

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK: PART 27

-----X
HSBC Bank USA, N.A., as Trustee for Ellington
Loan Acquisition Trust 2007-2,

Index No.

Plaintiff,

-against-

; Capital One Bank USA, N.A.;
United States of America, "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.

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March 9, 2017
Riverhead, New York 11901

B E F O R E:

JUSTICE ROBERT F. QUINLAN
Justice of the Supreme Court

A P P E A R A N C E S:

SHAPIRO, DiCARO & BARAK, LLC
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175 Mile Crossing Boulevard
Rochester, New York 14624
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CHRISTINE ALSTER
Senior Court Reporter

1 considered in this case.

2 In any event, this is the Court's decision in
3 HSBC Bank U.S.A., N.A. as Trustee for Ellington Loan
4 Acquisition Trust 2007-2 against
5 Capital One Bank, U.S.A., N.A., United States of
6 America, and "John Doe" under index number of

7
8 This is motion sequence 001 for summary
9 judgment and associated relief motion -- by the
10 plaintiff. Motion sequence 002, a cross-motion to
11 dismiss by the defendant, and also in opposition to the
12 plaintiff's submissions.

13 Upon completion of six foreclosure settlement
14 conference part conferences held pursuant to CPLR 3408,
15 on December 10, 2015, this foreclosure action involving
16 residential property in Suffolk County was released to
17 an IAS part. At that time it appears to me from the
18 Court's records it was assigned to the Honorable Joseph
19 Farneti, an Acting Supreme Court Justice, and the
20 defendant requested a preliminary conference which was
21 filed, I don't know if that was actually before or after
22 Justice Farneti was assigned or Acting Justice Farneti
23 was assigned, and a preliminary conference was scheduled
24 for this Court's D.C.M. part, Differentiated Case
25 Management, on February 25, 2018.

1 Prior to that conference -- prior to that
2 conference, which plaintiff had clearly already been
3 notified of, plaintiff moved in summary judgment to
4 dismiss the answer and for the relief presently before
5 the Court. The motion is dated, and apparently served,
6 on February 18, 2016. Although apparently not
7 electronically filed, which is the requirement for a
8 case such as this until March 1, 2016, the Court notes
9 that the affidavit served by mail says that on February
10 18, 2016 I served the within notice of motion, etcetera,
11 and it is also dated February 18, 2016 by a person whose
12 name is not necessary to put on the record, but a
13 litigation paralegal of Shapiro, DiCaro and Barak. Why
14 it wasn't filed immediately as required by the
15 electronic filing protocols here and wasn't filed before
16 March 1st, I am unaware.

17 Through a series of stipulations signed by
18 both counsels, plaintiff's motion for summary judgment
19 originally returnable on Saint Patrick's Day last year,
20 was adjourned, as well as defendant's subsequently filed
21 opposition and cross-motion to both be submitted on June
22 9th of last year. Through some form of clerical error
23 by the Court or the Court's computer system, the Court's
24 records indicate that plaintiff's summary judgment
25 motion was marked submitted on March 17, 2016 and

1 referred to the Foreclosure Settlement Department, and
2 defendant's motion was not noted as a cross-motion, was
3 submitted on May 26th of 2016 and referred to the
4 Foreclosure Settlement Conference Part for a decision
5 -- excuse me, Foreclosure Settlement Department for a
6 decision. Although E-Courts to the public on line shows
7 the case was assigned to my part on the submission
8 dates, was actually still with Acting Supreme Court
9 Justice Farneti at that time with compliance conferences
10 set in reference to the D.C.M. order issued and signed
11 by the parties on February 25th of 2016 to appear for
12 conferences, according to the calendar, on compliance
13 before Justice Farneti on August 18th, September 29th,
14 and December 15th of 2016.

15 To implement the intent of both parties, the
16 Court is going to direct the clerk to correct the
17 markings, if possible, to indicate that both plaintiff's
18 summary judgment motion and defendant's cross-motion to
19 compel discovery and deny summary judgment be marked
20 submitted as cross-motion and motion on June 9, 2016.

21 The motion was assigned to my foreclosure part
22 along with approximately 100 other opposed motions and
23 foreclosures in the late Fall of 2016 by an
24 administrative order of the District Administrative
25 Judge sometime after September 29th.

1 The Court wishes the record to note that both
2 parties appeared at the February 25, 2016 discovery --
3 excuse me, Differentiated Case Management conference in
4 which a discovery scheduling order was issued and
5 consented to by both parties, and certain timelines for
6 discovery and depositions were set forth therein and
7 signed that day. That is an order of this Court,
8 meaning Supreme Court, State of New York. Why this
9 occurred when defendant's -- excuse me, plaintiff's law
10 firm was fully aware, not only of their intent to make a
11 motion, but they had physically mailed it a week before,
12 goes unexplained at this point. The Court will address
13 some of that in its decision.

14 In deciding this motion in addition to the
15 oral arguments of counsel, the Court has considered
16 plaintiff's motion papers, affirmations of counsel, an
17 affidavit of an employee of plaintiff's servicer,
18 Nationstar Mortgage LLC, referred to hereinafter, it
19 will be referred to as servicer, and attached exhibits,
20 defendant's cross-motions to compel discovery. And in
21 opposition, affirmations of defendant's counsel,
22 affidavit of the defendant and attached exhibits,
23 plaintiff's opposition to defendant's cross-motion. And
24 in reply to defendant's opposition to its motion,
25 affirmation of counsel and attached exhibits and

1 defendant's counsel's affirmation in reply to the
2 opposition.

3 The Court notes that defendant's cross-motion
4 in the notice of motion reads that it is pursuant to
5 CPLR Section 3124 compelling the plaintiff to produce
6 the requested disclosure as enumerated in defendant's
7 discovery demands dated October 9, 2014, all of which
8 were recently reserved on February 29, 2016 and
9 incorporated by reference to the preliminary conference
10 order dated February 25, 2016, and for such other
11 further relief as the Court deemed just and proper under
12 the circumstances. Doesn't move for dismissal at this
13 time, and the Court is not going to engage in an order
14 of dismissal at this point for anything raised herein.

15 In the interest of judicial economy, I guess
16 you would say, defendant's cross-motion is granted to
17 the extent set forth below. Plaintiff's motion for
18 summary judgment is denied except to the extent set
19 forth below dismissing certain of defendant's
20 affirmative defenses.

21 Defendant filed an answer to plaintiff's
22 complaint which consisted of general denials, 23
23 affirmative defenses and seven counterclaims. Although
24 many of these affirmative defenses and all of his
25 counterclaims were not supported or raised in opposition

1 to the plaintiff's motion for summary judgment, and
2 subject to dismissal, as generally affirmative defenses
3 and counterclaims which are not raised in opposition are
4 deemed abandon, (see New York Commercial Bank v J.
5 Realty F. Rockaway Limited, 108 AD3d 756 [Second
6 Department 2013]; Starkman v City of Long Beach, 106
7 AD3d 1076 [Second Department 2013]; Keuhne and Nagel,
8 Inc. v Baiden, 36 NY2d 539 [1975]; Katz v Miller, 120
9 AD3d 768, [Second Department 2014]).

10 And although this Court has done so routinely
11 in other cases, under the particular facts of this case,
12 the Court does not believe their dismissal is warranted,
13 even though unsupported, but the Court will dismiss the
14 fifth and fifteenth affirmative defenses which deal with
15 the claim that plaintiff has not correctly credited
16 defendant's for amounts actually paid.

17 A dispute concerning the amount claimed owed
18 by defendant-mortgagor is not a defense to summary
19 judgment or a basis or preclude it, but it may be the
20 subject of a hearing before a referee to compute
21 appointed pursuant to RPAPL Section 1321, (see Long
22 Island Savings Bank of Centereach FSB v Denkensohm, 222
23 AD2d 659 [Second Department 1995].

24 Also, the defendant's thirteenth affirmative
25 defense is dismissed as plaintiff's complaint and

1 submissions set forth allegation sufficient if proven to
2 establish a cause of action for foreclosure of this
3 mortgage. Although that still remains obviously the
4 burden of plaintiff to establish this at a trial or
5 subsequent summary judgment motion.

6 The defendant's nineteenth affirmative
7 defense, a claim that plaintiff accepted defendant's
8 conduct of nonpayment for so long before bringing this
9 action that it had accepted his non-performance for so
10 long that they are not entitled to enforce their claim
11 is also dismissed. Not only for being unsupported, not
12 because it was unsupported in opposition, because it was
13 unsupported the by law and without merit.

14 In all other respects, plaintiff's motion for
15 summary judgment and dismissal of the defendant's answer
16 is denied and striking the other affirmative defenses is
17 denied. As this is an application for an order pursuant
18 to RPAPL Section 1321, and to set the default of the
19 non-appearing, non-answering defendants.

20 As defendant has raised a genuine question of
21 fact concerning plaintiff's standing to bring the
22 action, plaintiff's motion for summary judgment must be
23 denied, (see HSBC Bank U.S.A. National Association v
24 Gilbert, 120 AD3d 756 [Second Department 2014]), and
25 with it, it's ancillary motions setting the default of

1 the non-appearing, non-answering defendants and for an
2 order of reference pursuant to RPAPL Section 1321 and to
3 amend the caption in the matter.

4 Entitlement to summary judgment in favor of
5 the foreclosing plaintiff is established prima facie by
6 the plaintiff's production of the mortgage, the unpaid
7 note and evidence of default and payment (see Wells
8 Fargo Bank, N.A. v DeSouza, 126 AD3d 965 [Second
9 Department 2015]; Wells Fargo, N.A. v Eroboho, 127 AD3d
10 1176 [Second Department 2015]; Wells Fargo Bank, N.A. v
11 Morgan, 139 AD3d 1046 [Second Department 2016]). If
12 plaintiff has established that by proof submitted in
13 evidentiary form, it demonstrates its entitlement to
14 summary judgment (CPLR 3212; RPAPL Section 1321; see
15 Federal Home Loan Mortgage Corp. v Karastathis, 237 AD2d
16 558 [Second Department 1997]). The burden then shifts
17 to the defendant to demonstrate the existence of a
18 triable issue of fact as to a bona fide defense to the
19 action, (see Capstone Business Credit, LLC v Imperia
20 Family Realty, LLC, 70 AD3d 882 [Second Department
21 2010]; Zanzini v Chandler, 79 AD3d 1031 [Second
22 Department 2010]; Citibank, N.A. v Van Brunt Properties,
23 LLC, 95 AD3d 1158 [Second Department 2012]).
24 Defendant's answer and affirmative defenses alone are
25 insufficient to defeat plaintiff's motion, (see Flagstar

1 Bank v Bellafiore, 94 AD3d 1044 [Second Department
2 2012]). Accordingly, it is incumbent upon a defendant
3 to produce evidentiary proof in admissible form
4 sufficient to demonstrate the existence of a triable
5 issue of fact as to a bona fide defense to the action,
6 (see Washington Mutual Bank v Valencia, 92 AD3d 774
7 [Second Department 2012]; Winegrad v New York University
8 Medical Center, 64 NY2d 851 [1985], Zuckerman v City of
9 New York, 49 NY2d 557 [1980]).

10 Where plaintiff's lack of standing to bring
11 the action has been placed in issue by defendant's
12 answer as here, plaintiff must also establish its
13 standing as part of its prima facie showing, (see Aurora
14 Loan Services, LLC v Taylor, 25 NY3d 355 [2015];
15 Loancare v Firshing, 130 AD3d 787 [Second Department
16 2015]; HSBC Bank U.S.A., N.A. v Baptiste, 128 AD3d 77
17 [Second Department 2015]).

18 Plaintiff establishes its standing by
19 demonstrating when the action was commenced it was
20 either the holder or assignee of the underlying note,
21 (see Aurora Loan Services, LLC v Taylor, previously
22 cited; Wells Fargo Bank, N.A. v Rooney, 132 AD3d 980
23 [Second Department 2015]).

24 A written assignment of physical delivery
25 prior to the commencement of the action is sufficient to

1 transfer the obligation, and the mortgage passes with
2 the debt as an inseparable incident thereto, (see U.S.
3 Bank, N.A. v Collymore, 68 AD3d 752 [Second Department
4 2009]; Bank of New York Mellon v Gales, 116 AD3d 723
5 [Second Department 2014]).

6 In addition where plaintiff has pled
7 compliance -- I guess it's pleaded, actually, compliance
8 with the notice requirements of RPAPL Section 1304, or
9 defendant has property asserted noncompliance therewith
10 as the defenses here, plaintiff must adduce due proof
11 that the pre-action foreclosure 90-day notice
12 requirements have been satisfied, (see Zarabi versus
13 Movahedian, 136 AD3d 895 [Second Department 2016];
14 Cenlar FSB v Weisz, 136 AD3d 855 [Second Department
15 2016]; CitiMortgage v Espinal, 134 AD3d 876 [Second
16 Department 2016]; Bank of New York v Aquino, 131 AD3d
17 1186 [Second Department 2015], PHH Mortgage Corp. v
18 Celestin, 130 AD3d 703 [Second Department 2015]).

19 Here, defendant's first and arguably his
20 second, third and fourth and sixth defenses raise the
21 issue of plaintiff's standing. Defendant's 21st
22 affirmative defense claims plaintiff's failure to comply
23 with the requirements of RPAPL Section 1304. Here
24 plaintiff has failed to establish standing. Plaintiff
25 claims in its submissions that the assignment of the

1 mortgage by Mortgage Electronic Registration Systems,
2 Inc., MERS, on behalf of original mortgagee and lender,
3 Fremont Investment and Loan, hereinafter referred to as
4 Fremont, assign both the mortgage and note and establish
5 plaintiff's standing, that argument is without merit
6 upon the proof submitted. Although after review of the
7 corrective assignment dated April 13, 2013 and filed
8 with the Suffolk County Clerk on May 30th of 2013 of the
9 original attempt by MERS to assign both to plaintiff
10 dated April 27, 2009 and recorded with the Suffolk
11 County Clerk on March 1, 2010. The Court does not
12 believe either, either referring assigning to the note,
13 and even if it did, it would be insufficient.

14 Purported assignment of the note and mortgage
15 from MERS to plaintiff at best transferred only the
16 mortgage, as plaintiff of provides no proof of authority
17 from MERS to assign the note, (see Bank of New York v
18 Silverberg, 86 AD3d 274 [Second Department 2011], and
19 thus fails to demonstrate the note was assigned at that
20 time, (see Mortgage Electronic Registration Systems,
21 Inc. v Coakley, 41 AD3d 674 [Second Department 2007];
22 U.S. Bank, N.A. v Faruque, 120 AD3d 575 [Second
23 Department 2014]; Aurora Loan Services, LLC v Baritz, I
24 don't have -- there is one, I think I have it somewhere
25 else, I might cite it somewhere else. I don't have the

1 official cite in front of me right now, so I'm citing it
2 at 2016 NY Slip Op 07154 [Second Department 2016]).

3 Plaintiff also attempts to establish its
4 standing through an affidavit of an employee of
5 plaintiff's servicer, Nationstar. Although the employee
6 establishes her ability to testify pursuant to CPLR
7 4518(a) as to her employer's records, she fails to
8 establish her ability to testify as to the plaintiff's
9 records and therefore her claims that plaintiff had --
10 had in its possession or in the possession of an
11 unidentified agent of the plaintiff, the note prior to
12 the date the action was commenced is insufficient.

13 First of all, the equivocal statement that
14 plaintiff had it or an unidentified agent of the
15 plaintiff had it, is not sufficient in and of itself in
16 this Court's opinion to meet the burden to establish
17 standing. But further, there is further infirmity with
18 this offer of proof, there is no proof offered by the
19 employee of Nationstar or any other source to establish
20 whether the, quote, indorsement, unquote, after the
21 signatory page of the note was indorsed on the back of
22 note. It certainly wasn't indorsed on the front of the
23 note, or the Court would have observed it. If it was
24 not, and it was on a separate page, as it is submitted
25 on a separate page, it would be an allonge.

1 There is no proof submitted that this last
2 page was firmly affixed to the original note as to be a
3 part thereof; (UCC 3-202(2); see *Slutsky v Blooming*
4 *Grove Inn*, 145 AD2d 2008 [Second Department 1989]; *HSBC*
5 *Bank U.S.A., N.A. v Roumiantseva*, 130 AD3d 983 [Second
6 Department 2015]). Failure to so affix it securely
7 would make the indorsement invalid.

8 The affidavit of plaintiff's representative
9 which failed to establish plaintiffs -- excuse me, the
10 affiant's personal knowledge of the business practices
11 and procedures of plaintiff was inadmissible, as it
12 failed to provide proof establishing its possession of
13 the note prior to commencement of the action and
14 therefore its standing, (CPLR 4518; see *Aurora Loan*
15 *Services, LLC v Mercius*, 138 AD3d 650 [Second Department
16 2016]; *Deutsch Bank National Trust Company v Brewton*,
17 142 AD3d 683 [Second Department 2016]; *HSBC Mortgage*
18 *Services, Inc. v Royal*, 142 AD3d 952 [Second Department
19 2016]; *Aurora Loan Services v Baritz*, I know I had the
20 correct cite, 144 AD3d 618 [Second Department 2016]).

21 In addition, even if she established her
22 ability to testify as to plaintiff's receipt, the Court
23 of Appeals decision in *Aurora Loan Services, LLC v*
24 *Taylor* maybe said to have liberalized what is needed in
25 the affidavit to prove standing, but it still requires

1 at least a direct statement in the affidavit, the
2 affidavit is attempted to prove standing as to when a
3 plaintiff received the note as indicated in the facts of
4 the Second Department decision it was affirming, (see
5 Aurora Loan Services, LLC v Taylor, 114 AD3d 627 [Second
6 Department 2014]), which was affirmed by the Court of
7 Appeals, 25 NY3d 355 [Second Department 2015]). This
8 affidavit fails to establish that, so it is insufficient
9 to establish plaintiff's standing, (see Deutsch Bank
10 National Trust Company v Idarecis, 133 AD3d 702 [Second
11 Department 2015]).

12 The undated copy of the indorsement of the
13 note from Fremont failed to establish possession prior
14 to commencement of the action, as did an assignment of
15 the mortgage that did not mention transferring the note,
16 (see, Deutsche Bank National Trust Company v Weiss, 133
17 AD3d 704 [Second Department 2015]).

18 The issue of standing is also -- as the
19 plaintiff attempts to file it -- excuse me, prove it in
20 the usual simplest way to establish its possession of
21 the note prior to commencement of the action by
22 attaching a copy of it with proof either of valid
23 indorsement or an allonge to the complaint.

24 Plaintiff has standing if it establishes it
25 was the holder of the note at the time the action was

1 commenced, (see *Emigrant Bank v Larizza*, 129 AD3d 904
2 [Second Department 2015]; *M&T Bank v Cliffside Property*
3 *Management, LLC*, 137 AD3d 876 [Second Department 2016]).
4 Plaintiff can demonstrate its standing as holder of the
5 note by establishing it had been assigned to it prior to
6 the commencement of the action by attaching a copy of
7 the indorsed note to the complaint at the time the
8 action was commenced, (see *Nationstar Mortgage, LLC v*
9 *Catizone*, 127 AD3d 1151 [Second Department 2015];
10 *Deutsch Bank National Trust Company v Leigh*, 137 AD3d
11 841 [Second Department 2016]; *JP Morgan Chase Bank, N.A.*
12 *v Weinberger*, 142 AD3d 643 [Second Department 2016];
13 *Nationstar Mortgage, LLC v Weisblum*, 143 AD3d 866
14 [Second Department 2016]; and *Deutsch Bank National*
15 *Trust Company v Logan*, 146 AD3d 861 [Second Department
16 2017]; *Deutsch Bank Trust v Garrison*, I don't have an
17 official cite, it's cited as 2017 NY Slip Op 00628
18 [Second Department 2017]).

19 As there is no proof submitted that this
20 second page following the signatory page of the note is
21 on the back of the note or is an attachment to the note
22 sufficiently secured as an allonge, this attempt must
23 fail under this proof.

24 Not only has plaintiff failed to establish its
25 standing, but has failed to provide sufficient proof to

1 establish the mailing as required under RPAPL Section
2 1304. Although the affidavit of the employee of
3 Nationstar, the servicer, who sent the notices
4 establishes her ability to testify as to Nationstar's
5 business records, her statements as to the mailings by
6 certified and regular mail are in and of themselves
7 conclusory and insufficient.

8 Unsubstantiated and conclusory statements in
9 the affidavit of plaintiff's representatives along with
10 the dated copies of the notice of default are
11 insufficient to prove that the notices required by RPAPL
12 Section 1304 were properly mailed, (see *HSBC Mortgage*
13 *Corp. v Gerber*, 100 AD3d 966 [Second Department 2012];
14 *CitiMortgage, Inc. v Espinal*, 134 AD3d 876 [Second
15 Department 2015]; *Cenlar, FSB v Weisz*, previously cited,
16 but cited again, 136 AD3d 855 [Second Department 2016];
17 *U.S. Bank, N.A. v Carey*, 137 AD3d 894 [Second Department
18 2016]; *GMAC Mortgage, LLC v Bell*, 128 AD3d 772 [Second
19 Department 2015], and *JP Morgan Chase Bank, N.A. v*
20 *Kotch*, 142 AD3d 536 [Second Department 2016]). To
21 establish mailing, plaintiff must provide proof of
22 actual mailing or description of its office's practice
23 and procedures for mailing, (see *New York and*
24 *Presbyterian Hospital v Allstate Insurance Company*, 29
25 AD3d 547 [Second Department 2016]).

1 It is well established that the proponent of
2 summary judgment motion must make a prima facie showing
3 of entitlement to judgment as a matter of law tendering
4 sufficient evidence to demonstrate the absence of any
5 material issues of fact, (see Alvarez v Prospect
6 Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New
7 York, 49 NY2d 557 [1980]). The failure to make such a
8 prima facie showing, as here, requires that the denial
9 of the motion, regardless of the sufficiency of the
10 opposing papers, (see Winegrad v New York University
11 Medical Center, 64 NY2d 851 [1985]).

12 Plaintiff's motion is denied except to the
13 extent previously noted in dismissing the fifth, 13th,
14 15th, and 19th affirmative defenses.

15 The Court notes that in arguments made this
16 morning for the first time by plaintiff's counsel, the
17 interesting argument that the document prepared by the
18 Department of Financial Services to show compliance with
19 the filing requirements mandated by the statute under
20 RPAPL Section 1306 establishes proof of the mailing of
21 the 1304 notices as they -- servicer or bank must file
22 within 72 hours with the Department of Financial
23 Services the fact that they had made the mailings. The
24 document that is provided is -- appears to be from the
25 Department of Financial Services, although it's not a

1 certified copy. And additionally, it indicates the same
2 date as indicated on the letters submitted and in the
3 affidavit of the employee of Nationstar, yet it does not
4 provide, in the Court's opinion, proof in admissible
5 form that the 1304 notices were made. In the Court's
6 opinion, it is not just hearsay being a statement from
7 the Department of Financial Services, it is also double
8 hearsay as it included statements made out of court by
9 the servicer or plaintiff of their mailing of the
10 notices. But it doesn't provide the evidentiary proof
11 necessary to establish mailing as indicated in the
12 Court's decision.

13 Defendant's cross-motion to compel discovery
14 is granted to the extent set forth below. The Court
15 would note, though, also that it does not have before it
16 a cross-motion to dismiss by the defendant. The
17 defendant and the plaintiff, as a result of the
18 discovery order the Court is going to issue today, will
19 have a right to renew not only this motion, the motion
20 before the Court, but the right to bring any other
21 motion relative to the pleading before the Court at the
22 completion of discovery.

23 The Court notes that plaintiff was denied
24 summary judgment in large part because the insufficiency
25 of the affidavit of the plaintiff's servicer's employee

1 to establish standing and the mailing of the notices
2 required by RPAPL Section 1304, that some of these
3 issues may be able to be resolved by a more sufficient
4 affidavit, but some of the issues raised as to 1304,
5 especially, may not be able to be resolved by a
6 sufficient affidavit if in fact there is a defect as to
7 where those notices were mailed and whether or not
8 though there had been a notification of a change of
9 address by the defendant to the plaintiff which would
10 have warranted mailing to another address. Although
11 this argument was made before the Court this morning,
12 the Court will reserve decision on such argument because
13 this is not a motion to dismiss, but anticipates seeing
14 such an argument raised in summary judgment and a motion
15 to dismiss at the completion of discovery. The parties
16 are suggesting, because I can't tell you what to do in
17 discovery, to address this issue in the course of
18 discovery.

19 The defendant has a reasonable right to
20 discovery on the issues that are presently before the
21 court, including the last issue by the Court, including
22 the production of, or the right to review the original
23 noting, something requested in his discovery and
24 inspection notice served on October 9, 2014 along with
25 his answer and apparently by the discovery -- excuse me,

1 the differentiated case management preliminary
2 conference order stipulated to both sides.

3 The Court finds it concerning that whether the
4 summary judgment was filed by mail as the affidavit
5 attached to the copy, the hard copy the Court has in
6 front of it, dated February 18, 2016 or by e-filing on
7 March 1, 2016 as the Court's computer records indicates,
8 plaintiff's law firm knew of the summary judgment motion
9 as the representative of the firm signed the preliminary
10 conference order in a D.C.M. part on February 18, 2016.

11 The Court at this point takes the position
12 that it appears to be sloppiness, negligence, one hand
13 not knowing what the other hand is doing in a large law
14 firm and not an intentional practice; although with
15 further proof, perhaps the Court might feel differently.
16 In any event, plaintiff's law firm is cautioned that at
17 least in front of this Court in the future to avoid such
18 conduct. They have every right to make that motion
19 before the D.C.M. conference, if they wished. In doing
20 so, they should have made their representative, who was
21 at the D.C.M. conference aware of it, defendant's
22 counsel aware of it, and the Court aware of it,
23 requesting an adjournment of the D.C.M. conference
24 rather than have the parties that were there on
25 February 18, 2016 go through a useless, not really

1 useless, but an unnecessary, at that point, effort and
2 having an order issued upon consent of the parties by
3 this Court. The Court notes that this wasn't just some
4 simple order, it set out times for depositions,
5 discovery compliance and a conference before Acting
6 Justice Farneti. Under the circumstances, the Court
7 finds this more than just a waste of time of the
8 parties, and the Court cautions plaintiff's law firm
9 against such future conduct.

10 Although the Court may speculate and wonder
11 whether there are real claims in many of the affirmative
12 defenses and counterclaims raised by the defendant in
13 his answer, he is still entitled to explore the
14 possibilities of claiming such violations of banking
15 law, RESPA, Fair Debt Collection Practice Act, unclean
16 hands, fraud in procuring the loan by the original
17 lender, etcetera, raised by those affirmative defenses,
18 which under different circumstances this Court may have
19 dismissed and has dismissed in other cases as
20 unsupported. But he still has every opportunity under
21 the New York State Law to explore those reasonably
22 through discovery. As he asked for the discovery that
23 was related to these claims and plaintiff consented by
24 signing the D.C.M. stipulation, that form of discovery
25 will be allowed, although it would generally be

1 something this Court would not put into its scheduling
2 and discovery order. As plaintiff's insufficiently pled
3 and prepared motion has delayed the defendant's
4 discovery and the process of this case for and -- for
5 one month -- probably about a year right now, the Court
6 will direct discovery be expedited. Without going
7 through all the defendant's discovery demands and
8 requests for production, there will be no discovery
9 allowed related to the transfer and assignment of the
10 mortgage in an attempt to establish standing. As
11 indicated in the Court's decision, that cannot form the
12 basis for standing in this case as a result of the MERS
13 involvement as nominee and their inability thereby to
14 transfer standing, which requires -- not transfer
15 standing, transfer the note, which would establish
16 standing, as that has been eliminated from the case,
17 there is no need for discovery as to those issues,
18 either by document production or testimony at a
19 deposition. But other issues involving standing clearly
20 have -- can be, and probably will be, explored properly.

21 Further, this discovery order allows plaintiff
22 to also serve further discovery demands that may be
23 aimed at narrowing issues surrounding some of
24 defendant's claims, especially those that are as broad
25 as merely claims plaintiff has failed to comply with the

1 statutory requirement.

2 The defendant is also authorized to file
3 additional discovery demands also in the hope of
4 narrowing the issues surrounding the case. To
5 accomplish this purpose, the Court will modify the usual
6 Part 27 discovery and scheduling order, which is usually
7 limited to no more than three or four issues.

8 Plaintiff's application to amend the caption
9 and remove the "John Doe" defendants is granted.
10 Although I said earlier I wasn't going to grant that
11 amendment to the caption, removing the "John Doe"
12 defendants is somewhat innocuous and irrelevant to what
13 proceedings remain before the Court.

14 The default, though, of the non-appearing,
15 non-answering defendants are not fixed and set at this
16 time, plaintiff can make that application on a later
17 motion. Plaintiff's application -- so it's denied.

18 Plaintiff's application for appointment of a
19 referee to compute and determine pursuant to RPAPL
20 Section 1321 is denied with a right to renew as set
21 forth in the discovery order. Plaintiff's proposed
22 order submitted with this motion is marked not signed.

23 The discovery order of the Court issuing this
24 case will have it attached as Exhibit A caution taken
25 from plaintiff's proposed order, which just merely shows

1 the amended caption.

2 The Court has granted plaintiff's application
3 to amend the caption as indicated in Exhibit A attached
4 hereto. Plaintiff's counsel is directed to file a copy
5 of this order with the amended caption attached as
6 Exhibit A upon the calendar clerk of this court within
7 30 days of this date, and all further proceedings will
8 be under the amended caption.

9 The Court has denied plaintiff's motion for
10 summary judgment, dismissing only the defendant's fifth,
11 13th and 19th affirmative defenses, and directing that
12 no discovery is to be allowed as to the assignment of
13 the mortgage from MERS purportedly on behalf of the
14 original lender to plaintiffs, and any further
15 assignments of that mortgage as such will be ineffective
16 to establish plaintiff's standing.

17 The Court is directing that a trial limited to
18 those issues remaining will be held. To facilitate
19 that, the Court directs all new discovery demands,
20 including any demands relating to viewing the original
21 note be served within 30 days of this date. All
22 previous discovery agreed to in the D.C.M. order of
23 September, 2016, except those remaining to issues set
24 forth above, are to be complied with within 30 days of
25 this date.

1 All discovery is to be completed within 120
2 days of this date, including depositions.

3 The case will appear for a certification
4 conference on August 2, 2017 at 9:30 a.m., at which time
5 the Court will direct the filing of a note of issues and
6 set a pretrial conference to determine the trial date.

7 The trial of the matter will remain with IAS
8 Part 27 and not be placed in the inventory the CCP Part.

9 Upon the completion of discovery, the Court
10 will entertain renewed summary judgment motions from the
11 parties, but in no case will such a motion be
12 entertained more than 30 days after the filing of the
13 note of issue.

14 No other motions may be made without
15 permission of the Court, which can be obtained after
16 submission of a letter supporting such an application
17 and a phone conference or conference in the part if so
18 directed by the Court on the application.

19 This is the judgment and decision of the Court
20 in this matter. Anyone wishing to appeal, please order
21 a copy of the transcript of the decision. You can order
22 the whole thing, but only the -- if you want, you can
23 just order the decision, and I will sign it "so ordered"
24 so that you may have appealable paper.

25 I'm going to ask the court officer to hand to

1 both counsel three pages of the discovery order
2 including Exhibit A. I just ask counsel to sign on page
3 two to acknowledge receipt of the document, which we'll
4 make a copy of it and give to both counsel before you
5 leave. It does not, of course, acknowledge that you
6 agree with anything I just said for the last half an
7 hour or so.

8 Are there any questions?

9 MR. MARQUEZ: If I may, I just wanted it to be
10 clear on the record that the discovery that we may
11 pursue has to do with the physical delivery of the
12 note --

13 THE COURT: Anything dealing with standing
14 other than the assignments, because that's out. I would
15 hope not to see that back in a subsequent motion by the
16 plaintiff, but one never knows, since I've seen it in
17 otherwise.

18 Mr. Corcoran.

19 MR. CORCORAN: No, your Honor, thank you.

20 THE COURT: Thank you both for maybe for this
21 part, a long, but well-made arguments by both of you
22 both in the submissions, but also this morning in your
23 oral arguments.

24 Mr. Corcoran, I think that you've made an
25 interesting argument as to 1306, which I think I may

1 have mentioned on the record to other people before, but
2 one I haven't actually physically seen before. We'll
3 see what happens with that. Thank you both.

4 MR. CORCORAN: Thank you, your Honor.

5 MR. MARQUEZ: Thank you, your Honor.

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7 * * * * *

8 CERTIFIED TO BE A TRUE AND ACCURATE
9 TRANSCRIPT OF THE STENOGRAPHIC MINUTES
10 TAKEN HEREIN:

11 

12 _____
13 CHRISTINE ALSTER
14 OFFICIAL COURT REPORTER
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