2019 NY Slip Op 29112

U.S. BANK NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE J.P. MORGAN MORTGAGE TRUST 2007-S3 MORTGAGE PASS-THROUGH CERTIFICATES, Plaintiff,
v.
ROCCO CANNELLA, CITIBANK (SOUTH DAKOTA), N.A., HSBC BANK NEVADA, N.A., JOHN DOE (THOSE UNKNOWN TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS OR THEIR HEIRS, DISTRIBUTES, EXECUTORS, ADMINISTRATORS, TRUSTEES, GUARDIANS, ASSIGNEES, CREDITORS OR SUCCESSORS CLAIMING AN INTEREST IN THE MORTGAGED PREMISES.), Defendants.

034916/2017.
Supreme Court, Rockland County.
Decided April 15, 2019.

Peter R. Bonchonsky, Esq., Bonchonsky & Zaino, LLP, 226 Seventh Street, Garden City, NY, 11530, Counsel for Plaintiff.

R. Spencer Lauterbach, Esq., The Lauterbach Law Firm, 151 North Main Street — 4th Floor, New City, NY 10956, Counsel for Defendant Rocco Cannella.

PAUL I. MARX, J.

It is ORDERED that Plaintiff's motion is disposed as follows:

BACKGROUND

On October 9, 2017, Plaintiff commenced this residential mortgage foreclosure action by filing a Summons and Complaint against Defendant borrower, Rocco Cannella ("Defendant"), Defendant lienholders, Citibank (South Dakota), N.A. ("Citibank") and HSBC Bank Nevada, N.A. ("HSBC"), and "John Doe".

On May 22, 2007, Defendant executed a note in the amount of $488,000 ("Note") payable to JPMorgan Chase Bank, N.A. ("Chase"). Defendant secured the Note by executing a mortgage against real property located at 15 Spruce Court, Nanuet, New York 10954 ("Mortgage").

On November 11, 2011, Defendant entered into a Loan Modification Agreement with Chase ("Agreement").[1] Affidavit of Patrick Riquelme, Document Control Officer of Select Portfolio Servicing, Inc. ("SPS"), at ¶ 7 (NYSCEF Doc. 36). The "Agreement created a single lien of $506,676.03." *Id.* The Agreement also "changed the interest rate to 3.125% per annum for the first five years and then increased to 4.000% in the sixth through the twenty-fifth year."Affirmation of Peter R. Bonchonsky, Esq. in Support of Motion at ¶ 6 (referencing Agreement at ¶ 7, attached to Riquelme Affidavit as Exhibit C). As Riquelme attests, "[t]he Note [dated May 22, 2007], Mortgage, and Modification Agreement are the `Loan Documents' referenced herein that memorialize the `Loan'."[2] Affidavit of Patrick Riquelme at ¶ 9.

Chase subsequently endorsed the Note in blank on an undated allonge, which is "titled in bold, capital letters `ALLONGE TO MORTGAGE NOTE'". Reply Affirmation of Peter R. Bonchonsky, Esq. at ¶ 10 (NYSCEF

Doc. 54). The allonge "contains very specific language stating that the Allonge pertains to the ROCCO CANNELLA $488,000 Note dated May 22, 2007, in favor of JPMorgan Chase Bank, N.A., with loan number XXXXXXXXXX and relating to the property address of 15 Spruce Court, Nanuet, New York 10954. It is endorsed in blank by an authorized officer (vice president) of JPMorgan Chase Bank, N.A." *Id.*

Defendant defaulted on the Loan by failing to make the payment that was due November 1, 2016.[3] Thereafter, the Note and Mortgage were transferred to Plaintiff.[4] "On August 3, 2017, the Mortgage together with `all beneficial interest' under the Mortgage was assigned to Plaintiff. The assignment was recorded on August 4, 2017 in Instrument Number XXXX-XXXXXXX." Riquelme Affidavit at ¶ 8 (Assignment is annexed as Exhibit D).

SPS, Plaintiff's loan servicer and attorney-in-fact, is in possession of the original Note, Mortgage and Agreement (the Loan Documents) on Plaintiff's behalf. SPS sent the default notices required by the Mortgage and RPAPL § 1304 to Defendant prior to commencement of the action.

On November 20, 2017, Defendant filed an Answer, asserting five combined affirmative defenses and counterclaims arising under the Truth in Lending Act and Regulation "Z" for allegedly failing to inform him of his right to rescind the loans (15 USC §§ 1601 et seq; 12 CFR § 226); deceptive business practices under General Business Law § 349 by extending credit based on collateral rather than capacity to repay; violations of Banking Law §§ 6-l and 6-m; and Banking Law § 598. Defendant also alleged six additional affirmative defenses raising plaintiff's lack of standing; failure to provide notice of default; violations of RPAPL §§ 1304 and 1306; statute of limitations bar; and improper transfer of the Note and Mortgage after the closing date set forth in the pooling and servicing agreement ("PSA") pursuant to which Plaintiff acquired the Note (NYSCEF Doc. 16).

On December 22, 2017, Plaintiff replied to defendant's counterclaims, asserting general denials and affirmative defenses (NYSCEF Doc. 23).

Defendants Citibank and HSBC have not answered or appeared in the action.[5]

On July 30, 2018, Defendant served a Demand for Discovery and Inspection upon Plaintiff, requesting production of, among other items, the original Note and "any and all endorsements of the subject note and the back side of any allonge or endorsement page. "Demand for Discovery and Inspection at ¶ h (NYSCEF Doc. 28). On September 7, 2018, the parties stipulated to extend the time to respond to Defendant's discovery request to September 28, 2018. Defense counsel states in the opposition papers that "[d]iscovery was exchanged." Affirmation of Jennifer L. Fredeman, Esq. at ¶ 10. However, counsel does not state whether the original Note and allonge were produced for inspection.

On September 28, 2018, Plaintiff filed the instant motion seeking summary judgment against Defendant and striking the Answer, affirmative defenses and counterclaims; amending the caption; granting default judgment against the remaining defendants; appointing a referee and other just and proper relief.

