SHORT FORM ORDER

COPY

Index No.: 17679-2008
Mtn. Seq.#: 005 & 006
Submit Date: 8-14-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

Motion Date: 005: 6-19-2013
006: 8-14-2013
Motion No.: 005: MOT D
006: MOT D

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION CORP. JPMAC 2006-FRE1
10790 Rancho Bernardo Road
San Diego CA 92127,

Plaintiff,

-against-

YOLANDE NICHOLSON, "JOHN DOE", NANCY ENGELHARDT,

Defendants.

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McCabe, Weisberg & Conway, P.C.
By Jose O. Hasbun, Esq.
Attorneys for Plaintiff
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New Rochelle, NY 10801

Alice A. Nicholson, Esq.
Attorney for Defendant Nicholson
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Brooklyn, NY 11242

Upon the following papers numbered 1 to 67 read on this application for an order vacating a previous Order of Reference and granting a new Order of Reference, and a Cross Motion for an order compelling the acceptance of an Answer and other relief; Notice of Motion/Order to Show Cause and supporting papers 1-36; Notice of Cross Motion and supporting papers 37-56; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers 57-67; Other __; it is

ORDERED that the motion by the plaintiff, US Bank National Association, as Trustee for JP Morgan Mortgage Acquisition Corp. JPMAC 2006-FRE1 10790 Rancho Bernardo Road San Diego CA 92127 ["the plaintiff"], for an order vacating the Order of Reference dated December 18, 2009, granting a Second Order of Reference and permitting the plaintiff to proceed with foreclosure (motion sequence 005), and the cross motion by the defendant Yolande Nicholson for an Order compelling the acceptance of the Answer previously served upon the plaintiff, dismissing the complaint for the failure to comply with **REAL PROPERTY ACTIONS AND PROCEEDINGS LAW**

["**RPAPL**"] § 1303, and denying the plaintiff's motion for a judgment of foreclosure and granting the defendant summary judgment dismissing the complaint (motion sequence 006), are decided together; and it is further

ORDERED that so much of the plaintiff's motion seeking an order vacating the Order of Reference dated December 18, 2009, is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking a Second Order of Reference and permitting the plaintiff to proceed with foreclosure is denied; and it is further

ORDERED that so much of the cross motion by the defendant Yolande Nicholson ["the defendant" or "Nicholson"] for an Order compelling the acceptance of the Answer previously served upon the plaintiff, is granted, and the cross motion is otherwise denied.

Plaintiff's Motion for a New Order of Reference

This foreclosure action involves a loan made by Fremont Investment & Loan ["Fremont"] to the defendant on October 14, 2005, in the amount of $632,000.00, secured by a mortgage executed by the defendant on that same date. The mortgage indicates that for purposes of recording Mortgage Electronic Recording Systems, Inc., ["MERS"], is the mortgagee of record. The instant action to foreclose the mortgage was commenced on behalf of the plaintiff on May 8, 2008, by the now-defunct law firm of Steven J. Baum, P.C. It was not until ten days later, on May 18, 2008, that the mortgage was purportedly assigned by MERS as nominee for Fremont to the plaintiff.

On two prior occasions the plaintiff sought an Order Appointing a Referee and to Compute. The plaintiff withdrew the first application submitted on December 3, 2008. The second application was submitted on September 30, 2009; the resulting Order of Reference which the plaintiff now seeks to vacate was granted on December 18, 2009. In addition, the plaintiff withdrew a previous motion for a Judgment of Foreclosure and Sale on October 18, 2010.

According to the plaintiff's moving papers, the current law firm representing the plaintiff attempted to comply with the Office of Court Administration's memorandum dated October 20, 2010, as supplemented, requiring counsel to consult with a representative of the lender and confirm the factual accuracy of the allegations set forth in the complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents. Counsel consulted with its client and was advised that the plaintiff could not confirm the accuracy with regard to execution and/or notarization of the prior Affidavit of Fact dated April 21, 2009. Thus, the plaintiff now seeks an order vacating the December, 2009, Order of Reference that was based on the April, 2009 affidavit, and granting a new Order of Reference in order to move forward with the foreclosure.

In support of the plaintiff's application it submitted, inter alia, an "Attorney Statement" dated May 13, 2013, contending that the "subject [n]ote was transferred via indorsement in blank", referring to an Exhibit attached to the moving papers. The Exhibit consisted of a copy of the note signed by the defendant, and a separate undated page containing no identifying information

connecting it with the subject note. Rather, the only writing on the page is a stamp that purports to be a blank indorsement with a signature of one "Michael Koch", identified as "Fremont Investment & Loan, Vice President".

The plaintiff contends that the effect of the blank indorsement was to make the note payable to bearer pursuant to UCC § 1-201(5), which may be negotiated by transfer of possession alone relying on UCC §§ 3-204[2] and 3-202 [1]. The "Attorney Statement" contends that under UCC § 9-203 (9) (g), the assignment or transfer by the seller of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee, thereby rendering an actual assignment unnecessary. The argument is obviously intended to remedy the fact that the plaintiff was not assigned the mortgage until ten days after it commenced the action to foreclose (*see generally* ***Bank of New York v. Silverberg,*** 86 A.D.3d 274, 926 N.Y.S.2d 532 [2d Dept. 2011] ["In a mortgage foreclosure action, 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"]).

The "Attorney Statement" relies on the affidavit of Carrie S. Patridge, dated April 15, 2013, as support for the statement that the plaintiff has been in "continuous possession of the Note (and Mortgage) since the commencement of the action". Patridge is described as the Vice President of the loan servicer authorized to act on the plaintiff's behalf. The Patridge affidavit states that the defendant defaulted on December 1, 2007, the default has not been cured, and that a notice of default was sent to the defendant on February 11, 2008.

Although the Patridge affidavit states that the plaintiff is the holder of the note, conspicuously absent from the affidavit or anywhere else in the moving papers is evidence that the plaintiff was the holder of the note and mortgage when the action was commenced on May 8, 2008. The "Attorney Statement" does not provide proof when, if ever, Fremont indorsed the subject note to the plaintiff or transferred possession of it. It merely references the Patridge affidavit for the proposition that the plaintiff is in possession of the note, and the UCC for the further proposition that transfer of possession of the note to the plaintiff automatically transferred possession of the mortgage.

The "Attorney Statement" also chronicles that the indorsement of the note was "later memorialized" by the assignment of mortgage dated May 18, 2008, which was later recorded. Anecdotally, although the assignment is dated May 18, 2008, the notary on the assignment is dated May 1, 2008.

Regarding the statutory notice required by **RPAPL** § 1303, the Attorney Statement states that counsel for the plaintiff provided the process server with the summons and complaint, printed on white paper, together with the notice required by **RPAPL** § 1303 (a), referring to the attached "Exhibit G". That exhibit contains a two-page yellow notice with language required by § 1303 by an amendment to the statute that did not take effect until August 5, 2008 (L. 2008, c. 472, §1, eff. August 5, 2008). The action was commenced on May 8, 2008.

The affidavit of service indicates that service of the summons and complaint and § 1303 notice was made by serving a person of suitable age and discretion, one Nancy Engelhardt.

Engelhardt is described in the affidavit of service as a co-occupant female, approximately 31 to 39 years of age, 5'4" to 5' 7" tall, 125 to 149 pounds with red hair. The Attorney Statement claims that none of the defendants answered the complaint with the exception of Nicholson, who appeared and requested notice of the application. Based on the foregoing, the plaintiff seeks a new Order of Reference.

Defendant's Opposition and Cross Motion

The cross motion seeks an Order compelling the acceptance of the Answer previously served upon the plaintiff, dismissing the complaint for the failure to comply with **RPAPL** § 1303, and denying the plaintiff's motion for a judgment of foreclosure and granting the defendant summary judgment dismissing the complaint. Two grounds for the relief sought include the failure to fulfill a condition precedent to suit, i.e., the service of a § 1303 notice, and the plaintiff's lack of standing to commence the action.

According to the attorney for Nicholson, even before the defendant's default, she has been pursuing a loan modification and has provided a voluminous number of documents toward that goal. The defendant denies that the summons and complaint with the required § 1303 notice was ever properly served upon her. In an affidavit dated August 1, 2013, Nicholson denied that she ever received the notice and challenges that the pleadings and the required notice were ever served on Engelhardt who she describes as 5' 2" or less, middle-aged, and very thin, weighing much less than the 125-149 pounds as reported by the process server in the affidavit of service. Nicholson also denied that she ever received the required § 1303 notice with any of the copies of the summonses and complaints that were subsequently mailed or left at her home.

