SHORT FORM ORDER INDEX NO. 022372/2009

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 40 - SUFFOLK COUNTY

PRESENT:
Hon. JAMES HUDSON

x

BANK OF AMERICA, NA,

Plaintiff,

-against-

FRANK JAKLITSCH; LORRAINE A. JAKLITSCH; FRANK JAKLITSCH - MORTGAGOR'S FATHER; LLOYD HAVEN DRIVE CORP.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; WASHINGTON MUTUAL BANK FA; VALLEY NATIONAL BANK; "JOHN DOES" and "JANE DOES" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

x

MOTION DATE: 12-20-16
ADJ. DATE: 1-17-17
Mot. Seq. # 004 -MotD

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated November 22, 2016, and supporting papers (including memorandum of law dated November 22, 2016); (2) Affirmation in Opposition by the defendant Frank Jaklitsch's counsel, Robert Vadnais, Esq., dated January 3, 2017, and supporting papers; (3) Reply by the plaintiff's counsel, Loretta Carthy, Esq., dated January 13, 2017, and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (#004) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against defendant Frank Laklitsch, striking his answer and dismissing the affirmative defenses set forth therein; fixing the defaults of the non-answering defendants; appointing a referee; and amending the caption is granted solely to the extent stated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that the plaintiff is awarded partial summary judgment dismissing all of the affirmative defenses asserted in defendant Frank Jaklitsch's answer, with prejudice, except for the portion of the ninth affirmative defense, alleging a failure to satisfy a condition precedent (notice of default) and a failure to comply with the notice requirements of RPAPL 1303 and 1304; and it is

ORDERED that the caption is amended by substituting Wilmington Savings Fund Society, FSB doing business as Christiana Trust, not its individual capacity, but solely as trustee for BCAT 2015-13BTT as the property party plaintiff; substituting Dalton Jakitson for the fictitious "JOHN DOES" defendants, and by excising the remaining fictitious "JANE DOES" defendants, along with the remaining descriptive wording relating thereto; 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

ORDERED that the plaintiff shall serve a copy of this order upon the Calendar Clerk for IAS Part 39 notifying said Part that Action No. 2/Index No.: 12387/2010 was previously consolidated with this action by order dated March 24, 2014 (Martin, J.); and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry by first-class mail upon counsel for the answering defendant and all other parties, if any, who have appeared herein and not waived further notice within thirty (30) days of the date of this order, and it shall promptly file the affidavit(s) of service with the Clerk of the Court.

This is an action to foreclose a mortgage on certain real property known and described as 11 Lloyd Haven Drive, Huntington, New York 11743. The defendant Frank Jaklitsch ("the defendant mortgagor") allegedly defaulted on a consolidated note and consolidation, extension and modification agreement ("the CEMA") dated August 2, 2005, by failing to make the monthly payment of principal and interest due on or about November 1, 2008, and each month thereafter.

After the defendant mortgagor allegedly failed to cure the default in payment, plaintiff commenced this action by the filing of the lis pendens, summons and complaint on July 10, 2009. Issue was joined by the interposition of the defendant mortgagor's answer, with an attached verification sworn to on October 27, 2014. The remaining defendants have neither answered nor appeared herein.

By way of further background, this action was transferred from the inventory of the Honorable Daniel Martin, J.S.C. to this IAS Part upon Justice Martin's retirement in 2017. The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor, striking his answer and dismissing the affirmative defenses asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

In support of the motion, the plaintiff submitted, inter alia, the pleadings; the consolidated note, the consolidated mortgage, the CEMA and the assignments; affidavits of service; the affirmation from its counsel, Loretta Carthy, Esq.; the affidavit in support from Lucy Babik, a Contested Foreclosure Specialist of Selene Finance LP, attorney-in-fact and servicer for Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2014-12TT ("Wilmington"); the affidavit of merit from Ceedra D. Allen, a Vice President of the plaintiff; and the

affidavit from Margaret Dalton, another Vice President of the plaintiff.