DISCUSSION

A plaintiff in an action to foreclose a mortgage "[g]enerally establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default". *U.S. Bank Nat. Ass'n v Sabloff,* 153 AD3d 879, 880 [2nd Dept 2017] (citing *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689; *see Deutsche*

Bank Natl. Trust Co. v Brewton, 142 AD3d 683, 684). However, where a defendant has affirmatively pleaded standing in the Answer,[6] the plaintiff must prove standing in order to prevail. *Bank of New York Mellon v Gordon*, 2019 NY Slip Op. 02306, 2019 WL 1372075, at *3 [2nd Dept March 27, 2019] (citing *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 983-984; *HSBC Bank USA, N.A. v Calderon*, 115 AD3d 708, 709; *Bank of NY v Silverberg*, 86 AD3d 274, 279).

A plaintiff establishes its standing in a mortgage foreclosure action by showing that it was the holder of the underlying note at the time the action was commenced. *Sabloff, supra* at 880 (citing *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361; *U.S. Bank N.A. v Handler*, 140 AD3d 948, 949). Where a plaintiff is not the original lender, it must show that the obligation was transferred to it either by a written assignment of the underlying note or the physical delivery of the note. *Id.* Because the mortgage automatically passes with the debt as an inseparable incident, a plaintiff must generally prove its standing to foreclose on the mortgage through either of these means, rather than by assignment of the mortgage. *Id.* (citing *U.S. Bank, N.A. v Zwisler*, 147 AD3d 804, 805; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754).

Here, Plaintiff demonstrated, prima facie, that it was the holder of the Note at issue when the action was commenced, by attaching the Note, endorsed in blank on an allonge, to the Summons and Complaint. *Sabloff, supra* at 880 (citing *U.S. Bank N.A. v Saravanan*, 146 AD3d 1010; *Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866).

In opposition, Defendant raised the sole issue whether "Plaintiff has failed to establish standing because it has submitted an undated Allonge that does not appear to have been *permanently affixed* to the Note." Memorandum of Law in Opposition at 2 (emphasis added). Defendant cites UCC § 3-202(2), which provides that "an indorsement must be written by or on behalf of the holder and on the instrument or on a paper so *firmly affixed* thereto as to become a part thereof." *Id.* (emphasis added).

Defendant contends that a material question of fact is raised as to whether the allonge was properly affixed to the Note, because the Note contains two (2) hole punches at the top of each of its three pages, while there are no hole punches on the allonge. This circumstance, Defendant argues, demonstrates that the allonge is not "permanently affixed" to the Note. Memorandum of Law in Opposition at 2. Defendant relies on *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2nd Dept 2015], which held that an allonge attached to a note by a paperclip did not constitute a valid transfer of the note to the plaintiff, because the allonge was not so firmly affixed to the note as to become a part thereof. *Id.* at 985. Thus, the Second Department affirmed the Supreme Court's order dismissing the action for lack of plaintiff's standing.

Defendant asserts that the affidavit of Patrick Riquelme, SPS Document Control Officer, fails to establish that the allonge was permanently affixed to the Note. Defendant alleges that Riquelme's affidavit is deficient, because he "simply states that the Allonge is affixed but not that it is `permanently affixed', which is the legal standard." Memorandum of Law in Opposition at 3 (citing Riquelme Affidavit at ¶ 5). Defendant states that Plaintiff's counsel, Peter R. Bonchonsky, Esq., also "does not state that the Allonge was permanently affixed, simply that it was affixed." *Id.*(citing Bonchonsky Affirmation at ¶ 4). Defendant continues, that "[t]here is no statement as to when the Allonge was attached and no statement that the Allonge was permanently affixed to the Note in accordance with UCC § 3-202 and caselaw. Furthermore, there is no payee/transferee/assignee specified in the Note." *Id.*Defendant concludes that "Plaintiff has not satisfied its burden of establishing standing [thus,] there is an existence of material fact with respect to physical possession and Plaintiff's Motion for Summary Judgment must be denied." *Id.*

In reply, Plaintiff asserts, in the first instance, that Defendant has not raised a triable issue of fact, because he did not submit a party affidavit. Plaintiff advances the argument that Defendant's counsel's affirmation alone is not sufficient to raise a triable issue of fact. Reply Affirmation of Peter Bonchonsky, Esq. at ¶ 1-2 (NYSCEF Doc. 54).

Plaintiff further contends that Defendant has applied its own incorrect standard, which purportedly requires that the allonge must be "permanently" affixed to the note, when "neither the language of § UCC 3-202 nor any controlling decisional law require that an endorsement and/or allonge be dated nor that it be shown [to be] `*permanently*' affixed to the note." *Id.* at ¶ 3 (emphasis in original). Plaintiff again refers to Riquelme's statement that "[t]he Note bears an endorsement and/or Allonge affixed to the Note" and to the copy of the Note attached to its Complaint to establish its standing. Affidavit of Patrick Riquelme at ¶ 5 (NYSCEF Doc. 36).

Plaintiff also asserts that *Citimortgage v MacKenzie*, 161 AD3d 1040 [2nd Dept 2018] and *Bank of America National Association v Masri*, 158 AD3d 660 [2nd Dept 2018] are directly on point and support its entitlement to summary judgment. *MacKenzie,* Plaintiff asserts, held that attaching a copy to the complaint of the underlying note with an allonge annexed establishes a plaintiff's standing. Reply Affirmation of Peter R. Bonchonsky, Esq. at ¶ 9. Plaintiff further states that *Masri*held that a plaintiff may satisfy its prima facie burden by submitting an "affidavit of merit which merely state[s] that the allonge(s) `were affixed to the Note'", as Riquelme stated in his affidavit.[7] *Id.* at ¶ ¶ 11-12. Plaintiff contends that it has met the requirements of both *MacKenzie* and *Masri* by attaching a copy of the Note with the allonge to its Complaint and by Mr. Riquelme's attestation that the allonge is affixed to the Note.

Attorney Affirmation

The Court will first address the issue whether Plaintiff's compliance with UCC § 3-202(2) can be presented by an attorney affirmation rather than a party affidavit.