Nicholson also attested that the § 1303 notice accompanying the judgment of foreclosure that was ultimately withdrawn on October 18, 2010, is not the same § 1303 notice that is attached as an Exhibit to the instant motion for a new Order of Reference. A review of the plaintiff's withdrawn motion for a Judgment of Foreclosure and Sale confirms this. The "Attorney Statement in Reply/Opposition to Cross-Motion", dismisses the discrepancy in the § 1303 notices attached to the withdrawn Judgment of Foreclosure and the pending motion for a new Order of Reference, respectively.

The affidavit of service indicates that service on Nicholson was complete on May 20, 2008. By email to Tracy Fourtner of the Baum law firm on July 11, 2008, defense counsel requested an extension of time to answer the complaint until August 15, 2008. Defense counsel affirms that Tracy Fourtner of the Baum law firm told her that the law firm was considering discontinuing the action because the parties were entering into an agreement. Eventually Kathleen Bartkus of the Baum law firm responded by email to defense counsel's request for an extension to answer: "please be advised our file is on hold due to your client has entered into a forbearance plan. Please advise if you still intend on answering the complaint. Also please forward a signed Notice of Appearance." Although defense counsel filed a Notice of Appearance, the defendant claims never to have received a forbearance agreement.

By Order to Show Cause signed by this Court dated November 12, 2009, the defendant requested that the Court grant leave to file an Answer pursuant to CPLR 3012(d), vacate any order or judgment previously granted, and order a settlement conference pursuant to CPLR 3408. A proposed Verified Answer was annexed to the Order to Show Cause. The defendant's Order to Show Cause was submitted at a time when the second motion for an Order of Reference was pending. According to the Court's internal case management system, it appears that the movant failed to file the signed Order to Show Cause with Special Term. The defendant disputes this and provides proof of filing and service on the cross motion. In any event, the defendant's motion for leave to file an Answer and schedule a settlement conference, was never marked fully submitted for a decision. The plaintiff was granted an Order of Reference on December 18, 2009. Some time after the Order of Reference was granted, at the defendant's request, the Court scheduled a settlement conference for April 15, 2010.

At that point, defense counsel asserts that plaintiff's counsel agreed to accept the Answer that was originally annexed to the November, 2009 Order to Show Cause. The Answer was mailed to the Baum law firm on April 15, 2010, the same day as the first settlement conference. In the Answer, the defendant asserted the affirmative defense of lack of standing and the plaintiff's failure to provide the statutory notice required by **RPAPL** § 1303, among other defenses. According to the information maintained by the Court's computerized database, foreclosure settlement conferences were held in this Court's Specialized Mortgage Foreclosure Conference Part on April 15, 2010, June 16, 2010, and November 17, 2010.

The plaintiff moved for a judgment of foreclosure and sale on August 10, 2010. It is undisputed that the plaintiff moved for a judgment of foreclosure while the defendant was submitting documents to the plaintiff for review of a loan modification. Although the plaintiff sought a default judgment, the attorney fee application in the proposed judgment of foreclosure sought fees based on its attorneys' appearance at settlement conferences and for "Review of answer". By Order dated October 26, 2010, the plaintiff withdrew the motion for a Judgment of Foreclosure.

From October 26, 2010, until recently, this matter remained on the Court's "shadow docket"[1]. By Order dated May 17, 2013, the Court directed the plaintiff to either proceed with the action or discontinue it. The Order provided that upon the plaintiff's failure to act within ninety days, the Court "may" dismiss the action; the Order did not make a dismissal automatic upon the expiration of the ninety day period. In any event, by Notice of Motion dated May 13, 2013, the plaintiff moved for a new Order of Reference.

Defendant's Excuse for the Default Reasonable

With respect to so much of the plaintiff's motion for a new Order of Reference, the motion is denied. In an action to foreclose a mortgage, the plaintiff must establish its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default

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[1] *See* Andrew Keshner, Advocates Seek to Eliminate Foreclosure 'Shadow Docket', N.Y.L.J., Mar. 27, 2012, at 1.

(*see* ***Deutsche Bank Nat. Trust Co. v. Whalen,*** 107 A.D.3d 931, 969 N.Y.S.2d 82 [2d Dept. 2013], *citing* ***GRP Loan, LLC v. Taylor***, 95 A.D.3d 1172, 1173, 945 N.Y.S.2d 336; ***Deutsche Bank Natl. Trust Co. v. Posner***, 89 A.D.3d 674, 674–675, 933 N.Y.S.2d 52). Where standing is put into issue by the defendant, "the plaintiff must prove its standing in order to be entitled to relief" (***U.S. Bank, N.A. v. Collymore***, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578; *see* ***Wells Fargo Bank Minn., N.A. v. Mastropaolo***, 42 A.D.3d 239, 242, 837 N.Y.S.2d 247).

"In a mortgage foreclosure action, 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" (***Bank of N.Y. v. Silverberg***, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *see* ***Deutsche Bank Natl. Trust Co. v. Spanos***, 102 A.D.3d 909, 911, 961 N.Y.S.2d 200; ***U.S. Bank, N.A. v. Collymore***, 68 A.D.3d at 753, 890 N.Y.S.2d 578). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (***Deutsche Bank Natl. Trust Co. v. Spanos***, 102 A.D.3d at 912, 961 N.Y.S.2d 200 [internal quotation marks and citations omitted]; *see* ***HSBC Bank USA v. Hernandez***, 92 A.D.3d 843, 844, 939 N.Y.S.2d 120; ***Bank of N.Y. v. Silverberg***, 86 A.D.3d at 281, 926 N.Y.S.2d 532; ***U.S. Bank, N.A. v. Collymore***, 68 A.D.3d at 754, 890 N.Y.S.2d 578).

The plaintiff maintains that the defendant's failure to raise its alleged lack of standing as an affirmative defense in an answer or in a timely motion to dismiss the complaint constituted a waiver of the defense (*see generally* ***Wells Fargo Bank Minn., N.A. v. Mastropaolo***, 42 A.D.3d at 250). Notably, the plaintiff submitted an "Attorney Statement in Reply/Opposition to the Cross-Motion" dated August 7, 2013, ["the Reply Statement"], rather than an attorney's affirmation. Plaintiff's attorney submitted no evidence controverting defense counsel's assertion in her affirmation that in response to counsel's request for an extension of time to answer in July of 2008, 1) Tracy Fourtner of the Baum law firm told counsel that the Baum law firm was considering discontinuing the action because the parties were entering into an agreement, and 2) on the day of the first settlement conference on April 15, 2010, plaintiff's counsel accepted the defendant's Answer that had first been provided as an attachment to the November, 2009 Order to Show Cause to compel acceptance of the Answer.

Counsel's unsworn and conclusory "Reply Statement" asserting that defense counsel's affirmation is bald and self-serving, and fails to demonstrate an agreement to accept a late Answer, is not based on personal knowledge, lacks evidentiary value, and is insufficient to support the plaintiff's motion for a new Order of Reference or to defeat the defendant's cross motion (***Zuckerman v City of New York***, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; ***Assets Recovery 26 LLC v Rivera***, 39 Misc.3d 1240(A), 2013 WL 2996135 [N.Y. Sup.]; *see also* ***LaSalle Bank, NA v. Pace,*** 100 A.D.3d 970, 970-971, 955 N.Y.S.2d 161 [2d Dept. 2012] [stating that attorney affirmation filed in compliance with Administrative Order 548–10, as supplemented by Administrative Order 431–11, is not itself substantive evidence supporting summary judgment]).

The Reply Statement simply dismisses its predecessor law firm's emails referring to the fact that the "file [wa]s on hold" and that the parties were "enter[ing] into a forebearance plan". It bears repeating that plaintiff's attorney's Reply Statement is not affirmed, is not based on counsel's personal knowledge, and relies on no evidence whatsoever to refute the defendant's assertions.

Under the circumstances, the Court concludes that even assuming that the defendant defaulted in answering the complaint, under the circumstances as outlined above, the defendant has established a reasonable excuse for a default in answering (***Braynin v. Dunleavy,*** 109 A.D.3d 571, 970 N.Y.S.2d 611 [2d Dept. 2013]). Thus, the issue of the plaintiff's standing to commence the action is properly before the Court (***Homecomings Financial, LLC v Guldi***, 108 A.D.3d 506, 508, 969 N.Y.S.2d 470 [2d Dept. 2013]).