In opposition to the motion, the defendant mortgagor submits the affirmation of his counsel, Robert Vadnais, Esq. In his opposition papers, the defendant mortgagor reasserts that part of his previously pleaded ninth affirmative defense which alleges the plaintiff's failure satisfy a condition precedent to the filing of this action as well as his eleventh affirmative defense asserting the plaintiff's lack of standing. The defendant mortgagor also asserts that the plaintiff failed to send him additional notice pursuant to CPLR 3215(g)(3)(iii), and he now attempts to assert an unpleaded defense alleging a violation of RPAPL 1301. More specifically, the defendant mortgagor contends that the plaintiff submitted insufficient proof of mailing of the notice of default. In reply to the opposition and in further support of the motion, the plaintiff submitted, among other things, an affirmation of its counsel, Ms. Carthy.

The court turns first to the issue of the plaintiff's compliance with certain conditions precedent to this action. With respect to RPAPL 1303, the plaintiff's moving papers contain insufficient proof that the notice served upon the defendant mortgagor was in the proper form (*cf.*, ***Nationstar Mtge., LLC v Kamil***, 155 AD3d 968, 63 NYS3d 890 [2d Dept 2017]; ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]). Even though the plaintiff's submissions include an affidavit of service of the RPAPL 1303 notice upon the defendant mortgagor, the affidavit contains insufficient facts as to compliance and the affirmation of counsel is devoid of any statements as to compliance with the form, type size, type face, paper color and content requirements of RPAPL 1303.

For foreclosure actions commenced on or after September 1, 2008, RPAPL 1304 requires that, with regard to a "high-cost home loan," a "subprime home loan" or a "non-traditional home loan," at least 90 days before a lender or mortgage loan servicer commences legal action against the borrower, the lender or mortgage loan servicer must give the borrower a specific statutorily prescribed notice (*see*, L 2008, ch 472, § 2; *cf.*, L 2009, ch 507). In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific language and type-size requirements of the notice are set forth in RPAPL 1304 (1).

When initially enacted, RPAPL 1304 applied only to "high-cost," "subprime," and "non-traditional" home loans, terms which were defined in subdivision (5) (*see*, L 2008, ch 472, § 2; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]; ***Wilmington Trust Co. v Hurtado***, 48 Misc3d 1201 [A], 18 NYS3d 582 [Sup Ct, Suffolk County 2015]). Subsequently, RPAPL 1304 was amended, effective January 14, 2010, to take its current form, by deleting all references to high-cost, subprime, and non-traditional home loans (L 2009, ch 507, § 1-a; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 105). In its current form, RPAPL 1304 is applicable to any "home loan," as defined in subdivision (5) (a) of that section.

At the outset, the plaintiff submitted insufficient evidentiary proof as to whether the subject loan is a "high-cost," "subprime," and "non-traditional" home loan, or even a "home loan," and thus subject to the notice provisions of RPAPL 1304 at the time of commencement (*see*, L 2008, ch 472, § 2; former RPAPL 1304 [5][B][i]; ***US Bank N.A. v Richard***, 151 AD3d 1001, 57 NYS3d 509 [2d Dept 2017]; ***US***

Bank N.A. v Caronna, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]; ***HSBC Bank USA v Sarabella***, 2018 NY Misc LEXIS 1122, 2018 WL 1675727, 2018 NY Slip Op 30548 [U] [Sup Ct, Suffolk County 2018] [plaintiff furnished information on Fannie Mae web site as to conforming loan limits and requested court to take judicial notice of same, on notice to defendant]; ***Ng v HSBC Mtge Corp.***, 2010 WL 889256 [EDNY 2010] [size of the loan limit determined by number of dwelling units and conforming loan size limit at the time of mortgage for a comparable dwelling]; *cf.*, ***Wells Fargo Bank, N.A. v Emmet***, 2009 NY Misc LEXIS 5078, 2009 WL 3793455, 2009 NY Slip Op 32509 [U][Sup Ct, Suffolk County 2009][exhibit entitled "Historical Conventional Loan Limits" not in evidentiary form, and even if it were, no evidentiary proof that such "Conventional Loan Limits" equate to the "conforming loan size" referred to in the statute by way of an affidavit from one with personal knowledge]). Because this action was commenced on July 10, 2009, the provisions of RPAPL 1304 would apply only if the loan was defined as a "home loan" as well as either a "high-cost," a "subprime," or "non-traditional" home loan (*see*, L 2008, ch 472, § 2). In the plaintiff's moving papers, there are no allegations by way of an affidavit from one with personal knowledge as to whether the loan whether the loan meets the definition of any of these aforementioned categories. The plaintiff now alleges, however, that it complied with the notice provisions of RPAPL 1304, without any explanation as to why it was required to do so. Parenthetically, even though the mortgages and the CEMA specify that the property is a "one or two family dwelling only," there are no sworn statements from a representative of the plaintiff or its servicer as to whether the property is improved by a one or two family residence, and the court notes that none of the loan instruments bear a legend that they are single family-Fannie Mae/Freddie Mac uniform instruments. Thus, the court is left in the untenable position of having to guess whether the notice provisions of RPAPL 1304, as originally enacted, apply herein.

