SHORT FORM ORDER

INDEX NO.: 033184/2013

SUPREME COURT - STATE OF NEW YORK
IAS PART 30 - SUFFOLK COUNTY

PRESENT: Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE: 04/26/2016
ADJ. DATE: 07/01/2016
Mot. Seq. # 001-MotD

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WACHOVIA MORTGAGE, FSB,

Plaintiff,

-against-

GLENN MUSCO, "JOHN DOE 1 to JOHN DOE 25", said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants,

WOODS OVIATT GILMAN LLP
Attorneys for Plaintiff
700 Crossroads Building
2 State Street
Rochester, NY 14614

MOODIE LAW GROUP, PLLC
Attorney for Defendant
Glenn Musco
325 East Surnise Highway
Lindenhurst, NY 11757

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated March 31, 2016, Affirmation in Support by the plaintiff's counsel, Kristin Corsi, Esq., dated March 31, 2016; Memorandum of Law dated March 31, 2016, and supporting papers; (2) Amended Notice of Motion dated April 19, 2016; (3) Affirmation in Opposition by the defendant Glenn Musco's counsel, William McCormick, Esq., dated May 24, 2016 and supporting papers; (4) Affirmation in Reply by the plaintiff's counsel, Kristin Corsi, Esq., dated June 28, 2016; (5) Other: Stipulations of Adjournment dated April 19 and June 13, 2016; and now it is

ORDERED that the motion (001) by the plaintiff for, *inter alia*, an order awarding summary judgment in its favor against the defendant Glenn Musco, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent stated below, otherwise denied; and it is

ORDERED that the branch of the motion wherein plaintiff requests an order awarding it the costs and disbursements of this motion is denied without prejudice, leave to renew upon proper documentation for same at the time of submission of the judgment; and it is

ORDERED that the plaintiff is awarded partial summary judgment dismissing the second affirmative defense, the portion of the third affirmative defense unrelated to the RPAPL §1304 90-day pre-foreclosure notice, and the fourth through thirteenth enumerated affirmative defenses asserted in the defendant's answer, all with prejudice; and it is

ORDERED that pursuant to CPLR §3212(g), the Court finds that the sole remaining issues of fact are whether the subject loan is a "home loan" within the meaning of RPAPL §1304, and whether the plaintiff complied with the notice requirements of RPAPL §1304, and the Court will conduct a "framed issue hearing" limited to these issues; and it is

ORDERED that a "framed issue hearing" shall be held in this action on **March 2, 2018 at 9:30 a.m.** at IAS Part 30, A-259, Second Floor, One Court Street, Riverhead, NY 11901, at which counsel are directed to appear; and it is

ORDERED that the caption is amended by substituting Jane Smith (name refused) for the fictitious "John Doe #1" through John Doe #25" defendants as well as the descriptive wording relating thereto; and it is

ORDERED that the plaintiff shall to serve a copy of this Order amending the caption of this action upon the Calendar Clerk of this Court; and it is

ORDERED that, within sixty (60) days of the date of this Order, the plaintiff shall file with the Clerk of this Court a certificate of conformity with respect to the affidavit of the plaintiff in support of the motion, executed outside the State of New York on January 27, 2016 (*see*, CPLR 2309[c]; ***U.S. Bank N.A. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); and it is further
further

ORDERED that the plaintiff shall serve a copy of this Order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date herein, and it shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential property known as 41 W. Woodside Avenue, Patchogue, New York 11772 also known as 41 Woodside Avenue, Patchogue, New York 11772. On March 4, 2008, the defendant Glenn Musco ("the defendant mortgagor") executed an adjustable-rate note in favor of Wachovia Mortgage, FSB ("the lender") in the principal sum of $150,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated March 4, 2008 on the property. The mortgage was recorded in the Office of the Suffolk County Clerk's Office on April 3, 2008.

