SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

----------X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2006-5, MORTGAGE-BACKED PASS-THROUGH CERTIFICATES SERIES 2006-5,

Plaintiff,

- v -

ROSE A MARINO, AMELIO P MARINO, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, HSBC MORTGAGE CORPORATION (USA), JOHN DOE

Defendant.

----------X

INDEX NO. 850107/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

In this action Plaintiff seeks to foreclose on a consolidated, extended and modified mortgage encumbering residential real property located at 245 West 71st Street, New York, New York. The mortgage, dated August 4, 2006, was given by Defendant Rose A. Marino ("Marino") to non-party American Home Mortgage ("American") to secure a loan with an original principal amount of $2,400,000.00. The indebtedness is evidenced by a note executed the same date as the mortgage. Marino and American's servicer executed a loan modification agreement dated March 1, 2010. Therein, Marino acknowledged the outstanding indebtedness and promised to pay the new principal balance and abide by the terms of the note.

Plaintiff commenced this action alleging *inter alia* that Marino defaulted in repayment of the loan on or about January 1, 2013. Marino filed an answer and pled thirty-four affirmative defenses, including lack of standing and failure to comply with RPAPL §1304, as well as asserting seven counterclaims. Now, Plaintiff moves for summary judgment against Marino, to strike her answer and affirmative defenses, a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption. Marino opposes the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default

in repayment (*see U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]).

Based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]), its strict compliance with RPAPL §§1303, 1304 and 1306 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]). In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Kevin Flannigan ("Flannigan"), an authorized representative of PHH Mortgage Corporation ("PHH"), successor to Ocwen Loan Servicing, LLC ("Ocwen"), the servicer and attorney-in-fact for Plaintiff. As the action was not commenced by PHH as servicer for Plaintiff, nor is it presently being prosecuted as same (*cf. CWCapital Asset Mgt. v Charney-FPG 114 41st St., LLC*, 84 AD3d 506, 507 [1st Dept 2011], Plaintiff was required to demonstrated PHH's authority to act on its behalf for Flannigan's affidavit to be valid (*see eg 21st Mtge. Corp. v Adames*, 153 AD3d 474, 476-477 [2d Dept 2017]). This was established through the proffer of a limited power of attorney, dated April 5, 2022, in which Plaintiff's Trustee nominated PHH as its "Sub-Servicer" which expressly included the authority to prosecute a foreclosure action (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

As to the substance of the affidavit, Flannigan claims that his submission was based upon a review of PHH's records and knowledge of its record keeping practices. Flannigan's affidavit laid a proper foundation for the admission of the records of PHH into evidence under CPLR §4518. Contrary to Marino's assertion, Flannigan stated he was familiar with the record keeping practices of PHH and sufficiently showed that the records PHH relied upon "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Flannigan sufficiently established that those records were received from the makers and incorporated into the records SPS kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were all the records referenced by Flannigan (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Flannigan's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *see also Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). In addition, the loan modification agreement evidenced the indebtedness (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]) and Marino's default in repayment was established through multiple admissions contained in letters addressed to the servicer that she proffered in opposition to the motion.

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). In this case, Plaintiff annexed a copy of the note to the complaint endorsed in blank by the original lender, American, on its face. This is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]; *Bank of NY v Knowles*, supra at 597).

In opposition, Defendants' claim that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. The argument concerning physical delivery of the note is meritless. When a copy of the note, endorsed in blank, is attached to the complaint "[t]here is simply no requirement that an entity. . . must establish how it came into possession of that instrument" (*see JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]; *see also Bank of Am., N.A. v Pennicooke*, 186 AD3d 545 [2d Dept 2020]).