If required, the plaintiff's submissions are insufficient to demonstrate evidentiary proof of proper service of the 90-day pre-foreclosure notice upon the defendant mortgagor (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]). The plaintiff submitted neither an affidavit of service of the 90-day notice upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the alleged mailings by regular and certified mail as well as familiarity with the sender's mailing practices and procedures (*see*, ***Citibank, N.A. v Wood***, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017] [plaintiff's submissions devoid of proof of a standard office mailing procedure or an independent proof of the actual mailing]; ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017] [plaintiff's representative did not allege that he was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed]; ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016] [affidavit insufficient to establish RPAPL 1304 compliance where no showing of personal knowledge of procedures customarily used in ordinary course of business for mailing of statutory notices]; ***Deutsche Bank Nat. Trust Co. v Bertini***, 2018 NY Misc. LEXIS 616, 2018 WL 1072107, 2018 NY Slip Op. 30305 [U] [Sup Ct, Suffolk County 2018] [plaintiff's submissions devoid of proof of a standard office mailing procedure or any independent proof of actual mailing]; *cf.*, ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016] [affidavit describing the sender's standard business practice]; ***Wells Fargo Bank, N.A. v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015] [affidavit of mailing and certified mailing receipts]).

The conclusory statements set forth in the affidavit of Ms. Babik that the defendant mortgagor was sent 90-day pre-foreclosure notices, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Wells Fargo Bank, N.A. v Trupia***, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, *supra*). Even though Ms. Babik alleges that 90-day notices were "sent," she did not set forth sufficient facts as to how or when compliance was accomplished. Ms. Babib also did not state that she served the notices; nor did she identify the individual(s) who allegedly did so. Further, it is noted that Ms. Babik's affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 776 [2d Dept 2001]).

Turning to the default notice provisions in the consolidated mortgage, the plaintiff failed to submit sufficient evidence that the defendant mortgagor was served with a 30-day notice of default prior to demanding payment of the loan in full (*see*, ***US Bank N.A. v Singh***, 147 AD3d 1007, 47 NYS3d 439 [2d Dept 2017]; ***Nationstar Mtge., LLC v Dimura***, 127 AD3d 1152, 7 NYS3d 573 [2d Dept 2015]; ***HSBC Mtge. Corporation (USA) v Gerber***, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]; *cf.*, ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013] [compliance with 90-day notice requirements satisfies the 30-day default notice requirement in the mortgage]; ***Onewest Bank, N.A. v Rosado***, 2016 US Dist LEXIS 74422, 2016 WL 3198305 [SDNY 2016][notice of default substantially complied with terms of mortgage]). In this case, the plaintiff's representative did not allege that she is familiar with the standard *mailing* practices or procedures of the prior servicer, and that those practices or procedures were followed in this instance. Nor did the plaintiff submit any other proof of proper mailing such as proof of mailing from the United States Postal Service, combined with an authenticated business ledger, or an affidavit of service.

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]). Further, in the Second Department, capacity to sue and standing are distinct legal concepts (*see*, ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

By its submissions, the plaintiff demonstrated its standing by way of physical possession of the note prior to commencement (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Bethpage Fed. Credit Union v Caserta***, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; ***HSBC Bank USA, N.A. v Armijos***, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; ***Silvergate Bank v Calkula Props., Inc.***, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). In her affidavit, Ms. Babik alleges that the plaintiff as holder, or its agent, had physical possession of the original consolidated note on April 15, 2009, a date being prior to commencement, and

that the plaintiff remained in continual possession of the note until delivery of same to Wilmington, or its agent. In rendering her affidavit, Ms. Babik alleges that her determination as to standing is based upon, among other things, the business records relating to the servicing of the loan, her review of the loan documents, "vault document management" and correspondence. To the extent that the servicing records were created by a prior servicer, those records were "integrated and boarded" into Selene's systems and are now part of Selene's servicing records. It is the regular business practice of Selene to integrate the prior servicer's servicing records into Selene's servicing records, and to rely on the accuracy of those boarded servicing records in providing its servicing loan functions. Ms. Babik further alleges that she is familiar with how each document attached to the moving papers was retrieved and compiled, and has personally reviewed each document attached to the plaintiff's moving papers. Moreover, Ms. Dalton, another Vice President of the plaintiff, alleges that "the loan was acquired and in the possession of the [p]laintiff on April 15, 2009."

In any event, the plaintiff demonstrated its standing by, inter alia, the submission of the written assignments of the mortgages and the notes executed prior to commencement (*see*, ***U.S. Bank N.A. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In this case, the assignments include references to the promissory notes and/or indebtedness and/or beneficial interest in the notes (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; *see also*, ***Washington Mut. Bank v Nussen***, 138 AD3d 828, 29 NYS3d 522 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***JP Morgan Chase Bank, N.A. v Russo***, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014] [Washington Mutual Bank, FA's receivership by the FDIC, and loan acquisition by JP Morgan Chase Bank, N.A.]).

The plaintiff also demonstrated the defendant mortgagor's default in payment (*see*, ***Bank of Am., N.A. v Cudjoe***, 157 AD3d 653, 69 NYS3d 101 [2d Dept 2018]; ***Emigrant Bank v Marando***, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; ***Emigrant Funding Corp. v Agard***, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]). The affidavits of the plaintiff's representatives, combined with the plaintiff's other submissions sufficiently show that the loan has been in default since November 1, 2008.

In the fifth affirmative defense, the defendant mortgagor alleges the lack of personal jurisdiction over him. By its submissions, the plaintiff demonstrated that it obtained personal jurisdiction over the defendant mortgagor (*see*, ***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]). In any event, such defense was waived as the defendant mortgagor failed to move to dismiss the complaint insofar as asserted against him on this ground within 60 days after serving the answer (*see*, CPLR 3211[e]; ***Putnam County Sav. Bank v Mastrantone***, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]; ***Reyes v Albertson***, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; ***Dimond v Verdon***, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]).

The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004]

[unsupported affirmative defenses are lacking in merit]; *see also*, ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]). Further, RPAPL 1306 is inapplicable because it became effective after the commencement of this action (see, L 2009, ch 507, § 5, eff Feb 13, 2010). The court notes that several of the asserted affirmative defenses asserted in the answer contain compound, boilerplate defenses in contravention of the civil practice rules (*see*, CPLR 3014; ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015]).

It was thus incumbent upon the defendant mortgagor to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing as to the default in payment 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 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*; ***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]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses asserted in the answer, except those noted above. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). All of the unsupported affirmative defenses asserted in the answer are thus dismissed.

Rejected as unmeritorious are the defendant mortgagor's challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the defendant mortgagor's contentions, the affidavits of the plaintiff's representatives submitted in support of the motion are legally sufficient and comport with the requirements of CPLR 3212 (*see*, ***Citigroup v Kopelowitz***, 147 AD3d 1014, 48 NYS3d 223 [2d Dept 2017]; ***North Am. Sav. Bank, FSB v Esposito-Como***, 141 AD3d 706, 35 NYS3d 491 [2d Dept 2016]; ***RBS Citizens, N.A. v Galperin***, 135 AD3d 735, 23 NYS3d 307 [2d Dept 2016]; *see also*, ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015][personal knowledge of the maker's business practices and procedures, or records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business]). Further, the contents of the affidavits submitted in support of the motion are based upon their personal knowledge of the business records of the plaintiff and/or its current and prior servicer's relating

to the loan as well as their own knowledge as to how these records are kept and maintained (*see*, ***US Bank N. A. v Ehrenfeld***, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; ***U.S. Bank N.A. v Carey***, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]; *see*, ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*).

The plaintiff demonstrated its standing, as indicated above. In response, the defendant mortgagor has not come forward with any evidence to raise a triable issue of fact as to plaintiff's standing, or the validity of the assignments (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***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]). Accordingly, all of the affirmative defenses asserting the lack of standing and/or the lack of capacity to sue are dismissed in their entirety.

The defendant mortgagor's contentions that the plaintiff has violated the provisions of RPAPL 1301 are without merit (*see*, ***Aurora Loan Servs., LLC v Lopa***, 88 AD3d 929, 932 NYS2d 496 [2d Dept 2011] [prayer for a deficiency judgment in a foreclosure complaint does not constitute a separate action for a money judgment in violation of the election of remedies doctrine]). The complaint demands, inter alia, foreclosure and sale and a deficiency judgment; it does not include a separate cause of action for recovery on the guarantee of the first note. In any event, because the defendant mortgagor did not make a pre-answer motion to dismiss on this ground, he waived this purported defense (*see*, CPLR 3018[b]; CPLR 3211[a][e]; *see also*, ***New York Commercial Bank v. J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***First Nationwide Bank v Brookhaven Realty Assoc.***, 223 AD2d 618, 637 NYS2d 418 [2d Dept 1996]).

The defendant mortgagor's argument that the plaintiff failed to comply with CPLR 3215(g)(3) by not sending him additional notice lacks merit because he has answered the complaint (*see*, CPLR 3215; ***Bono v DuBois***, 121 AD3d 932, 995 NYS2d 153 [2d Dept 2014]). The defendant mortgagor's remaining contentions have been examined and found to be without merit. In any event, as provided for by section "V" of the CEMA, the defendant mortgagor validly waived any right of set off, counterclaims or defenses to any of the obligations of the consolidated note and mortgage under the express terms of the CEMA (*see*, ***KeyBank N.A. v Chapman Steamer Collective, LLC***, 117 AD3d 991, 986 NYS2d 598 [2d Dept 2014]; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Petra CRE CDO 2007-1, Ltd v 160 Jamaica Owners, LLC***, 73 AD3d 883, 904 NYS2d 699 [2d Dept 2010]; ***Parasram v DeCambre***, 247 AD2d 283, 668 NYS2d 454 [1st Dept 1998]). Such waivers are enforceable as they do not contravene the public policy of this State (*see*, ***Chemical Bank N.Y. Trust Co. v Batter***, 31 AD2d 802, 297 NYS2d 363 [1st Dept 1969]).

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

352 [2d Dept 2011]).

The plaintiff is therefore awarded partial summary judgment in its favor dismissing all of the affirmative defenses asserted in defendant Frank Jaklitsch's answer, with prejudice, except for the portion of the ninth affirmative defense alleging a failure to satisfy a condition precedent (notice of default), and a failure to comply with the notice requirements of RPAPL 1303 and 1304 (*see*, ***Emigrant Bank v Myers***, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017] [unmeritorious affirmative defenses dismissed]; ***U.S. Bank N.A. v Pia***, 73 AD3d 752, 901 NYS2d 104 [2d Dept 2010] [dismissing defenses based upon unsupported allegations of violations of TILA and GBL § 349]). The court next turns to the ancillary relief in plaintiff's motion.

The branch of the motion for an order amending the caption, by substituting Dalton Jakitson for the fictitious "JOHN DOES" defendants, and by excising the remaining fictitious "JANE DOES" defendants, is granted (*see*, CPLR 1024; ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). The branch of the motion for an order substituting Wilmington for the plaintiff in this action is also granted (*see*, CPLR 1018; 1021; 3025[b]; ***Citibank, N.A. v Van Brunt Props., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the defendants Lorraine Jaklitsch, Frank Jaklitsch-Mortgagor's Father, Lloyd Haven Drive Corp., New York State Department of Taxation and Finance, Washington Mutual Bank, FA, Valley National Bank and Dalton Jakitson (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). Accordingly, the default in answering of all of the non-answering defendants is fixed and determined. In light of the outstanding issues of fact, the remainder of the ancillary relief is denied at this juncture.

In view of the foregoing, and pursuant to CPLR 3212 (g), the court finds that the sole remaining issues of fact relate to: compliance with the notice of default provisions of the consolidated mortgage; proof of compliance with RPAPL 1303; and proof of the applicability of the 90-day notice provisions of RPAPL 1304 in this action, and, if required, proper evidentiary proof of compliance with the same. Thus, the undecided branches of the plaintiff's motion are denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date of this order. The plaintiff's renewal motion, if any, shall include a copy of the papers submitted with this motion and a copy of this order.

The proposed long form order submitted by the plaintiff appointing a referee to compute has been marked "not signed."

Dated: May 3d 2018
Riverhead, NY

Hon. JAMES HUDSON, A.J.S.C.

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