Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Joan C. McGeveran, Bank of America, N.A., CACH LLC, "John Doe" (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants.

Clerk of the Court

Index No.: 15487/2011

Motion Sequence No.: 001; MOTD
Motion Date: 11/4/16
Submitted: 11/4/16

Motion Sequence No.: 002; XMD
Motion Date: 11/4/16
Submitted: 11/4/16

Attorney for Plaintiff:

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51 East Bethpage Road
Plainview, NY 11803

Attorney for Defendant
Joan C. McGeveran:

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Upon the following papers numbered 1 to 8, read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 3; Notice of Cross Motion and supporting papers, 4 - 6; Answering Affidavits and supporting papers, 7 - 8; Replying Affidavits and supporting papers; it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the answering defendant Joan C. McGeveran, striking her answer and dismissing the affirmative defenses and counterclaims set forth therein; (2) pursuant to CPLR 1024, substituting Brian McGeveran, Charlie McGeveran, Gavin McGeveran, and Shawn McGeveran for "John Doe," and to amend the caption accordingly; (3) pursuant to CPLR 1018, substituting MTGLQ Investors, L.P. as plaintiff in the place and stead of Wells Fargo Bank, N.A., (4) pursuant to CPLR 3215, fixing the defaults of the non-answering

defendants; and (5) 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 is granted in part, and denied in part; and it is further

ORDERED that so much of the plaintiff's motion that seeks an order granting summary judgment, striking Joan C. McGeveran's answer, is granted; and it is further

ORDERED that so much of plaintiff's motion that seeks to substitute MTGLQ Investors, L.P. as plaintiff in the place and stead of Wells Fargo Bank, N.A. in the instant action is denied, with leave to renew within 120 days of the date of this order, not to be extended without leave of Court; and it is further

ORDERED that so much of plaintiff's motion that seeks to substitute Brian McGeveran, Charlie McGeveran, Gavin McGeveran, and Shawn McGeveran for "John Doe," and to amend the caption accordingly, is granted; and it is further

ORDERED that so much of plaintiff's motion that seeks an order fixing the defaults of all non-answering defendants is granted; and it is further

ORDERED that the cross-motion (002) by defendant Joan C. McGeveran for, inter alia, dismissal of the complaint as asserted against her is denied; and it is further

ORDERED that plaintiff shall promptly serve a copy of this order with notice of entry upon all parties who have appeared in this action, if any.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York, commenced on May 11, 2011. On October 12, 2004, nonparties Mary M. McGeveran ("Mary M.") and John B. McGeveran (collectively referred to herein as the "borrowers") executed a note in favor of plaintiff in the amount of $200,000.00. To secure said note, on the same date, the borrowers gave a mortgage on the subject property to plaintiff. Also on October 12, 2004, the borrowers executed a deed transferring their interest in the subject property to non-party John McGeveran and defendant Joan C. McGeveran. On October 2, 2007, John B. McGeveran died, and on February 9, 2008, Mary M. McGeveran also passed away. On May 3, 2008, non-party John McGeveran and defendant Joan C. McGeveran executed another deed conveying the subject property to defendant Joan C. McGeveran alone. On June 26, 2015, after the commencement of this action, plaintiff executed an Assignment of Mortgage in favor of GCAT Management Services 2015-13 LLC ("GCAT"). On May 13, 2015, GCAT executed an assignment of mortgage in favor of MTGLQ Investors, L.P. ("MTGLQ"). By its complaint, plaintiff alleges that the borrowers defaulted in their payments on the note. By her answer, defendant Joan C. McGeveran denies the material allegations as set forth in the complaint and asserts 13 affirmative defenses, including lack of standing and failure to comply with the notice requirements prescribed by Real Property Actions and Proceedings Law (RPAPL) §1304. No other defendants have answered the complaint or otherwise appeared in this action.

Plaintiff now moves for summary judgment. In support of its motion, plaintiff submits, among other things, copies of the note and mortgage, copies of assignments of the subject mortgage, several duly executed affidavits of service, and an affidavit of Angie Farmer, Vice President of Rushmore Loan Management Services, LLC ("Rushmore"), loan servicer for MTGLQ, plaintiff's successor in interest. Defendant Joan C. McGeveran opposes the motion, arguing, inter alia, that MTGLQ has failed to establish its standing to prosecute this action, and that she and her now-estranged husband, John McGeveran, obtained a subsequent loan and that the subject mortgage was satisfied by same. In opposition, defendant submits several documents, including her own affidavit.

Here, as defendant served an answer that included the affirmative defense of standing, plaintiff must prove its standing so as to be entitled to relief (*see* ***Bank of N.Y. Mellon v Visconti***, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). As plaintiff is the original lender, it has standing to bring this action (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; ***Wachovia Mtge. Corp. v Lopa***, 129 AD3d 830, 13 NYS3d 97 [2d Dept 2015]; ***Emigrant Mtge. Co., Inc. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]).

Plaintiff's submissions also establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage, and evidence of nonpayment (*see* ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). By her affidavit of merit, Ms. Farmer attests that, based on records kept during the regular course of MTGLQ's business, the payment on the note scheduled for December 1, 2010 was not made, and that no subsequent payments were made to bring the loan current (*see* CPLR 4518[a]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]). As there is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, as long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a) and the records themselves actually evince the facts for which they are relied upon, Ms. Farmer's affidavit is sufficient to establish the default on the subject note (*see* ***HSBC Bank USA, N.A. v Ozcan***, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]; ***Wells Fargo Bank, N.A. v Thomas***, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; ***Citigroup v Kopelowitz***, 147 AD3d 1014, 48 NYS3d 223 [2d Dept 2017]; ***Deutsche Bank Nat. Trust Co. v Monica***, 131 AD3d 737, 739, 15 NYS3d 863, 865 [3d Dept 2015]). Moreover, plaintiff's submissions, namely the subject loan documents showing that nonparties Mary M. and John B. McGeveran were the obligors on the subject note, and not defendant, demonstrate, prima facie, that defendant is not a "borrower" within the meaning of the Real Property Actions and Proceedings Law. Thus, the notice requirements of the statute are inapplicable to this action (*see* RPAPL §1304[1]).

Plaintiff having met its initial burden on its motion for summary judgment on its mortgage foreclosure cause of action, the burden shifted to defendant to assert any defenses which could properly raise a triable issue of fact (*see* ***Bank of Smithtown v 219 Sagg Main, LLC***, *supra*; ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Cohen***, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021,

907 NYS2d 22 [2d Dept 2010]). In opposition to plaintiff's motion, and in support of her cross-motion to dismiss, defendant submits, among other things, her own affidavit, alleging that MTGLQ does not have standing to prosecute this action, and that the subject mortgage was satisfied in 2007 by another loan from Bank of America. However, as plaintiff established its standing as the original lender, defendant's contention is without merit (*see* ***Aurora Loan Servs., LLC v Taylor***, *supra*; ***Citicorp Mortgage v Adams***, *supra*; ***Wachovia Mtge. Corp. v Lopa***, *supra*). Further, although defendant asserts that the subject mortgage has been satisfied by a subsequent loan, she submits no other evidence to corroborate this contention, rendering same conclusory and speculative (*see* ***Reale v Tsoukas***, 146 AD3d 833, 45 NYS3d 148 [2d Dept 2017]). The Court notes that "Bank of America, N.A." is a named party defendant in the instant action, and the complaint alleges that this party is holder of a mortgage on the subject property. Thus, as the statements in defendant's affidavit are without merit as to plaintiff's standing, and they are conclusory and speculative as to whether the subject mortgage has been satisfied, she fails to raise any triable issues of fact, or to meet her burden on her cross-motion to dismiss (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Reale v Tsoukas***, *supra*). Furthermore, plaintiff, in its moving papers, 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, e.g.* ***Flagstar Bank v. Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Becher v. Feller***, 64 A.D.3d 672, 884 N.Y.S.2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v. Perez***, 41 A.D.3d 590, 837 N.Y.S.2d 877 [2d Dept 2007]; ***Coppa v. Fabozzi***, 5 A.D.3d 718, 773 N.Y.S.2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also* ***Gillman v. Chase Manhattan Bank, N. A***., 73 N.Y.2d 1, 537 N.Y.S.2d 787 [1988] [unconscionability generally not a defense]; ***Emigrant Mtge. Co., Inc. v. Fitzpatrick***, 95 A.D.3d 1169, 945 N.Y.S.2d 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]; ***La Salle Bank N.A. v. Kosarovich***, 31 A.D.3d 904, 820 N.Y.S.2d 144 [3d Dept 2006]; ***CFSC Capital Corp. XXVII v. Bachman Mech. Sheet Metal Co.***, 247 A.D.2d 502, 669 N.Y.S.2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Jo-Ann Homes v. Dworetz***, 25 NY2d 112, 302 NYS2d 799 [defense of unclean hands rejected]; ***Connecticut Natl. Bank v. Peach Lake Plaza***, 204 A.D.2d 909, 612 N.Y.S.2d 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]). Defendant Mary M. did not address her other affirmative defenses in her cross-motion. When a defendant fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enter., Inc. v. Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co, LLC v. Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Moreover, because defendant Mary M. did not raise and/or assert the remaining pleaded defenses in her cross-motion, the dismissal of those defenses as abandoned and waived is warranted (*see* ***New York Commercial Bank v. J. Realty F. Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept. 2013]; ***Starkman v. City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept. 2013]; *see also* ***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enterprises, Inc. v. Zcam LLC***, 101 AD3d 606, 957 NYS2d 88 [1st Dept. 2012]).

Based upon the foregoing, plaintiff is awarded summary judgment in its favor against defendant Mary M. (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, defendant Mary M's cross-motion is denied and her answer and affirmative defenses are stricken.

In addition, by its moving papers, plaintiff established the default in answering of all of the other named defendants and accordingly, the default in answering of all of the non-answering defendants is fixed and determined (*see* RPAPL § 1321; ***HSBC Bank USA, N.A. v. Alexander***, 124 A.D.3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v. Ambrosov***, 120 A.D.3d 1225, 993 N.Y.S.2d 322 [2d Dept 2014]; ***U.S. Bank, N.A. v. Razon***, 115 A.D.3d 739, 981 N.Y.S.2d 571 [2d Dept 2014]; ***HSBC Bank USA, N.A. v. Roldan***, 80 A.D.3d 566, 914 N.Y.S.2d 647 [2d Dept 2011]).

The motion for an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendants named "John Doe" and substituting Brian McGeveran, Charlie McGeveran, Gavin McGeveran, and Shawn McGeveran as party defendants in place and in stead of the defendants sued herein as "John Doe", is granted, without opposition (*see* ***Neighborhood Hous. Servs. of N.Y. City, Inc. v. Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept. 2009]); ***PHH Mtge. Corp. v. Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept. 2013]).

Plaintiff's submissions, namely the written assignments of mortgage and the unendorsed note payable to plaintiff, however, fail to establish that an amendment of the caption to substitute MTGLQ as plaintiff is warranted, as same fail to demonstrate, prima facie, that plaintiff transferred its interest in the action to MTGLQ (*see* CPLR 1018; ***Citicorp Mortgage v Adams***, 153 AD3d 779, 60 NYS3d 337 [2d Dept 2017]; *cf.* ***Brighton BK, LLC v Kurbatsky***, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]; ***Aurora Loan Serv., LLC v Lopa***, 130 AD3d 952, 15 NYS3d 105 [2d Dept 2015]).

As such, although plaintiff established its entitlement to relief on its complaint, in the interests of judicial economy, the Court will reserve signature on the proposed order of reference, as plaintiff may renew its motion as to the substitution of the party plaintiff and amendment of the caption.

Accordingly, plaintiff's motion is granted in part, and denied in part, with leave to renew within 120 days of the date of this order, plaintiff's proposed order of reference has been reserved for signature, and defendant's cross-motion is denied.

Dated: 6/25/2018

William B. Rebolini.
HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**