This case is distinguishable from those cases where a borrower relies on an unsubstantiated loan modification to excuse a default (*compare* ***Deutsche Bank Nat. Trust Co. v. Gutierrez,*** 102 A.D.3d 825, 958 N.Y.S.2d 472 [2d Dept. 2013]). Here, no evidence has been produced to refute the defendant's assertions that the parties were working toward a loan modification at least until the last foreclosure settlement conference in November of 2010. Thereafter, there was no further action on the part of the plaintiff until the Court *sua sponte* calendared the matter for a status conference in May of this year and essentially insisted that the plaintiff "fish or cut bait". It is also telling, and uncontradicted, that in the plaintiff's fee application that was part of the withdrawn Judgment of Foreclosure, the plaintiff's attorney included charges for attending the 2010 settlement conferences and for "Review of answer". Thus, all the direct and circumstantial evidence supports the defendant's version of what transpired and in the exercise of this Court's discretion constitutes a reasonable excuse for the defendant's default in answering the complaint. (*cf.* ***Maspeth Federal Savings & Loan Ass'n***, 77 A.D.3d 889, 909 N.Y.S.2d 403 [2d Dept. 2010]).

Defendant's Meritorious Defense

Where standing is put into issue by the defendant, "the plaintiff must prove its standing in order to be entitled to relief" (***U.S. Bank, N.A. v. Collymore***, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578; *see* ***Wells Fargo Bank Minn., N.A. v. Mastropaolo***, 42 A.D.3d 239, 242, 837 N.Y.S.2d 247). The plaintiff has failed to demonstrate that it had standing when it commenced the action because there is no proof that the plaintiff was in possession of the subject note when the action was commenced. The "Attorney Statement" refers to the Patridge affidavit to establish the plaintiff's possession but this bootstrapping argument fails. Patridge, a Vice President for the loan servicer, states "[t]he plaintiff is the holder of the note and Chase is the servicer of the loan and is authorized to act on behalf of the holder of the Note."

The Patridge affidavit does not say that the plaintiff was the holder of the note when the action was commenced. The affidavit also lacks any information about the promissory note's delivery to the plaintiff (*see* ***HSBC Bank USA v Hernandez,*** 92 A.D.3d 843, 939 N.Y.S.2d 120 [2d Dept. 2012]; ***Homecomings Financial, LLC v. Guldi***, 108 A.D.3d 506, 508-509, 969 N.Y.S.2d 470 [2d Dept. 2013]). In any event, the Patridge affidavit did not give factual details as to the physical delivery of the note and, thus, was insufficient to establish that the plaintiff had physical possession of the note at any time (*Id.* at 509, *citing* ***Deutsche Bank Natl. Trust Co. v. Haller***, 100 A.D.3d 680, 954 N.Y.S.2d 551; ***HSBC Bank USA v. Hernandez,*** *supra*; ***Aurora Loan Servs., LLC v. Weisblum***, 85 A.D.3d 95, 109, 923 N.Y.S.2d 609).

Moreover, the critical proposition upon which the plaintiff's entire argument rests is not without doubt. The mostly blank and undated piece of paper with nothing but a purported signature

of "Michael Koch" as Vice President, attached as movant's Exhibit B, does not demonstrate that the plaintiff was the holder of the subject note when the action was commenced (***Assets Recovery 26 LLC v Rivera,*** 39 Misc.3d 1240(A), 2013 WL 2996135 [N.Y. Sup.] ***Deutsche Bank National Trust Co. v Haller***, 100 A.D.3d 680, 954 N.Y.S.2d 551 [2d Dept. 2012]).

Thus, even assuming that the previous counsel for the plaintiff did not agree to accept the defendant's late Answer on April 15, 2010, the Court concludes that the Answer is deemed served on the plaintiff as of that date as the defendant has established both a reasonable excuse for the failure to Answer and a meritorious defense (*see* ***Equicredit Corp. of America v. Campbell,*** 73 A.D.3d 1119, 900 N.Y.S.2d 907 [2d Dept. 2010]).