Defense counsel attempts to raise the legal issue whether the Note complies with the UCC, based on her contention that the allonge does not appear to be "permanently" affixed to the Note. Defendant borrower has no personal knowledge of whether the allonge is affixed to the Note, as he certainly would not have seen the Note after it was transferred to Plaintiff. Defendant could only have acquired personal knowledge about the allonge if Plaintiff complied with Defendant's Demand for Discovery and Inspection, which requested Plaintiff's production of the original Note and any allonge or endorsement page for inspection. Demand for Discovery and Inspection at ¶ h (NYSCEF Doc. 28). Although defense counsel stated that the parties exchanged discovery, there is no evidence that Plaintiff complied with the Demand for production of the original Note and allonge.[8]Nevertheless, the legal issue defense counsel raises in her affirmation does not require testimony from Defendant. Defense counsel's assertion is based upon her personal observation of the copy of the Note which is attached to the Complaint and to the motion papers, which she claims shows that the allonge is not firmly affixed to the Note.

The issue is properly raised by an attorney affirmation. "The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide `evidentiary proof in admissible form', *e. g.*, documents, transcripts." *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]. Moreover, "an affidavit based on documentary evidence in an attorney's possession is probative and sufficient, notwithstanding his lack of personal knowledge." *Id.* at 564 (Meyer, J., concurring) (citing *Getlan v Hofstra Univ.*, 41 AD2d 830, 831 [2nd Dept 1973], *app dsmd* 33 NY2d 646 [1973]). Such an "affidavit of an attorney on a motion for summary judgment based on documentary

evidence in the attorney's possession may have probative value and should be evaluated by the court." *Getlan, supra* at 831 (citing *Glynn v Glynn*, 30 AD2d 697; *Lindner v Eichel*, 34 Misc 2d 840, 845). Defense counsel's affirmation properly raises a question as to whether the allonge is firmly affixed to the Note and, if so, by what means.

UCC § 3-202(2)

Turning to the substantive issue involving UCC § 3-202(2), Defendant contends that the provision requires that an allonge must be "permanently" affixed to the underlying note for the note to be negotiated by delivery. UCC § 3-202(1) states, in pertinent part, that if, as is the case here, "the instrument is payable to order it is negotiated *by delivery* with any necessary indorsement". UCC § 3-202(1) (emphasis added). The pertinent language of UCC § 3-202(2) provides that when an indorsement is written on a separate piece of paper from a note, the paper must be "so *firmly* affixed thereto as to become a part thereof." UCC § 3-202(2) (emphasis added); *Bayview Loan Servicing, LLC v Kelly*, 166 AD3d 843 [2nd Dept 2018]; *HSBC Bank USA, N.A. v Roumiantseva, supra* at 985; *see also One Westbank FSB v Rodriguez*, 161 AD3d 715, 716 [1st Dept 2018]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208, 212 [2nd Dept 1989] ("The note secured by the mortgage is a negotiable instrument (*see,* UCC 3-104) which requires indorsement on the instrument itself `or on a paper so firmly affixed thereto as to become a part thereof' (UCC 3-202[2]) in order to effectuate a valid `assignment' of the entire instrument (*cf.,* UCC 3-202 [3], [4])").

It is, of course, apparent that the statute does not contain the word "permanently". Therefore, the requirement that an allonge be "permanently affixed" would have to be read into the statute. Defendant cited no decision of any court which has done so. Nor has Defendant cited any decision that has adopted the language "permanently affixed" as being equivalent to the stated language: "so firmly affixed thereto as to become a part thereof." While substituting "permanently affixed" in place of "so firmly affixed thereto as to become a part thereof" may not be unreasonable,[9] this Court declines to impose that standard or to use the term as a shorthand for the statutory language, which is very clear. In this Court's view, permanence has the connotation that the two documents, note and allonge, which were created at separate times, must become one, never to be separated upon being affixed. Indeed, if the need arose to separate the documents, as frequently occurs when a note is transferred to a new holder, an affidavit from someone with personal knowledge would be required to attest that the documents were firmly affixed—enter the trusty staple—separated for photocopying and immediately reaffixed, perhaps even by ensuring that the staples, if used, enter the pages through the very same holes created from the prior stapling.[10] While that may work for a document that generally remains static after it is created, perhaps such as a last will and testament,[11] a negotiable instrument is not a document in repose. A negotiable instrument, by its very nature, is intended to be handled, inspected and transferred to different entities, perhaps multiple times. In fact, throughout the life of a note, as Plaintiff's counsel explains in his Reply Affirmation, "[l]enders/servicers may ordinarily inspect, move, store or transfer notes…". Reply Affirmation of Peter R. Bonchonsky, Esq. at ¶ 15. While the lifestyle and purpose of a note certainly require some measure of fixity, since the holder's rights and obligations derive from its form, its nature requires a lesser standard than permanence.[12] Thus, to the extent that Defendant attempts, by use of the term "permanently affixed", to apply a higher standard than that expressed in the statute, Defendant's contention is rejected. The plain wording of the statute can be readily interpreted and applied without substituting different terminology and falling into the trap of applying a different standard.

In contrast to Defendant's strong language regarding permanence, Plaintiff dilutes the UCC § 3-202(2) requirement, arguing that it is enough that the allonge "is affixed" to the Note, as Riquelme attested. Plaintiff argues that Riquelme's statement is sufficient because it is the same wording used by the Second Department in

both *MacKenzie, supra* at 1041 ("the underlying Note, to which was annexed an allonge [t]hus, the Plaintiffs established, prima facie that it had standing") and *Masri, supra* at 662 ("the plaintiff established, prima facie, its standing to commence the action by submitting the affidavit of Lynn Benedict, an attorney-in-fact for the plaintiff stat[ing] that the original note was delivered to JPMorgan Chase prior to the commencement of the action, that JPMorgan Chase held the original note on behalf of the plaintiff, and that two allonges were affixed to the note, one containing an endorsement from the original lender and the other containing an endorsement in blank [from the prior lender]."). Tellingly, however, neither *MacKenzie* nor *Masri* addressed the UCC § 3-202(2) requirement that the allonge must be *firmly* affixed to the note as to become a part of it. As a result, the statement in *MacKenzie* about an allonge being "annexed" and the statement in *Masri* about an allonge being "affixed" are of limited usefulness here.

In fact, both parties misstate the standard explicitly expressed in UCC § 3-202(2); Defendant does so by overstating the requirement and Plaintiff does so by understating it. Therefore, the Court rejects both purported standards advanced by the parties. In any event, questions remain as to what means of attaching an allonge to a note satisfies the statutory requirement that the allonge must be "firmly affixed" and, in effect, "become a part of" the note and whether the allonge in this case meets that requirement.

The Appellate Division Departments which have addressed the New York UCC § 3-202(2) standard, have adhered to the standard clearly laid out in the statute. Where the issue has been raised in the summary judgment context, the appellate courts have either found a triable question of fact as to the manner of affixation of the allonge to the note or that the method of affixation that was utilized was insufficient to satisfy the standard. For example, in *Bayview Loan Servicing, LLC v Kelly*, 166 AD3d 843, 846 [2nd Dept 2018], the Second Department found "a triable issue of fact as to whether the note was properly endorsed in blank by an allonge `so firmly affixed thereto as to become a part thereof' when it came into the possession of Wells Fargo, which later endorsed the note to the plaintiff." (citations omitted). The factors in the case which raised a triable issue of fact were: (1) in a prior action on the same note, the copy of the note that was attached to the complaint did not contain any endorsements or allonges. In the case before it, by contrast, the note contained an allonge with a blank endorsement that was not produced in the earlier action, despite the defendant having raised the issue of an endorsement in the prior action; (2) the allonge had certain physical attributes, which are not described in the opinion, but the court stated that those attributes were not consistent with the copy of the note to which the allonge was purportedly firmly affixed; and (3) an affidavit from the plaintiff's vice president did not clarify the issue, because his statements related only to a later endorsement to the plaintiff which was directly on the note, and he did not say anything about the blank endorsement from the original lender contained on the allonge. Based upon these factors, the Appellate Division held that the Supreme Court's grant of summary judgment was improper.

In *One Westbank FSB v Rodriguez*, 161 AD3d 715, 716 [1st Dept 2018], the First Department similarly found "a triable issue as to whether the purported indorsement [in blank, which was contained on an allonge that did not reference the note,] constituted a valid transfer of the underlying note to plaintiff." The court affirmed the Supreme Court's denial of summary judgment, because "there [was] no indication in the record that the blank indorsement was ever attached to the note, much less `so firmly affixed thereto as to become a part thereof,' as required under NY UCC § 3-202(2)." *Id.* (citation omitted)).

HSBC Bank USA, N.A. v Roumiantseva, supra, 130 AD3d 983, which is cited by nearly every court to address the issue since the case was decided in 2015, considered a particular method of attachment or affixation of an allonge to the note. On a motion to dismiss, the Supreme Court directed the plaintiff to produce the original note and allonge pursuant to CPLR §3212(c). Upon production of the note and allonge, the court found the allonge affixed to the note by a paperclip. Finding that this method of affixing the allonge to the note did not satisfy the

standard under UCC § 3-202(2), the court granted defendants' motion to dismiss for lack of standing. On appeal, the Second Department affirmed the trial court, holding that "the purported endorsement, attached by a paperclip, was not so firmly affixed to the note as to become a part thereof', as required by UCC § 3-202(2)." *Id.* at 985 (citing UCC § 3-202[2], Comment 3; *Slutsky v Blooming Grove Inn, supra* at 212; *cf. U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [1st Dept 2013]; *Deutsche Bank Trust Co. Ams. v Codio*, 94 AD3d 1040, 1041 [2nd Dept 2012]).[13]The Second Department further held that "the purported endorsement did not constitute a valid transfer of the underlying note to the plaintiff." *Id.* Consequently, the plaintiff lacking standing to foreclose.

In *Deutsche Bank Nat. Trust Co. v Barnett*, 88 AD3d 636 [2nd Dept 2011], the Second Department held that the plaintiff's submission of "copies of two different versions of an undated allonge which was purportedly affixed to the original note pursuant to UCC 3-202(2)" raised a triable issue of fact. *Id.* at 638 (citing *Slutsky, supra* at 212). The endorsement on the allonge which purportedly assigned the note from First Franklin, a division of Franklin of Indiana, to the plaintiff conflicted with the copy of the note submitted by the plaintiff, "which contain[ed] undated endorsements from Franklin of Indiana to First Franklin Financial Corporation (hereinafter Franklin Financial), then from Franklin Financial in blank." *Id.* Thus, the court held that summary judgment should have been denied.

There are several unreported decisions from various Supreme Courts which address UCC § 3-202(2) in varying degrees of depth. *Federal Natl. Mtge. Assn. v Ersoy,* 61 Misc 3d 1208(A) [Sup Ct, Suffolk County 2018] (finding a failure of proof, such as an affidavit or affirmation of someone with personal knowledge, showing that the allonge was attached to the note); *U.S. Bank Nat. Ass'n v Steinberg,* 42 Misc 3d 1201(A), * 5 [Sup Ct, Kings County 2013] (merely cites UCC § 3-202(2) but focuses on whether there was physical delivery); *CIT Group/Consumer Finance v Platt,* 33 Misc 3d 1231(A), *4 [Sup Ct, Queens County 2011] (involved an allonge that principally had an issue with the signatory lacking authority to endorse the note, as well as noting that the allonge was not firmly affixed to the note); *IndyMac Bank F.S.B. v Garcia,* 28 Misc 3d 1202(A), *2 [Sup Ct, Suffolk County 2010] (parrots the standard and cites the UCC provision, but does not discuss whether the allonge is affixed); *LaSalle Bank Natl. Assn. v Lamy,* 12 Misc 3d 1191(A), * 3 [Sup Ct, Suffolk County 2006] (held that the "undated [allonge] d[id] not appear to be part of the note itself nor d[id] it appear to be affixed thereto so firmly as to become a part thereof." (citation omitted)).

Ersoy, the most recent of these decisions, contains the fullest treatment of the issue. The court there stated that the allonge would have established standing, but for a failure of proof: "if there had been proof provided either on that allonge, or through the affidavit of the employee of [the loan servicer], or an affidavit or affirmation of someone else with personal knowledge, that the allonge was attached to the note." *Ersoy, supra* at *7. The court held that "[f]ailure to provide proof that the allonge was firmly affixed to the original note as to be part thereof makes the endorsement invalid and fails to provide the necessary proof of standing through attachment of the note to the complaint." *Id.*

It is unmistakably clear from these appellate and trial court decisions that Plaintiff's position must be rejected. Simply "annexing" or "affixing" an allonge to a note or statements to that effect in an affidavit do not comport with the language of UCC § 3-202(2) or satisfy the standard of that provision. Indeed, the Official Comment to UCC § 3-202(2) explains that "[s]ubsection (2) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge."

Two justifications for the requirement that an allonge must be firmly affixed to a note have been advanced by various courts throughout the United States, as all states have adopted the UCC. One justification that has been presented is that the requirement serves to prevent fraud, making it much less likely that "a signature innocently placed upon an innocuous sheet of paper could be fraudulently attached to a negotiable instrument in order to simulate an indorsement." *Adams v Madison Realty & Development, Inc.*, 853 F2d 163, 167 [3rd Cir 1988] (citing *Pribus v Bush*, 173 Cal Rptr 747, 751 [1981]). The second rationale is the usefulness of a firmly affixed allonge in tracing the "chain of title, thus furthering the [UCC's] goal of free and unimpeded negotiability of instruments." *Id.* (citing *Haug v Riley*, 101 Ga 372 [1897]; *see also Crosby v Roub*, 16 Wis 616, 626-27 [1863]; 4 W. Hawkland & L. Lawrence, Uniform Commercial Code Series § 3-202:05 (1984)). "The prime characteristic of a negotiable instrument is that it can be negotiated based on physical delivery and endorsement, and a buyer of the note can rely on its enforcement without resort to additional documentation." *HSBC Bank USA, N.A. v Thomas*, 46 Misc 3d 429, 433 [Sup Ct, Kings County 2014]. "[T]he rights and obligations connected to a negotiable instrument derive from its form, and are inextricably dependent on it." *Id.*

Where an "allonge has certain physical attributes inconsistent with the copy of the note to which it was purportedly firmly affixed", a triable issue of fact may be raised which precludes granting summary judgment. *Bayview Loan Servicing, LLC v Kelly, supra* at 846; *see also HSBC Bank USA, N.A. v Thomas, supra* at 433 (A discrepancy between the loan number referenced on the allonge and the number of the note was "sufficient to raise a question of fact as to whether the purported allonge was firmly affixed to the 2006 note").

Here, Defendant has identified a discrepancy in the way in which the pages of the Note are attached to one another, as opposed to the indeterminate way that the allonge is affixed to the Note. Defendant's contention appears to be well-founded, based on the fact that the pages of the original Note have two round holes punched at the top of each page, indicating that the pages are likely affixed at the top of each page with an Acco binder or equivalent device and the absence of the same holes at the top of the allonge. The Note and the allonge both contain tiny black marks that appear in the same location in the upper left-hand corner of the photocopied pages which likely signify staple holes.

In a very recent unreported decision by the Supreme Court in Suffolk County, *Nationstar Mortgage LLC v Corrao,* 63 Misc 3d 1203(A) [Sup Ct, Suffolk County March 18, 2019], the court stated, without any fanfare, that an "allonge was firmly affixed to the note by a staple." *Id.* at *2. The court's focus in *Corrao* was not on the allonge stapled to the note, which the plaintiff established through an affidavit of its employee. Instead, the issue for the court was whether a different "page" which was also submitted with the copy of the note was part of the original note or a second allonge. The employee did not establish that the "page", which bore "an undated indorsement from the original lender to Amalgamated Bank, [a subsequent assignee],[14] was a copy of the reverse side of the last page of the note or a separate document." *Id.* As the court stated, "[w]ithout such proof, the `page' appear[ed] to be an allonge and with no proof that it was firmly attached to the note, it would be an invalid indorsement." *Id.* (citing UCC 3-202 [2]; *see Slutsky v Blooming Grove Inn, supra*; *HSBC Bank USA, N.A. v Roumiantseva, supra*). The required proof was proffered by plaintiff's counsel, who had personally reviewed the original note and allonge while the firm had them in their possession at commencement of the action. Plaintiff's counsel attested "that the `page' was actually the reverse side of the signatory page of the note, not a separate document, and [also] that the undated allonge in blank from Amalgamated Bank was firmly attached to the note by a staple", thereby establishing the plaintiff's standing.[15] *Id.*

There is no appellate decisional law in New York which finds staples to be a proper method of firmly affixing an allonge to a note. Other jurisdictions have found stapling an allonge to the note to be a sufficient means of firmly affixing the two documents. *See, e.g., Southwestern Resolution Corp. v Watson*, 964 SW2d 262[Texas

1997], *rehearing overruled* [1998]; *Lamson v Commercial Credit Corp.*, 531 P2d 966 [Colo 1975] ("the Bank executed a special two-page indorsement of the two checks to the plaintiff Lamson").[16] In *Watson,* the Texas Supreme Court reviewed the history of allonges under various revisions of the UCC, including the change from the requirement that it be `attached thereto' to `so firmly affixed thereto as to become a part thereof', noting that "the drafters of the new provision specifically contemplated that an allonge could be attached to a note by staples." *Watson, supra* at 263-264 (citing American Law Institute, Comments & Notes to Tentative Draft No. 1-Article III 114 (1946), reprinted in 2 Elizabeth Slusser Kelly, Uniform Commercial Code Drafts 311, 424 (1984) ("The indorsement must be written on the instrument itself or on an allonge, which, as defined in Section ____, is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it."")). In *Lamson, supra*, the Supreme Court of Colorado determined that the equivalent Colorado UCC provision, Section 4-3-202(2), "does permit stapling as an adequate method of firmly affixing the indorsement [as] [s]tapling is the modern equivalent of gluing or pasting." 531 P2d at 968. That court held "that under the circumstances described, stapling an indorsement to a negotiable instrument is a permanent attachment so that it becomes `a part thereof.'" *Id.*[17]

Much closer to home than Texas and Colorado, in *Adams v Madison Realty & Development, Inc., supra,* 853 F2d 163, a federal appellate court from the Third Circuit "assume[d], without actually deciding, that the loose indorsement sheets accompanying [the] notes would have been valid allonges had they been stapled or glued to the notes themselves." *Id.* at 165 (*Cf. All American Finance Co. v Pugh Shows, Inc.*, 30 Ohio St.3d 130, 132-133 n. 3 [1987] (collecting cases showing disagreement among courts on how firmly indorsements must be affixed)). The court nonetheless undertook a lengthy analysis because the district court had determined that the "[f]ailure to properly attach the indorsements was `hypertechnical.'" The court held "the indorsement sheets were not physically attached to the instruments in any way, and thus patently fail[ed] to comply with the explicit Code prerequisite." *Id.* The court therefore vacated and remanded to the district court.

At this juncture, where it is unclear how the allonge is affixed to the Note, it would be speculative to conclude that the marks on the Note and allonge are staple holes. Riquelme has stated only that the allonge is "affixed to the Note"; he did not state how. Indeed, without any proof as to how the allonge is affixed, Riquelme's tepid statement falls far short of proof that the allonge is "*firmly* affixed." It is possible that the allonge is pinned to the Note or affixed with a paper clip, both methods which have been rejected. While it is more plausible that the allonge and Note are affixed by staples, the Court cannot make such a conclusion, which would be only a guess. What is evident from simple observation, however, and thus is not "speculation and guesswork" as Plaintiff contends,[18] is that the allonge plainly is not affixed in the same manner that the pages of the Note are themselves affixed to each other. Thus, it is unclear whether the affixing is firm enough to satisfy UCC § 3-202(2). The manner of affixing the allonge to the Note determines whether the Note itself was negotiable and thereby capable of being transferred to Plaintiff. *See Roumiantseva, supra* at 985; *Adams, supra* at 166("The instrument must be obtained through a process the Code terms `negotiation,' defined as `the transfer of an instrument in such form that the transferee becomes a holder.' U.C.C. § 3-202(1). If the instrument is payable to order negotiation is accomplished `by delivery with any necessary indorsement'.").

Specific Allonge

Attempting to maneuver around the strictures of UCC § 3-202(2), Plaintiff argues that the specificity of the allonge was sufficient to effectuate the transfer of the Note, because it is particular to the subject Note. Plaintiff asserts that the allonge "contains very specific language stating that the Allonge pertains to the ROCCO CANNELLA $488,000 Note dated May 22, 2007, in favor of JPMorgan Chase Bank, N.A., with loan number XXXXXXXXXX and relating to the property address of 15 Spruce Court, Nanuet, New York 10954. It is

endorsed in blank by an authorized officer (vice president) of JPMorgan Chase Bank, N.A." Reply Affirmation of Peter R. Bonchonsky at ¶ 10. Plaintiff contrasts the subject allonge with an allonge that does not contain specific references to a particular note, asserting that "there is no question that this Allonge directly pertains to the subject Note." *Id.*

Plaintiff cites no authority which states that a specifically worded allonge can substitute for UCC § 3-202(2)'s explicit requirement that an allonge must be firmly affixed to the note, and indeed, so firmly affixed as to become a part of the note. While, admittedly, the allonge contains clear evidence that it pertains to the subject Note,[19] UCC § 3-202(2) must still be met, as that determines whether the Note is negotiable and may be transferred by physical delivery. Moreover, the mere fact that the allonge is specific to the Note says nothing about whether the allonge is affixed to the Note, let alone, whether it is "firmly affixed" to the Note.

Accordingly, although superficially appealing, the Court rejects Plaintiff's argument that the specificity of the allonge can replace UCC § 3-202(2)'s explicit requirement.

Assignment of Mortgage

Plaintiff further attempts to sidestep the issue of UCC § 3-202 by arguing that the New York Assignment of Mortgage ("Assignment"), which assigned the subject Mortgage, also assigned the Note to Plaintiff. Plaintiff relies on the language in the Assignment which stated that Chase "does hereby grant, sell, assign, transfer and convey" to Plaintiff "all beneficial interest under a certain Mortgage dated May 22, 2007 made and executed by [Defendant] to and in favor of [Chase] upon property situated [at] 15 SPRUCE CT, NANUET, NY 10954." Riquelme Affidavit, Exhibit E, New York Assignment of Mortgage at 1 of 2. While Plaintiff contends that this language also assigned the Note, Plaintiff also cites NY Jur 2d Mortgages § 283 and *Chase Home Finance, LLC v Micotta*, 101 AD3d 1307 [3rd Dept 2012] (citing *Bank of NY v Silverberg*, 86 AD3d 274 [2nd Dept 2011]) in support of its further contention that no special language is needed to effectuate assignment of a note and mortgage.

A plaintiff can establish its standing through an assignment of a mortgage which includes language also assigning the note. *See Emigrant Bank v Larizza*, 129 AD3d 904 [2nd Dept 2015]; *U.S. Bank N.A. v Akande*, 136 AD3d 887 [2nd Dept 2016]; *Wells Fargo Bank. N.A. v Archibald*, 150 AD3d 937 [2nd Dept 2017]. As the Second Department stated in *Silverberg*, "`[n]o special form or language is necessary to effect an assignment *as long as the language shows the intention of the owner of a right to transfer it*'". *Silverberg, supra*, 86 AD3d at 280-281(emphasis added) (citing *Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 612 [2004], quoting *Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 55 [1996]).[20] In addition, "[a]n assignor's failure to indorse the note will not render an assignment of mortgage invalid where said assignment was made in a writing and therein transferred the assignor's interests in both the note and the mortgage to the assignee." *LaSalle Bank Nat. Ass'n v Lamy,* 12 Misc 3d 1191(A) at *2 [Sup Ct, Suffolk County 2006] (citing *Matter of Stralem, supra*, 303 AD2d 120).

Plaintiff relies on three decisions of the Supreme Court, Suffolk County, which held the same language used in the Assignment—"all beneficial interest under a certain Mortgage"— sufficient to also transfer the subject note. Reply Affirmation at 8 (citing *Deutsche Bank National Trust Co. v Francis*, (2017 WL 2304042, Supreme Ct, Suffolk County); *HSBC Bank v. Serafin*, (2017 WL 1401364 Supreme Ct, Suffolk County); and *Deutsche Bank National Trust Co. v Williams* (2015 WL 7008076 Supreme Ct, Suffolk County)).

This Court declines to follow its sister courts in Suffolk County on this point. The Assignment in this case, while using the same language as the assignments in those cases, specifically referred to the Note elsewhere in the Assignment without using any language which can be construed as assigning the Note. Riquelme Affidavit, Exhibit D at 1 of 2. Immediately following the Section, Block and Lot numbers of the subject property, the Assignment states that "such Mortgage having been given to secure payment of Four Hundred Eighty Eight Thousand and 00/100ths ($488,000.00), which Mortgage is of record in the Office of the County Clerk or Register of ROCKLAND County, State of New York." *Id.* The Assignment did not go on to state that the referenced debt was simultaneously being assigned to Plaintiff. Assignment of the Note should have clearly followed the reference to the Note. It did not. Finally, the Assignment provides: "TO HAVE AND TO HOLD, the same unto Assignee, its successors and assigns forever, subject only to the terms and conditions of the above-described Mortgage." *Id.* Again, there is no mention of the Note.

Plaintiff's entire argument rests on the words "all beneficial interest under a certain Mortgage", without any specific reference to the Note or any language that can reasonably be construed as including the Note in the assignment. The drafter should have added the words "together with the note described in the Mortgage", or comparable language. *See* *Matter of Stralem*, 303 AD2d 120, 123 [2nd Dept 2003] ("The language of the assignment executed by the decedent could not have been more clear. [T]he decedent assigned the mortgage on the property, `together with the note or obligation described in or secured by said mortgage'"); *HSBC Bank USA, Nat. Ass'n v Miller,* 26 Misc 3d 407, 412 [Sup Ct, Sullivan County 2009] ("nor did the language of the assignment explicitly assign `the note or obligation described and secured by said mortgage'.") (citing *Stralem, supra*). In this Court's view, a written assignment of a note must be clear and unequivocal, or, at any rate, clearer than the language used in the Assignment.

RPAPL § 258, which provides the statutory form for a written assignment of a mortgage and note, utilizes very clear language. While use of the language in this section is not mandatory, it offers a guidepost by which to evaluate the efficacy of an assignment. Section 258 reads as follows:

SCHEDULE O.

Assignment of Mortgage.

Statutory Form I. Without Covenant.

Know that_____, assignor, in consideration of_____ dollars, paid by_____, assignee, hereby assigns unto the assignee, a certain mortgage made by_____, given to secure payment of the sum of_____ dollars and interest, dated the_____ day of_____, recorded on the_____ day of_____, in the office of the_____ of the county of_____, in liber_____ of mortgages, at page_____, covering premises_____, *together with the bond or obligation described in said mortgage, and the moneys due and to grow due thereon with the interest* (emphasis added)

The language in RPAPL § 258, which this Court emphasized—"*together with the bond or obligation described in said mortgage*"—stands in sharp contrast to the language used here in the Assignment—"all beneficial interest under a certain Mortgage". If such language is mere surplusage, as Plaintiff seems to believe, the drafters of RPAPL § 258 would not have included it in a statutory form promulgated for general use as best practice.

In any event, the Assignment does not comport with *Silverberg*'s requirement that "the language must [show] the intention of the owner of a right to transfer it." *Silverberg, supra* at 280-281 (citations and internal quotation

marks omitted). This Court will not read meaning into the words "all beneficial interest under a certain Mortgage" which is not there. In this Court's view, this language generally does not support piggybacking an assignment of a note onto an assignment of a mortgage. In this case, where the Note is specifically referenced in the Assignment with no language that the Note is being assigned, no such assignment of the Note was effectuated. Only the Mortgage was assigned by the Assignment and all beneficial interest under the Mortgage, without inclusion of the Note. To hold otherwise would seem to turn the general rule, that the mortgage follows the note, completely on its head.

Indeed, the principle is so well established in New York that it cannot "be questioned that a mortgage given to secure [a] note[] is an incident to the latter and stands or falls with [the note]." *Weaver Hardware Co. v Solomovitz*, 235 NY 321, 331-332 [1923]. The Second Department has repeatedly and consistently held that "[a]n assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it." *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909, 911-912 [2nd Dept 2013]; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 843 [2nd Dept 2012]; *Bank of NY v Silverberg*, *supra* at 280; *U.S. Bank, NA v Collymore*, 68 AD3d 752, 754 [2nd Dept 2009]; *see also Merritt v Bartholick*, 36 NY 44 [1867]. Because the Assignment here did not assign the Note, it does not constitute evidence of Plaintiff's prima facie standing to foreclose, as a matter of law.

The Court rejects Plaintiff's argument that the Assignment effectuated a transfer of the Note, by which Plaintiff need not satisfy UCC § 3-202(2)'s explicit requirement for the allonge to be firmly affixed to the Note. Plaintiff having failed to successfully circumvent UCC § 3-202(2), a triable issue of fact remains as to whether the purported endorsement on the allonge was firmly affixed to the Note as to constitute a valid transfer of the Note to Plaintiff, thereby conferring standing to foreclose.

Plaintiff has not established its prima face entitlement to judgment as a matter of law on the issue of standing. As a result, the Court need not consider any of the other requests for relief contained in Plaintiff's motion. *See, e.g.*, *Bank of New York v Willis*, 150 AD3d 652, 654 [2nd Dept 2017]; *New York Comm'l Bank v J Realty F. Rockaway Ltd.*, 108 AD3d 756, 757 [2nd Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2nd Dept 2013]. Accordingly, Plaintiff's motion for summary judgment is denied in its entirety.

This action has been transferred to the Court's newly formed Mandatory Appearance Part for all further proceedings. The parties will receive notice from that Part of the next scheduled appearance.

The foregoing constitutes the Decision and Order of this Court.

[1] The Agreement appears to reference a prior foreclosure action, or "foreclosure activities" of some sort, against Defendant. It mentions Defendant's financial hardship and states, for example, that "[t]he Lender agrees to suspend any foreclosure activities so long as I comply with the terms of the Loan Documents, as modified by this Agreement." Affidavit of Patrick Riquelme, Exhibit C, Loan Modification Agreement at ¶ 1. A search of the Court's records did not uncover a prior foreclosure action having been filed against Defendant.

[2] Although the Agreement changed the principal amount of the Loan from $488,000.00 to a new principal balance of $506,676.03, it appears that Chase did not issue a new note.

[3] The date of Defendant's default coincided with the increased interest rate, when the Agreement called for the mortgage payment to be raised from $1,850.51 to $2,090.95.

[4] Although assignments of mortgage are not always done at the same time a note is transferred to an assignee, Plaintiff argues that the New York Assignment of Mortgage from Chase to Plaintiff simultaneously transferred the Note.

[5] Because Defendants Citibank and HSBC are in default, the reference to Defendant throughout the decision refers only to Rocco Cannella, unless otherwise indicated.

[6] The Appellate Division has stated that, because "standing is not an essential element of the cause of action" in a mortgage foreclosure action, "under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading". *Bank of New York Mellon v Gordon*, 2019 NY Slip Op. 02306, 2019 WL 1372075, at *3 [2nd Dept March 27, 2019] (citations omitted).

[7] Plaintiff's assertion that "the Riquelme affidavit, alone, is also enough for Plaintiff to meet its burden" is incorrect. As the Appellate Division stated in *Bank of New York Mellon v Gordon, supra* at *5, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted." (citations omitted) "`Evidence of the contents of business records is admissible only where the records themselves are introduced'". (citations omitted). Without the records, "`a witness's testimony as to the contents of the records is inadmissible hearsay'." (citations omitted).

[8] Presumably, defense counsel would have referred to her inspection of the original Note and allonge in her affirmation.

[9] In *Lamson v Commercial Credit Corp.*, 531 P2d 966 [Colo 1975], discussed *infra*, the Supreme Court of Colorado used the term "permanent attachment" to describe a two-page indorsement of two checks which a bank stapled to the checks. The court determined that "stapling an indorsement to a negotiable instrument is a *permanent attachment* so that it becomes `a part thereof.'" *Id.* at 968 (emphasis added).

[10] Much may depend on the specificity of the allonge and whether it clearly references the note to which it purports to be firmly affixed, as in this case. The less specific the allonge, perhaps the greater the proof needed to ensure that it is firmly affixed to the note. An affidavit describing the separation and reattachment might well be needed. The issue must, of course, be raised by a defendant challenging a plaintiff's standing to foreclose.

[11] The Court recognizes that this characterization may be a gross overstatement as it pertains to wills, which themselves may have a document annexed to it, known as a codicil. The analogy is offered merely to give some broad frame of reference to the point that is being made here.

[12] Indeed, as noted *infra*, some states have amended their UCC provision to change the language of the comparable section from "firmly affixed" to "affixed", thereby lowering the standard.

[13] While *Slutsky* supports the general principle that an allonge must be firmly affixed to a note, there was no indorsement in that case. As a result, although the defendant claimed that the note had been transferred from the plaintiff, there was no evidence that it had; thus, the plaintiff had standing to foreclose. 147 AD2d at 212.

Neither *U.S. Bank N.A. v Guy, supra*, nor *Deutsche Bank Trust Co. Ams. v Codio, supra*, specifically addressed UCC § 3-202(2). In *Guy*, the court stated that the plaintiff "by producing the underlying adjustable rate note with an affixed undated allonge endorsed in blank made a showing sufficient to deny" the defendant's CPLR §3211 (a) (3) motion to dismiss. *Guy, supra* at 846. In *Codio*, the plaintiff produced "a document designated as

an `allonge to note,' which established that the plaintiff is the transferee of the subject mortgage", with no discussion of whether the allonge was firmly affixed to the note. *Codio, supra* at 1041.

[14] The assignee, Amalgamated Bank, who obtained the note from the original lender, subsequently endorsed the note in blank on the undated allonge (firmly affixed by a staple). The issue of the endorsement on "the page" was significant to determine whether Amalgamated Bank was a prior holder of the note, thereby making the endorsement on the allonge, by which the note was transferred to the plaintiff, a valid transfer.

[15] Where a plaintiff's counsel's firm was in possession of the original note at commencement, counsel's affirmation, or an employee of counsel's firm, may be used to establish possession of the note and the physical characteristics of the note. *See Bank of New York v Gordon, supra* at *3; *PennyMac Corp. v Chavez*, 144 AD3d 1006 [2nd Dept 2016]; *US Bank, NA v Cruz*, 147 AD3d 1103[2nd Dept 2017]; *US Bank, NA v Ellis*, 154 AD3d710 [2nd Dept 2017]; *US Bank, NA v Cardenas*, 160 AD3d 784 [2nd Dept 2018]).

[16] It should be noted that both Texas and Colorado changed the language in their UCC provisions from "firmly affixed" to simply "affixed".

[17] Defense counsel could have cited *Lamson* for her use of the term "permanently affixed"; instead, she provided no authority for her use of the term.

[18] *See* Reply Affirmation of Peter R. Bonchonsky, Esq. at ¶ 15 ("Defendant attempts to raise a triable issue of fact by no more than an attorney's speculation and guesswork that some of the pages of the Note appear to contain various marks or hole punches and others do not.").

[19] A specific allonge may easily find its way to the note to which it relates should the two be separated. The opposite, however, is not true. A note without the allonge being firmly affixed contains no reference to the endorsement on the allonge and thus, the note could not similarly find its way to the respective allonge.

[20] None of the decisions cited in *Silverberg* involved assignment of a note and mortgage. *Silverberg*was able to gloss over the specific issue, because MERS did not have the right to assign notes: "although the consolidation agreement gave MERS the right to assign the mortgages themselves, it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender." *Silverberg, supra* at 281.