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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

BANK OF AMERICA NATIONAL ASSOCIATION by Merger to LASALLE BANK NATIONAL ASSOCIATION as TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUSTS 2006-6AR,

Plaintiff,

-against-

CARLOS ROSARIO, CRIMINAL COURT OF THE CITY OF NEW YORK, MIDLAND FUNDING LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC, as Nominee for LEND AMERICA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, JOHN DOE (Said name being fictitious, it being the intention of the Plaintiff to designate any and all occupants of premises being foreclosed herein and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgage premises.)

Defendants.

Index Number: 24042/10

Motion Date: 2/28/14

Motion Seq. No. 1

The following numbered papers read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment as against defendant Carlos Rosario, pursuant to CPLR 3211(b) to dismiss the defenses asserted in the answer of defendant Carlos Rosario, for leave to treat the answer of defendant Carlos Rosario as a limited notice of appearance, for leave to appoint a referee to ascertain and compute the sums due and owing plaintiff and to report whether the mortgaged premises may be sold in parcels, for leave to amend the caption substituting Lina Rosario and Maria Polanco as party defendants in place and stead of “John Doe,” substituting U.S. Bank National Association, as Trustee Successor in Interest to Bank of America, National Association, as Trustee, Successor by Merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-6AR, in place and

stead of plaintiff, and deleting reference to plaintiff's address, for leave to correct the notice of pendency, summons and complaint, nunc pro tunc, to reflect that the correct property address is 32-20 106th Street, East Elmhurst, New York, to deem all non-appearing and non-answering defendants in default, and to fix their defaults; and this cross motion by defendant Carlos Rosario pursuant to CPLR 3025 for leave to amend his answer as proposed and pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against him based upon lack of standing and failure to comply with a contractual condition precedent.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-9
Notice of Cross Motion - Affidavits - Exhibits	10-13
Answering Affidavits - Exhibits	14-19

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action seeking foreclosure on September 22, 2010. It alleged that defendant Carlos Rosario gave a mortgage encumbering real property in East Elmhurst, New York as security for the repayment of a promissory note, evidencing a loan in the original principal amount of $576,000.00. Plaintiff also alleged that the mortgage was assigned to it by an assignment dated September 13, 2010 from Mortgage Electronic Registration Systems, Inc. (MERS), and defendant Carlos Rosario defaulted in paying the mortgage installment due on October 1, 2009 and thereafter. The mortgage indicates that MERS was acting solely as a nominee for the plaintiff and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. Plaintiff further alleged that it elected to accelerate the mortgage debt. In addition, plaintiff asserted a second cause of action to declare and adjudge the liens held by defendants Beneficial New York Inc., Ensign Bank FSB, First Northern Co-Operative Bank, People of the State of New York and United States of America Acting Through the IRS, which are prior to and adverse to the subject mortgage, to be invalid and extinguished pursuant to RPAPL article 15.

Defendant Carlos Rosario, then appearing pro se, served an answer, asserting as affirmative defenses based upon his claims that he did not receive the notice pursuant to RPAPL 1303 and was a victim of "predatory lending," the summons recited the incorrect street address, plaintiff failed to comply with the notice requirements of RPAPL 1304, and "improper notice service." Defendant United States of America Acting Through the IRS

served a notice of appearance and waiver. The remaining defendants are in default in the action.

A residential foreclosure conference was held on April 9, 2012, at which defendant Carlos Rosario appeared by counsel, and by order of the same date, the Court Attorney Referee directed the case to proceed by motion. The Court Attorney Referee noted that the case had not settled, and defendant borrower failed to demonstrate sufficient financial ability to qualify for plaintiff's "govt styled modification product."

Plaintiff moves for summary judgment as against defendant Carlos Rosario, to dismiss the defenses asserted in the answer of defendant Carlos Rosario, for leave to appoint a referee, for leave to amend the caption, for leave to correct the notice of pendency, summons and complaint, nunc pro tunc, to reflect that the subject property's address is 32-20 106th Street, East Elmhurst, New York, and to deem all non-appearing and non-answering defendants in default, and fix their defaults.

Defendant Carlos Rosario, now appearing by counsel, opposes the motion by plaintiff, asserting plaintiff lacks standing and has failed to demonstrate the mortgage debt was properly accelerated, and cross moves for leave to amend his answer as proposed and to dismiss the complaint insofar as asserted against him. He proposes to delete those affirmative defenses based upon improper service of the summons and complaint,[1] that he was a "victim of predatory lending," and the recitation of the incorrect street address in the pleadings, and to assert additional affirmative defenses based upon lack of standing, failure to comply with RPAPL 1302 and RPAPL 1306, failure to state a cause of action, failure to provide proper notice of default in accordance with the condition precedent to acceleration set forth in the subject mortgage, violations of the Banking Law, the Federal Debt Collection Practices Act (FDCPA) (*see* 15 USC § 1692 *et seq.*), General Business Law § 349, the Fair Credit Reporting Act (15 USC § 1681[b]) (the FCRA), failure to mitigate damages, partial and full payments, setoff, fraud, and counterclaims seeking a setoff, money damages and injunctive relief. The other defendants have not appeared in relation to the motion or cross motion. Plaintiff opposes the cross motion.

With respect to that branch of the motion by plaintiff for leave to amend the caption, the court notes that the caption used by plaintiff on its notice of motion, and the proposed

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[1] The decision by defendant Carlos Rosario to drop the affirmative defense of improper service may have been prompted by his failure to move to dismiss the complaint upon such ground within 60 days of service of a copy of his answer. His failure resulted in such defense being deemed waived (*see* CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

order was improper insofar as it makes no mention of defendants Beneficial New York Inc., Ensign Bank FSB, First Northern Co-Operative Bank, and People of the State of New York. (A review of the papers on file in the County Clerk's office does not reveal any amended complaint, or a prior order granting leave to amend the caption deleting reference to these defendants, dismissing the complaint insofar as asserted against them, or discontinuing the action against them.) Plaintiff has determined that there are occupants at the subject premises, who were served with process as "John Doe" defendants, whose true identities are Lina Rosario and Maria Polanco. The branches of the motion by plaintiff substituting Lina Rosario and Maria Polanco as party defendants in place and stead of defendant "John Doe," and deleting reference to plaintiff's address, and striking the affirmative defense of defendant Carlos Rosario asserted in his answer based upon the wrong address are granted.

Accordingly, it is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, as Trustee for MORGAN STANLEY MORTGAGE LOAN TRUSTS 2006-6AR,

Index No. 24042/10

Plaintiff,

-against-

CARLOS ROSARIO, BENEFICIAL NEW YORK INC., CRIMINAL COURT OF THE CITY OF NEW YORK, ENSIGN BANK FSB, FIRST NORTHERN CO-OPERATIVE BANK, MIDLAND FUNDING LLC, MORTGAGE ELECTRIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR LEND AMERICA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, LINA ROSARIO and MARIA POLANCO,

Defendants

Counsel for plaintiff states the notice of pendency, summons and complaint contain a scrivener's error in that those documents incorrectly refer to the subject property's address as 32-20 160th Street, rather than 32-20 106th Street. That those documents refer to an incorrect street address of the subject property does not constitute an affirmative defense to this action, where the property's metes and bounds description was annexed to the complaint. That branch of the motion by plaintiff seeking leave to amend the notice of pendency, summons and complaint to reflect *nunc pro tunc* that the street address of the subject property is 32-20 106th Street is granted.

With respect to that branch of the motion by plaintiff for summary judgment on the cause of action for foreclosure as against defendant Carlos Rosario, to establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the note and mortgage, and the defendant's default in payment (*see Daniel Perla Associates, LP v 101 Kent Associates, Inc.*, 40 AD3d 677 [2d Dept 2007]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002]).

In support of its motion for summary judgment on its foreclosure claim against defendant Carlos Rosario, plaintiff submits, among other things, a copy of the pleadings, the mortgage, the note endorsed in blank and without recourse by Helene Decillis, vice president, on behalf of Lend America, and the assignment dated September 13, 2010 from MERS, as the nominee of Lend America, a notice of default dated November 29, 2009, the affirmation of its counsel, and an affidavit of Valerie Robles,[2] the vice president of loan documentation for Wells Fargo Bank, N.A., the servicer for plaintiff, attesting to the default by defendant Carlos Rosario in payment under the note and mortgage on October 1, 2009 and thereafter.

To the extent defendant Carlos Rosario asserts that plaintiff, by its submissions, has failed to demonstrate service of a proper notice of default in accordance with the condition precedent to acceleration set forth in paragraph No. 22 of the subject mortgage, and to dismiss the complaint insofar as asserted against him on such basis, he did not specifically allege nonperformance of a contractual condition precedent in his answer,[3] and thereby waived such defense (*see* CPLR 3015[a]; *First Northern Mortgagee Corp. v Yatrakis*, 154 AD2d 433 [2d Dept 1989]). In addition, to the extent Carlos Rosario asserts that plaintiff has failed to establish standing to commence this action, defendant Carlos Rosario

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[2] The affidavit of Ms. Robles was signed and notarized out of state, but not is accompanied by a certificate of conformity as required pursuant to CPLR 2309(c).

[3] The court does not consider the vague and conclusory allegation in the answer of defendant Carlos Rosario that there was "improper notice service" to constitute an allegation of noncompliance with a contractual condition precedent.

waived the defense of lack of standing by failing to assert it as an affirmative defense in his answer (*see* CPLR 3211[e]).

Although defendant Carlos Rosario waived the defenses of nonperformance of a contractual condition precedent and lack of standing by failing to assert them as affirmative defenses in his initial answer (*see* CPLR 3211[e]), these defenses can nevertheless be interposed in an amended answer served by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay (*see Marcum, LLP v Silva*, 117 AD3d 917 [2d Dept 2014]; *HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]; *U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724 [2d Dept 2011]).

Leave to amend a pleading "shall be freely given" (CPLR 3025[b]), so long as the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see HSBC Bank v Picarelli*, 110 AD3d 1031; *Aurora Loan Servs., LLC v Thomas*, 70 AD3d 986 [2d Dept 2010]). The decision as to whether to allow an amendment within the sound discretion of the court (*see Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983]). " 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714, 716 [2d Dept 2006], quoting *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see HSBC Bank v Picarelli*, 110 AD3d 1031).

The subject mortgage requires that the "lender" provide the borrower a 30-days notice of default as prescribed therein prior to demanding full payment of the loan in the event of the borrower's default (*see GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471 [2d Dept 1997]). The affidavit of Ms. Robles, which indicates that the required notice of default was sent by mail to defendant Carlos Rosario, even when combined with the copy of the notice of default, does not state that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by paragraphs 15 and 22 of the mortgage agreement (*see Wells Fargo Bank, N.A. v Eisler*, ___ AD3d ___, 2014 WL 2871399, 2014 NY App Div LEXIS 4792 [2d Dept 2014]; *cf. HSBC Mtge. Corp. [USA] v Gerber*, 100 AD3d 966 [2d Dept 2012]; *Norwest Bank Minn. v Sabloff*, 297 AD2d 722, 723 [2d Dept 2002]). Under such circumstances, the proposed fourteenth affirmative defense based upon failure to comply with the condition precedent to the commencement of this action is not palpably insufficient or patently devoid of merit (see *Wells Fargo Bank, N.A. v Eisler*, ___ AD3d ___, 2014 WL 2871399, 2014 NY App Div LEXIS 4792; *GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471, 471 [2d Dept 1997]).

In a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage at the time it commences a foreclosure action (*see Wells Fargo Bank, N.A. v*

Marchione, 69 AD3d 204, 207 [2d Dept 2009]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). To the extent plaintiff relies upon the assignment, it does not specifically assign the note. Rather, it purports to assign the mortgage together with MERS's "beneficial interest under the [subject] [m]ortgage, and the moneys due and to grow due thereon with the interest." Such language is insufficient to assign the note or the underlying obligation (*see Deutsche Bank Nat. Trust Co. v McRae*, 27 Misc 3d 247 [Sup Ct, Albany County 2010]; *cf.* Real Property Law § 258 [*see* Schedule "O"] [statutory form of assignment of mortgage]; *Matter of Stralem*, 303 AD2d 120 [2d Dept 2003]).

Even assuming the parties to the assignment intended to assign the underlying debt, as well as the mortgage, the subject mortgage and note do not give MERS the right to assign the underlying note in its own right and there is no claim by plaintiff that the note was physically delivered to MERS, or Lend America had transferred and tendered the promissory note to MERS, before the commencement of the foreclosure action (*see Bank of New York v Silverberg*, 86 AD3d 274; *cf. Mortgage Electronic Registration Systems, Inc. v Coakley*, 41 AD3d 674 [2d Dept 2007]). To the extent plaintiff instead claims to have physically possessed the original note at the time of the commencement of this action, the affidavit of Ms. Robles lacks factual detail as to by whom or by which entity physical delivery of the note was made to plaintiff (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *HSBC Bank USA v Hernandez*, 92 AD3d 843; *cf. Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2d Dept 2014]), and whether the blank endorsement of the note was effectuated prior to the commencement of the action (*see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *US Bank N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]). Under such circumstances, the proposed first affirmative defense of lack of standing is not palpably insufficient or patently devoid of merit (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752).

Defendant Carlos Rosario proposes to assert the additional affirmative defenses based upon failure to state a cause of action, and full payment as affirmative defenses in his amended answer. The proposed third affirmative defense based upon failure to state a cause of action is palpably insufficient and patently without perit. So much of the proposed ninth affirmative based upon full payment is not palpably insufficient or patently without merit.

In addition, there is no showing of prejudice or surprise resulting directly from the delay by defendant Carlos Rosario in seeking leave to assert the defenses based upon lack of standing, full payment, and nonperformance of a contractual condition precedent (*see HSBC Bank v Picarelli*, 110 AD3d 1031; *cf. HSBC Bank USA v Philistin*, 99 AD3d 667 [2d Dept 2012] [the defendant's motion for leave to amend, made seven months subsequent

to the grant of summary judgment dismissing the complaint without opposition, was properly denied]).

However, to the extent defendant Carlos Rosario proposes to assert as a second affirmative defense noncompliance with RPAPL 1302, RPAPL 1302 requires that a complaint, in any foreclosure action involving a "high-cost" or "subprime" home loan, must contain an affirmative allegation that, at the time the action is commenced, the plaintiff has complied with all of the provisions of Banking Law § 595-a, and the rules and regulations promulgated thereunder, Banking Law 6-l or 6-m, and RPAPL 1304 (L 2008, ch 472, § 17). The instant complaint contains an allegation in compliance with RPAPL 1302. Ms. Robles also states that the filing requirement was met within three business days of the mailing of the 90-day pre-foreclosure notice. The proposed second affirmative defense therefore is patently devoid of merit.

The proposed fourth affirmative defense based upon improper acceleration of the mortgage debt is duplicative of the fourteenth affirmative defense and therefore may not properly be asserted in the amended answer.

To the extent defendant Carlos Rosario seeks leave to assert in the proposed amended answer an eighth affirmative defense based upon his claim that plaintiff failed to mitigate its damages, mitigation of damages is not an affirmative defense to an action to foreclose a mortgage. Hence, the proposed eighth affirmative defense is patently without merit and may not be asserted.

In addition, to the extent defendant Carlos Rosario seeks leave to assert in the proposed answer an affirmative defense based upon a claim of partial payment, he makes no allegation that plaintiff agreed to accept a partial payment and waive any payment default or forbear from seeking foreclosure. Under such circumstances, so much of the proposed ninth affirmative defense based upon partial payment is palpably insufficient and devoid of merit.

Likewise, the proposed tenth affirmative defense and first counterclaim are predicated upon an allegation that plaintiff overcharged defendant Carlos Rosario the alleged monthly mortgage and finance charges, and that as a result he is entitled to a setoff. Such allegation does not constitute a defense to foreclosure, and any dispute as to the exact amount owed by defendant Carlos Rosario pursuant to the mortgage and note, may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co, v Baumann*, 160 AD2d 831 [2d Dept 1990]). As a consequence, the proposed tenth affirmative defense and first counterclaim are palpably insufficient and devoid of merit.

The proposed eleventh and twelfth affirmative defense and second and third counterclaims are palpably insufficient because they are based upon the allegation that the

instant action was brought for the purpose of inducing defendant Carlos Rosario to pay money to plaintiff which he does not owe it, or surrender his home to plaintiff, and plaintiff used falsified documents in doing so. Such claims do not constitute causes of action for abuse of process (*see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn. Local 1889, AFT AFL-CIO*, 38 NY2d 397, 403 [1975]) or malicious prosecution (*see Muro-Light v Farley*, 95 AD3d 846 [2d Dept 2012]), and are duplicative of the proposed first affirmative defense to the degree it alleges lack of standing.

Defendant Carlos Rosario proposes to amend his answer to assert as a defense that the complaint is inadequate to the extent it does not sufficiently plead compliance with RPAPL 1306. RPAPL 1306 requires the filing of a pre-foreclosure notice with the superintendent of banks, and that a foreclosure complaint contain, as a condition precedent to such action, an affirmative allegation that at the time the action is commenced, the plaintiff has complied with the provisions of this section. The instant complaint contains an allegation that plaintiff complied with RPAPL 1306. Thus, the sixth proposed amendment asserting that plaintiff violated RPAPL 1306, and so much of the proposed fifth affirmative defense predicated upon a violation of RPAPL 1306 are patently without merit.

Defendant Carlos Rosario seeks to include in his proposed amended answer an affirmative defense based upon his claim that plaintiff U.S. Bank violated the FDCPA. The FDCPA, however, does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or note (*see United Cos. Lending v Candela*, 292 AD2d 800, 801–802 [4th Dept 2002], *citing* 15 USC § 1692a [6][F][iii]; *see also Maguire v Citicorp Retail Servs.*, 147 F3d 232, 235 [2d Cir 1998]; *Wadlington v Credit Acceptance*, 76 F3d 103, 106 [6th Cir 1996]). To the extent defendant Carlos Rosario also seeks to assert a violation of General Business Law § 349, a claimed violation of that section does not constitute an affirmative defense to a claim for foreclosure (*see La Salle Bank Nat. Assn. v Kosarovich*, 31 AD3d 904 [3d Dept 2006]). The proposed seventh affirmative defense is patently devoid of merit.

The proposed thirteenth affirmative defense and fourth counterclaim for a setoff is based upon the claim of defendant Carlos Rosario that plaintiff violated the FCRA, by disseminating negative credit information about him to credit reporting agencies. There is no private right of action under the section of the FCRA which requires furnishers of information to provide accurate information to consumer reporting agencies because enforcement of this section is limited to government agencies and officials (*see* 15 USC § 1681s-2[a]) (see *Ladino v Bank of America*, 52 AD3d 571 [2d Dept 2008]). In addition, violation of the FCRA does not constitute an affirmative defense to foreclosure. The proposed thirteenth affirmative defense and fourth counterclaim therefore are patently devoid of merit.

To the extent defendant Carlos Rosario seeks to reassert his affirmative defense based upon an alleged violation of RPAPL 1303 in his proposed amended answer, plaintiff offers an affidavit of service dated November 10, 2012 of a licensed process server, indicating service of a copy of the summons and complaint together with a copy of the notice required under RPAPL 1303 on blue colored paper in bold, 14-point type and by delivery to "MARIA POLANCO (WIFE)," at the mortgaged premises, as the dwelling place of defendant Carlos Rosario, and a subsequent mailing of the process and RPAPL 1303 notice to Carlos Rosario. Such affidavit raises a presumption that the proper delivery occurred (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). Defendant Carlos Rosario has offered nothing to rebut or dispute the veracity or contents of the affidavit of service (*see Manhattan Sav. Bank v Kohen*, 231 AD2d 499, 500 [1996]). In addition, a mere denial of receipt is not enough to rebut the presumption the RPAPL 1303 notice was mailed (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). That branch of the motion by plaintiff to strike the affirmative defense asserted by defendant Carlos Rosario based upon noncompliance with RPAPL 1303 is granted.

To the extent defendant Carlos Rosario also seeks to reassert his affirmative defense in his proposed amended answer based upon alleged violation of RPAPL 1304, plaintiff has offered proof to establish strict compliance with the notice requirement of RPAPL 1304 that, at least 90 days before commencing a foreclosure action, a lender serve the defendant with a proper notice under the statute. Defendant Carlos Rosario has failed to raise a triable issue of fact with respect to such showing (*see Emigrant Mortg. Co., Inc. v Persad*, 117 AD3d 676 [2d Dept 2014]). That branch of the motion by plaintiff to strike the affirmative defense asserted by defendant Carlos Rosario based upon noncompliance with RPAPL 1304 is granted.

The cross motion by defendant Carlos Rosario is granted only to the extent of granting him leave to amend his answer in accordance with this order. Defendant Carlos Rosario is directed to serve and file his amended answer within 10 days of the service of this order with notice of entry. That branch of the motion by plaintiff for summary judgment on the cause of action for foreclosure against defendant Carlos Rosario is denied.

Plaintiff has failed to demonstrate proper service of the notice of motion and supporting papers on defendants Beneficial New York Inc., Criminal Court of the City of New York, Ensign Bank FSB, First Northern Co-Operative Bank, Midland Funding LLC, Mortgage Electronic Registration Systems, Inc. as Nominee for Lend America, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, People of the State of New York, United States of America Acting Through the IRS, Lina Rosario and Maria Polanco in compliance with CPLR 3215(g)(1). That branch of the motion by plaintiff for leave to deem these defendants

in default and fix their defaults is denied without prejudice to renewal based upon proper papers, including proof of proper notice.

That branch of the motion by plaintiff for leave to appoint a referee is denied at this juncture.

Dated: July 8, 2014

J.S.C.