[* 1]

MEMO DECISION/SHORT FORM ORDER

INDEX No. 22235/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/12/14
SUBMIT DATE 7/11/14
Mot. Seq. # 002 - MG
Mot. Seq. #003 - MD
CDISP: NO: ORDER SIGNED

WELLS FARGO BANK, N.A., Plaintiff, -against- ANTHONY T. PASCIUTA, BROOKHAVEN MEMORIAL HOSPITAL, CAPITAL ONE BANK (USA) N.A., MIDLAND FUNDING LLC, d/b/a in New York as MIDLAND FUNDING OF DELAWARE, and "JOHN DOES" and "JANE DOES", said names being fictitious parties intended being possible tenants or occupants of premises and corporations other entities or persons who claim or may claim a lien against the premises, Defendants.	ROSICKI, ROSICKI & ASSOCIATES Attys. for Plaintiff 51 East Bethpage Road Plainview, NY 11803 IVAN YOUNG LAW GROUP Atty. for Defendant Pasciuta 80 Orville Drive, Ste. 100 Bohemia, NY 11716

Upon the following papers numbered 1 to 14 read on this motion by the plaintiff for an order of reference on default and cross motion by Pasciuta to vacate default; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-8 including memo of law; Answering papers 9-10; Reply including Memo Of Law 11-14; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for an order fixing the defaults in answering of all defendants served with process, the deletion of unknown defendants and the appointment of a referee to compute amounts due under the note and the mortgage that are the subject of this foreclosure action is considered under CPLR 3215, RPAPL § 1321 and is granted.

ORDERED that the cross motion (#003) by defendant, Anthony T. Pasciuta, for an order vacating his default in answering and for leave to appear by answer is considered under CPLR 317, 3012(d), 2004 and 200, and is denied.

In July of 2012, the plaintiff commenced this action to foreclose a consolidated mortgage lien that arose on February 24, 2009, when the plaintiff extended monies to defendant Pasciuta in the amount of $12,280.69. At the time of such loan, the plaintiff was the assignee of a prior note and mortgage dated July 10, 2006 executed by defendant Pasciuta and the plaintiff's assignor. The first mortgage note and its mortgage of July 10, 2006, and the second consolidated mortgage note and its mortgage, dated February 24, 2009, were the subject of a Consolidation, Extension and Modification Agreement [CEMA] of the same date executed by the plaintiff and defendant Pasciuta. Therein, the lien of the first note and mortgage became consolidated with the second so as to form a single lien in the amount of $304,246.00. The consolidated mortgage note and mortgage of February 24, 2009 reflect this single lien amount as the principal amount of the loan.

In its complaint, the plaintiff alleges that on January 1, 2011, the mortgagor defendant defaulted in making payments due under the terms of the consolidated note and mortgage. Following the commencement of this action, the plaintiff joined the mortgagor defendant by service of the summons and complaint with notice on July 28, 2012 and such service was complete in September of 2012. Defendant Pasciuta failed to appear herein by service of an answer. He did, however, participate in three settlement conferences of the type required by CPLR 3408 which began in May of 2013 and ended on September 13, 2013, without a settlement being reached.

By the instant motion, the plaintiff seeks an order of reference upon the defaults in answering of all of the defendants jurisdictionally joined herein by service of process upon them. The plaintiff further seeks an order dropping, as party defendants, the unknown persons listed in the caption and amendment of the caption to reflect same.

Defendant Pasciuta opposes the plaintiff's motion and cross moves to vacate his default in answering and for leave appear by answer, in the form of the proposed answer attached to his moving papers. In support of his claims for this relief, defendant Pasciuta asserts that he was defrauded by an attorney he retained in November of 2011 to avoid foreclosure, which attorney was disbarred by the Appellate Division Second Department on January 22, 2014 due to his resignation after the filing of disciplinary grievance charges for improprieties in the performance of mortgage modification work, improper fee retainer agreements and for sharing legal fees with non-lawyers (*see* ***Matter of Rory Alacorn***, 115 AD3d 109, 978 NYS2d 853 [2d Dept 2014]). The defendant further claims that the plaintiff has presented to this court in its moving papers, a copy of the February 24, 2009 consolidated note that differs from the one recorded in the Suffolk County Clerk's office, as it includes the affixation of Pasciuta's initials to the bottom of page one and a signature on page two, by a person other than defendant Pasciuta. He also claims that he never received any pre-action, ninety-day notice of the type required by RPAPL §1304. Finally, defendant Pasciuta claims that his default in answering should be set aside pursuant to CPLR 317 because he was not personally served with the notice of the action and possesses meritorious defenses to the plaintiff's claims.

The court first considers the cross motion (#003) by defendant Pasciuta since the court's determination thereof may render the plaintiff's motion, academic. "'A defendant who has failed to appear or answer the complaint must generally provide a reasonable excuse for the default and

demonstrate a potentially meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer'" (***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], quoting, ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *see* ***Mannino Development, Inc. v Linares***, 117 AD3d 995, 2014 WL 2198432 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Lafazan***, 115 A.D.3d 647, 983 NYS2d 32 [2d Dept 2014]; ***JP Morgan Chase Bank v Palma***, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Community Preserv. Corp. v Bridgewater Condominiums,*** LLC, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]; ***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 889, 890, 909 NYS2d 403[2d Dept 2010]; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; ***Equicredit Corp. of Am. v Campbell***, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]). Absent a valid jurisdictional or abandonment defense, a party in default may not appear in the action and contest the plaintiff's right to relief unless the defaulter can establish grounds for the vacatur of his or her default (*see* ***Schwartz v Reisman***, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013] ***U.S. Bank N.A. v Gonzalez,*** 99 AD3d 694, 694–695, 952 NYS2d 59 [2d Dept 2012]; ***McGee v Dunn,*** 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]; ***Hense v Baxter***, 79 AD3d 814, 914 NYS2d 200 [2d Dept 2010]).

The cross motion of defendant Pasciuta rests principally on the grounds to vacate defaults and extend times which appellate case authorities have engrafted in CPLR 317, 3012(d), 2004 and 2005. A defendant moving under CPLR 317 must establish that he or she did not personally receive notice of the summons in time to defend and that he or she possesses a meritorious defense to the claim of the plaintiff. No demonstration of a reasonable excuse is necessary under CPLR 317, since the statute itself provides for same, namely, non-receipt of personal notice of the summons in time to defend (see CPLR 317). However, an affidavit of merit by the moving defendant or a proposed answer, verified by such defendant containing the assertion of facts which potentially constitute at least one bona fide defense must be attached to motion papers, in which, relief under this statutes is demanded (*see* ***New York Hosp. Med. Ctr. of Queens v Insurance Co. of the State of Pennsylvania***, 16 AD3d 391, 791 NYS2d 145 [2d Dept 2005]; ***Hilldun Corp. v Scarboro Textiles, Inc.***, 73 AD2d 535, 422 NYS2d 417 [1st Dept 1979]).

Here, there has been no showing that defendant Pasciuta failed to receive notice of the action in time to defend as the record is replete with evidence otherwise. In any event, the absence of any denial of receipt of the mailings of the summons and complaint to the correct address as attested to in the affidavit of the plaintiff's process server are fatal to the defendant's claim for relief under CPLR 317 (*see* ***Burekhovitch v Tatarchuk***, 99 AD3d 653, 952 NYS2d 812 [2d Dept 2012]; ***Jackson v Professional Transp. Corp.***, 81 AD3d 602, 916 NYS2d 159 [2d Dept 2011]; ***Cavalry Portfolio Serv., LLC v Reisman***, 55 AD3d 524, 865 NYS2d 286 [2d Dept 2008]). His conclusory claims that he only learned of this action in January of 2013 when he first spoke with his current counsel and that he was never "personally served with WFB's foreclosure complaint" are insufficient to establish that he did not receive notice of the summons and complaint in time to defend (*see* ***Bank of New York v Samuels***, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]; ***Stevens v Charles***, 102 AD3d 763, 958 NYS2d 722 [2d Dept 2013]; ***C & H Import & Export, Inc. v MNA Global, Inc.***, 79 AD3d 784, 912 NYS2d 428 [2d Dept 2010]). Such claims are also insufficient to raise a successful jurisdictional defense of the type contemplated by CPLR 3211(a)(8) (*see* ***US Natl. Bank Assn. as Trustee v Melton***, 90 AD3d 742,

934 NYS2d 352 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). In any event, and as outlined below, defendant Pasciuta failed to demonstrate his possession of any bona fide defense to the plaintiff's claims for foreclosure and sale.

Motions for relief pursuant to CPLR 3012(d) are governed by a different standard than those made under CPLR 317, although the requirement of a showing of a meritorious defense remains. "'A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when . . . moving to extend the time to answer or to compel the acceptance of an untimely answer'" (***Mannino Development, Inc. v Linares***, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]***; HSBC Bank USA, N.A. v Lafazan***, 115 A.D.3d 647, 983 NYS2d 32 [2d Dept 2014]; ***JP Morgan Chase Bank v Palma***, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014]; ***Community Preserv. Corp. v Bridgewater Condominiums,*** LLC, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011] ***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 890, 909 NYS2d 642 [2d Dept 2010], quoting , ***Lipp v Port Auth. of NY & NJ***, 34 AD3d 649, 649, 824 NYS2d 671 [2d Dept 2006]; *see also* ***Karalis v New Dimensions HR, Inc***, 105 AD3d 707, 962 NYS2d 647 [2d Dept2013]; ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Rudman***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]). The determination of that which constitutes a reasonable excuse lies within the discretion of the Supreme Court (*see* ***Mellon v. Izmirligil***, 88 AD3d 930, *supra*; [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, supra ; ***Maspeth Federal Sav. & Loan Assn. v Mcgown***, 77 AD3d 890, *supra*; ***Star Indus. Inc. v Innovative Beverages, Inc.***, 55 AD3d 903, 904, 866 NYS2d 357 [2d Dept 2008]). Where the delay in moving to vacate is lengthy, the moving party must offer a reasonable explanation for such delay as well as one for the initial default (*see* ***TD Bank, N.A. v Spector***, 114 AD3d 933, 980 NYS2d 836 [2d Dept 2014]; ***Karalis v New Dimensions HR, Inc***, 105 AD3d 707, *supra*).

Here, defendant Pasciuta asserts that his default was caused by the fraudulent and deceitful acts of the attorney, he first retained on November 30, 2011, who never told him about the pendency of this action and who never appeared in this later commenced action on Pasciuta's behalf (*see* Pasciuta's affidavit in opposition ¶ 27). However, these assertions are belied by the terms of the retainer agreement Pasciuta signed which stated that the Alarcon firm "would not be providing foreclosure defenses", but only, "pre-foreclosure services" aimed at avoiding foreclosure through a loan modification or other settlement (see *id.*, ¶ ¶ 15-16) .

Defendant Pasciuta claims to have inquired into this limitation as to the nature of the legal services being provided. The response he allegedly received was a verbal assurance from Alarcon agents that these terms were "generic" and aimed principally at "out-of state clients" (*see id.*, ¶ 17), and that in the unlikely event a public sale of his premises were scheduled by the court, the firm "would leverage a settlement through the court and charge me only a small additional fee" (*see* Pasciuta's affidavit in opposition ¶¶ 16-18). This indicates that Pasciuta understood the limited nature of the services to be provided by such firm under the terms of the retainer agreement he signed. Defendant Pascuita's purported reliance upon those assurances and the further verbal utterance by Alarcon operatives that the firm "would handle everything" for a "flat fee of $4500.00" was thus not reasonable and Pasciuta's production of a receipt for payment of $1400 issued by Alarcon (*see id.* ¶

19 and the attached Exhibit G), does not establish that he was entitled to a defense against the foreclosure complaint served in this action or other litigation defense work by the Alarcon firm beyond that provided in the retainer agreement or other enforceable agreement with the firm. His claim of fraud and/or law office failure on the part Alarcon is thus untenable and insufficient to warrant a finding that his default in answering was justifiable so as to warrant relief under CPLR 3012(d) and 2005 or that his time to answer should be extended under CPLR 2004, for good cause shown.

In addition, defendant Pasciuta fired the Alarcon firm in January of 2013, some four months after his default in answering the plaintiffs's summon became fixed under CPLR 320. Shortly thereafter, the defendant met his current counsel, whom he later retained. He advised defendant Pasciuta that although this action had been commenced in July of 2012, it was "stayed" until the action cleared the specialized conference part thus precluding the filing of any motions (*see* Pasciuta's affidavit in opposition ¶¶ 26; 28). Defendant Pasciuta then participated in the three settlement conferences conducted by quasi-judicial personnel assigned to the specialized mortgage foreclosure conference part of this court, on May 9, 2013, July 16, 2013 and September 12, 2013. In January of 2014, defendant Pasciuta, by his current counsel, moved to dismiss the complaint pursuant to CPLR 3215(c), without moving to vacate his default. Only now, in response to the plaintiff's motion, does defendant Pasciuta move for a vacatur of his nearly two year old default in answering, which he admits learning of in January of 2013, and no explanation for the delay in moving for this relief was advanced by defendant Pasciuta in his cross moving papers. These circumstances, coupled with the fact that defendant Pasciuta does not deny receipt of the summons with the notice required by RPAPL 1320 or the separate CPLR 1303 notice, warning of the consequences of a default, warrant rejection of the excuse advanced by defendant Pasciuta as a reasonable one for purposes of CPLR 2005 and 3012(d) (*see* ***Dimopoulos v Caposella***, 118 AD3d 739, 987 NYS2d 434, 435 [2d Dept 2014]; ***Chase Home Finance, LLC v Minott***, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]).

Even if it were otherwise, defendant Pasciuta failed to demonstrate his possession of a bona fide defense to the plaintiff's claims for foreclosure and sale. The proposed answer set forth in the cross moving papers advances three affirmative defenses, namely, a lack of standing, a lack of capacity to sue and a failure to comply with ninety days notice requirements imposed by CPLR §1304. Only the standing and the statutory notice defense are asserted by defendant Pasciuta in support of his cross motion and thus are addressed below.

The defendant's standing defense is predicated upon the plaintiff's failure to demonstrate in its moving papers, that it was the owner and holder of both notes and mortgages at the time of the commencement of this action. However, a claim of a lack of standing on the part of any plaintiff is not an element of its claim (*see* ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014], but instead, is an affirmative defense which must be raised by an appearing defendant possessed of such claim, and if not so raised, it is waived (*see* ***Deutsche Bank Trust Co. Americas v Cox,*** 110 AD3d 760, 973 NYS2d 662, [2d Dept 2013]; ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; ***U.S. Bank Natl. Ass'n v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624,

883 NYS2d 135 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Here, any standing defense was waived by defendant Pasciuta's failure to assert it in a timely pre-answer motion to dismiss or in an answer timely served. The plaintiff thus had no obligation to establish its standing on its motion-in-chief for an order a reference on default by proof of any kind (*id.*).

Moreover, appellate case authorities have held that affirmative defenses that have been waived by a defendant in default may not be used to support an application by such defendant to vacate his or her default (*see* ***Deutsche Bank Nat. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; *see also* ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, *supra*; ***Citibank, N.A. v Swiatkowski***, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]). Defendant Pasciuta's demand for relief pursuant to CPLR 3012(d), to the extent premised upon a standing defense, is thus unavailing. In any event, defense counsel's complaints about the plaintiff's failure to demonstrate its standing lack merit since the plaintiff is the original lender under the terms of the consolidated note given by defendant Pasciuta to the plaintiff along with its mortgage (*see* ***Emigrant Mortg. Co., Inc. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]). It is also the assignee of the first note and mortgage under the terms of a written assignment executed prior to the commencement of this action, which assignment has not been challenged by the defendant. Since an assignment of a first note, the balance of which, was increased by a second loan pursuant to a CEMA has been held to effectively transfer a note of that kind to the maker of the second mortgage or other lenders, the unassailed assignment produced by the plaintiff here is sufficient evidence of the plaintiff's standing (*see* ***Benson v Deutsche Bank Nat. Trust, Inc.***, 109 AD3d 495, 970 NYS2d 794 [2d Dept 2013]).

Defendant Pasciuta's RPAPL §1304 notice defense has not been waived and may thus be asserted both in opposition to the plaintiff's motion-in-chief and in support of the defendant's cross motion to vacate his default and to appear herein by answer (*see* ***Aurora Loan Services, LLC v. Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011] *cf.*, CLR 1302 [2]; ***Pritchard v Curtis***, 101 AD3d 1502, 957 NYS.2d 440 [3d Dept 2012; "*Statutorily, violation of the provisions of RPAPL 1304 constitutes a defense to a home loan mortgage foreclosure action*"]). Such defense rests upon the defendant's denial of receipt of "any First Class or Certified Mailing notice from WFB that contained or even resembled the mandatory language required by RPAPL 1304" and the fact that his recent search of the United States Postal Service's on-line tracking system for the certified mail number listed on the face of the plaintiff's RPAPL 1304 notice resulted in a response of "NOT FOUND".

The court finds, however, that the defendant's qualified denial of receipt of a RPAPL §1304 notice "from WFB" is insufficient to defeat the plaintiff's proof that a compliant RPAPL §1304 notice was sent on February 16, 2012 by certified and first class mail to defendant Pasciuta at the mortgaged premises by servicing agents of the plaintiff, as alleged in the supporting affidavit of the plaintiff's Vice President. RPAPL §1304 [2] does not require that such notice be sent by the lender, as it provides that it may originate from an assignee or loan servicer. The fact that defendant Pasciuta did not receive a RPAPL §1304 notice from the plaintiff ("WFB") is thus irrelevant. The defendant's

reliance upon the "NOT FOUND" response he received to his recent on-line tracking search of the certified mailing number on the face of the notice, which he offers as additional proof in support of his claim of non-receipt of such notice, is unavailing, as the number listings posted on the website searched expire within weeks after delivery of the item tracked.

The court is thus left with the defendant's bare denial of receipt of the statutory notice of default, which like denial of contractual notices of similar import, are insufficient to demonstrate a defense based thereon (*see* ***Emigrant Mortg. Co., Inc. v Persad***,117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 1021–1022, 907 NYS2d 22 [2d Dept 2010]). These circumstances render it unnecessary to address the defendant's challenges to purported insufficiencies in the plaintiff's proof of its service of a content compliant mailing of the RPAPL §1304 notice, since the plaintiff had no obligation to establish compliance on its motion-in-chief for an order fixing the defaults in answering of all defendants and appointing a referee to compute pursuant to RPAPL 1321 (*see* ***U.S. Bank Nat. Ass'n v Poku***, 118 AD3d 980, 2014 WL 2871393 [2d Dept 2014]; ***U.S. Bank, Natl. Assn. v Razon***, 115 AD3d 739, 981 NYS2d 571, 572 [2d Dept 2014]; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]).

The defendant's further claim that the plaintiff's production to this court of a modified and/or forged copy of the consolidated note is not a defense to this action and it provides no basis for the granting of his cross motion. The existence of slightly different versions of a mortgage note has been held not to establish fraud where the mortgagor defendant has admitted that an unaltered version of the note was validly signed by him at the time of the loan (*see* ***Citimortgage, Inc. v Friedman***, 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]). Here, neither the validity of the recorded consolidated note nor the propriety of its execution by defendant Pasciuta is at issue admits his execution of the recorded version of the consolidated note, the terms of which are not alleged to have been modified in the second copy. These circumstances, coupled with the plaintiff's production of a limited power of attorney given on the date of the second loan by defendant Pasciuta empowering the closing agent and the plaintiff to correct errors in the loan documents militates against any finding forgery or fraud on the part of the plaintiff.

The court has considered all remaining contentions advanced by the defendant and his counsel in support of the cross motion and finds them to be lacking in merit, including the claim that the settlement negotiations engaged in by defendant Pasciuta before or after commencement of this foreclosure action provide a reasonable excuse for a default so as to warrant relief pursuant to CPLR 3012(d) and 2005 (*see* ***Mannino Development, Inc. Linares***, 117 AD3d 995, 936 NYS2d 578 [2d Dept 2014]; ***Community Preservation Corp. v. Bridgewater Condominiums, LLC***, 89 AD3d 784, 932 NYS2d 378 [2d Dept. 2011]; ***Mellon v Izmirligil***, 88 AD3d 930, *supra*; ***Maspeth Federal Sav. and Loan Ass'n v McGown***, 77 AD3d 889, *supra*; ***Kouzios v Dery***, 57 AD3d 949, 950, 871 NYS2d 303 [2d Dept 2008]; ***Antoine v Bee***, 26 AD3d 306, 812 NYS2d 557 [2d Dept 2008]; ***Majestic Clothing Inc. v East Coast Stor., LLC***, 18 AD3d 516, 518, 795 NYS2d 289 [2d Dept 2006]; ***Armstrong Trading, Ltd. v MBM Enter.***, 29 AD3d 835, 815 NYS2d 689 [2d Dept 2006]; ***American Shoring, Inc. v D.C.A. Const., Ltd.***, 15 AD3d 431, 789 NYS2d 722 [2d Dept 2005]).

The court thus denies the cross motion (#003) by defendant Pasciuta for an order vacating his default and for leave to appear by service of the answer attached to his cross moving papers.

The plaintiff's motion-in-chief (#001), in which it seeks an order fixing the defaults in answering of all defendants joined herein by service of process, the deletion of the unknown defendants and an order of reference, is considered under CPLR 3215 and RPAPL §1321 and is granted. A party moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting defendant's failure to answer or appear (*see* CPLR 3215 [f]; ***U.S. Bank Nat. Ass'n v Poku***, 118 AD3d 980, *supra*; ***U.S. Bank, Natl. Assn. v Razon***, 115 AD3d 739, *supra*; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Loaiza v Guzman***, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, *supra*; ***Dupps v Betancourt***, 99 AD3d 855, *supra*). While a plaintiff moving for a default judgment must establish enough facts to enable a court to determine that a viable cause of action exists (*see* CPLR 3215[f]), prima facie evidentiary proof of the type required on a motion for summary judgment is not necessary (*see* ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 760 NYS2d 727 [2003]; ***Fried v Jacob Holding, Inc***., 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]). Where these elements are established, a motion for entry of a default judgment should be granted (*see* ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, *supra*; ***U.S. Bank, Natl. Assn. v Razon***, 115 AD3d 739, *supra*; ***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, *supra*). Here, the plaintiff's moving papers, which included an affidavit of its Vice President of Loan Documentation, satisfied these requirements.

To successfully oppose a motion for leave to enter a default judgment based on the failure to timely serve an answer, a defendant in default must, in the absence of some viable jurisdictional or abandonment defense (*see* CPLR 3211(a)(2);(8);(9); CPLR 3215(c)), "provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid entering of a default judgment or to extend the time to answer'" (***Mellon v Izmirligil***, 88 AD3d 930, *supra*; ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, *supra*; ***Diederich v Wetzel***, 112 AD3d 883, *supra*. ***Swedbank AB, NY v Hale Ave. Borrower, LLC***, 89 AD3d 922, *supra*; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, *supra*). Defendant Pasciuta's opposition was insufficient in this regard as no reasonable excuse for his lengthy default in answering was advanced in his submissions as outlined above. Nor did he demonstrate his possession of any unwaived, bona fide defense to the plaintiff's claims for foreclosure and sale. The plaintiff's motion is thus granted.

The proposed order appointing a referee to compute has been marked signed, as modified by the court.

Dated: ~~July~~ August 5, 2014

THOMAS F. WHELAN, J.S.C.