Marino also posits that an issue of fact precluding summary judgment exists as to whether Plaintiff frustrated "Defendants from fulfilling the payment obligations under the note and mortgage". Generally, a material breach by one party to a contract may excuse another party's performance (*see Grace v Nappa*, 46 NY2d 560, 567 [1979]). Moreover, "[a] promisee who prevents the promisor from being able to perform the promise can not maintain suit for nonperformance; he discharges the promisor from duty" (*Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 [3d Dept 1988]). Here, Marino's affidavit and the proffered correspondences only demonstrate that Marino *believed* the amount of the installment payments demanded were incorrect without demonstrating that supposition was a fact (*see generally Flintkote Co. Bert Bar Holdings*, 114 AD2d 400 [2d Dept 1985]). Marino does not proffer the alleged erroneous account statements referenced nor explain how, other than in a conclusory fashion, that the amount demanded therein was flawed. A litigant cannot simply submit an array of documents without explaining how these documents support its argument (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493 [1st Dept 2010]). Similarly, Marino's claims of timely payment of installments are unavailing as they are uncorroborated by financial records of any kind (*see 255 Co. v World Wide Trend Setters, Inc.*, 148 AD3d 336 [1st Dept 1989]; *Peerless Constr. Co. v Mancini*, 95 AD3d 666 [3d Dept 1983]). To the extent it is asserted that Plaintiff interfered with Marino's tender of arrears before acceleration of the indebtedness, there is no evidence of Marino's

attempt to pay *all* arrears, which encompasses accrued interest and late charges (*see EMC Mortg. Corp. v Stewart*, 2 AD3d 772, 773 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 766 [3d Dept 2001]; *First Fed. Sav. Bank v Midura*, supra).

The opposition based on an alleged breach of the implied covenant of good faith and fair dealing fails as that affirmative defense is improperly duplicative of the breach of contract claims and defenses (*see eg City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]).

Assuming, that the defense of unclean hands is applicable to a mortgage foreclosure action (*see Phh Mtge. Corp. v Davis*, 111 AD3d 1110, 1112 [3d Dept 2013]), that doctrine "is used only to bar the grant of equitable relief to a party who is 'guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct'" (*Wells Fargo Bank v Hodge*, 92 AD3d 775 [2d Dept 2012]). The purported failure of Plaintiff, as well as its servicers and assignees, to respond to Defendant's inquires, even if true, does not constitute conduct to support such a defense (*see Wells Fargo Bank, N.A. v Dara*, 180 AD3d 844 [2d Dept 2020]). Nor does Plaintiff's decision to not offer a loan modification or its decision to proceed to foreclosure (*see Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468 [1st Dept 2013]).

Marino's defense based upon General Business Law §349 is unavailing as it is specific to the subject mortgage and is not based on "consumer-oriented" conduct (*see Wells Fargo Bank, N.A. v Farfan*, 203 AD3d 1107, 1110 [2d Dept 2022]). Defendant was required, but failed, to proffer evidence that Plaintiff's acts or practices have a broader impact on consumers at large since private contract disputes, unique to the parties, do not fall within the ambit of the statute (*see New York Univ v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Scarola v Verizon Communications, Inc.*, 146 AD3d 692, 693 [1st Dept 2017]). "[C]onclusory allegations about defendant's practices with other clients are insufficient to save the claim" (*Golub v Tanenbaum-Harber Co. Inc.*, 88 AD3d 622, 623 [1st Dept 2011]). Indeed, Plaintiff was not the original lender and Defendant failed to explain what specific actions by Plaintiff are the foundation of this claim.

A claim of fraud must allege "the circumstances constituting the wrong…in detail" (CPLR §3016 [b]). "To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment" (*Merrill Lynch v Wise Metals Group, LLC.*, 19 AD3d 273, 275 [1st Dept 2005]). A "cause of action for fraud arising out of a contractual relationship may be maintained only where the plaintiff alleges a breach of duty separate from, or in addition to, a breach of the contract" (*Levine v American Intern. Group*, 16 AD3d 250 [1st Dept 2005]). Therefore, "the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group LLC v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004]). In the present case, Marino failed to establish what duty Plaintiff owed her outside the loan documents. Any claim by Marino that she reasonably relied on representations that were plainly at odds with the terms contained in the loan documents is unavailing (*see Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830 [2d Dept 2015]).

Defendant's reliance on Plaintiff's alleged failure to reply to "qualified written requests" as constituting violations of the Real Estate Settlement Procedures Act [12 USC §2601, *et seq.*] fails. "A RESPA violation does not adversely affect the validity or enforceability of a federally related mortgage

loan (see 12 USC § 2615) and thus, a disclosure violation of RESPA does not constitute a valid defense to mortgage foreclosure" (*Deutsche Bank Nat'l Trust Co. v Campbell*, 26 Misc3d 1206[A][Sup Ct Kings Cty 2009]).

Concerning the defense of estoppel, this equitable doctrine exists "to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another" (*American Bartenders School v 105 Madison Co.*, 59 NY2d 716, 718 [1983]; *see also Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). "To establish an estoppel, a party must prove that it relied upon another's actions, its reliance was justifiable, and that, in consequence of such reliance, it prejudicially changed its position" (*Flushing Unique Homes, LLC v Brooklyn Fed. Sav. Bank*, 100 AD3d 956, 958 [2d Dept 2012]). Absence of any of these essential elements renders an estoppel defense deficient (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 106 [2006]). In this case, reliance on representations of Plaintiff in the second loan modification process is not justifiable since Marino does not claim Plaintiff assented to modify the loan nor was Plaintiff under an obligation to grant a modification (*see King Penguin Opportunity Fund III, LLC v Spectrum Group Mgt. LLC*, 187 AD3d 688, 689 [1st Dept 2020]). Similarly, there is no claim that Plaintiff expressly consented to forego foreclosure while this second modification process proceeded (*cf. Marine Midland Bank-Western v. Center of Williamsville, Inc.*, 48 AD2d 764 [4th Dept 1975]).

Parenthetically, the Court notes that the detrimental reliance claimed by Marino in support of these affirmative defenses is almost entirely founded in increased interest and other charges caused by the delays. Ordinarily, disputes as to the amount owed are not a defense to a motion for summary judgment on a foreclosure cause of action (*see eg Emigrant Bank v Cohen*, 205 AD3d 103, 109 [2d Dept 2022]; *Heywood Condominium v Rozencraft*, 148 AD3d 38 [1st Dept 2017]; *see also NYCTL 2009-A Trust v Tsafatinos*, 101 AD3d 1092 [2nd Dept 2012]). This is because the amount owed does not affect the validity of a mortgage nor whether a mortgagor defaulted (*see Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]). Nevertheless, in a foreclosure action "'the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by particular facts in each case,' including wrongful conduct by either party" (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1st Dept 2021], *citing South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]) as well as "unexplained delay" in prosecution for the foreclosure claim (*see Deutsche Bank Natl Trust Co v Cumbe*, 217 AD3d 832 [2d Dept 2023]; *see also Deutsche Bank Natl Trust Co v Armstrong*, 218 AD3d 738 [2d Dept 2023]).

The assertion the motion must be denied because no discovery has been conducted concerning the above defenses is unavailing as Defendants offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

Regarding service of any required statutory and contractual pre-foreclosure notices, proof of service of same is only part of a plaintiff's *prima facie* case for summary judgment where non-conclusory affirmative defenses raising same are pled by a defendant in its answer (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602). Here, Marino only raised non-compliance with RPAPL §1304 and "express or implied terms of the note and mortgage".

Proof of compliance with RPAPL §1304 requires Plaintiff to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). "'[P]roof of the requisite mailing . . .

can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure'" (*Deutsche Bank Natl. Trust Co. v Dennis*, 181 AD3d at 866, *quoting Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019]). In other words, either an affidavit from the person who performed the mailing of the notice or proof from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]).

To demonstrate standard mailing procedure, the Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2d Dept 2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

In support of these requirements, Plaintiff proffered an affirmation of service from Anthony Cellucci, Esq ("Cellucci"), an attorney with Plaintiff's purported former counsel, who averred he personally mailed the notices. The affirmation is dated June 20, 2023, and recounts service allegedly made on June 9, 2016. "A properly executed affidavit of service raises a presumption that a proper mailing occurred" (*Engel v Lichterman*, 62 NY2d 943, 944 [1984]). In this context, direct knowledge affidavits, despite the rarity of same, are competent to prove service of the statutory notice (*see Emigrant Bank v Cohen*, 205 AD3d 103, 107-108 [2d Dept 2022]). Moreover, an affidavit not executed concurrently with the mailings does not, in and of itself, render such proof infirm (*id.* at 107 [Affidavit executed 8½ months after service]). Further, "RPAPL 1304 does not preclude an attorney acting on behalf of a lender from sending RPAPL 1304 notices" (*Ocwen Loan Servicing LLC v Siame*, supra at 409; *United Nations Federal Credit Union v Diarra*, 194 AD3d 506 [1st Dept 2021]). Nevertheless, the Court is not obligated to accept proof of service completely at face value and may evaluate the trustworthiness of the averments therein and the surrounding circumstances. "Put another way, the crux of the inquiry is whether the evidence of a defect casts doubt on the reliability of a key aspect of the process such that the inference that the notice was properly prepared and mailed is significantly undermined" (*Cit Bank N.A. v Schiffman*, supra at 557).

In this case, the preparation of the Cellucci's affirmation seven years after the fact, and eight-days before the motion was filed, does not suggest the record was made "while the memory of the event was still fresh enough to be fairly reliable" (*Toll v State*, 32 AD2d 47, 50 [3d Dept 1969]). Absent any additional information which expounds on and corroborates Cellucci's extraordinary recollection of an ostensibly mundane event, the timeline here supports a conclusion that the document was prepared exclusively for this motion which, under the particular circumstances of this case, renders it deficient (*see generally People v Foster*, 27 NY2d 47, 52 [1970]). Also absent from Cellucci's affirmation is any alternative proof of mailing such as domestic return receipts with attendant signatures or a "copy of an envelope addressed to the defendant bearing a certified mail twenty-digit barcode" (*Nationstar Mtge., LLC v LaPorte*, 162 AD3d 784, 786 [2d Dept 2018]).

With respect to the contractual pre-foreclosure notice under paragraph 22 of the mortgage, Plaintiff submitted an affidavit from Lisa Cochran ("Cochran"), an SVP - IT Management by Covius Document Services, LLC, f/k/a Walz Group, LLC ("Covius"), an alleged agent of Ocwen. Cochran's affidavit is deficient as the procedure used by Covius was only described in conclusory detail (*see Freedom Mtge Corp v Granger*, 188 AD3d 11631165 [2d Dept 2020]; *M & T Bank v Biordi*, 176 AD3d 1194, 1196 [2d Dept 2019]; *cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]).

Accordingly, Plaintiff failed to establish *prima facie* that it sent either the notices required pursuant to RPAPL §1304 or under paragraph 22 of the mortgage.

With respect to the affirmative defenses counterclaim not addressed in the moving papers, to the extent that specific legal arguments were not proffered, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branches of Plaintiff's motion for summary judgment on its causes of action for foreclosure and the appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses and counterclaims in Defendants' answer, except the eighth affirmative defense, are stricken, and it is

ORDERED that this action is hereby dismissed, without prejudice, against Amelio P. Marino, who is not a necessary party to this action, and that the caption be amended to reflect this dismissal; and it is further

ORDERED that the request that John Doe (Refused Name) be substituted for "John Doe #1" as a party defendant in the caption of this action is denied as the New York County Clerk will not accept a judgment with any "Doe" defendant in the caption; and it is further

ORDERED that the names of "John Doe #1" through "John Doe #12" be stricken from the action, said parties not being necessary party defendants herein; and it is further

ORDERED that the caption shall be amended to read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2006-5,

MORTGAGE-BACKED PASS-THROUGH CERTIFICATES SERIES 2006-5,

Plaintiff,

-against-

ROSE A. MARINO; NEW YORK CITY ENVIRONMENT AL CONTROL BOARD; UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE; HSBC MORTGAGE CORPORATION (USA),

Defendants.

----------X

and it is

ORDERED that this matter is set down for a status conference on **May 29, 2024 @ 11:40 am** via Microsoft Teams.

4/12/2024
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE