SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Liberty Pointe Bank

-v-

75 East 125th, et al

INDEX NO. 116405/08

MOTION DATE _____

MOTION SEQ. NO. 006

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that the motion by plaintiff LibertyPointe Bank (VNB as assignee of LibertyPointe), pursuant to CPLR 3212 for summary judgment on its claim for foreclosure of the mortgage, to strike the defendants 75 East 125th, LLC and Saadia Shapiro's answer; to dismiss defendants' counterclaims; and to appoint a referee to compute the amount due under the subject mortgage, is granted; and it is further

ORDERED that all the affirmative defenses and counterclaims in the Answer of the defendants 75 East 125th, LLC and Saadia Shapiro, are stricken and dismissed; and it is further

ORDERED that the matter is hereby referred to Roberta Ashkin, Esq., as Referee to (a) compute the amount due to the plaintiff for principal, interest, taxes and other disbursements advanced upon the note and mortgage being foreclosed in this action, and (b) examine and report whether mortgaged premises can be sold in parcels; and it is further

ORDERED that the Referee report to this Court with all convenient speed; and it is further

ORDERED that the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving appointment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: _____

_____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith; and it is further

ORDERED that, by accepting this appointment, the Referee certifies that she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36), including but not limited to, section 36.2(e) ("Disqualification from appointment"), and section 36.2(d) ("Limitations on appointments based upon compensation"), and it is further

ORDERED that on filing the Referee's report, plaintiff may move for confirmation of said report and for judgment of foreclosure and sale as prayed for in the complaint, and for an extra allowance in addition to taxable costs; and it is further

ORDERED that defendants 75 East 125th Street, LLC and Saadia Shapiro's cross-motion is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated 2/14/13 ENTER: HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LIBERTYPOINTE BANK,

Plaintiff,

- against -

Index: 116405/2008
Motion Seq. 006

75 EAST 125th, LLC; SAADIA SHAPIRO; THE CITY OF NEW YORK (Environmental Control Board); NEW YORK CITY TRANSIT AUTHORITY, TRANSIT ADJUDICATION BUREAU; NEW YORK CITY DEPARTMENT OF TRANSPORTATION, PARKING VIOLATIONS BUREAU; and SAMUEL'S TEMPLE CHURCH OF GOD IN CHRIST, INC.,

DECISION/ORDER

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this foreclosure action, plaintiff LibertyPointe Bank ("LibertyPointe") moves for an order (1) granting summary judgment on its foreclosure claim pursuant to CPLR 3212; (2) striking the answer of the defendants 75 East 125th, LLC ("75 E 125th") and Saadia Shapiro ("Shapiro") (collectively, "defendants"); (3) dismissing defendants' counterclaims; and (4) appointing a referee to compute the amount due under the subject mortgage.

Defendants cross-move to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(3) "for lack of capacity to sue" and for sanctions pursuant to 22 NYCRR 130-1.1, or alternatively, for a stay pursuant to CPLR 2201.

Background Facts

This action was brought in December 2008 to foreclose on the mortgage held by LibertyPointe on premises located at 75 East 125th Street, New York, New York.

On December 11, 2006, defendants executed and delivered to LibertyPointe a note for

$1,950,000 and the mortgage (exhibits A and B). Defendant Saadia Shapiro, a fifty-percent owner and managing member of Mortgagor, personally guaranteed repayment of the loan (exhibit C). According to plaintiff, defendants failed to pay their mortgage installments beginning from August 2008 and now owe plaintiff $1,950,000 with interest. Plaintiff also seeks to recover the reimbursements for all advances it made to protect its security interest in the premises.

In their Answers,[1] defendants asserted various affirmative defenses and counterclaims, including fraud.

In February 2010, plaintiff moved for summary judgment and to strike defendants' affirmative defenses and counterclaims.

Thereafter, on March 11, 2010, LibertyPointe was closed by the New York State Banking Department and the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver for the failed bank. Contemporaneously, the FDIC entered into a Purchase and Assumption Agreement (the "Purchase Agreement") with Valley National Bank ("Valley National"), pursuant to which it transferred certain assets and liabilities of LibertyPointe, including the mortgage and the note, to Valley National. Valley National, in turn, assigned the mortgage and note to VNB Corp. ("VNB"), an entity now maintaining this action in the name of LibertyPointe (the original plaintiff).

Defendants did not oppose plaintiff's motion for summary judgment and, by order dated March 29, 2010, this Court granted the motion on default, struck the defendants' Answers, and

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[1] 75 E 125th and Shapiro served identical answers and counterclaims on January 14, 2009. Other than Samuel's Temple Church of God in Christ Inc., who appeared by notice of appearance, none of the remaining defendants have appeared in this action or interposed an answer to the complaint. According to plaintiff, their time to do so has expired and thus, each such defendant is in default with respect to this action.

directed a Referee to compute the amount due to plaintiff. Thereafter, on or about October 12, 2010, defendants sought, by order to show cause, to vacate the default, in part, on the ground that they were fraudulently induced into signing the mortgage and the note by LibertyPointe's former chairman Shaya Boymelgreen who allegedly represented to defendants that the mortgage was a "land loan" and would not need to be repaid as it would be converted into a construction loan for development of the property, and that LibertyPointe would not foreclose on the mortgage until a $2 million debt owed by LibertyPointe's Chairman Shaya Boymelgreen to non-party Yitz Grossman was repaid (the "alleged representations").

On February 14, 2011, this court denied defendants' motions, holding that, while defendants had a reasonable excuse for not responding to the summary judgment motion, they failed to show meritorious defense warranting a vacatur of the judgment. On May 24, 2012, the Appellate Division, First Department reversed this court's February 14, 2011 order, finding that, "defendants' contention that they were fraudulently induced into entering into the mortgage transaction by the misrepresentations of plaintiff's former president, including his alleged assertion that plaintiff would not foreclose on the mortgage until the former president had paid a pre-existing debt which he owed to defendants' "silent partner," would directly contradict the terms of the note and mortgage which plaintiff sues upon," and that "neither the parol evidence rule, nor the agreement's merger clause, bars defendants' claim of fraudulent inducement," which is "sufficiently substantial and meritorious to support vacatur of their default" (exhibit U).

In the instant motion, plaintiff argues that, while this is its second motion for summary judgment in this action, it is nevertheless properly made because it [is based on new facts] and raises new legal arguments that could not have been asserted in the prior summary judgment

motion. LibertyPointe was closed and the FDIC was appointed receiver *after* plaintiff filed its first motion. This appointment provided LibertyPointe and its successors with a complete defense to any claims of fraudulent inducement asserted by defendants, by virtue of the so-called *D'Oench* doctrine and its statutory codification in 12 USC §1823. Pursuant to this doctrine, an agreement between a failed banking institution and another party cannot be the basis of a defense or claim asserted against the failed bank or its successors, unless the agreement is in writing and was executed and approved by the depository institution.

Furthermore, defendants do not dispute that they defaulted on their obligation under the note and mortgage, which constitutes a *prima facie* case for a mortgage foreclosure. And, based on the *D'Oench* doctrine and its statutory codification, 12 USC § 1823, plaintiff now has a complete legal defense to the affirmative defenses and counterclaims asserted by defendants that were considered by the First Department "potentially meritorious." And, granting the requested relief will eliminate an unnecessary burden on the resources of this Court.

And in any event, defendants' affirmative defenses and counterclaims contain conclusory allegations and defendants failed to show that any discovery could lead to relevant evidence that could defeat summary judgment.

In opposition, defendants argue that plaintiff's second summary judgment motion should be denied because the First Department's decision established the "law of the case" that defendants have a potentially meritorious fraudulent inducement defense to the complaint. Plaintiff's purported new factual evidence [of LibertyPointe Bank's failure and appointment of the FDIC as receiver] was previously available to plaintiff, who could have raised its legal argument [of the application of *D'Oench* doctrine] in opposition to defendants' motion to vacate

the default [filed in September 2010], approximately six months after the FDIC's seizure of Liberty Pointe, and also, in 2012 before the Appellate Division First Department.

Alternatively, the named plaintiff LibertyPointe lacks standing to assert the purported defense of the doctrine and the federal statute, as it may be asserted only by the FDIC or its assignee(s). CPLR 3018, which allows a successor entity to continue in an action in the name of the original plaintiff, "does not provide that a defense allegedly belonging to the successor entity, but not to the original named plaintiff, may be asserted by the original[ly] named plaintiff itself" (Opposition, p.7).

Furthermore, VNB also lacks standing to bring this motion on behalf of LibertyPointe because it cannot prove that it is the owner of the subject note and the mortgage. Defendants argue that irregularities involving backdating appear on the face of the assignments from FDIC to Valley National and from Valley National to VNB, rendering them invalid or, at the very least, presenting issues of fact as to their validity, which warrant a denial of plaintiff's motion. The assignment from FDIC to Valley National was purportedly executed on March 11, 2010, pursuant to a power of attorney, dated "March 22, 2010," and thus, the person executing the assignment on March 11, 2010 had no power to do so. Furthermore, the assignment was recorded on May 5, 2010 and notarized on September 27, 2010 (exhibit O to Justin F. Capuano Affirmation). Plaintiff as assignee of the mortgage fails to support its motion with proper documents of assignment showing the transfer of the obligations or testimony showing the delivery of the obligations.

Likewise, Valley National Bank's assignment to VNB was purportedly executed on June 1, 2010, but was not notarized until September 27, 2010 (exhibit P to Justin F. Capuano

Affirmation). Furthermore, the billing records of Liberty Pointe's counsel appear to show that the mortgage assignment documents were actually prepared on August 23 - 24, 2010 (months after they were purportedly made and executed) for purposes of this litigation (Exhibit G to the Shapiro affirmation). Thus, argue defendants, the documents, created months later and then backdated, are ineffective to assign the interests they purport to assign, and should not be considered by the court in support of plaintiff's motion.

Defendants also seek sanctions pursuant to 22 NYCRR 130-1.1, or, in the alternative, request that the motion be stayed pursuant to CPLR 2201, "until LibertyPointe['s] counsel can show that he has authority from a proper party to proceed on behalf of the named plaintiff." And finally, plaintiff should be compelled to comply with defendants' discovery demands, as LibertyPointe ignored the court's order dated October of 2012, directing it to respond to defendants' August 2012 discovery demands and appear for deposition in January 2013. However, plaintiff instead now makes another summary judgment motion.

In reply, plaintiff argues that its motion is properly made because it raises new legal arguments that could not have been previously asserted due to new facts since the FDIC was appointed receiver after the *first* summary motion was made on February 24, 2010; granting the motion will unburden the court's resources as it is indisputable that defendants now have no defenses to the foreclosure. Plaintiff could not have raised the *D'Oench* doctrine in opposition to defendants' *motion to vacate* because in that motion defendants argued that their defenses were based on *modifications* of the Mortgage and Note, and it is only recently that defendants claim that their defenses are based on the purported side agreements with LibertyPointe's former president. And, plaintiff could not have raised the *D'Oench* doctrine argument for the first time

on appeal.

Furthermore, the purpose of the public policy disfavoring successive summary judgment motions is to prevent parties from delaying litigation by moving subsequent to a *denial* of a motion. Plaintiff's initial summary judgment motion was *granted* and the current motion was made following the Appellate Division's granting of defendants' motion to vacate.

Further, the assignments of the mortgage and the note to Valley Bank and then to VNB were proper. First, no formal assignment from FDIC to Valley Bank was necessary because FDIC as Receiver transferred the mortgage pursuant to the Purchase Agreement, pursuant to which FDIC sold, assigned, transferred, conveyed and delivered to Valley National "all right, title, and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) . . . of [LibertyPointe]" (see Purchase Agreement, at § 3.1; exhibit N).

The Assignment of Mortgage does not state it was executed "on" March 11, 2010, but rather "as of" March 11, 2010, which means the date when the assignment was *effective, i.e.*, when the actual transfer of the mortgage and note took place, and not when it was *signed.* And, the notarization of the document on September 27, 2010 is not improper because there is a presumption of due execution, which can only be rebutted by a showing of clear and convincing evidence to the contrary.

Further, the "law of the case" doctrine is inapplicable because the issue of the merits of defendants' fraudulent inducement defense has not been determined in this case. Rather, the First Department held that defendants had "a potentially meritorious defense."

Finally, plaintiff did not violate the July 17, 2012 Order because the parties entered into a stipulation dated October 9, 2012, which extended plaintiff's time to respond to those discovery

demands to December 11, 2012. And, discovery is not necessary since, even if the alleged representations were arguably made, in light of the *D'Oench* doctrine, plaintiff is precluded from raising any defenses as to avoid foreclosure for non-payment.

Discussion

Standing

As a threshold matter, the court addresses defendants' challenge of plaintiff's [VNB's] standing to maintain this foreclosure action on the ground that the assignments from FDIC to Valley National and from Valley National to VNB were invalid.

Initially, the court notes that defendants herein neither pleaded lack of standing as an affirmative defense in their answer, nor raised this issue in their motion to vacate the default in September 2010,[2] nor assert that they had no knowledge of the assignments at the time they moved to vacate the default. Furthermore, this court has already held in its prior decision that plaintiff has standing to maintain this action.[3]

In any event, the court finds defendants' arguments of plaintiff's [VNB]'s lack of standing based on invalid assignments lack merit.

A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced *(Deutsche Bank Natl. Trust Co. v*

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[2] While, the parties have not briefed the issue of waiver, it should be noted, that the Court of Appeals has held that an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e) *(Fossella v Dinkins*, 66 NY2d 162, 485 NE2d 1017 [1985]; *Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo*, 42 AD3d 239; *Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006]).

[3] The Court further held that pursuant to CPLR 1018, "upon a transfer of interest, an 'action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action. Therefore, as plaintiff [VNB] is the assignee of the subject mortgage, it may continue this action without substituting itself in the caption" (February 14, 2011 Order, p. 14).

Barnett, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011], *citing Bank of N.Y. v Silverberg*, 86 AD3d 274 [2d Dept 2011]). When a valid assignment is made, the assignee steps into the assignor's shoes and acquires whatever rights the latter had (*East West Bank v 32 Tower, LLC*, 33 Misc 3d 1221(A), 939 NYS2d 740 [Sup Ct, Kings county 2011](Table), *citing Matter of Stralem*, 303 AD2d 120, 122–123 [2d Dept 2003]).

It is well established that "[a] mortgage can be assigned in two ways - by the delivery of the bond and mortgage by the assignor to the assignee with the intention that all ownership interest be thereby transferred . . . or by a written instrument of assignment" (*Deutsche Bank Trust Co. Ams. v Peabody*, 2008 NY Slip Op 51286[U], *2 [Sup Ct, Saratoga County 2008]). Thus, "[e]ither a written assignment of the underlying note or the physical delivery of the note . . . is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A.*, 68 AD3d at 754; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912 [3d Dept 2009]).

As this court has stated in its prior decision, pursuant to CPLR 1018, upon a transfer of interest, an "action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action" *(Cent. Fed. Say., F.S.B. v 405 West 45th Street, Inc.*, 662 NYS2d 489, 490 [1st Dept 1997][an assignee of a mortgage can continue the action in the name of the original mortgagee, even in the absence of a formal substitution]).

Here, plaintiff demonstrated that the assignments to Valley National and to VNB are valid. It is undisputed that LibertyPointe was the holder of the mortgage and note on the date on which this action was commenced, and that upon LibertyPointe's failure, the failed bank was

placed into receivership by the FDIC, and contemporaneously therewith the assets of LibertyPointe were transferred to Valley National pursuant to the statutory authority granted to the FDIC under 12 USC § 1821(d)(2)(A). Under 12 USC§ 1821(d)(2)(G)(i)(II), the FDIC, as receiver of a failed bank, is authorized to "transfer any asset or liability of the institution in default [. . .] without any approval, assignment, or consent with respect to such transfer." The Purchase Agreement expressly stated that FDIC *sold, assigned, transferred, conveyed and delivered* to Valley National "all right, title, and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) . . . of [LibertyPointe]" (see Purchase Agreement, at § 3.1; exhibit N)(emphasis added). Thus, no formal assignment was necessary to transfer the note and mortgage from the FDIC to Valley National and Valley National has succeeded in the interests of LibertyPointe under the subject loan, including the note and mortgage, pursuant to the Assumption Agreement, dated March 11, 2010.[4]

In addition to the Purchase Agreement, pursuant to the written Assignment of Mortgage dated March 11, 2010, FDIC assigned the subject mortgage "[t]ogether with the [. . .] notes or obligations described in said mortgage" to Valley National (exhibit O). Thus, Valley National was validly assigned the note and mortgage that is the subject of this foreclosure action (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 280–281, 926 NYS2d 532 [2d Dept 2011]).

Plaintiff likewise demonstrates a valid assignment from Valley National to VNB, through the Assignment of Mortgage dated June 1, 2010, stating that the subject mortgage "[t]ogether with the [. . .] notes or obligations described in said mortgage" were assigned from Valley

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[4] The Purchase Agreement states that FDIC "sells, assigns, transfers, conveys and delivers to Valley National "all right, title, and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) . . . of [LibertyPointe]" (see Purchase Agreement, at § 3.1).

National to VNB (exhibit P). Therefore, these assignments, relied upon by the plaintiff to establish its ownership interest in the note and mortgage, are sufficient to establish its standing to maintain this action.

And in any event, the record shows that VNB has physical possession of the subject note[5] and defendants do not contest the note's delivery (see *U.S. Bank, N.A.*, 68 AD3d at 754; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912, *supra*).

The court finds defendants's contention that VNB and Valley National backdated the assignments "probably for the purposes of this litigation" to be entirely speculative and in any event, irrelevant, and defendants do not dispute the default. While "a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment" (*Wells Fargo Bank, NA v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]), defendants do not argue plaintiff's lack of standing on this ground. Rather, they claim that the assignments are conflicted as to the dates of their execution and acknowledgment. However, the fact that said assignments were notarized on a later date is of no consequence, since the notarial acknowledgments establish that Marianne Potito who executed the Valley Bank assignment and appeared before the notary on September 27, 2010, and, at such appearance, acknowledged to the notary that she, the signatory, had executed the assignment in her capacity as authorized signatory (*Chianese v Meier*, 285 AD2d 315, 729 NYS2d 460 [1st Dept 2001][where a document on its face is properly subscribed and bears the acknowledgment

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[5] The court notes that, having possession of the note and mortgage, plaintiff [VNB] is the holder of both mortgage and the note (*Deutsche Bank Nat. Trust Co. v Pietranico*, 33 Misc 3d 528, 928 NYS2d 818 [Sup Ct Suffolk County 2011][the mere possession of a promissory note provides presumptive ownership of that note by the current holder and the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose]).

of a notary public, there is a "presumption of due execution, which may be rebutted only upon a showing of clear and convincing evidence to the contrary"]).

Furthermore, in *Rosner v Metropolitan Property and Liability Ins. Co.* (96 NY2d 475, 754 NE2d 760 [2001]), the Court of Appeals explained that

> "[t]he phrase "as of" is frequently "used to signify the effective legal date of a document, as when the document is backdated or the parties sign at different times" (Black's Law Dictionary 109 [7th ed. 1999]; *see also*, Garner, A Dictionary of Modern Legal Usage 80 [2d ed. 1995] [same]). Further, "as of" is justified only as a device for assigning an event to one time and the report or recognition of it to another" (Follett, Modern American Usage: A Guide 76 [Jacques Barzun ed. 1966][emphasis omitted]. [Thus,] "as of" refers to a date mutually agreed upon by the parties having some contractual significance, rather than merely referencing the date of an event, such as the execution or delivery of a document."
> (*Rosner*, 96 NY2d at 480).

Thus here, even though in the FDIC assignment the Power of Attorney is dated March 22, 2010, the date of the assignment is "as of" March 11, 2010, and Potito's capacity as attorney-in-fact was in place at the time of the acknowledgment of her signature on September 27, 2010. Likewise, the assignment from Valley National to VNB "as of" June 1, 2010, signifies the effective legal date of a document, even though it was notarized on September 27, 2010 when Potito's signature was duly acknowledged. Thus, the purported "backdating" does not vitiate the subject assignments (*see also Cialeo v Mehlman*, 210 AD2d 67, 619 NYS2d 276 [1st Dept 1994][even if there were an issue of fact with respect to the authenticity of one of the signatures on an unrecorded assignment, any failure to have the requisite two signatures on the document as required by the partnership agreement did not vitiate the subsequent assignments]).[6]

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[6] For the same reason, defendants' assertions that the billing records of plaintiff's counsel appear to show that the mortgage assignment documents were prepared on August 23 - 24, 2010, allegedly after the assignments were executed, are inconsequential for purposes of this litigation, since Potito executed the assignments in her capacity as authorized signatory and her signature was acknowledged on September 27, 2010.

Cases from the First Department cited by defendants are distinguishable. In *Acquisition Company, LLC v 627 Greenwich, LLC* (85 AD3d 645, 927 NYS2d 23 [1st Dept 2011]), the assignment was invalidated on the ground that the purported assignees entirely failed to submit documents of assignment as was required by the building loan agreement between the borrower and the first assignee. And, *Flyer v Sullivan* (284 AD 697, 134 NYS2d 521 [1st Dept 1954]) does not recite facts and merely stands for the proposition that a note and mortgage may be transferred by physical delivery without a written instrument of assignment.

Furthermore, defendants' claims of the documents' backdating and notary irregularities are insufficient to support the assertion that the subject documents are fraudulent (*Skilled Investors, Inc. v Bank Julius Baer & Co., Inc.*, 62 AD3d 424, 878 NYS2d 54 [1st Dept 2009]), or that the assignment resulted in any prejudice or surprise to defendants.

Therefore, since the assignments are not invalidated based on dates irregularities, plaintiff [VNB] has standing to bring this action (*see CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc.*, 96 AD3d 680, 949 NYS2d 21 [1st Dept 2012]).

Successive Motion for Summary Judgment

The court holds that plaintiff has demonstrated sufficient cause to justify the making of the *second* summary judgment motion. As a general rule, "[p]arties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds *when moving for summary judgment*" (*NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426, 921 NYS2d 35 [1st Dept 2011], *citing Phoenix Four v Albertini*, 245 AD2d 166, 167, 665 NYS2d 893 [1997][internal quotation marks and citation omitted][emphasis added]). However, the First Department has stated that "[e]xceptions are permitted to the rule against successive summary

judgment motions not only when evidence has been newly discovered since the prior motion [. . .] but also when 'other sufficient cause' for the subsequent motion exists [including, where a movant] demonstrates that the matter can be further disposed of without burdening the resources of the court and movants with a plenary trial (*Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39, 752 NYS2d 603 [1st Dept 2002]).

As the court's discussion below demonstrates, this matter can be disposed of without proceeding to trial, warranting the departure from the rule proscribing successive summary judgment motions (*Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38).

First, as this court already held, plaintiff in its first motion for summary judgment set forth the *prima facie* elements of its claim for a foreclosure based on defendants' default, by providing evidence of the mortgage, the note, and defendants' default (*Deutsche Bank Nat'l Trust Co. v Gordon*, 84 AD3d 443, 443–44, 922 NYS2d 66 [1st Dept 2011]; *see* February 14, 2011 Order). And second, in the instant motion, plaintiff demonstrates that defendants' affirmative defenses and counterclaims now fail as a matter of law.

Defendants' argument that plaintiff could have raised the issue of the application of the *D'Oench* doctrine, discussed below, in its opposition to defendants' motion for vacatur of the default is inapposite. Even though the FDIC was appointed as receiver during the pendency of said motion, defendants fail to cite to any cases in support of the proposition that the rule that "[t]here can be no reservation of any issue to be used upon any subsequent *motion for summary judgment* (*Levitz v Robbins Music Corp.*, 17 AD2d 801, 232 NYS2d 769 [1st Dept 1962]), applies with equal force to a non-moving party, opposing a motion to vacate a default.

Thus, the court considers the merits of plaintiff's instant motion.

The D'Oench Doctrine

The federal common law *D'Oench* doctrine, first set forth by the Supreme Court in *D'Oench, Duhme & Co. v FDIC* (315 US 447, 62 SCt 676, 86 LEd 956 [1942]),[7] and codified in 12 USC §1823, "prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed bank or thrift." Section 1823(e), which codifies the *D'Oench* doctrine, states:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement
> (A) is in writing,
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the

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[7] In *D'Oench*, the FDIC sued the maker of a demand note payable to Bellville Bank and Trust Company, a failed institution. The maker defended against the claim by presenting receipts for the notes which indicated an agreement between the maker and bank that the bank would not call the notes for repayment. In concluding that the maker could not raise a "secret" agreement with the bank to defend against the FDIC's suit, the Court recognized a "federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [it] insures or to which it makes loans." *D'Oench*, 315 US at 457.

There is a split among the Courts of Appeals, however, as to whether *D'Oench Duhme* is still good law (*Rankin v Toberoff*, Not Reported in FSupp, 1998 WL 370305 [SDNY 1998]). In *O'Melveny & Myers v FDIC*, 512 US 79, 114 SCt 2048, 129 LEd2d 67 [1994], the Supreme Court, while not mentioning *D'Oench Duhme* specifically, held that with the enactment of the detailed statutory scheme of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), there is no longer a place for federal banking common law (*see O'Melveny & Myers*, at 85–87). In the wake of *O'Melveny*, the DC Circuit and the Eighth Circuit have concluded that the *D'Oench* doctrine has been pre-empted by 12 USC §1823 (*Murphy v FDIC*, 61 F3d 34 [DC Cir 1995]; *DiVall Insured Income Fund Ltd. Partnership v Boatmen's First Nat'l Bank of Kansas City*, 69 F3d 1398 [8th Cir 1995], while the Fourth and Eleventh Circuits have held that it is still viable (*Young v FDIC*, 103 F3d 1180 [4th Cir 1997]; *Motorcity of Jacksonville, Ltd. v Southeast Bank N.A.*, 83 F3d 1317 [11th Cir 1996]).

While the Second Circuit has not addressed this issue directly, in opinions issued subsequent to *O'Melveny* the Court appears to assume the continuing vitality of *D'Oench* (*see, e.g., Duraflex Sales & Serv Corp. v W.H.E. Mechanical Contractors*, 110 F3d 927 [2d Cir1997]; *FDIC v Suna Assocs., Inc.*, 80 F3d 681 [2d Cir 1996]). Similarly, courts in this district have continued to apply *D'Oench* without reference to the holding of *O'Melveny (see, e.g., RPT Metro Equities Ltd. Partnership v 129 Duane Equities, Inc.*, 1995 WL 387681 [SDNY 1995]; *FDIC v Wrapwell Corp.*, 922 FSupp 913 [SDNY 1996]).

D'Oench has gradually been expanded into a "federal holder in due course" doctrine, permitting the FDIC to take assets of failed banks free of all defenses. The federal holder in due course doctrine has been further expanded to include *assignees* of the FDIC, under the rationale that without such protection, there could be no market in the assets of failed banks and the FDIC and its funds would suffer (*see, e.g., FDIC v Newhart*, 892 F2d 47, 50 [8th Cir 1989]).

> asset by the depository institution,
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

Furthermore, section 1823(e) is applicable to third-party assignees and transferees of the FDIC, such as VNB in this action *(United Central Bank v Team Gowanus, LLC*, Slip Copy, 2012 WL 5507307 [EDNY 2012]; *Aurora Loan Servs. LLC v Sadek*, 809 FSupp2d 235, 242 [SDNY2011]; *Rankin v Toberoff*, 1998 WL 370305, at*4 [SDNY 1998]).

Here, there is no indication that the alleged agreement between LibertyPointe's former chairman Shaya Boymelgreen and defendants' "silent partner" Yitz Grossman, that plaintiff would not foreclose on the mortgage until Boymelgreen had paid a pre-existing debt owed to Grossman, is in writing or that it was executed and approved by the depository institution, or appears anywhere in the records of the banking institution. Thus, the Court finds that *D'Oench* and 12 USC §1823 (e) are available to plaintiff to bar defendants from asserting the defenses of fraud in the inducement as against VNB, as assignee of the FDIC (*see F.D.I.C. v Central Wine and Liquor*, 187 AD2d 314, 589 NYS2d 166 [1st Dept 1992]; *F.D.I.C. v Giammettei*, 34 F3d 51 [2d Cir 1994][defendants investors were barred from raising the bank's alleged breach of escrow and conversion as defenses to action brought by the FDIC, as receiver for the bank, to recover on the notes]).

Therefore, even assuming that defendants had a meritorious defense of fraudulent inducement based on plaintiff's former chairman's alleged representations, defendants are barred from raising said defense by the *D'Oench* doctrine and its statutory codification in 12 USC §

1823(e).

Defendants' opposition fails to raise a triable issue of fact.

Furthermore, this motion is not premature for lack of discovery. Even assuming the alleged representations were made, the *D'Oench* doctrine precludes plaintiff from raising any defenses to avoid foreclosure. Thus, further discovery is unwarranted.

Therefore, the court finds that sufficient cause exists for granting the motion in this case because it is substantively valid and the granting of the motion will further the ends of justice while eliminating the unnecessary burdens on the court's resources *(Detko v McDonald's Rests. of N. Y.*, 198 AD2d 208, 209, 603 NYS2d 2d 496, 497 [2d Dept 1993], *lv denied* 83 NY2d 752, 611 NYS2d 134 [1994]).

Law of the Case

"The doctrine of [the] law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding [. . .] The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision" (*Town of Angelica v Smith*, 89 AD3d 1547, 933 NYS2d 480 [4th Dept 2011]).

Contrary to defendants' contention, the First Department's holding that defendants had "a potentially meritorious defense [of fraudulent inducement]" does not constitute the law of the case insofar as the issue of said defense was not "necessarily *resolved* on the merits in a prior decision." Furthermore, the First Department did not address said defense in light of the *D'Oench* doctrine.

Accordingly, plaintiff is entitled to summary judgment on its foreclosure claim (*see CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc.*, 96 AD3d 680, 949 NYS2d 21 [1st Dept 2012]), and

defendants' affirmative defenses and counterclaims are dismissed.

Defendants' Cross-Motion

CPLR 3211 (a)(3)

The portion of defendants' cross-motion to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(3) for "lack of capacity to proceed on behalf of the named plaintiff" is denied.

Defendants' argument that the successor entity [VNB] must be the substituted as the named plaintiff in this action lacks merit. As noted above, this court has previously ruled that, pursuant to CPLR 1018, plaintiff, VNB, as the assignee of the subject mortgage and note, may continue this action without substituting itself in the caption (February 14, 2011 Order, p. 14).

Defendants' alternative relief for a stay pursuant to CPLR 2201 "on the ground that plaintiff's counsel lacks authority at this time to proceed on behalf of the plaintiff," is likewise denied.

Sanctions (22 NYCRR § 130-1.1)

Defendants' request for sanction is also denied.

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 [c] states that conduct is frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Here, defendants failed to establish that plaintiff's conduct in connection with the alleged backdating of the documents rose to the level of frivolous or egregious conduct, such that sanctions are warranted (*Marine Midland Bank, N.A. v Vivlamore*, 185 AD2d 506, 508, 585 NYS2d 878 [3d Dept 1992]; *Chase v Stendhal*, 16 Misc 3d 1137(A), 851 NYS2d 57 [Sup Ct, New York County 2007]).

Therefore, this portion of the cross-motion is also denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff LibertyPointe Bank (VNB as assignee of LibertyPointe), pursuant to CPLR 3212 for summary judgment on its claim for foreclosure of the mortgage, to strike the defendants 75 East 125th, LLC and Saadia Shapiro's answer; to dismiss defendants' counterclaims; and to appoint a referee to compute the amount due under the subject mortgage, is granted; and it is further

ORDERED that all the affirmative defenses and counterclaims in the Answer of the defendants 75 East 125th, LLC and Saadia Shapiro, are stricken and dismissed; and it is further

ORDERED that the matter is hereby referred to Roberta Ashkin, Esq., as Referee to (a) compute the amount due to the plaintiff for principal, interest, taxes and other disbursements advanced upon the note and mortgage being foreclosed in this action, and (b) examine and report whether mortgaged premises can be sold in parcels; and it is further

ORDERED that the Referee report to this Court with all convenient speed; and it is further

ORDERED that the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving appointment pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith; and it is further

ORDERED that, by accepting this appointment, the Referee certifies that she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36), including but not limited to, section 36.2(e) ("Disqualification from appointment"), and section 36.2(d) ("Limitations on appointments based upon compensation"), and it is further

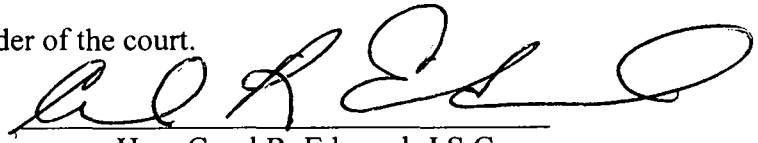
ORDERED that on filing the Referee's report, plaintiff may move for confirmation of said report and for judgment of foreclosure and sale as prayed for in the complaint, and for an extra allowance in addition to taxable costs; and it is further

ORDERED that defendants 75 East 125th Street, LLC and Saadia Shapiro's cross-motion is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: February 14, 2013



Hon. Carol R. Edmead, J.S.C.