2d Dept 2011][emphasis added]).

As is well established, the law regarding residential mortgage foreclosure in this State and in this department, a plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see* ***Kondaur Capital Corp. v. McCary,*** 115 AD3d 649, 650, 981 NYS2d 547; *see* ***HSBC Bank USA v. Hernandez,*** 92 AD3d at 843, 939 NYS2d 120; ***Bank of N.Y. v. Silverberg,*** 86 AD3d at 279, 926 NYS2d 532). 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 (*see* ***Aurora Loan Serv., LLC v. Taylor,*** 114 AD3d 627, 980 NYS2d 475; ***HSBC Bank USA v. Hernandez,*** 92 AD3d at 844, 939 NYS2d 120; ***U.S. Bank, N.A. v. Collymore,*** 68 AD3d at 754, 890 NYS2d 578). As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see* ***Bank of N.Y. v. Silverberg,*** 86 AD3d at 280, 926 NYS2d 532). However, the transfer of the mortgage without the debt is a nullity, and no interest is acquired by it (*see* ***Bank of N.Y. Mellon v. Gales,*** 116 AD3d 723, 982 NYS2d 911; ***Bank of N.Y. v. Silverberg,*** 86 AD3d at 280, 926 NYS2d 532), because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (*see* ***Deutsche Bank Natl. Trust Co. v. Spanos,*** 102 AD3d 909, 911, 961 NYS2d 200); ***U.S. Bank Nat. Ass'n v. Faruque,*** 120 AD3d 575, 577, 991 NYS2d 630, 632–33 [2d Dept. 2014]).

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]).

It is well settled that the proponent of a summary judgment motion bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Norwest Bank Minn. v Sabloff***, 297 AD2d 722, 723, 747 NYS2d 559 [2d Dept 2002]). Failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposition papers (***De Santis v Romeo***, 177 AD2d 616, 616, 576 NYS2d 323 [2d Dept 1991]).

Movant establishes its prima facie entitlement to judgment as a matter of law by the production of copies of the mortgage, the unpaid note, and evidence of default (*see e.g.* ***Aurora Loan Servs., LLC v. Enaw***, 126 AD3d 830, 7 NYS3d 146; ***U.S. Bank N.A. v. Weinman***, 123 AD3d 1108, 2 NYS3d 128; ***Plaza Equities, LLC v. Lamberti***, 118 AD3d 688, 689, 986 NYS2d 843; ***Solomon v. Burden***, 104 AD3d 839, 961 NYS2d 535), and demonstrates its standing based both on its physical possession of the note, and on its status as an assignee of the note, as of the date that the action was commenced (*see* ***Wells Fargo Bank, N.A. v. Parker***, 125 AD3d 848, 5 NYS3d 130; ***Wells Fargo Bank, N.A. v. Ali***, 122 AD3d 726, 995 NYS2d 735); ***Emigrant Bank v. Larizza***, 129 AD3d 904, 905, 13 NYS3d 129, 131 [2d Dept. 2015]).

Defendant's defense alleging lack of plaintiff's standing must fail. 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, *supra* at 911 [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, 651 NYS2d 121 [2d Dept 1996]). "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.

The plaintiff has here demonstrated that, as holder of the endorsed note, it has standing to commence this action (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***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]; ***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]).

[PLAINTIFF MISSING REFERENCED BANK AFFIDAVIT FROM RAPHAEL GONZALEZ RE POSSESSION OF NOTE]

In her affidavit, Mr. Raphael Gonzalez alleges that the plaintiff, directly or through its custodian Deutsche Bank, received physical delivery of the original note on June 14, 2013. The documentary evidence submitted by the plaintiff also includes, among other things, the note transferred via a blank endorsement (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Additionally, the plaintiff submitted, among other things, the assignment of the mortgage executed prior to commencement, which memorialized the transfer of the same to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage, which followed as an incident to the note (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Therefore, the plaintiff demonstrated its prima facie burden as to its standing. The opposition in response to this branch of the motion is insufficient to raise a triable issue of fact (*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]).

The plaintiff also 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*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016 (b) requires that the circumstances of fraud be stated in detail, including specific dates and items]; ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; ***Scarano v Scarano***, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [the mere denial of receipt of the notice of default is

insufficient to rebut the presumption of delivery]; ***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]). Moreover, in this case, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see*, ***Matter of Stralem***, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer (*see*, ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). In response, the answering defendants have not come forward with any evidence to raise a triable issue of fact as to the plaintiff's standing (*see*, ***JP Morgan Chase Bank, N.A. v Weinberger***, 2016 NY App Div LEXIS 5730, 2016 WL 4443712, 2016 NY Slip Op 05850 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*).

Rejected as unmeritorious are the answering defendants' challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the answering defendants' contentions, the affidavit of the plaintiff's representative is legally sufficient and comports with the requirements of CPLR 3212 (*see,* ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; ***Fleet Bank v Pine Knoll Corp.***, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also*, ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3dDept 2013]; *cf.*, ***Citibank N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). The answering defendant's assertions that the affidavit is hearsay because the affiant did not personally service the subject account are also unavailing in light of the affiant's unchallenged assertion of personal knowledge of the plaintiff's possession of the note since origination (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]). In his affidavit, the plaintiff's affiant alleges, inter alia, that he reviewed the original note, mortgage, other loan documents and related business records, which were made by him, or from information transmitted by a person with knowledge of the events described therein, at or near the time of the events described, and kept in the ordinary course of business at or near the time of the transactions or events by or from a person with personal knowledge. Additionally, as noted above, in the complaint, which was verified by the same affiant, the plaintiff alleges, inter alia, that it is the assignee and the holder of the note.

Contrary to the answering defendants' 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 answering defendants failed to demonstrate that they 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]). 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]).

Notably, the answering defendants did not deny having received the loan proceeds and having defaulted on the subject loan payments in an affidavit made by them (*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]). Thus, even when considered in the light favorable to the answering defendants, 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*, ***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 opposition papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211 [e]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d735 [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, 912 NYS2d 285 [2d Dept 2010]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The court has considered the answering defendants' remaining contentions in opposition to the motion and finds that such lack merit.

The plaintiff, therefore, is awarded summary judgment in its favor against the answering defendant (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*). Accordingly, the answer and the affirmative defenses set forth therein are stricken.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal because they are unmeritorious. (*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*, ***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]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; ***Banque Arabe Et Internationale D'Investissement v One Times Square Assoc. Ltd. Partnership***, 193 AD2d 387, 597 NYS2d 48 [1st Dept 1993] [Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in New York and to commence actions to enforce obligations under those mortgages]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991] [where a foreclosure action is commenced within the applicable limitations period, the doctrine of laches is no defense]). Furthermore, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see*, ***Matter of Stralem***, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667

[1975]; *see also*, ***Madeline D'Anthony Enters., 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]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendants, "JOHN DOE 1" through "JOHN DOE 20," is **granted** (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***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.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (***Rakusin v. Miano***, 84 AD3d 1051, 1052, 923 NYS2d 334; *see* ***Swift v. New York Med. Coll.***, 25 AD3d 686, 687, 808 NYS2d 731; ***Torah v. Dell Equity, LLC***, 90 AD3d 746, 746, 935 NYS2d 33, 34 [2d Dept. 2011]). The moving defendant under this section must establish, prima facie, "that the time in which to commence an action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies" (***Texeria v. BAB Nuclear Radiology, P.C.***, 43 AD3d 403, 405, 840 NYS2d 417 [internal citations omitted]; *see* ***6D Farm Corp. v. Carr***, 63 AD3d 903, 905–906, 882 NYS2d 198; ***Savarese v. Shatz***, 273 AD2d 219, 708 NYS2d 642; ***Romanelli v. Disilvio***, 76 AD3d 553, 554, 907 NYS2d 258, 259 [2d Dept. 2010]).

An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR § 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (***Wells Fargo Bank, N.A. v. Cohen***, 80 AD3d 753 [2d Dept 2010]; ***Loiacono v. Goldberg***, 240 AD2d 476 [2d Dept 1997]). Once a mortgage debt is accelerated, however, the entire amount is due and the statute of limitations begins to run on the entire debt (***Wells Fargo Bank, N.A. v. Burke,*** 94 AD3d 980 [2d Dept 2012]; ***EMC Mtge. Corp. v. Patella,*** 279 AD2d 604 [2d Dept 2001])

The law is well settled that with respect to a mortgage payable in installments, there are "separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due" unless the mortgage debt is accelerated (***Pagano v. Smith***, 201 AD2d 632, 633, 608 NYS2d 268; *see*, ***Khoury v. Alger***, 174 AD2d 918, 571 NYS2d 829). Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt (*see*, ***Federal Nat. Mortgage Assn. v.***

Mebane, 208 AD2d 892, 894, 618 NYS2d 88; ***Loiacono v. Goldberg***, 240 AD2d 476, 477, 658 NYS2d 138, 139 (2d Dept. 1997).

Here, plaintiff has satisfactorily demonstrated that contrary to defendant's claims otherwise, the mortgage loan in question was not accelerated as of defendant's original default in or around July 1, 2008, but rather, was accelerated as of January 11, 2010, attendant with plaintiff's commencement of its foreclosure action with filing of the summons and complaint.

Moreover, Supreme Court's prior dismissal of plaintiff's original foreclosure action in 2010 for failure to produce the original mortgage, note and/or assignment documents on standing grounds did not constitute a substantive or merits determination, and thus is not entitle to preclusive effect (*see* ***Caliguri v. JPMorgan Chase Bank, N.A.***, 121 AD3d 1030, 1031, 996 NYS2d 73, 75 [2d Dept. 2014]), *lv app den*, 25 NY3d 911 [2015][a dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes]; *accord* ***U.S. Bank Nat. Ass'n v. Dellarmo***, 128 AD3d 680, 9 NYS3d 322 [2d Dept. 2015]). Thus defendant has not met his burden to warrant dismissal of the action on statute of limitations or *res judicata* grounds. Since the six year statute of limitations has not elapsed from acceleration of defendant's mortgage loan debt in January 2010 to the commencement of this instant action in March 2015.

In sum, defendants motions seeking summary judgment, to dismiss, and to renew, resettle or reargue are **denied.** Plaintiff's motion for summary judgment and for an order of reference is **granted**.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendants, "JOHN DOE 1" through "JOHN DOE 20," is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***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.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 13, 2018

WILLIAM G. FORD, J.S.C.

___ **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**