RPAPL § 1303

In ***First National Bank of Chicago v. Silver***, (73 A.D.3d 162, 899 N.Y.S.2d 256 [2d Dept 2010]), the Appellate Division Second Department found that compliance with **RPAPL** § 1303, which mandates notice to a mortgagor under the Home Equity Theft Prevention Act (**REAL PROPERTY LAW** § 265–a "**HETPA**"), is a mandatory condition precedent to foreclosure, compliance with which must be established by plaintiff. The failure to demonstrate compliance is not an affirmative defense, but may be raised at any time. *Id.* at 166. The ***Silver*** Court held that plaintiff's failure to demonstrate compliance with the notice requirement mandates dismissal of the action (73 A.D.3d at 169, 899 N.Y.S.2d 256; *see also* ***Aurora Loan Services, LLC v. Weisblum,*** 85 A.D.3d 95, 102-103, 923 N.Y.S.2d 609 [2d Dept. 2011]).

Here, the defendant denies that she was ever served with the statutorily required notice. Unlike the defendant in ***Aurora Loan Services, LLC v. Weisblum***, *supra*, Nicholson's is not a bare and unsubstantiated denial of receipt which is admittedly insufficient to rebut the presumption of proper service created by an affidavit of service (*see* ***Deutsche Bank Nat. Trust Co. v. White,*** --- N.Y.S.2d ----, 2013 WL 5539360 [2d Dept. 2013]).

Where a defendant submits a sworn denial of receipt of papers that allegedly were served, which contains specific facts to rebut the statements in the process server's affidavit, it is generally sufficient to rebut the presumption of proper service, and necessitates an evidentiary hearing (*see* ***Engel v. Boymelgreen***, 80 A.D.3d 653, 654, 915 N.Y.S.2d 596; ***Tikvah Enters., LLC v. Neuman***, 80 A.D.3d at 749, 915 N.Y.S.2d 508; ***City of New York v. Miller***, 72 A.D.3d at 727, 898 N.Y.S.2d 643).

Contrary to plaintiff's attorney's "Reply Statement", Nicholson provided an affidavit dated August 1, 2013, with a description of the individual purportedly served pursuant to CPLR 308 (2) that is substantially at odds with the process server's description of the person served in the affidavit of service (***Emigrant Mortg. Co., Inc. v. Westervelt,*** 105 A.D.3d 896, 964 N.Y.S.2d 543 [2d Dept. 2013]).

In addition, the plaintiff makes little or no attempt to address the defendant's proof that the copy of the § 1303 notice that supported the withdrawn judgment of foreclosure and sale is not the same notice as the one annexed to the moving papers for a new Order of Reference. As discussed

in detail in a scholarly article authored by Mark C. Dillon, Associate Justice of the Appellate Division of the New York State Supreme Court, Second Judicial Department, the **RPAPL** portion of **HETPA**, **RPAPL** §1303 was enacted in 2006, originally effective as of February 1, 2007, and underwent some tweaking by amendments enacted in 2007, 2008, 2009, 2010, and 2011 (*see* "*Unsettled Times Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law*, 76 Albany Law Review 1085, 1114 [2012-2013]). The plaintiff has failed to establish that it satisfied the statutory-specific notice to the defendant with the service of the summons and complaint that was in effect at the time the action was commenced. For that reason alone, the plaintiff's motion for a new Order of Reference is denied.

Cross Motion for Summary Judgment

So much of the defendant's motion to dismiss the complaint pursuant to CPLR 3211, or alternatively for summary judgment, is denied. As discussed above, questions of fact exist as to whether the note was physically delivered to the plaintiff prior to the commencement of the action and when, if at all, the note was endorsed (***Deutsche Bank National Trust Co. v Haller***, 100 A.D.3d 680, 954 N.Y.S.2d 551 [2d Dept. 2012], *citing* ***Deutsche Bank National Trust Co. v Rivas***, 95 A.D.3d 1061, 945 N.Y.S.2d 328). Questions of fact also exist as to whether the plaintiff complied with **RPAPL** § 1303 that was in effect when the action was commenced (***First National Bank of Chicago v Silver,*** 73 A.D.3d 162, 899 N.Y.S.2d 256 [2d Dept. 2010]). Although the Court concludes that the notice annexed to the plaintiff's motion did not comply, the notice annexed to the withdrawn Judgment of Foreclosure may have. Finally, an issue of fact also exists as to whether the plaintiff failed to provide the defendant with thirty days written notice of the defendant's default under the mortgage precluding summary judgment (***G.E. Capital Mort. Services Inc. v Mittleman***, 238 A.D.2d 471, 656 N.Y.S.2d 645 [2d Dept. 1997]).

DATED: 12 Nov. 2013

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION