NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-2,	Index No. 709350/14
Plaintiff,	Motion Date July 28, 2017
- against-	Motion Cal. No. 131
ELIZABETH DIAZ, ANA DIAZ, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and JOHN DOE,	Motion Seq. No. 2
Defendants.	

The following papers read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendants Elizabeth Diaz and Ana Diaz ("defendants"), to dismiss the affirmative defenses asserted by defendants in their answer pursuant to CPLR 3211(b), for leave to enter a default judgment as against all non-appearing defendants, and for leave to appoint a referee to ascertain and compute the sums due and owing plaintiff.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits - Memorandum of Law...	EF Doc. #46-#49
Memorandum of Law in Opposition - Exhibits.....	EF Doc. #50-#60
Reply Affirmation.....	EF Doc. #61

Upon the foregoing papers it is ordered that the motion is determined as follows:

On April 7, 2006, defendant Elizabeth Diaz executed and delivered a note evidencing a $303,750.00 loan to her from MortgageIt, Inc. (MortgageIt). On the same day, defendant

Elizabeth Diaz and her mother, defendant Ana Diaz, executed and delivered a mortgage against the real property known as 107-15 76th Street a/k/a 10715 76th Street, Ozone Park, New York (the subject property), to Mortgage Electronic Registration Systems, Inc., as nominee for MortgageIt. Defendants entered into a loan modification agreement dated March 11, 2010, with Wells Fargo Bank, N.A. d/b/a America's Servicing Co., which increased the principal balance of the existing mortgage to $305.469.80, and modified the monthly installment from $1,919.91 to $2,023.72 and extended the maturity date to August 1, 2036. (The capitalized amount was $14,697.50). The mortgage was assigned to US Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSAB Mortgage-Backed Trust 2006-2, as memorialized by the Corrective Assignment of Mortgage dated October 10, 2014, and recorded on November 6, 2014, intending to amend the Assignment of Mortgage dated September 6, 2011, and recorded on September 15, 2011.

Plaintiff commenced this foreclosure action, alleging it is the holder of the note, and that defendants defaulted under the terms of the mortgage by failing to pay the monthly installment due on October 1, 2013 and thereafter. Plaintiff alleges that as a consequence, it "previously elected and hereby elects" to call the entire amount due under the mortgage. Plaintiff further alleges that on June 3, 2014, it issued a 90-day notice to defendants in the form prescribed pursuant to RPAPL 1304. Plaintiff also asserts a second cause of action alleging that the "notary page" of the mortgage incorrectly recites the subject property's designation on the tax map as Section 45, Block 375, Lot 17, whereas the correct tax map designation is Block 9129, Lot 73. Plaintiff further alleges that the mortgage otherwise correctly identifies the subject property and was correctly recorded and indexed as a lien against the subject property. Plaintiff seeks to reform the subject mortgage to reflect that the tax map designation is "Block 9129, Lot 73." Plaintiff also asserts a third and fourth cause of action alleging that there are prior adverse judgment liens encumbering the property, which are held by defendant City of New York Transit Adjudication Bureau, and plaintiff seeks to declare and adjudge such liens to be invalid and extinguished pursuant to RPAPL article 15, and to foreclose defendant City of New York Transit Adjudication Bureau and all persons or entities claiming by, through or under it, from all right, claim, lien, interest or equity of redemption in and to the subject property, or to declare such liens to be equitably subordinated to the subject mortgage lien.

Defendants served a joint answer, asserting various affirmative defenses, including lack of standing, and failure to provide proper notice of default as required in the mortgage and promissory note, comply with RPAPL 1303 and 1304, and give notice of default as required by the terms of the mortgage as a condition precedent to foreclosure. The remaining defendants are in default in appearing or answering.

The matter was referred to the Foreclosure Settlement Conference Part (FSCP) where, a conference was held on April 9, 2015 and continued on June 18, 2015, July 24, 2016, and September 18, 2015. The Court Attorney Referee, by order dated September 18, 2015, determined that the case met the criteria of the FSCP but had not settled, and therefore,

granted plaintiff leave to proceed with prosecution of the action. The Court Attorney Referee directed plaintiff to appear at a status conference on June 7, 2016, and file a foreclosure affirmation/certificate of merit pursuant to Administrative Order 208/13 and an application for an order of reference by the status conference date. By order dated June 7, 2016, the Court Attorney Referee directed plaintiff to appear at a final status conference on November 22, 2016, and file a foreclosure affirmation/certificate of merit pursuant to Administrative Order 208/13 and an application for an order of reference by the final conference date.

By notice of motion dated July 27, 2016, plaintiff moved for summary judgment against defendants and for an order of reference. By order dated February 7, 2017, plaintiff's motion was denied without prejudice. The court noted that plaintiff had failed to submit a copy of the pooling and servicing agreement in support of its motion.

Defendants oppose the motion. The remaining defendants have not appeared in relation to the motion.

That branch of the motion by plaintiff for leave to amend the caption deleting reference to "John Doe" is granted. Plaintiff has ascertained that defendant "John Doe" is not a necessary party defendant.

Accordingly, the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY
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U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-2,

Plaintiff.

Index No. 709350/14

-against-

Elizabeth Diaz, Ana Diaz, Criminal Court of the City of New York, New York State Department of Taxation and Finance, City of New York Environmental Control Board, City of New York Department of Transportation Parking Violations Bureau, City of New York Transit Adjudication Bureau,

Defendants.
----------X.

With respect to that branch of the motion by plaintiff for summary judgment against defendants, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A plaintiff, to establish *prima facie* entitlement to judgment as a matter of law in an action to foreclose a mortgage, must produce the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687 [2d Dept 2017]). Moreover, where, as here, a plaintiff's standing to commence a foreclosure action has been placed in issue by a defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725 [2d Dept 2017]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it was the holder or assignee of the underlying note at the time the action was commenced (*see Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 689; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726). Where the note is endorsed in blank, the plaintiff may establish standing by demonstrating that it had physical possession of the original note at the time the action was commenced (*see Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684-685 [2d Dept 2016]; *see generally Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]).

In addition, proper service of the RPAPL 1303 and 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition (*see Investors Savings Bank v Salas*, 152 AD3d 752 [2d Dept 2017]; *JPMorgan Chase Bank, Nat. Assn. v Kutch*, 142 AD3d 536 [2d Dept 2016]). Where a defendant alleges that plaintiff failed to comply with a condition precedent set forth in the loan documents to foreclose on a mortgage, the plaintiff as part of its prima facie case, also must establish satisfaction of such condition precedent (*see GMAC Mortgage, LLC v Bell*, 128 AD3d 772 [2d Dept 2015]; *Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152, 1153 [2d Dept 2015]).

In support of its motion, plaintiff submits, among other things, an affirmation of its counsel, a copy of the affidavits of service, the pleadings, the mortgage, the loan modification agreement, the assignment of mortgage and corrective assignment of mortgage, 90–day notices dated June 3, 2014, a notice of default dated June 3, 2014, and affidavits of Yuluana Hernandez and Asahia Brooks, vice presidents for loan documentation for Wells Fargo Bank, N.A. (Wells Fargo), the loan servicer for plaintiff.

With respect the issue of standing, a certified copy of the note, bearing an endorsement in blank by MortgageIt, was annexed to the complaint at the time of its filing. Counsel for plaintiff states in her affirmation that she is personally familiar with the record-keeping practices and procedures of the law firm. She also states that based upon her review of the law firm's business records, on September 30, 2014, the law firm received, during the course of representing plaintiff in this matter, the collateral file for the subject mortgage loan,

including among other things, the original endorsed note dated April 7, 2006 and mortgage. According to counsel, the law firm remained in physical possession of the endorsed note and mortgage on December 8, 2014, the date of commencement of the action, and currently remains in possession of those documents. The foregoing proof satisfies plaintiff's *prima facie* burden as to standing premised on its counsel's physical possession of the note, endorsed in blank at the time the action was commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d at 362; *U.S. Bank Nat. Assn. v Cruz*, 147 AD3d 1103 [2d Dept 2017]). Defendants have failed to raise a triable issue of fact with respect to this proof.

With respect to the issue of compliance with the notice requirements of RPAPL 1304, Brooks states in her affidavit that she reviewed Wells Fargo's business records, and "certif[ies] and affirm[s] that, in compliance with RPAPL 1304, a notice as required by said statute was sent, separate from any other mailing or notice, enclosed in both a certified mail postage prepaid envelope and also a first-class mail, postage prepaid, sealed envelope." She also states that "[b]oth envelopes were provided to the United States Post Office for mailing, addressed to Elizabeth Diaz and Ana Diaz at the address of the residence that is subject to the [m]ortgage and, if different from Elizabeth Diaz and Ana Diaz's address that is subject to the [m]ortgage, to Elizabeth Diaz and Ana Diaz's last known address." Brooks further states that "said notice was mailed on June 4, 2014," and "[p]roof of the certified mailing is attached." A computer printout referencing "Certified Mail" and "Electronic Confirmation Return Receipt" with a tracking number is annexed to her affidavit.

To the extent Brooks' statements are based upon Wells Fargo's business records, she does not indicate familiarity with Wells Fargo's mailing practices and procedures, and therefore did not establish a standard office procedure designed to ensure that items are properly addressed and mailed (*see Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 1050 [2d Dept 2017]; *Citibank, N.A. v Wood*, 150 AD3d 813, 814 [2d Dept 2017]; *cf. Citimortgage, Inc. v Banks*, 155 AD3d 936 [2d Dept 2017]; *Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 900 [2d Dept 2016]). Moreover, plaintiff's submissions indicate that its servicer purportedly mailed only one notice, addressed to both defendants Elizabeth Diaz and Ana Diaz, when mailing the notice to them by regular and certified mail. Such notice is insufficient to establish proper service of the RPAPL 1304 notice on each of the borrowers[1] (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). To the extent plaintiff's counsel affirms that plaintiff complied with RPAPL 1304, her affirmation is not based upon her personal knowledge of the alleged mailing of the 90-day notice (*see Zuckerman v City of New York*, 49 NY2d at 563).

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[1] Although only Elizabeth Diaz is identified as the "borrower" on the note, both Elizabeth Diaz and Ana Diaz executed the loan modification agreement and are collectively defined in it as "borrower," and mutually agreed, under that definition as "borrower," to pay the unpaid principal balance, plus interest, to the order of the lender, at the modified payment rate defined therein (*see Aurora Loan Services, LLC v Komarovsky*, 151 AD3d 924 [2d Dept 2017]).

Plaintiff relies upon the Hernandez affidavit to establish *prima facie* that the notice of default was sent in accordance with the terms of the mortgage.[2] That affidavit, which asserts the notice of default was sent in accordance with the terms of the mortgage, is unsubstantiated and conclusory. Even when considered together with the copy of the notice of default, it fails to show that the required notice was mailed by first class mail or actually delivered to the designated address if sent by other means, as required by the subject mortgage (*see* paragraph 15 of the subject mortgage) (*see Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982 [2d Dept 2014]; *HSBC Mtge. Corp. [USA] v Gerber*, 100 AD3d 966 [2d Dept 2012]). Furthermore, Hernandez does not state she is familiar with Wells Fargo's mailing practices and procedures and therefore does not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed. She also does not specifically state when, where and by what method of mail the notice of default was sent. The affirmation of plaintiff's counsel relative to whether the notice of default was sent to defendants is not based upon her personal knowledge (*see Zuckerman v City of New York*, 49 NY2d at 563).

Plaintiff, therefore, has failed to establish, *prima facie*, that it strictly complied with the requirements of RPAPL 1304, and served defendants the requisite notice to cure their default as expressly required in the mortgage agreement. Defendant Elizabeth Diaz additionally states in her affidavit in opposition that she did not receive any notices prior to plaintiff's commencement of this action.

Plaintiff also has failed to establish *prima facie* that the judgment liens purportedly held by defendant City of New York Transit Adjudication Bureau are not based upon judgments obtained against defendants, or have been satisfied, or should be equitably subrogated to the subject mortgage lien. Plaintiff has failed to present any evidence as to the existence of the purported judgment liens.

Under such circumstances, summary judgment against defendants is unwarranted. Those branches of the motion by plaintiff for summary judgment against defendants, to strike their answer and for leave to appoint a referee are denied (*see HSBC Mortg. Services, Inc. v Royal*, 136 AD3d 855 [2d Dept 2016]; *Cenlar, FSB v Weisz*, 136 AD3d 855 [2d Dept 2016]).

With respect to that branch of the motion by plaintiff to dismiss the affirmative defenses asserted by defendants in their answer, plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2d Dept 2006]; *see Ramanathan v Aharon*, 109 AD3d 529, 531 [2d Dept 2013]).

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[2] Paragraph 22 of the mortgage requires that the lender provide the borrower with a 30-day notice of default prior to demanding payment of the loan in full.

That branch of the motion by plaintiff to dismiss the first affirmative defense asserted by defendants based upon lack of personal jurisdiction due to improper service of process is granted. Defendants failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of their answer, and have made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, such defense is deemed waived by defendants (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

That branch of the motion by plaintiff to dismiss the second affirmative defense asserted by defendants based upon lack of standing is granted. Plaintiff has established prima facie that it had standing to commence this action, and in opposition, defendants have failed to raise a triable issue of fact.

That branch of the motion by plaintiff to dismiss the third affirmative defense asserted by defendants based upon failure to comply with RPAPL 1304 is denied.

That branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendants is granted. Defendants assert that plaintiff failed to provide them with notice pursuant to RPAPL 1303 and failed to plead compliance with RPAPL 1303 in the complaint. Plaintiffs offer two affidavits of service dated December 24, 2014 of a licensed process server. The first affidavit indicates service of, among other things, a copy of the summons and complaint, and the notice required under RPAPL 1303, upon defendant Elizabeth Diaz by delivery of those items to Ana Diaz, "MOTHER," as a person of suitable age and discretion on December 18, 2014 at 2:18 P.M. at 107-15 76th Street a/k/a 10715 76th Street, Ozone Park, New York, the place of Elizabeth Diaz's place of residence, and a subsequent mailing of a copy of those documents to defendant Elizabeth Diaz at the same address. The second affidavit of service indicates service of, among other things, a copy of the summons and complaint, and the notice required under RPAPL 1303, upon defendant Ana Diaz by in-hand delivery of those items to Ana Diaz on December 18, 2014 at 2:18 P.M. at 107-15 76th Street a/k/a 10715 76th Street, Ozone Park, New York. Both affidavits also indicate that the RPAPL 1303 notice was printed on a colored piece of paper, which color differed from the color of the summons and complaint, and the title of the notice was in bold 20-point type and the text of the notice was in bold, 14-point type. Such affidavits constitute proof of proper service of the notice required by RPAPL 1303 upon defendants (*see Nationstar Mortg., LLC v Kamil*, 155 AD3d 968 [2d Dept 2017]). Defendant Elizabeth Diaz's bare and unsubstantiated denial of receipt of notice pursuant to RPAPL 1303 is insufficient to rebut the presumption of proper service created by the affidavit of service (*see id.; Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103). Defendant Ana Diaz has failed to rebut the presumption of proper service (*see U.S. Bank N.A. v Tate*, 102 AD3d 859 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 106). Defendants have failed to show that a plaintiff must plead compliance with RPAPL 1303 (*cf.* RPAPL 1302 [requires pleading compliance with RPAPL 1304 where the mortgage is a high-cost home loan or subprime home]).

That branch of the motion by plaintiff to dismiss the fifth affirmative defense asserted by defendants is granted. Defendants assert that plaintiff has failed to plead in its complaint, compliance with the contractual condition precedent relative to the provision of notice of default and demand for a cure. The performance or occurrence of conditions precedent in a contract need not be pleaded (CPLR 3015; *Allis-Chalmers Mfg. Co. v Malan Const. Corp.*, 30 NY2d 225 [2d Dept 1972]).

That branch of the motion by plaintiff to dismiss the sixth affirmative defense asserted by defendants in their answer based upon failure to give proper notice of default in compliance with the contractual condition precedent to prior to commencement of the action is denied. Plaintiff has failed to establish such defense is without merit as a matter of law (*see Norwest Bank Minn. v Sabloff*, 297 AD2d 722 [2d Dept 2002; *GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471 [2d Dept 1997]).

That branch of the motion by plaintiff to dismiss the seventh affirmative defense asserted by defendants is granted. Mitigation of damages is not an affirmative defense to an action to foreclose a mortgage. Any dispute as to the exact amount owed plaintiff pursuant to the mortgage and note, may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831 [2d Dept 1990]). To the extent defendants assert that plaintiff failed to negotiate in good faith *before bringing this action*, they have failed to cite to any statute or provision in the loan documents imposing a duty on plaintiff to modify the notes or negotiate a workout faith (*see Brown v Deutsche Bank Nat. Trust Co.*, 120 AD3d 440 [2d Dept 2014]). Such terms cannot be added pursuant to the covenant of good faith (*id.* at 441). To the extent defendants assert that plaintiff is barred from bringing this action under the doctrine of unclean hands, that doctrine is used only to bar the grant of equitable relief to a party who is guilty of immoral, unconscionable conduct and even then only "when the conduct relied on, is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (citations omitted)" (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]; *see Wells Fargo Bank v Hodge*, 92 AD3d 775 [2d Dept 2012]). Defendants have failed to allege or demonstrate that plaintiff engaged in immoral or unconscionable conduct which was directly related to the subject note and mortgage or caused the default in payments thereunder to support the defense of unclean hands (*see Wells Fargo Bank v Hodge*, 92 AD3d 775).

That branch of the motion by plaintiff to dismiss the eighth affirmative defense asserted by defendants based upon failure to state a cause of action is denied. The assertion of the defense in an answer may not be subject to motion to strike or provide a basis to test sufficiency of the complaint (*see Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]).

With respect to that branch of the motion by plaintiff to dismiss the ninth affirmative defense asserted by defendants in their answer, defendants claim that plaintiff violated the federal Truth in Lending Act (15 USC § 1601 *et seq.*) (the TILA), its implementing regulations (12 CFR 226.1 *et seq.* [Regulation Z]) and the Home Ownership and Equity

Protection Act of 1994 (15 USC § 1639) (the HOEPA) by failing to provide them with a Truth-in-Lending statement, good faith estimate, and notice of the right to rescind.

Generally, the TILA and its implementing regulations, 12 CFR 226.1 *et seq.* (Regulation Z), require that a consumer in a closed-end credit transaction be provided written material disclosures of certain terms relating to the subject transaction, including, among other things, the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule (*see* 15 USC § 1638). The TILA's mandatory disclosures must be made prior to "consummation" of the transaction (12 CFR 226.17[b]), which is defined as "the time that a consumer becomes contractually obligated on a credit transaction" (12 CFR 226.2[a][13]) (see *Ngwa v Castle Point Mortg., Inc.*, 2008 WL 3891263 at *8, 2008 US Dist LEXIS 63552 at *28-29 [SD NY August 20, 2008]). The TILA disclosures are required at loan origination and after a refinancing, but a lender is not required to provide additional TILA disclosures when the parties agree to a "change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency" (12 CFR 226.20[a][4]; *see also Beck v Wells Fargo Bank, Nat. Assn.*, Case No. 11–cv–663, 2011 WL 6217345 at *4, 2011 US Dist LEXIS 143828 at *7 (ND Cal December 14, 2011) ("[l]oan modifications and workout agreements do not trigger new TILA obligations"]). The TILA gives the consumer in a credit transaction, where the lender takes a security interest in the consumer's residence, an unconditional right to rescind the transaction within three days of (1) the consummation of the transaction, or (2) the delivery of certain required disclosures and rescission forms to the consumer, whichever occurs later (*see* 15 USC § 1635[a]). The HOEPA is an amendment to the TILA, which imposes additional truth-in-lending disclosure requirements when a borrower is involved in a "high cost" loan transaction (*see Palmer v GMAC Commercial Mortg.*, 628 F Supp 2d 186, 189 [D DC 2009]; *Bryant v Mortg. Capital Res. Corp.*, 197 F Supp 2d 1357, 1360 n 4 [ND Ga 2002]).

To the extent defendants claim that plaintiff failed to provide them with a good faith estimate and a TILA statement, plaintiff offers a copy of the TILA disclosure statement dated April 7, 2006, executed by defendants, disclosing the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and other disclosures (*see* 12 CFR 226.23[a][3] n 48). By executing the TILA statement, defendants acknowledged receipt of a completed copy of such statement prior to consummation of the loan by defendant Elizabeth Diaz on April 7, 2006. Defendants have failed to raise any issue of fact as to whether these disclosures were inadequate or erroneous.

To the extent defendant Ana Diaz asserts that plaintiff failed to provide her with a notice of the right to rescind, she did not sign the note, and therefore was not an obligor at the time of the making of the original loan within the meaning of 15 USC § 1635(a) entitled to receive such notice (*see Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]). To the extent defendant Ana Diaz became an obligor vis-a-vis the loan modification agreement, the loan modification agreement did not give rise to a duty by the lender to provide additional TILA disclosures, including notice of a right to rescind to defendants because under the loan modification agreement, the change in the payment schedule did not

involve a rate increase, and the new unpaid principal balance amount consisted of the capitalization of the past due amount (*see Diamond v. One West Bank*, 2010 WL 1742536 at *5, 2010 US Dist LEXIS 50627 at *12-13 [D Ariz April 29, 2010] ["(a) loan modification does not require additional TILA disclosures, particularity where no new monies are advanced"]; *Sheppard v GMAC Mortg. Corp. (In re Sheppard)*, 299 BR 753, 760–63 (Bankr ED Pa 2003) [holding that loan modification was not a refinancing under 12 CFR 226.20(a) and therefore defendant did not have to provide TILA disclosures, even when additional sum was added to the plaintiffs' original loan amount, as new obligation did not completely replace the prior one]; *Castrillo v Am. Home Mortg. Servicing, Inc.*, 670 F Supp 2d 516, 528 [ED La 2009] [holding that where a loan modification agreement does not "completely replace" an earlier mortgage, but rather "amends and supplements" it, the document does "not give rise to disclosure requirements or rescission rights under TILA"]).

However, with respect to defendant Elizabeth Diaz, plaintiff has failed to establish that she was provided with a notice of the right to rescind under TILA at the time of the origination of the mortgage loan or thereafter (*see* 15 USC § 1635[a]; *WM Specialty Mortg., LLC v Sparano*, 68 AD3d 987 [2d Dept 2009]).

As a consequence, that branch of the motion by plaintiff to dismiss the ninth affirmative defense asserted by defendant Ana Diaz is granted. That branch of the motion to dismiss the ninth affirmative defense asserted by defendant Elizabeth Diaz based upon plaintiff's alleged violation of the TILA, Regulation Z and HOEPA is granted only to the extent of dismissing the portion of the ninth affirmative defense based upon alleged violation of TILA, Regulation Z and HOEPA predicated upon failure to provide her with a Truth-in-Lending statement and a good faith estimate. That branch of the motion to dismiss the ninth affirmative defense asserted by defendant Elizabeth Diaz based upon plaintiff's alleged violation of the TILA predicated upon the failure by plaintiff or its predecessor in interest to provide her with a notice of her right to rescind is denied.

That branch of the motion by plaintiff to dismiss the tenth affirmative defense based upon usury asserted by defendants is granted. The note and mortgage, as modified, calls for payment of the principal amount of $305,469.80 plus interest at the stated rate of interest of 6.50 % per annum. Such rate is below the maximum legal rate of 16% per annum and hence is not usurious (*see* Banking Law § 14-a[1]; General Obligations Law § 5-501[1]).

That branch of the motion by plaintiff to dismiss the eleventh affirmative defense asserted by defendants based upon failure to join a necessary party is granted. Defendants have failed to identify the necessary party (RPAPL 1311).

That branch of the motion by plaintiff to dismiss the twelfth affirmative defense asserted by defendants based upon the expiration of the statute of limitations for the cause of action for foreclosure is granted. As a general matter, an action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]; *Yeshiva Chasdei Torah v Dell Equity, LLC*, 90 AD3d 746, 746 [2d Dept 2011]). The six-year statute of limitations in a

mortgage foreclosure action begins to run from the due date for each unpaid installment, or from the time the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated (*see Plaia v Safonte*, 45 AD3d 747, 748 [2d Dept 2007]). The default is alleged to have occurred on October 1, 2013, and this action was timely commenced on December 8, 2014, within six years of the default.

That branch of the motion by plaintiff to dismiss the thirteenth, fourteenth and fifteenth affirmative defenses asserted by defendants based upon the doctrines of estoppel, waiver, release, laches and claims of unconscionable conduct is granted. Defendants have failed to allege any facts supporting these conclusions of law (*see Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [Sup Ct, NY County 1961]; CPLR 3018[b]).

With respect to that branch of the motion by plaintiff to dismiss the sixteenth, seventeenth and nineteenth affirmative defenses asserted by defendants based upon the claim of culpable conduct by plaintiff or others, such claim is related to tort. The claims asserted by plaintiff herein relate to a default under the mortgage, reformation of the mortgage and equitable subordination, as opposed to tortious conduct and thus, any affirmative defense based upon a notion of culpable or tortious conduct is unavailable herein (*see* CPLR 1401; *Pilweski v Solymosy*, 266 AD2d 83 [1st Dept 1999]; *Castleton Holding Corp. v Forde*, 15 Misc 3d 1111[A] [Sup Ct, Kings County 2007]). In addition, defendants have failed to identify the person or entity which engaged in the culpable conduct. Therefore, that branch of the motion by plaintiff to dismiss the sixteenth, seventeenth and nineteenth affirmative defenses asserted by defendants in their answer is granted.

That branch of the motion by plaintiff to dismiss the eighteenth affirmative defense asserted by defendants is granted. Defendants allege that to the extent plaintiff has sustained damages, they did not cause it. Plaintiff does not make a claim for an award of damages. Plaintiff instead seeks to enforce its rights to foreclose under the subject mortgage, and for reformation and equitable subordination.

That branch of the motion by plaintiff to dismiss the twentieth affirmative defense asserted by defendantsin their answer based upon failure to negotiate in good faith pursuant to CPLR 3408 is dismissed. Defendants have made no allegation or showing that plaintiff engaged in conduct which improperly hindered the settlement process or needlessly prevented the parties from reaching a mutually agreeable resolution (*see Flagstar Bank, FSB v Titus*, 120 AD3d 469, 470 [2d Dept 2014]; *cf. U.S. Bank N.A. v Smith*, 123 AD3d 914, 916 [2d Dept 2014]; *US Bank N.A. v Sarmiento*, 121 AD3d 187, 204–205 [2d Dept 2014]). Rather, by order dated September 18, 2015, the Court Attorney Referee noted that defendants had failed to submit loan modification documents.

That branch of the motion by plaintiff to dismiss the twenty-first affirmative defense asserted in defendants's answer is granted. Defendants assert that plaintiff has failed to interpose a verified complaint. A complaint in a foreclosure action, or an action pursuant to article 15 of the RPAPL, need not be verified (*see* CPLR 3020).

That branch of the motion by plaintiff to dismiss the twenty-second affirmative defense asserted in defendants' answer is granted. The twenty-second affirmative defense purportedly reserves the right of defendants to assert further affirmative defenses. Such alleged reservation of rights does not constitute an affirmative defense. A defendant is obligated to obtain the consent of the other parties or the leave of court to amend an answer in the event a defendant seeks to assert an affirmative defense not previously raised (CPLR 3025[b]).

That branch of the motion by plaintiff for leave to enter a default judgment against all non-appearing defendants is granted only to the extent of deeming defendants Criminal Court of the City of New York, New York State Department of Taxation and Finance, City of New York Environmental Control Board, City of New York Department of Transportation Parking Violations Bureau, and City of New York Transit Adjudication Bureau to be in default in appearing or answering.

Dated: January 22, 2018

DARRELL L. GAVRIN, J.S.C.