The note provides that any notice to be given to the defendant mortgagor shall be made at 155 Lincoln Boulevard, Hauppauge, New York 11788-4410 ("the Hauppauge property"), or at a single alternate address if the lender is given notice of an alternate address (*see*, Note § 9). Similarly, the defendant mortgagor's mailing address listed in the mortgage is the Hauppauge property (*see*, Mtge

pg. 16). Further, the occupancy provisions in the mortgage were left blank, and therefore, do not apply to this loan.

By way of a bank merger and physical delivery, the note was allegedly transferred to and/or acquired by Wells Fargo Bank, N.A., successor by merger to the lender ("the plaintiff") prior to commencement.

The defendant mortgagor allegedly defaulted on the mortgage by failing to make the monthly payment of principal and/or interest due on or about February 15, 2012, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a *lis pendens*, summons and complaint on December 17, 2013. Issue was joined by the interposition of the defendant mortgagor's answer July 17, 2014. The remaining defendants have neither answered nor timely appeared herein, and thus all are in default.

By his answer, the defendant mortgagor admits that he is the owner of the property, but denies the remaining allegations in the complaint. The defendant mortgagor also asserts thirteen affirmative defenses, alleging, among other things, the plaintiff's lack of standing (second affirmative defense), and the plaintiff's failure to comply with the 90-day pre-foreclosure notice requirements set forth in RPAPL §1304 (third affirmative defense).

By way of background, a settlement conference conducted before the specialized foreclosure conference part on November 3, 2014 and subsequently continued on January 20, 2015. A representative of the plaintiff attended and participated in the settlement conference. On the last date, this case was dismissed from the conference program by the assigned referee because it was determined that the property was not the defendant mortgagor's primary residence. Accordingly, there has been compliance with CPLR §3408, if required.

The plaintiff now moves for, *inter alia*, an order: (1) pursuant to CPLR §3212 awarding summary judgment in its favor against the defendant mortgagor, striking his answer and dismissing the affirmative defenses asserted therein; (2) pursuant to CPLR §3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL §1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

In opposition to the motion, the defendant mortgagor submits, *inter alia*, an affidavit made by him and the affirmation from his counsel. Parenthetically, the Court notes that even though the defendant mortgagor's present counsel filed a notice of appearance dated April 19, 2016, a consent to change counsel was never filed herein substituting Moodie Law Group, PLLC for DeLisa Law Group, PLLC (*see*, CPLR 321[b]).

In his opposing papers, the defendant mortgagor reasserts his previously pleaded defenses alleging the plaintiff's alleged failure to serve him with a 90-day notice pursuant to RPAPL §1304 and the plaintiff's alleged lack of standing to sue. He also contends that he was denied a meaningful settlement conference pursuant to CPLR 3408 because this case was allegedly prematurely released

from the conference program. The defendant mortgagor further alleges that the plaintiff failed to furnish him with discovery. In response, the plaintiff filed reply papers.

Initially, to the extent that the defendant mortgagor purports to move for any relief by his opposing papers, the same is denied. Because the affirmative relief sought in the opposing papers was not made pursuant to a proper cross motion under CPLR 2215, the Court in its discretion will not entertain it (*see*, ***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]; *see also*, CPLR 8020 [a]).

The Court turns first to the issue of the plaintiff's compliance with certain conditions precedent to commencement of this action. The plaintiff's submissions are insufficient to demonstrate evidentiary proof of proper service of the 90-day pre-foreclosure default notices upon the defendant mortgagor (*see*, ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016] [affidavit insufficient to establish RPAPL §1304 compliance where no showing of personal knowledge of procedures customarily used in ordinary course of business for mailing of statutory notices]; ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016] [unsubstantiated and conclusory statements were insufficient to establish that the 90-day notice required by RPAPL 1304 was mailed]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015] [plaintiff failed to demonstrate strict compliance with RPAPL 1304; affidavit of service not submitted]; *cf.*, ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016] [affidavit describing the sender's standard business practice]; ***Wells Fargo Bank, N.A. v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015] [affidavit of mailing and certified mailing receipts]). The plaintiff submitted neither an affidavit of service of the 90-day notices upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailings (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]).

Under the facts presented, the statements set forth in the affidavit of Ms. Hicks regarding the 90-day pre-foreclosure notices, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Wells Fargo Bank, N.A. v Trupia***, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, *supra*; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). Although Ms. Hicks alleges that the subject notices were mailed to the defendant mortgagor, she did not set forth sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notices; nor did she identify the individuals who allegedly did so. Further, it is noted that Ms. Hick's affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 776 [2d Dept 2001]).

In any event, the plaintiff failed to demonstrate that the subject loan is not a "home loan" as that term is defined by RPAPL §1304 (*see*, ***US Bank N.A. v Richard***, 151 AD3d 1001, 57 NYS3d 509

[2d Dept 2017]; ***Richlew Real Estate Venture v Grant***, 131 AD3d 1223, 17 NYS3d 475 [2d Dept 2015]; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]; *see also*, ***JP Morgan Chase Bank, N.A. v Venture***, 148 AD3d 1269, 48 NYS3d 824 [3d Dept 2017]; ***MLF3 Jagger LLC v Kempton***, 56 Misc3d 227, 50 NYS3d 247 [Sup Ct, Suffolk County 2017]; *cf.*, ***HSBC Bank USA, N.A. v Ozcan***, 154 AD3d 822, ___ NYS3d___ [2d Dept 2017]; ***Bayview Loan Servicing, LLC v Akande***, 154 AD3d 694, 61 NYS3d 647 [2d Dept, 2017]; ***CitiMortgage, Inc. v Simon***, 137 AD3d 1190, 28 NYS3d 454 [2d Dept 2016]; ***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 985 NYS2d 254 [2d Dept 2014]; ***Brandywine Pavers, LLC v Bombard***, 108 AD3d 1209, 970 NYS2d 653 [4th Dept 2013]; ***Wells Fargo Bank, N.A. v Moskopf***, 44 Misc3d 1223 [A], 999 NYS2d 799 [Sup Ct, Suffolk County 2014] [plaintiff demonstrated that loan was not a "home loan" as defined by RPAPL § 1304]). Even though the plaintiff submitted some evidence tending to show that the property was rented and not owner-occupied at the time of commencement, its submissions were insufficient to demonstrate that the property was not used, or intended to be used, as the defendant mortgagor's primary residence at the time of the loan origination (*see*, ***HSBC Bank USA v McKenna***, 37 Misc885, 952 NYS2d 746 [Sup Ct, Kings County 2012]; ***Rossrock Fund II LP v Arroyo***, 34 Misc3d 1211[A], 943 NYS2d 794 [Sup Ct, Kings County 2012]). If the defendant mortgagor did not reside or intend to reside at the subject property as his primary residence at the time of the loan origination, then, in that event, the mandates of RPAPL §1304 would not apply herein, thus, raising additional triable issues of fact (*see*, RPAPL §1304[5]).

The Court reaches a different conclusion with respect to the remaining affirmative defenses asserted in the answer. The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Gillman v Chase Manhattan Bank, N. A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]). Furthermore, "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (***Home Sav. of Am., FSB v Isaacson***, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]).

By his first affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, he has not cross moved to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has demonstrated that the complaint sets forth a valid cause of action for, among other things,

foreclosure and sale. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see, **Old Williamsburg Candle Corp. v Seneca Ins. Co., Inc.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

The portion of the third affirmative defense, alleging violations of the notice requirements imposed by Article 13 of the Real Property Actions and Proceedings Law, other than the 90-day pre-foreclosure notice, is unduly vague and overly broad (*see*, CPLR 3013). The fourth affirmative defense, alleging violations of the notice requirements imposed by Article 13 of the Real Property Actions and Proceedings Law, is nearly duplicative of the third affirmative defense. In any event, the plaintiff demonstrated compliance with the notice requirements of RPAPL § 1303. The plaintiff's submissions include, among other things, a copy of the notice pursuant to RPAPL § 1303, the affirmation of counsel detailing compliance and an affidavit of service of the subject notice with the statutorily-required content, printed in the required type size on colored paper (*see*, ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]).

Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). 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*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

By its submissions, the plaintiff demonstrated its standing by way of physical possession of the note prior to commencement (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also*, ***Bank of Am., N.A. v O'Gorman***, 137 AD3d 1179, 28 NYS3d 417 [2d Dept 2016]; *cf.*, ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***US Bank N.A. v Faruque***, 120 AD3d 575, 991 NYS2d 630 [2d Dept 2014]). In her affidavit, Ms. Hicks alleges that the endorsed note was in the plaintiff's possession since March 6, 2008, a date being prior to commencement, and that the plaintiff has remained in continual possession of the note since that date. Ms. Hicks also alleges that the plaintiff is the original payee of the promissory note by operation of law as a result of a bank merger (*see*, Banking Law § 602; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, ***Wells Fargo Bank, N.A. v Kristall***, 2014 NY Misc. LEXIS 4063, 2014 WL 4635350, 2014 NY Slip Op 32383 [U] [Sup Ct, Suffolk County 2014]; ***Wells Fargo Bank v Jenkins***, 40 Misc3d 1225[A], 975 NYS2d 713 [Sup Ct, Queens County 2013] [recognizing the merger of Wells Fargo Bank with and into Wachovia Bank]). Such evidence demonstrates that the plaintiff holds and/or owns the original note and mortgage.

An affirmative defense based upon CPLR 3211(a)(8) was waived in this action because the defendant mortgagor failed to move to dismiss the complaint against him on this ground within 60 days after serving the answer (*see*, CPLR 3211[e]; ***Generation Mtge. Co. v Medina***, 138 AD3d 688,

27 NYS3d 881 [2d Dept 2016]; ***Putnam County Sav. Bank v Mastrantone***, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]). Thus, the thirteenth affirmative defense lacks merit.

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of the pleaded defenses in the answer, except those defenses noted above. The failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses in the answer in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*).

The plaintiff demonstrated its standing, as indicated above (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, *supra*; ***Capital One, N.A. v. Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]). Because the plaintiff's representative provided the factual details of when the plaintiff received possession of the promissory note, it need not furnish any further particulars of how it came into possession of the note (*see generally*, ***Pennymac Corp. v Chavez***, 144 AD3d 1006, 1007, 42 NYS3d 239 [2d Dept 2016]). Thus, the defendant mortgagor has not come forward with any evidence to raise a triable issue of fact as to the plaintiff's standing (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS2d 286 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]).

The defendant mortgagor has also not demonstrated any prejudice by the plaintiff's failure to furnish a certificate of conformity for the affidavit in support of the motion, which may be provided nunc pro tunc (*see*, CPLR 2001; ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Betz v Daniel Conti, Inc.***, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; ***Smith v Allstate Ins. Co.***, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). Additionally, the out-of-state affidavit submitted by the plaintiff substantially conforms to the statutory requirements of this State. In any event, the defendant mortgagor has not demonstrated any prejudice by the submission of the affidavit without a certificate of conformity.

The plaintiff is therefore awarded partial summary judgment in its favor dismissing all of the affirmative defenses asserted in the answer with prejudice, except for the first affirmative defense and the portion of the third affirmative defense asserting the lack of compliance with the 90-day pre-foreclosure notice.

The branch of the instant motion for an order pursuant to CPLR 1024 amending the caption by substituting Jane Smith (name refused) for the fictitious "John Doe #1" through John Doe #25" defendants is granted (*see*, ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

In view of the foregoing, and pursuant to CPLR 3212(g), the Court finds that the sole remaining issues of fact relate to whether the subject loan is a "home loan" as that term is defined by RPAPL § 1304, and, if so, whether the plaintiff complied with the 90-day pre-foreclosure notice requirements of RPAPL § 1304. The branch of the plaintiff's motion for an order striking the portion of the third affirmative defense asserting lack of compliance with the 90-day pre-foreclosure notice provisions of RPAPL § 1304 is thus denied. In light of the above-determination, the Court need not determine at this time the remainder of the ancillary relief requested in the motion.

In view of the above determination, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: January 24, 2018

Hon. DAVID T. REILLY, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION