

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

**PRESENT: HON. THOMAS A. ADAMS,
Supreme Court Justice**

-----X
Washington Mutual Bank, f/k/a Washington
Mutual Bank, FA,

**FORECLOSURE PART
NASSAU COUNTY**

Plaintiff,

INDEX NO.: 9476/08

MOTION SEQ. NO. 2

- against-

Motion Date: June 17, 2013

Navid Hakimian, Capital One, N.A., successor
by merger to North Fork Bank, Commercial
Bank of New York, et al,

Defendants.

-----X

The following papers were read on this application:

Notice of Motion, Affidavits, Affirmation and Exhibits.....	1
Opposing Affirmation, Affidavit and Exhibits.....	2
Stipulation.....	3
Reply Affirmation and Exhibits.....	

Upon the foregoing papers, it is ordered that the plaintiff's application in this mortgage foreclosure action is determined as hereinafter articulated.

The plaintiff moves, *inter alia*, for summary judgment, striking the Answer interposed by defendant, Navid Hakimian, for amendment relief so as to correct the plaintiff's name, for substitution of "Mrs. Hakimian" and Shiras Hakimian as party defendants in place and stead of defendant "John Doe", and, upon such substitution, for a default judgment against them, together with defendants Capital One, N.A., successor by merger to North Fork Bank and Commercial Bank of New York, based on their failure to interpose an Answer to the plaintiff's Complaint, and for the issuance of an Order of Reference.

At the outset, the Court acknowledges receipt of plaintiff's reply papers. The Court rejects same, as same were served and filed belatedly and in violation of the express terms of the parties' stipulation dated May 22, 2013.

The prayer to substitute "Mrs. Hakimian" and Shiras Hakimian, as party

defendants, is granted, and the caption is amended accordingly. The prayer to amend the caption to correct plaintiff's name is granted, and the caption is amended to reflect JP Morgan Chase Bank, N. A., as plaintiff.

The prayer for relief under CPLR 3215 is denied. (see, *Hosten v Oladapo*, 44 AD3d 1006; see also, *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept.])

Notably, the affidavit of merit fails to address plaintiff's claims against the defaulting defendants, and the submission of an unverified complaint attenuates its utility and plaintiff's reliance thereon. (see, CPLR 105 [u])

In focusing on the remaining prayer, the Court notes that the "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324)." (*Moore v 3 Phase Equestrian Center, Inc.*, 83 AD3d 677, 678 - 679 [emphasis supplied])

However, the "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers' (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [citations omitted]; see also *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065)." (*JMD Holding Corp. v Congress Financial Corporation*, 4 NY3d 373, 384)

The affidavit of merit addresses a default which occurred well before plaintiff's acquisition of the assets of Washington Mutual Bank, FA, the initial mortgagee (see, <http://www.fdic.gov/news/news/press/2008/pr08085.html>) and its signatory purports to attest to facts based on a review of the records of another, albeit currently subsumed within its own.

There is, however, no indication in this Record that the affiant is seized of personal knowledge of the material facts and thus lacks a predicate basis for the factual assertions posited. The deficiency noted undermines the movant's showing, as the affidavit submitted fails to present competent proof of the underlying facts.

Significantly, the affiant failed to demonstrate the admissibility of its predecessor's records under the business record exception to the hearsay rule, and, to the extent that the subject records are now subsumed within its own, the affiant's reliance thereon is no less problematic from an evidentiary perspective. (see, generally, *Vilomar v Castillo*, 73 AD3d 758, 759; *Springer v Arthurs*, 22 AD3d 829, 830)

"To be admissible as a business record, a document must have been made in

the regular course of business, and it must have been the regular course of the business to make such a record, at the time of the act, transaction, occurrence, or event recorded, or within a reasonable time thereafter (see CPLR 4518 [a]; *People v Kennedy*, 68 NY2d 569, 579-580). '[T]he mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records,' because 'such papers simply are not made in the regular course of business of the recipient, who is in no position to provide the necessary foundation testimony' (*People v Cratsley*, 86 NY2d 81, 90 [internal quotation marks omitted]; see *Standard Textile Co. v National Equip. Rental*, 80 AD2d 911)." (*Lodato v Greyhawk North America, LLC*, 39 AD3d 494, 495)

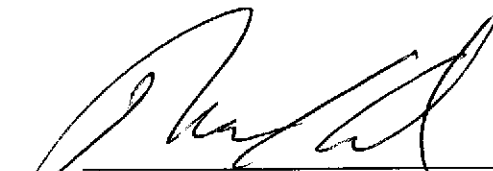
Based on the foregoing, plaintiff's prayer for relief under CPLR 3212 is denied.

The prayer for affirmative relief appearing within the opposing submission is denied for want of compliance with CPLR 2214 and/or 2215. (see, *Wassertheil v Elburg, LLC*, 94 AD3d 753, 753; *Pierre v City of New York*, 22 AD3d 733; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522)

To insure that the prosecution of this action is not further delayed, plaintiff is hereby directed to file a note of issue within ninety (90) days of the date hereof in default of which the action shall be deemed abandoned and dismissed for want of prosecution (see, CPLR Section 3216[a]).

ENTER:

Dated: SEP 27 2013



HON. THOMAS A. ADAMS
Supreme Court Justice

ENTERED
OCT 15 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE