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**ORDERED** that this motion (#003) by the plaintiff for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted in its entirety; and it is further

**ORDERED** that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

**ORDERED** that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

This foreclosure action was commenced by filing on May 21, 2015. Familiarity with the Court's order of March 30, 2017 (Martin, A.J.S.C.), is presumed. The matter was reassigned to this Part pursuant to Administrative Order No. 110-17, dated September 28, 2017 and submitted for decision on December 8, 2017. In essence, on July 16, 2005, defendant, Kevin Graffagnino, borrowed \$731,250.00 from the plaintiff's predecessor-in-interest and executed a promissory note and mortgage with the defendant, Mary Jo Graffagnino. The defendants defaulted on September 1, 2009 by failing to pay the monthly installments due and owing. Defendants submitted an answer with seventeen affirmative defenses and six counter-claims.

In the moving papers, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses of the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Cox*, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

The burden then shifts to defendants (*see Bank of America, N.A. v DeNardo*, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer or otherwise available to each of them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see CPLR 3013, 3018[b]*; *Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 677, 884 NYS2d 83 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369

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NYS2d 667 [1975]; *see also Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]. In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*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]).

Defendants' opposition challenges plaintiff's standing to commence this action. In accordance with the above, all other affirmative defenses and counterclaims raised in the answer and not addressed in the opposition are dismissed as abandoned. The standing defense has lost its significance and vitality with the advent of CPLR 3012-b.

One of the various methods that standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *U.S. Bank v Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; *JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; *Citimortgage, Inc. v Klein*, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Godwin*, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Joseph*, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The affidavit of Julie Burke, Assistant Secretary of Fay Servicing, LLC, plaintiff's servicer, satisfies that condition.

Additionally, as occurred in this action, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*see Bank of NY Mellon v Burke*, 2017 WL 5617560, 2017 NY Slip Op 08255 [2d Dept 2017], *citing Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726, 46 NYS3d 185 [2d Dept 2017]; *US Bank N.A. v Saravanan*, 146 AD3d 1010, 1011, 45 NYS3d 547 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861, 862-863, 45 NYS3d 189 [2d Dept 2017]; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 39 NYS3d 491, 494 [2d Dept 2016]; *see also HSBC Bank USA v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). Here, the plaintiff alleged in its complaint that it was the current holder of the note and attached a copy of the endorsed note to the complaint.

Plaintiff has also demonstrated its standing by virtue of the merger with the original lender (*see Banking Law §602; see also Citimortgage, Inc. v Goldberg*, 134 AD3d 880, 20 NYS3d 906 [2d Dept 2015]; *Capital One, N.A. v Brooklyn Flatiron, LLC*, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]; *Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]).

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Plaintiff, through its submissions, has thus demonstrated the requisite possession of the note prior to the commencement of the action (*see Bank of NY Mellon v Burke*, 2017 WL 5617560, *supra*). Therefore, the affirmative defenses addressed to standing are dismissed (*see US Bank Natl. Assn. v Richards*, 151 AD3d 1001, 57 NYS3d 509 [2d Dept 2017]; *Silvergate Bank v Calkula Prop., Inc.*, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; *Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 56 NYS3d 107 [2d Dept 2017]; *Bank of America, N.A. v Barton*, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]). Pursuant to CPLR 3212(g), the court hereby declares that the issue of the plaintiff's standing is hereby resolved in favor of the plaintiff for all purposes of this action.

Defendants' request for discovery has not been shown to alter the outcome of the above finding with regard to standing (*see HSBC Bank USA, Natl. Assn. v Armijos*, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; *Citimortgage, Inc. v Guillermo*, 143 AD3d 852, 39 NYS3d 86 [2d Dept 2016]).

In light of the above, the Court finds that the plaintiff has sufficiently demonstrated its entitlement to the relief requested on this motion (*see* CPLR 3212, 3215, 1003 and RPAPL §1321; *Wells Fargo Bank, N.A. v AH*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d NYS2d 87 [2d Dept 2014]; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]).

The Court, therefore, grants plaintiff's motion (#003) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 12/28/17

  
THOMAS F. WHELAN, J.S.C.