MEMO DECISION & ORDER

INDEX No. 4754/10

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 2/04/13
ADJ. DATES 3/15/13
Mot. Seq. # 001- Adj. to 6/7/13
Mot. Seq. #002 - MotD
HEARING SCHEDULED
FOR 6/7/13:

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON CSFB ARMT 2006-1

Plaintiff

-against-

CAROLINE WALOSKI WEINMAN, and JOHN DOE, (said the name being fictitious it being the intention of Plaintiff to designate any all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

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HOGAN & LOVELLS, US LLP
Attys for Plaintiff
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New York, NY 10022

GOLD BENES, LLP
Attys. For Defendant Weinman
1854 Bellmore Avenue
Bellmore, NY 11710

Upon the following papers numbered 1 to 22 read on this motion for summary judgment , the deletion of parties and the appointment of a referee to compute and cross motion for summary judgment, sanctions and dismissal pursuant to CPLR 3211 (a)(7) and 3126 ; Notice of Motion/Order to Show Cause and supporting papers 1-3; 4-5 ; Notice of Cross Motion and supporting papers 6-8 ; Answering Affidavits and supporting papers 9-10 ; Reply papers 11-12 ; Other 13-14 (Memorandum of Law in support of motion) 15-16 (Memorandum of Law in support of motion); 17-18 (Memorandum of Law in support of motion); 19-20 (Memorandum of Law in support of cross motion); 21-22 (Memorandum in support of Cross Motion) ; (~~and after hearing counsel in support and opposed to the motion~~, it is

ORDERED that this motion (#001) by the plaintiff for summary judgment against defendant, Caroline Waloski Weinman, the deletion of the unknown defendants, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL §1321 and is

adjourned to Friday **June 7, 2013** for a hearing of the type contemplated by CPLR 2218 and/or CPLR 3212(c), regarding service of the RPAPL §1304 notice; and it is further

ORDERED that the cross motion (#002) by defendant, Caroline Waloski Weinman, for summary judgment on a claim of breach of contract; an order imposing sanctions; dismissal of the complaint pursuant to CPLR 3211(a)(7) and for failure to satisfy "prerequisites to foreclosure" and/or dismissal pursuant to CPLR 3126 is considered under CPLR 3212, 22 NYCRR Part 130-1, CPLR 3211, and 3126 and is denied, except with respect to the demand for dismissal due to the absence of proof of service of the RPAPL §1304 notice.

The plaintiff commenced this action on February 2, 2010 to foreclose a July 14, 2005 mortgage that encumbers residential real property in Greenport, New York which was given by defendant Weinman to secure a mortgage note of the same date in the principal amount of $600,000.00. In the complaint served and filed herein, the plaintiff seeks a judgment foreclosing its mortgage lien and a concomitant extinguishment of all subordinate interests in the mortgaged premises. Also demanded is a judicial sale of the mortgaged premises and a deficiency judgment against the obligor/mortgagor/ defendant Weinman subject to the existence of a deficiency after the sale and the institution of post-sale proceedings contemplated by RPAPL §1371. The complaint charges defendant Weinman with defaults in payment of the monthly installments due under the terms of the note and mortgage beginning on September 1, 2009.

Issue was purportedly joined by the service of a late, unsigned, undated and unverified answer with counterclaims by defendant Weinman on March 3, 2010, to which, the plaintiff responded by reply on March 16, 2010. An amended answer which was also undated, unsigned and unverified was served by defendant Weinman, without leave of court in or about May 12, 2010. Although this amended answer was rejected by the plaintiff due, among other things, to the absence of such leave, the plaintiff responded by serving a reply to the counterclaims set forth therein. This amended answer is the target of those portions of the instant motion wherein the plaintiff seeks summary judgment dismissing the affirmative defenses and counterclaims asserted therein and for summary judgment on its complaint against defendant Weinman. In light of this procedural posture, all defects as to the form, service and timeliness of the answers served by the defendant are deemed waived by the plaintiff. The defendant's withdrawal of the two additional affirmative defenses set forth in the "amended" answer is hereby acknowledged. Accordingly, the defense that one or more necessary parties have not been joined and that the lien of the mortgage is unenforceable due to a lack of due diligence in ascertaining whether the defendant could afford the loan when made are dismissed.

The plaintiff now moves for an order awarding it the following relief: (1) summary judgment against the answering defendant together with dismissal of her affirmative defenses and counterclaims; (2) an order fixing the defaults in answering of the non-answering defendants; (3) deleting as party defendants the unknown persons listed in the caption together with an amendment of such caption to reflect same; and (4) appointing a referee to compute amounts due under the subject mortgage.

Defendant Weinman opposes the motion in cross moving papers wherein she demands the following relief: (1) summary judgment on the claim that the plaintiff breached the terms of the note and/or mortgage; (2) the imposition of sanctions and/or costs against the plaintiff pursuant to 22 NYCRR Part 130-1; (3) dismissal of the complaint pursuant to CPLR 3211(a)(7) and by reason of the plaintiff's failure to satisfy "prerequisites to foreclosure"; and (4) dismissal of the complaint pursuant to CPLR 3126.

The court first considers the defendant's cross motion since the successful prosecution thereof might render the plaintiff's motion-in-chief academic. A recital of material facts put before the court on the pending applications, however, is necessary due to the unique circumstances of this action.

In July of 2005, defendant Weinman applied for a residential mortgage loan with Wall Street Mortgage Brokers, Ltd., d/b/a Power Express [hereinafter "Wall Street"] by submission of a written loan application. Therein, the defendant represented that she had a net worth in excess of $3,000,000.00 and that she was seeking a conventional mortgage loan in conjunction with her purchase of a house built in 1822 on Main Street in Greenport, New York. Defendant Weinman further indicated that the purchase price of the house was $750,000.00 and that she needed a mortgage in the principal amount of $600,000.00. On July 14, 2005, Wall Street extended her a mortgage loan in that amount upon her execution of an Adjustable Rate Note, an Addendum to Note and an Interest Only Addendum to Adjustable Rate Promissory Note (*see* Exhibit F attached to defense counsel's affirmation in support of cross motion). Also executed on July 14, 2005 by defendant Weinman was a Mortgage, an Adjustable Rate Rider, an Amendment to the Adjustable Rate Rider and an Interest Only Addendum to Adjustable Rate Rider (*see* Exhibit C attached to affidavit of plaintiff's Vice President in support of motion). Under the terms of the loan documents, monthly payments for the first 10 years of the 30 year loan were denominated as "interest only" payments, although the defendant borrower could make voluntary principal payments with notice thereof to the lender during interest only period provided that the regular monthly payment of interest only was paid. The amount of the monthly payment was identified in the loan documents, including the note and its interest only addendum and the mortgage as $3,792.41. The loan closed and defendant took title to the house that was the subject of the mortgage loan transaction at issue in this action.

The mortgage note of July 14, 2005 contains an indorsement in blank on the last page and it was transferred to the plaintiff under the terms of a Pooling and Servicing Agreement by delivery to a custodial agent of the plaintiff on or about February 1, 2006. The plaintiff, as Trustee of the Trust known as Credit Suisse First Boston CSFB ARMT 2006-1, claims to be the holder of the note and owner of the mortgage by virtue of the indorsement and delivery of the note in February of 2006. It further claims to be the assignee of the note and mortgage by virtue of such physical delivery and the owner of the note and mortgage under the terms of a written assignment dated, January 27, 2010.

A Truth in Lending Disclosure Statement was also executed by defendant Weinman on July 14, 2005. This statement reflected the loan in the amount of $600,000.00 at 6.5% with an APR at 6.37%.

It also included a break down of the 360 monthly installments due during the thirty year term of the loan. Payments of principal and/or interest were listed in the amount of $3,792.41 together with $193.23 for taxes and $251.00 for insurance for a total monthly payment of $4,236.72. This monthly installment payment of $3,792.41 was the same as that set forth in the note and mortgage, wherein it was noted that it was subject to change. The Truth in Lending Disclosure Statement also included notations that the $3,792.41 monthly installment figure for principal and/or interest would continue for 120 months and that for the next 239 months, that amount would be reduced to $3,664.17 and that a final payment of $3,645.46 would be due on August 1, 2036.

In October of 2006, ASC, a division of Wells Fargo, the loan servicer, corresponded by letter with the defendant (*see* Exhibit M attached to defense counsel's affirmation in support of cross motion). Therein, ASC advised that in an effort to ensure quality in the servicing of loans, certain loans were chosen for periodic review and that the defendant's loan had been so chosen (*see* Exhibit M attached to defense counsel's affirmation in support of motion). That review reflected that "during certain periods of time incorrect interest rate and payments were utilized causing an overpayment in the amount of $9.39". ASC further advised that payment of such amount would follow within two weeks and that correction of monthly "principal and interest payment" was necessary as was an adjustment in the interest rate. The letter broke down the new payment as follows: Interest Rate 6.50%; Index 0.0%; Principal Balance $593,254.17; Principal and interest payment $3,792.41; Total payment with escrow items $4.198.93. The interest rate and the principal and interest payment of $3,792.41 were the same as that listed in the mortgage loan documents including the Truth in Lending Disclosure Statement. Although this letter reflected that the principal balance of the loan had been reduced from the original loan principal of $600,000.00 to the amount of $593,254.17 in the 15 months that had then passed from origination, the record is devoid of any allegations or evidence that the defendant, who admittedly received such letter, inquired about or objected to this principal reduction.

Defendant Weinman paid her monthly mortgage payments without difficulty until 2008 when she experienced substantial losses in the stock market due to imprudent investments by her stock broker. In January of 2009, she attempted the first of five attempts to secure a loan modification from the Loan Servicer, Wells Fargo. By August of 2009, three of such applications had been denied by Wells Fargo and she was just about out of cash reserves (*see* ¶ 8 of the Affidavit of defendant Weinman in support of cross motion). In September of 2009, defendant Weinman defaulted in making the monthly installment due under the terms of the loan documents. This default in payment, which continues to date, is admitted in the answers served by defendant Weinman.

In the month prior to the default in payment, namely August of 2009, the defendant's focus was largely dedicated to her worsening financial circumstances. For it was then that she claims to have first discovered that she had been overcharged by the plaintiff with respect to her monthly note payments. A basis for this discovery is not, however, advanced and this allegation is inconsistent with defendant's admission of receipt of the October 12, 2006 letter from ASC (submitted as exhibit M to her moving papers) wherein she was advised that her principal balance was then $593,254.17, nearly $7,000.00 less

than the principal loan amount of $600,000.00. The defendant nevertheless claims that upon such discovery, she immediately demanded that the plaintiff provide her with a credit towards future interest payments and restore the principal balance to $600,000.00. The plaintiff allegedly refused (*see* ¶ 13 of the Weinman Affidavit in support of cross motion). It was also in August of 2009, when the defendant decided to explore the possibility of obtaining a reverse mortgage to improve her financial circumstances. She embarked on this pursuit purportedly with the help of Wells Fargo agents. They allegedly advised her to remove her previously listed house from the market and to quit renting a carriage house on the premises. She further claims to have spent "thousands" of her "cash reserves" on repairs to the house. According to the defendant, these undertakings were required for approval of the reverse mortgage (*see* ¶ 20 of the Weinman Affidavit in support of cross motion).

By correspondence dated September 1, 2009, ASC, on behalf of the loan servicer, again wrote to the plaintiff regarding her loan. As was the case in the October 1, 2006 letter from ASC, the defendant was advised that for quality purposes, certain loans were chosen for periodic review and her loan had been so chosen (*see* Exhibit C of Weinman affidavit in support of cross motion). That review reflected that "during certain periods of time incorrect interest rate and payments were utilized causing an overpayment". Defendant Weinman was further advised that the amount of her monthly principal and/or interest payment of $3,792.41 set forth in the loan documents would be corrected downward to the sum of $3,100.48. The overpayment was described in the letter as $2,020.09 and it was credited to the unpaid principal balance. The letter reflected that the outstanding principal balance of the loan was $571,008.85. ASC further advised that adjustments to principal and interest were being made and would be effective on November 1, 2009, but they were not a "scheduled payment adjustment" under the terms of the loan. The August 1, 2015 payment adjustment or date of change set forth in the loan documents remained unaffected by the changes.

Defendant Weinman characterizes this September 1, 2009 letter from ASC as a "response" to her discovery of overpayments in August of 2009 and to her immediate contacts with Wells Fargo in which she purportedly directed it to apply all overpayments to future monthly installments of interest when due. Defendant Weinman allegedly reiterated those demands in response to ASC's September 1, 2009 letter by "demanding that the Plaintiff apply these overcharges towards future interest payments which would have provided me with financial relief for a significant time" (*see* ¶¶ 17-18 of the Weinman Affidavit in support of cross motion). According to the plaintiff, the overcharge totaled $28,990.15, as that amount represents the reduction in principal from $600,000.00 to the $571,085.85 set forth in the September 1, 2009 letter from ASC. The record is, however, devoid of any proof that defendant Weinman discovered the overpayments in August of 2009 and that the September 1, 2009 letter from ASC was a response thereto. The record is similarly devoid of any proof that defendant Weinman at any time, transmitted to Wells Fargo or ASC any demands or directives for restoration of the principal balance to its original amount and that the overpayments be applied to future monthly installments when due rather to reductions of principal.

On October 18, 2009, the plaintiff issued separate notices of default as required by the terms of the mortgage and by RPAPL § 1304. The contractual notice advised the defendant of the default and the amount owing and offered the defendant a thirty day cure period, to which, the defendant did not avail herself. The defendant continued to pursue the reverse mortgage she first explored in August of 2009 and allegedly received commitment letters in November of 2009 and in January of 2010 for that reverse mortgage in the net amount of $408,729.81. However, in February of 2010, the defendant was advised that HUD regulations precluded issuance of a reverse mortgage to pay off all or part of a distressed loan (*see* ¶¶ 22 -29 of the Weinman Affidavit in support of cross motion).

The summons and complaint were filed on February 2, 2010 and served upon defendant Weinman pursuant to CPLR 308(1). The affidavit of service includes a recital that the RPAPL § 1303 notice on blue paper was served along with the summons which bears the language required by RPAPL §1320. A conference of the type contemplated by CPLR 3404 was first held in April of 2010 in the specialized mortgage foreclosure part of the court. The conferences continued through August of that year when the case was released therefrom due to the parties' inability to reach an agreement as to a loan modification or other settlement. Shortly thereafter, the defendant filed a petition in bankruptcy. The automatic stay was lifted in or about January of 2011. The defendant has not advised the court of the nature of that proceeding or the court's determination of the petition.

In July of 2011, a demand for a preliminary conference was processed by clerical personnel and such a conference was scheduled for August 2, 2011. Although foreclosure actions are not subject to a differentiated case management track under applicable local rules, this court indulged the parties in the conference process. The preliminary conference was finally marked held in January of 2012 and moved to the compliance conference calendar. That conference was marked finally held on June 12, 2012. After the substantial exchange of documents by the plaintiff in response to the defendant's discovery demands, including the plaintiff's two time production of the original Adjustable Rate Note and its Addendum to Note and Interest only Addendum to Adjustable Rate Promissory Note, this motion ensued.

The first demand for relief advanced in the defendant's cross moving papers is her application for summary judgment on the THIRD counterclaim set forth in her amended answer in which she states that she is owed some $29,000.00 in overpayments of principal. The defendant characterizes this counterclaim as a claim that the plaintiff breached its obligations under the note and mortgage and owes the defendant that $29,000.00 in overpayments charged. Related claims for dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(7) are advanced in the defendant's third demand for relief in her notice of cross motion. For the reasons stated below, the court finds that such demands are without merit.

The defendant's breach of contract claim is apparently defensive rather than affirmative in nature as no damages are demanded. Rather, the THIRD counterclaim set forth in the answer of the defendant states the she is owed nearly $29,000.00 due to overpayments made by her which the plaintiff applied to reduce the principal amount of the loan. This claim and her claim for dismissal due to legal

insufficiency under CPLR 3211(a)(7) are premised upon allegations that overpayments of principal were made by the defendant from August 1, 2005 through October 1, 2009, during which time, only payments of interest were due and that the plaintiff should have applied the overpayments to future monthly installment payments when due in August or September of 2009, in accordance with the defendant's demands. According to the defendant, that would have precluded a payment default from occurring on September 1, 2009, when the defendant failed to remit the monthly installment then due. The defendant characterizes the plaintiff's decision to apply the overpayments to principal reduction rather than to future installments when due as wrongful and a breach of the terms of the note and/or mortgage. Likewise characterized are the overcharges themselves and the plaintiff's failure to immediately correct them as purportedly demanded by the defendant.

In support of these contentions, the defendant argues that only voluntary overpayments of principal remitted by the defendant to the plaintiff on notice as contemplated by ¶ 5 of the note could properly have been applied to a reduction in principal. Continuing, the defendant claims that her unknown and involuntary overpayments of principal during the first 40 months of the loan cannot be considered voluntary. Because the plaintiff was purportedly without any right to apply the over payments of principal to the reduction of the principal amount of the loan, the decision to so apply them was wrongful and constituted a breach of the loan documents. In addition, the plaintiff is alleged to have further breached the terms of the note and mortgage by continuing the overcharge payment schedule through November 1, 2009 even though the plaintiff was aware of the overcharges in August of 2009. By virtue of such breach, the defendant claims, in effect, to have been relieved of her admitted defaults in paying the monthly installments which began September 1, 2009 and continue to date. Since the plaintiff is allegedly entitled to be relieved of these payment defaults, she claims that there was no actionable default on her part and that the plaintiff's conduct in accelerating the debt and commencing this action was wrongful. Having allegedly established the bona fides of her breach of contract claim and the legal insufficiency of the plaintiff's clams due to the purported absence of any breach or default by the defendant under the terms of the loan documents, the defendant claims an entitlement to an award of summary judgment on her claimed entitlement to the $29,000.00 allegedly owing to her and a dismissal of the complaint due to legal insufficiency pursuant to CPLR 3221(a)(7).

The plaintiff challenges the position of the defendant on various grounds including that the plaintiff did not wrongfully fail to reimburse or to apply the overpayments to future installments of interest due since the application of the overpayments to the reduction in principal is expressly authorized by ¶ 2 of the mortgage. In addition, the plaintiff asserts that the existence of any claimed overpayment and the demand for its return do not serve as viable defenses to a claim for foreclosure and sale. Instead, the existence of such overpayments or to any failure to properly credit payments received by a mortgagee from the mortgagor are merely challenges to the amounts allegedly due and owing under the note and mortgage which are determinable by the referee or the court at the time of the computation of amounts owing under the loan documents.

It is axiomatic that when parties set down their agreement in a clear and complete document, their writing should be enforced according to its terms (*see* ***WWW Assoc., Inc. v Giacontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties (*see* ***Teichman v Community Hosp. of W. Suffolk***, 87 NY2d 514, 520, 640 NYS2d 472, 474 [1996]). A mortgagor is thus bound by the terms of his contract, including those set forth in payment and acceleration clauses, and cannot be relieved from his default absent a waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter's part (*see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, 451 NYS2d 663, 667 [1982]; ***Ferlazzo v Riley***, 278 NY 289, 16 NE2d 286 [1938]).

Unlike the defendant's claims of breach on the part of the plaintiff and the purported absence of a default in payment, the court finds persuasive the plaintiff's claim that pursuant to ¶ 2 of the mortgage it properly applied overpayments, if any, to a reduction in principal. That provision authorizes the plaintiff to apply payments that it accepted from the defendant in the following order: first to interest due; next to principal due; then to escrow funds due and any remaining amounts to late charges, other amounts due and finally to the reduction of principal. Since none of the items ahead of the last item "principal reduction" were due, the plaintiff properly applied the amounts remaining after application to interest due to principal reduction. The defendant points to no provision in the loan documents that overrides the priority of the application of overpayments to principal under ¶ 2 of the mortgage.

The defendant's claim that she did not default because she was, or should have been, relieved of any obligation to make the September 1, 2009 monthly installment due to the plaintiff's retention of overcharges that had accumulated and its failure to apply them to future installments when due appears to be contradicted by certain provisions set forth in ¶ 1 of the mortgage. In the last line of that paragraph, the defendant covenanted as follows: "No offset or claim which I might have now or in the future against the lender will relieve me from making payments due under the note and this Security Instrument or keeping all or any other promises and agreements secured by this Security Instrument". Under this provision, the defendant acknowledged that errors in the amount of the monthly payment contained in the loan documents and/or those otherwise practiced and performed by the parties would not absolve the defendant from her obligation to pay said monthly installments. Errors in payment computations and in the applications of funds received by the lender were thus contemplated by the parties at the time the loan originated and expressly excluded as a ground for the non-payment of any upcoming monthly installment by the defendant.

The defendant is bound by the terms of her contract, irrespective of whether or not she read and understood the terms thereof (*see* ***Gillman v Chase Manhattan Bank***, 73 NY2d 1, 11, 537 NYS2d 787 [1988]; ***Movado Group, Inc. v Mozaffarian***, 92 AD3d 431, 938 NYS2d 27 [1st Dept 2012]) and her failure to make the September 1, 2009 installment constituted a default in her payment obligations, notwithstanding the existence of the overcharges. Moreover, the overcharges of principal were known

or should have been known to the defendant in October of 2006, since a reduction in principal of nearly $7,000.00 was reported in the October 12, 2006 letter from ASC.

Furthermore, the court finds that errors, if any, in the crediting of payments received from the defendant do not defeat the plaintiff's claim for foreclosure and sale, but instead, go to the computation of amounts due which may be done by reference or by the court (*see* RPAPL § 1321). It is well established that claims of wrongful overcharges, improper crediting of amounts paid allegedly resulting in wrongful acceleration and improperly declared defaults, such as those alleged here, have been held not to constitute a defense to foreclosure, but instead, are matters which the defendant may put before the court or its referee by application to offset any overpayments (*see* ***First Nationwide Bank, FSB v Goodman***, 272 AD2d 433, 707 NYS2d 669 [2d Dept 2000]; ***Long Is. Sav. Bank of Centereach, FSB v Denkensohn***, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995]; ***Crest/Good Mfg. Co. v Baumann***, 160 AD2d 831, 554 NYS2d 264 [2d Dept 1990]; ***Johnson v Gaughan***, 128 AD2d 756, 757, 513 NYS2d 244 [2d Dept 1987]; ***Federal Natl. Mtge. Assn. v Connelly***, 84 AD2d 805, 444 NYS2d 147 [2d Dept 1981]; *see also* ***1855 East Tremont Corp. v Collado Holdings LLC***, 102 AD3d 567, 2013 WL 257418 [1st Dept 2013]; ***Shufelt v Bulfamante***, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]). Persons appearing in a foreclosure action who contest the plaintiff's claims as to the amount owed have a right to notice and the opportunity to be heard by the court or the referee appointed for purposes of examining the long account to determine the correct amount of the mortgage debt due and owing to the plaintiff (*see* ***Osinoff v Gert Realty Corp.***, 260 NY 36, 182 NE 238 [1932]; ***Blueberry Inv. Co. v Ilana Realty Inc.***, 184 AD2d 906, 585 NYS2d 564 [3d Dept 1992]). The defendant, here, shall thus be afforded due notice of the proceedings, at which, the computation of amounts owing shall be made by this court or a duly appointed referee.

Even if the plaintiff was obligated, contractually or otherwise, to return the overpayments to the defendant or to apply them to future due installments of interest on and after September 1, 2009, the plaintiff's failure to do so would not have constituted a material breach of the plaintiff's obligations such that it would have relieved the defendant from performing her payment obligations. A material breach is one that "is so substantial and fundamental that it defeats the object of the parties in making the transaction" (*see* ***Smolev v Carole Hochman Design Group, Inc.***, 79 AD3d 540, 913 NYS2d 79 [1st Dept 2010], *quoting* ***Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.***, 199 NY 268, 284, 92 NE 747 [1910]). A finding of a material breach must be premised upon proof that the departure from the terms of the contract or *defects in its performance* pervaded the whole of the contract so as to defeat the object that the parties intended (*see* ***Miller v Benjamin***, 142 NY 613, 617, 37 NE 631 [1894]; ***O'Herron v Southern Tier Stores, Inc.***, 9 AD2d 568, 189 NYS2d 323 [3d Dept 1959]).

Here, the record is devoid of any proof that errors in the monthly payment amounts as fixed in the loan documents that were remitted by the defendant and accepted by the plaintiff for the first forty months of the loan and/or the application of overpayments to a reduction in principal amounts constituted "a departure from the terms of the contract or defects in its performance so as to pervaded

the whole of the contract so as to defeat the object that the parties intended" (***Miller v Benjamin***, 142 NY 613, 617, *supra*; *see also* ***Mortgage Elec. Sys., Inc. v Maniscalco***, 46 AD3d 1279, 848 NYS2d 766 [3d Dept 2007]). Instead, the record is replete with evidence that the objectives which the parties intended in the making of the loan transactions were accomplished.

There is no dispute that the mortgage loan advanced to the defendant accomplished her objective of obtaining a mortgage loan in the amount of $600,000,00 which enabled her purchase of the historic residence on Main Street in Greenport, New York, at which she continues to reside to date. The plaintiff's predecessor-in-interest funded the mortgage loan in the principal amount of $600,000.00 in exchange for the profit available to it and its successors and assigns over the term of the loan by virtue of the interest charged. The profit was thus the object for the lender and the terms requiring monthly installments of interest over the course of the loan were material as they served as the mechanism by which the lender would collect such profit. The right to accelerate the debt in the event of a default in payment or otherwise and the right to foreclose the lien of the mortgage were also material terms to the lender as they provided security and moderated the risk of loss to which it was exposed to immediately upon advancement of the loan funds.

Unfortunately, no monthly installments of interest or principal have been paid by the defendant since September 1, 2009 and all overcharges, even if they had been applied to future installments due, would have been exhausted in or about April of 2010. So while the objectives of the defendant with respect to the mortgage loan transaction were accomplished by the extension of loan monies at origination, the plaintiff's objective in receiving a profit through the collection, over time, of interest on the principal loan amount, has been frustrated by the defendant's failure to make the monthly payments of interest that she covenanted to do in both the note and mortgage. The defendant's admitted breach of her payment obligations is a material breach that entitled the plaintiff to resort to the remedies available to it under the loan documents, including loan acceleration and the right to foreclose, both of which, the defendant willingly conferred upon the plaintiff in exchange for the monies advanced. The plaintiff's resort to those remedies is thus not wrongful, but instead, entirely consistent with the terms of the loan documents and the rights therein afforded to the lender. The court thus finds that the defendant failed to demonstrate that there was a breach on the part of the plaintiff and that such breach was material and willful, or, if not willful, so substantial and fundamental as to strongly defeat the object of the parties in making the loan transaction and relieved the defendant of her payment obligations and absolved her from the material breach of the loan documents that such non-payment constituted.

To the extent that the forgoing claims and arguments advanced by the defendant may be construed as an invitation for the court to invoke its equitable powers to prevent the effects that a judgment of foreclosure and sale impose upon a mortgagor such as the defendant, such invitation is declined. As indicated above, it is well settled law that a mortgagor is bound by the terms of his contract, including those set forth in payment and acceleration clauses (*see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, *supra*). It is equally well settled that because

the remedy of foreclosure is equitable in nature, it may be denied in cases of estoppel, bad faith, fraud or oppressive or unconscionable conduct (*see Id.*, at 56 NY2d 183; ***Ferlazzo v Riley***, 278 NY 289, *supra*).

However, a foreclosure action is in the nature of a proceeding in rem to appropriate the land and as such, is unlike most other equity actions which operate in personam (*see* ***Jo Ann Homes v Dworetz***, 25 NY2d 112, 302 NYS2d 799 [1969]). This distinction is not without a difference as it compels a vastly more limited application of equitable principles to foreclosure actions than to other actions equitable in nature. A court's resort to equity to deny the remedy of foreclosure is thus limited to cases wherein there is evidence of fraud, exploitive overreaching or unconscionable conduct on the part of the obligee to exploit an inadvertent, inconsequential, technical, non-prejudicial default by the mortgagor (*see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, *supra*; ***Karas v Wasserman***, 91 AD2d 812, 458 NYS2d 280 [3d Dept 1982]). Where the default is neither inadvertent nor unknowing, but instead, an act of volition that is substantial or material in nature in that it goes to the core of the mortgagee's willingness to extend the loan monies in exchange for the profit available from the collections of payments of interest over time and/or any right of acceleration in an effort to recover the unpaid loan proceeds, resort to equity to relieve a mortgagor or other obligor is improper (*see* ***Fifty States Mgt. Corp. v Pioneer Auto Parks***, 46 NY2d 573, 578, 415 NYS2d 800 [1979]; ***Graf v Hope Bldg. Corp.***, 254 NY 1, 12–14, 171 N.E. 884 [1930]; ***Cyber Land, Inc. v Chon Prop. Corp.***, 36 AD3d 748, 830 NYS2d 198 [2d Dept 2007]; ***Cohn v Middle Rd. Riverhead Dev. Corp.***, 162 AD2d 578, 556 NYS2d 764 [2d Dept 1990]).

Here, the defendant's September 1, 2009 default in payment of the monthly installment due under the terms of the loan documents was neither technical nor inconsequential, but instead, substantial and material as the receipt of monthly installments over time so as to make a profit was at the core of the decision to lend and to purchase the loan at a later date. Nor was the default inadvertent. Rather, it was a volitional act on the part of the defendant arising from conscious personal decisions purportedly dictated by her worsening financial circumstances and other considerations including discretionary determinations on how to spend her declining resources. In addition, a finding of any exploitive overreaching or unconscionable conduct on the part of the plaintiff is interdicted by the fact that the defendant was given due notice of the default and time to cure, to which she did not avail herself, and that she willingly conferred upon the plaintiff's predecessor-in-interest the remedies of acceleration and foreclosure. A resort to equity under these circumstances is thus unwarranted.

For these reasons, and those set forth above, the court finds that the defendant's breach of contract claim and/or defense that there was no actionable default in payment on her part is without merit as it lacks a factual basis having evidentiary support in the record and lacks a legal basis rooted in controlling principles of contract law or equity. Those portions of the defendant's cross motion wherein she seeks dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(7) and/or CPLR 3212 are thus denied and the THIRD counterclaim set forth in the defendant's amended answer is

dismissed, without prejudice to an application to the referee or the court for a set off at the examination of the long account to determine the correct amount of the mortgage debt.

The defendant next seeks the imposition of sanctions, costs and/or attorneys fees against the plaintiff pursuant to 22 NYCRR Part 130-1 by reason of its purported engagement in frivolous "behavior". This application is also denied. The plaintiff's conduct prior to the institution of this action, including the allegations that its agents instructed the defendant to apply for a reverse mortgage for purposes that violated HUD regulations, does not constitute frivolous conduct as that term is defined in 22 NYCRR § 130-1(c). The defendant's complaints about the conduct of the plaintiff during the course of the CPLR 3408 conferences held in the specialized mortgage conference part of this court lack merit since there is no obligation on the part of the foreclosing plaintiff to modify a mortgage loan before or after a default (*see* ***Graf v Hope Bldg. Corp.***, 254 NY 1, 4–5, *supra*; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***JP Morgan Chase Bank, Natl. Assn. v Ilardo***, 36 Misc3d 359, 940 NYS2d 829 [Sup. Ct. Suffolk County 2012]). Absent such an obligation, the plaintiff's declination to accept any of the various settlement proposals posited by the plaintiff in the settlement does not constitute frivolous conduct as defined in 22 NYCRR § 130-1(c) nor a violation of the duty to negotiate in good faith that is imposed by CPLR 3408 (*see* ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra*). All of the defendant's claims of improprieties or bad faith conduct on the part of the plaintiff prior to suit and/or during the CPLR 3408 settlement conferences conducted before a quasi-judicial officer of this court, are rejected as unmeritorious.

The defendant's accusations that the plaintiff submitted false documentation and that the plaintiff's agents are "robosigners" who falsely charged the defendant with a default in payment and supplied an affidavit of merit allegedly riddled with false assertions of fact are predicated upon nothing more than surmise, speculation and innuendo. Notably, the defendant offers no evidence that the note attached to the plaintiff's moving papers is a fake or a forgery or that it has been fraudulently changed or altered in any manner. While the copy of the note submitted did not include the addendums, the failure to include them merely rendered the note incomplete. Admittedly, the plaintiff produced the original note and both of its addendums for the defendant's inspection on two separate occasions including one at which a defendant's retained expert examined the note and its addendums. Conspicuously missing from the defendant's moving papers is an affidavit by such expert regarding the existence of some alteration of the terms note and/or its addendums or challenges to the genuineness of the signatures. These circumstances, coupled with the defendant's inclusion of copies of the note and its two addendums in her submissions to the court, warrant rejection of the defendant's claims that the plaintiff engaged in a nefarious and fraudulent scheme to mislead the court and to hide evidence and defeat fact finding.

Equally lacking in merit are the defendant's complaints about the plaintiff's failure to produce a consent order resolving proceedings between non-parties to this action, the full text of the Pooling and Servicing Agreement and other documentation that is neither relevant nor material to the maters at issue

in this foreclosure proceeding. The court thus finds no frivolous or bad faith conduct on the part of the plaintiff with respect to these matters.

Finally, the defendant's complaints about the purported "robosigning" of the assignment of the mortgage that is attached to the plaintiff's moving papers is flatly rejected. The allegations underlying this claim merely parrot the categorical allegations of fraud in the content and the preparation of foreclosure papers that have been the subject of national news media reports over the past several years. Rather than be guided or influenced in any way by such media accounts or other chronicles of past misdeeds, this court is obligated to adjudicate cases before it in accordance with the dictates of the cannons of judicial ethics. Those canons mandate that all adjudications be based solely upon the court's fair hearing and objective review of the claims and proofs of the parties and the court's application of controlling law thereto. Courts are thus required to ignore and reject all other things, including hot topics that swirl around from time to time in other venues. Observance of these cannons ensures the avoidance of improper influences and intrusions into the impartial and independent adjudicatory process that is at the very core of the judiciary's purpose and function. The defendant and her counsel would be well advised not go down this road again, for this court considers the putting of these media driven, categorical and irrelevant allegations of past misdeeds committed elsewhere upon litigants before this court to be frivolous under 22 NYCRR Part 130-1.

The court has considered the defendant's remaining claims for the imposition of sanctions due to the plaintiff's purported engagement in frivolous and/or bad faith conduct and finds them all lacking in merit. Accordingly, those portions of the defendant's cross motion wherein she demands monetary sanctions, costs and/or attorneys fees are denied.

The next ground for dismissal of the plaintiff's complaint set forth in the defendant's cross moving papers are challenges to the plaintiff's compliance with certain foreclosure "prerequisites". First asserted is the failure of the plaintiff to attach a copy of the RPAPL § 1304 notice of default to its moving papers. However, appellate case authorities have recently reminded us that, the defendant, as a moving party "needed to affirmatively demonstrate that this statutory pre-condition was not satisfied" since "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 2013 WL 3610840 [2d Dept 2013]; *cf.*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 104, 923 NYS2d 609 [2d Dept 2011]).

Here, there is no denial of receipt of the RPAPL § 1304 notice set forth in the defendant's moving papers. Only complaints that the plaintiff failed to produce a copy of such notice are advanced. In response, the plaintiff attached a copy of such notice to its opposing/reply papers which provides evidence of mailing on the face thereof that supports the plaintiff's pleaded claim that it complied with

the notice requirements of RPAPL § 1304 (*see* RPAPL § 1302). In her reply papers, the defendant asserts a blanket denial of receipt of the RPAPL § 1304 notice. These claims are, however, insufficient to warrant a dismissal of the complaint (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

Nevertheless, a plaintiff's failure to attach proof of service of the RPAPL § 1304 notice in accordance with its provisions has been held to preclude the granting of its motion for summary judgment (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 104, *supra cf.*, ***Solomon v Burden***, 2013 WL 1136861 [2d Dept 2013]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]; ***HSBC Bank USA, N.A. v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept. 2011]; *prima facie entitlement to summary judgment made in a residential foreclosure action by plaintiff's production of the mortgage and unpaid note, together with evidence of the mortgagor's default*). In an effort to bring this unduly protracted foreclosure action to a conclusion, the issue of service of this statutory notice shall be the subject of a hearing of the type contemplated by CPLR 3211(c) and/or 2218, at which, the parties shall be heard on this limited issue and the court will hear proofs of the parties including, customs and practices surrounding mailings.

Rejected as insufficient and unmeritorious is the defendant's denial of receipt the RPAPL § 1303 notice. Such denial rests upon her failure to recollect a colored piece of paper in the bundle of lose papers served upon her (*see* ¶ 9 of the Weinman Affidavit in support of cross motion). This averment is amplified in her reply papers on the basis of the recent review of the initiatory papers served upon her over three years ago. These claims are, however, insufficient to rebut the process server's affidavit in which he averred that the RPAPL § 1303 notice on blue paper was served with the summons and complaint (*see* ***US Bank Natl. Assn. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***US Natl. Bank Assoc. v Melton***, 90 AD3d 742, 934 NYS2d 352 [2011]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2012]; ***Mortgage Elec. Sys. v Schotter***, 50 AD3d 983, 857 NYS2d 592 [2d Dept 2008]). The defendant's claims and defenses regarding a lack compliance with the RPAPL §1303 notice are dismissed as unmeritorious.

Likewise dismissed are the defendant's complaints that the RPAPL § 1320 summons notice was defective. The court considers this challenge to be spurious as it rests, not upon a deviation from the statutory form due to errors or omissions in the words employed by the scrivener, but to the addition of emphasis by underlining. The defendant's claims and defenses resting upon purported defects in the RPAPL § 1302 summons notice are thus dismissed.

Unlike statutory conditions precedent like those addressed above which are not waived if not pleaded or raised by a timely pre-answer motion to dismiss (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra*; ***Citimortgage, Inc. v Pembelton***, ___ AD3d___, 2013 WL 440826 [Sup. Ct

Suffolk County 2013]), the failure to satisfy a contractual condition precedent must be denied in an answer and if not, satisfaction of the condition is admitted (*see* CPLR 3015[a]; *cf.*, ***Signature Bank v Epstein***, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]). Here, plaintiff's compliance with the contractual notice of default was not denied in the defendant's answers and her challenges thereto were waived by such pleading omission and her failure to advance the condition defects in a timely pre-answer motion to dismiss (*see* 3018[b]; 3211[a][5]). In any event, the court finds no merit to the defendant's claims that such notice served by the plaintiff upon the defendant was defective. All claims and defenses predicated upon purported defects in the contractual notice of default are thus dismissed.

The defendant's claims for dismissal of the complaint that rest upon her pleaded defense that the plaintiff lacks standing to prosecute the action are rejected as unmeritorious. The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see* ***US Bank of NY v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***US Bank, N.A. v Adrian Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank, N.A. v Marchione***, 67 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*, internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Physical delivery of the note alone is sufficient to transfer the mortgage as incident to the note (*see* ***Deutsche Bank Trust Co. Americas v Codio***, 94 AD3d 1040, 943 NYS2d 545 [2d Dept2012]; ***US Bank Natl. Assn. v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]).

Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof or by allonge as the mortgage follows as incident thereto (*see* UCC § 3–202; § 3–204; § 9–203[g]; ***Deutsche Bank Trust Co. Americas v Codio***, 94 AD3d 1040, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013], *supra*). Delivery of an indorsed note to an agent of the plaintiff constitutes delivery to the plaintiff as principal (*see* ***Policy Funding Corp. v Kings County Lafayette Trust Co.***, 33 NY2d 776, 350 NYS2d 414 [1979]; *see also* ***Tonelli v Chase Manhattan Bank, N.A.***, 41 NY2d 674, 394 NYS2d 858 [1977]).

Here, the plaintiff established that it took possession of the note in 2006, which was well before the commencement of the action, and was the holder thereof as such note contained an indorsement in blank on the face thereof. Such possession also effected an assignment by delivery which conferred assignee status of the note and the mortgage upon the plaintiff (*see* ***OneWest Bank FSB v Carey***, ___ AD3d ___, 2013 WL 828014 [1st Dept 2013]; ***US Bank Natl. Assn. v Cange***, 96 AD3d 825, *supra*; ***Bank of New York Mellon Trust Co. N.A. v Sachar***, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]). The plaintiff thus established, prima facie, its standing to prosecute this action. The court rejects the defendant's complaints about the plaintiff's non-compliance with the Pooling and Servicing Agreement

between the plaintiff and non-parties as irrelevant and immaterial since any such non-compliance does not constitute a viable defense to foreclosure (*see* ***In re Marks***, 2012 WL 6554705 [9th Cir. BAP (Cal.),2012]; ***In re Correia***, 452 B.R. 319 [1st Cir. BAP (Mass), 2011]; ***HSBC Bank USA, N.A. v Hardman***, 2013 WL 515432 [N.D. Ill.,2013]; ***In re Washington***, 469 B.R. 587 [Bkrtcy. W.D. Pa. 2012]; - *A borrower has no standing to assert a failure to comply with PSA provisions and such non-compliance is not a defense to a foreclosure action*).

Although the plaintiff attempts to bolster its claim of standing by its reliance upon an assignment of mortgage dated January 27, 2010 that is attached to the moving papers, such reliance is unavailing. A review of that assignment reveals that it does not include an assignment of the note which is fatal to the purported assignment of the mortgage alone (*see* ***Citimortgage, Inc. v Stosel***, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]; ***US Bank Natl. Assn. v Madero***, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]). All of the defendant's challenges to the propriety of the assignment or its execution are dismissed as academic (*see* ***Bank of New York Mellon Trust Co. N.A. v Sachar***, 95 AD3d 695, *supra*).

Those portions of the defendant's cross motion for dismissal of the plaintiff's complaint due to a purported lack of standing on the part of the plaintiff are denied and the defendant's SECOND affirmative defense asserting such claim is dismissed.

Also denied are those portions of the defendant's cross motion wherein she seeks dismissal of the complaint due to the plaintiff's failures to turn over certain documents demanded by defendant's counsel. Such documents include "documents regarding its standing to sue under the PSA". As indicated above, however, standing under the PSA is irrelevant as the plaintiff established that standing under its holder and assignee status due to the transfer of the indorsed note to it prior to the commencement of this action. The plaintiff's complaints about the withholding of correspondence regarding statements of the account of the mortgage are unavailing as the defendant was in possession of those letters as evidenced by her production of them in support of her cross motion (*see* page 40 of defense counsel's Memo of Law in support of cross motion). The cross moving papers are simply devoid of any evidence tending to establish that the plaintiff willfully refused to disclose documents and other information relevant and material to the claims or defenses asserted in this action to which the defendant was entitled to under CPLR 3101 (*see* ***Orgel v Stewart Title Ins. Co.***, 91 AD3d 922, 938 NYS2d 131 [2d Dept 2012]; ***Auerbach v Klein***, 30 AD3d 451, 816 NYS2d 376 [2d Dept 2006]).

Nor did the defendant demonstrate that the plaintiff's motion for summary judgment was premature as the defendant failed to offer a sufficient evidentiary basis to suggest that further discovery may lead to relevant evidence (*see* ***Friedlander Org., LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]; ***Swedbank, AB v Hale Ave. Borrower, LLC***., 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Westport Ins. Co. v Altertec Energy Conservation, LLC***, 82 AD3d 1207, 921 NYS2d 90 [2d Dept 2011]; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]).

The defendant's demands for dismissal of the complaint pursuant to CPLR 3126 or for an order directing the plaintiff to furnish certain discovery items pursuant to CPLR 3126 are thus denied.

The defendant's cross moving papers do not contain a demand for summary judgment on her FOURTH Counterclaim in which she asserts a claim for damages under the Federal Truth-in-Lending Law [TILA]. Discussion of that defense is advanced only as opposition to the plaintiff's motion-in-chief wherein it seeks dismissal of the all counterclaims and affirmative defenses. Under these circumstances, the court reserves its determination as to the nature, scope and viability and/or merits of the defendant's FOURTH counterclaim until it considers the merits of the plaintiff's motion-in-chief following the hearing on the predicate question regarding service of the RPAPL § 1304 default notice.

In view of the foregoing, the courts denies the defendant's cross motion except the unresolved portions concerning service of the RPAPL § 1304 notice that is the subject of the hearing scheduled herein. The court hereby adjourns the plaintiff's motion (#001) for summary judgment and other relief, including the appointment of a referee to compute, to **June 7, 2013**, on which date, the court shall conduct a hearing limited to the issue of service of the RPAPL § 1304 notice.

Dated: March 29, 2013

THOMAS F. WHELAN, J.S.C.