

**U.S. Bank Natl. Assoc. v Lanzetta**

2013 NY Slip Op 30755(U)

April 3, 2013

Supreme Court, Suffolk County

Docket Number: 22010-10

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 8 - SUFFOLK COUNTY

PRESENT: Hon. ELIZABETH H. EMERSON  
Justice of the Supreme Court

MOTION DATE 3-16-12  
ADJ. DATE ~~5-17-12~~ 11/15/12  
Mot. Seq. # 001-MD  
Mot. Seq. # 002-MotD

\_\_\_\_\_  
U.S. BANK NATIONAL ASSOCIATION AS  
TRUSTEE FOR RFMS1 2007S6,

Plaintiff,

FEIN, SUCH & CRANE, LLP  
Attorneys for Plaintiff  
747 Chestnut Ridge Road  
Suite 200  
Chestnut Ridge, N. Y. 10977-6216

-against-

JEAN LANZETTA; DOMINICK LANZETTA;  
DONNA LANZETTA; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., AS NOMINEE  
FOR GMAC MORTGAGE, LLC F/K/A GMAC  
MORTGAGE CORPORATION; "JOHN DOE  
#1 -5" AND "JANE DOE #1-5" said names being  
fictitious, it being the intention of Plaintiff to  
designate any and all occupants, tenants, persons  
or corporations, if any, having or claiming an  
interest in or lien upon the premises being  
foreclosed herein

LANZETTA & ASSOCIATES P.C.  
Attorneys for the Defendants  
Jean Lanzetta  
Dominick Lanzetta  
472 Montauk Highway  
East Quogue, N. Y. 11942

DONNA LANZETTA, ESQ.  
Defendant Pro Se  
6 Barracuda Road  
East Quogue, N. Y. 11942

Defendants,

\_\_\_\_\_  
X

*Handwritten initials/signature*

Upon the following papers numbered 1 to 27 read on this motion for summary judgment and this cross motion for leave to interpose an amended answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 21; Answering Affidavits and supporting papers 23 - 27; Replying Affidavits and supporting papers \_\_\_\_\_; Other Stipulation - 22; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and striking the answers and affirmative defenses of the defendants Jean Lanzetta, Dominick Lanzetta, and Donna Lanzetta; (2) amending the caption; and (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, is denied; and it is

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**ORDERED** that this cross motion (002) by the defendants, Jean Lanzetta, Dominick Lanzetta and Donna Lanzetta, for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment; (2) dismissing the plaintiff's complaint insofar as asserted against them on the grounds that the plaintiff lacks standing; and (3) for leave to serve an amended answer, is granted solely to the extent set forth below, otherwise denied; and it is

**ORDERED** that the plaintiff is directed to file a certificate of conformity with respect to the affidavits of the plaintiff's servicer executed outside the state of New York at the time of the hearing or trial of this matter (*see*, CPLR 2309 [c]; *U.S. Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); and it is

**ORDERED** that the defendants, Jean Lanzetta, Dominick Lanzetta and Donna Lanzetta are directed to serve the plaintiff with amended answers asserting as a second affirmative defense the plaintiff's alleged lack of standing within thirty (30) days of the date of this Order, and thereafter shall promptly file proof of service of same with the Clerk of the Court, and it is further

**ORDERED** that the moving parties are directed to serve a copy of this Order with notice of entry upon opposing counsel and upon all parties who have appeared herein pursuant to CPLR 2103 (b)(1), (2) or (3) within thirty (30) days of the date herein and to file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential property known as 6 Barracuda Road, East Quogue, New York 11942 (the property). Jean and Dominick Lanzetta (the defendant mortgagors) allegedly executed a fixed rate note dated January 26, 2007 (the note) in favor of GMAC Mortgage, LLC formerly known as GMAC Mortgage Corporation (GMAC) agreeing to pay the principal sum of \$525,000.00 at the rate of 6.500% beginning on March 1, 2007 through to February 1, 2037, the maturity date. To secure said note, the defendant mortgagors executed a mortgage (the mortgage) also dated January 26, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for GMAC and its successors and assigns and that for the purposes of recording the mortgage MERS was the mortgagee of record. MERS as nominee for GMAC allegedly transferred the mortgage and note to U.S. Bank National Trust Association as Trustee for REMSI-2007S6 (the plaintiff) by assignment dated May 27, 2010 and recorded on June 14, 2010. Parenthetically, by instrument dated December 27, 2008, the defendant Donna Lanzetta (Donna Lanzetta) transferred title of the property to herself and to the defendant Jean Lanzetta as joint tenants with right of survivorship.

According to the records maintained by the Court's computerized database, in compliance with CPLR 3408 settlement conferences were held in this Court's mortgage foreclosure conference part on September 16, and November 29, 2010 as well as on February 17, May 5, July 19, August 4, and December 12, 2011. At the last conference, this matter was marked "held" and referred as an IAS case as a loan modification or other settlement had not been achieved. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a as

amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and striking the answer and affirmative defenses of the defendants Jean Lanzetta, Dominick Lanzetta, and Donna Lanzetta (collectively the Lanzetta defendants); (2) amending the caption; and (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. The defendant mortgagors and Donna Lanzetta oppose the plaintiff's motion and cross move for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment; (2) dismissing the plaintiff's complaint insofar as asserted against them on the grounds that the plaintiff lacks standing; and (3) for leave to serve an amended answer. ~~No opposition papers or reply papers have been filed.~~

At the outset, the branch of the cross motion, which is improperly denominated as a motion to dismiss for lack of standing (*see*, CPLR 3211 [a][3]) and related relief, is denied as procedurally defective since it was made after joinder of issue and service of answers cut off the Lanzetta defendants' right to make a CPLR 3211 motion to dismiss (*see generally*, CPLR 3211 [e]; *Hertz Corp. v Luken*, 126 AD2d 446, 510 NYS2d 590 [1<sup>st</sup> Dept 1987]; *Allfour v Bono*, 2012 NY Misc LEXIS 3708, 2012 WL 3230701(U), 2012 NY Slip Op 32038(U) [Sup Ct, Suffolk County, Aug. 1, 2012, Emerson, J.]). Even though CPLR 3211 (c) empowers the court to treat a motion to dismiss as a motion for summary judgment, in this case, conversion is inappropriate since, inter alia, the answers interposed by the Lanzetta defendants do not include standing as affirmative defenses and, thus, adequate notice has not been provided to the parties (*cf.*, *Moutafis v Osborne*, 18 AD3d 723, 724, 795 NYS2d 716 [2d Dept 2005]; *Matter of Weiss v N. Shore Towers Apts., Inc.*, 300 AD2d 596, 751 NYS2d 868 [2d Dept 2002]; *Allfour v Bono*, 2012 NY Slip Op 32038(U), *supra*; *see generally*, *U.S. Bank Natl. Assn. v Denaro*, \_\_\_ AD3d \_\_\_, 950 NYS2d 581 [2d Dept, Sept. 15, 2012]; *Citibank, N.A. v Swiatowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]).

In support of the motion for summary judgment, the plaintiff offers the pleadings, affidavits of service, a copy of the mortgage, the note, the assignment, an affidavit of merit and two affidavits in support from an officer of the plaintiff's servicer/attorney-in-fact (GMAC) and the affirmation of counsel. In the complaint, the plaintiff alleges, among other things, that it is a banking corporation licensed and organized pursuant to the laws of the United States of America and that it is the owner of record of the bond/note and the mortgage securing the property. In her answer, Donna Lanzetta, and in their joint answer, the defendant mortgagors generally deny all of the allegations in the complaint and assert as a first affirmative defense that the complaint fails to state a claim upon which the relief may be granted. In his two affidavits of merit, GMAC's officer alleges, inter alia, that he has knowledge of the facts and circumstances herein by his review of the complaint and the plaintiff's records concerning this matter. According to the officer, the loan has been in default since January 1, 2010 and that the plaintiff provided a notice of default as well as a 90-day notice to the defendant mortgagors. The officer further alleges that, based upon his review of the mortgage documents and the assignment, the plaintiff is entitled to enforce the note. In his affirmation, counsel avers that none

of the defendants have answered the complaint or appeared herein, except the Lanzetta defendants.

In opposition to the plaintiff's motion and in support of the cross motion, the defendants Lanzetta submit, among other things, an affirmation from Donna Lanzetta, an affidavit from Jean Lanzetta and a proposed amended joint answer on behalf of the Lanzetta defendants. Initially, the affirmation of Donna Lanzetta, who is an attorney, submitted in support of the cross motion has been disregarded as improper to the extent it relates herself as a self-represented litigant as it is not in admissible form (*see*, CPLR 2106; *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 439 NYS2d 910 [1981]; *Schwartz v Sayah*, 83 AD3d 926, 920 NYS2d 714 [2d Dept 2011]; *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 872 NYS2d 144 [2d Dept 2009]). To the extent that it relates to the defendant mortgagors, Donna Lanzetta, as counsel, avers that there is an issue as to standing as MERS was never the lawful holder of the note. Also, Donna Lanzetta argues that the complaint should be dismissed, or, in the alternative, that the defendant mortgagors should be permitted to amend their answer to include standing as an affirmative defense as set forth in the proposed amended answer.

In her affidavit, Jean Lanzetta alleges, inter alia, that she and her husband Dominick Lanzetta contacted GMAC sometime in 2009 to discuss a loan modification after they had failed to make two payments. They initially attempted a mortgage modification, but then gave up after first being told that their paperwork was lost and subsequently being told that it was incomplete. The defendant mortgagors attempted to bring the mortgage current, but the payments were rejected by GMAC. Jean Lanzetta argues that there is an issue of fact regarding standing precluding summary judgment to the plaintiff, and that the defendants Lanzetta should be permitted to amend their answers to include the affirmative defense of standing.

In connection with the foregoing, the Lanzetta defendants seek leave to amend their previously interposed answers as one amended joint answer, to include certain other defenses not previously interposed, *e.g.*, the plaintiff's purported lack of standing; its lack of capacity; unclean hands; promissory estoppel; an unconscionable loan; failure to perform a condition precedent; the terms and conditions of the note and mortgage; and the terms and conditions of all applicable mortgage foreclosure statutes. The Lanzetta defendants also seek to interpose four counterclaims, *e.g.*, fraud based upon fraudulent documents submitted in support of the plaintiff's claim; misrepresentation based upon fraudulent documents submitted in support of the plaintiff's claim; the plaintiff's breach of contract, or, in the alternative, there is no valid loan agreement as it is unconscionable; and declaratory relief quieting title to the property.

The Court will first address the branch of the cross motion for leave to serve an amended answer. Motions for leave to amend pleadings pursuant to CPLR 3025 (b) are to be liberally granted absent prejudice or surprise resulting from the delay (*U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724, 933 NYS2d 293 [2d Dept 2011]; *Lucido v Mancuso*, 49 AD3d 220, 222, 851 NYS2d 238 [2d Dept 2008]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 585, 832 NYS2d 255 [2d Dept 2007]; *Curran v Auto Lab Serv. Ctr.*, 280 AD2d 636, 637, 721 NYS2d 662 [2d Dept 2001]). The branch of the Lanzetta defendants' motion for leave to

interpose an amended joint answer asserting an affirmative defense of lack of standing is granted as meritorious in light of the lack of proof concerning the alleged transfer of the note to the plaintiff (*see, U.S. Bank, N.A. v Sharif*, 89 AD3d 723, *supra*; *HSBC Bank USA v Picarelli*, 36 Misc3d 1218A, \_\_\_NYS2d\_\_\_ [Sup Ct, Queens County, July 25, 2012, Markey, J.]). Further, as the last foreclosure settlement conference pursuant to CPLR 3408 was not held until December 12, 2011, there is no prejudice or surprise resulting directly from the delay in seeking leave (*see, U.S. Bank, N.A. v Arias*, 2012 NY Misc LEXIS 3621, 2012 WL 3135064, 2012 NY Slip Op 31999U [Sup Ct, Queens County, July 25, 2012, Weiss, J.]).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the mortgage note, bond or obligation, and the evidence of default (*Valley Natl. Bank v Deutsche*, 88 AD3d 691, 692, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 1006, 896 NYS2d 681 [2d Dept 2010]; *Wash. Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]).

A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279-280, 926 NYS2d 532 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108, 923 NYS2d 609 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207, 887 NYS2d 615 [2d Dept 2009]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 709, 888 NYS2d 914 [2d Dept 2009]). A transfer of a mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it (*Bank of N.Y. v Silverberg*, 86 AD3d 274, *supra* at 280; *see, LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912, 875 NYS2d 595 [3d Dept 2009]). "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" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra* at 754; *see, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, *supra* at 108).

In the instant case, the plaintiff failed to establish, prima facie, that it had standing as its evidence did not demonstrate that the note was physically delivered to it prior to the commencement of the action (*see, Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). In his affidavits, the plaintiff's servicing agent did not give any factual details of a physical delivery of the note and thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action (*see, Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, *supra*; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra*). Also, the note itself does not contain an endorsement, and, in any event, MERS was not a party to the note (*see, U.S. Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, *supra*; *Bank of N.Y. v Silverberg*, 86 AD3d 274, *supra*). If MERS, as nominee of GMAC was not the

owner of the note, as it appears, it would have lacked the authority to assign the note to plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to plaintiff would be a nullity (*see, Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Additionally, the plaintiff failed to demonstrate that the note is a negotiable instrument as it is neither endorsed to the plaintiff, nor endorsed in blank (*see, UCC 3-104 [1][a]; cf., Mortgage Elec. Registration Sys. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). Furthermore, the plaintiff makes no showing that the note has an allonge affixed to it endorsing it over to the plaintiff (*see, UCC 3-302[2]; Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]).

Nevertheless, by its complaint the plaintiff has alleged facts in this matter, which if proven, would demonstrate standing (*see, U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra*; *Wells Fargo Bank, N.A. v Enyonam*, 2010 NY Misc LEXIS 3611, 2010 WL 3115877, 2010 NY Slip Op 32046U [Sup Ct, Queens County, Aug. 3, 2010, Weiss, J.]; *see generally, Saxony Ice Co. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 810 NYS2d 344 [2d Dept 2006]). Moreover, the plaintiff was not obligated to supply evidentiary support for its assertions in view of the defective notice of motion (*see, U.S. Bank Natl. Assn. v McPherson*, 35 Misc3d 1219A, \_\_ NYS2d \_\_ [Sup Ct, Queens County, Apr. 24, 2012, McDonald, J.]). In any event, the defendant mortgagors admit, in their moving papers, that questions of fact exist which preclude summary judgment (Def. Jean Lanzetta Aff. ¶¶ 9, 20) (*see, Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, *supra*; *U.S. Bank Natl. Assn. v Madero*, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]). Therefore, the branch of the cross motion for summary judgment dismissing the complaint based on lack of standing and the branch of the plaintiff's motion for summary judgment striking the Lanzetta defendants' answers are both denied (*see, U.S. Bank Natl. Assn. v Cange*, 96 AD3d 925, 947 NYS2d 522 [2d Dept 2012]; *HSBC Mtge. Corp. (USA) v MacPherson*, 89 AD3d 1061, 934 NYS2d 428 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, *supra*). The branch of the cross motion for an order denying the plaintiff's motion for summary judgment is denied as academic and superfluous.

The request by the Lanzetta defendants to interpose an affirmative defense asserting the plaintiff's alleged lack of capacity constitutes a bare legal conclusion and is denied as lacking in evidentiary facts and documentary proof in support thereof (*see generally, Bancorp v Pompee*, 82 AD3d 935, 918 NYS2d 574 [2d Dept 2011]; *Wells Fargo Bank Minn. Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]; *Deutsche Bank Natl. Trust Co. v Bills*, 37 Misc3d 1209A, \_\_ NYS2d \_\_ [Sup Ct, Essex County, Oct. 15, 2012, Meyer, J.]; *New York Community Bank v Holland*, 2012 NY Misc LEXIS 789, 2012 WL 756599, 2012 NY Slip Op 30411U [Sup Ct, Suffolk County, Feb. 15, 2012, Martin, J.]).

The request by the Lanzetta defendants to interpose additional affirmative defenses and certain proposed counterclaims, as noted above, is denied in its entirety as factually unsupported and without apparent merit (*see generally, Tarantini v Russo Realty Corp.*, 273 AD2d 458, 712 NYS2d 358 [2d Dept 2000]; *Alejandro v Riportella*, 250 AD2d 556, 672 NYS2d 412 [2d Dept 1998]; *see also, Gould v McBride*, 29 NY2d 768, 326 NYS2d 565 [1971]; *Moran Enters. Inc. v Hurst*, 96 AD3d 914, 947 NYS2d 538 [2d Dept 2012]; *Aurora Loan Servs., LLC v Thomas*, 70 AD3d 986, 897 NYS2d 140 [2d Dept 2010]; *Southwell v Middleton*, 67 AD3d 666, 890 NYS2d 57 [2d Dept 2009]; *Deutsche Bank*

*Natl. Trust Co. v Musco*, 2012 NY Misc LEXIS 4450, 2012 WL 4107461, 2012 NY Slip Op 32377U [Sup Ct, Richmond County, Sept. 7, 2012, Giacobbe, J.]. A defense that merely pleads conclusions of law without supporting facts is insufficient and fatally deficient (*see, Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). The assertions by the Lanzetta defendants with respect to the post-commencement recording of the assignment is without merit since “a good assignment is made by delivery only” (*Fryer v Rockefeller*, 63 NY 268, 276 [1875]; *Deutsche Bank Natl. Trust Co. v Bills*, 37 Misc3d 1209A, \_\_\_ NYS2d \_\_\_, 2012 NY Misc LEXIS 4842, 2012 WL 4868108, 2012 NY Slip Op 51943U [Sup Ct, Essex County, Oct. 15, 2012, Meyer, J., slip op, at 5]). Further, the arguments regarding the purported irregularities with the acknowledgment associated with the assignment, rife with speculation and innuendo, and which appear to aimed at obscuring the issue of nonpayment, are also without merit (*see, Hypo Holdings, Inc. v Chalasani*, 280 AD2d 386, 721 NYS2d 35 [1<sup>st</sup> Dept 2001]; *Flushing Preferred Funding Corp. v Patricola Realty Corp.*, 36 Misc3d 1240A, \_\_ NYS2d\_\_ [Sup Ct, Suffolk County, Sept. 11, 2012, Whelan, J.]; *see also, Citimortgage, Inc. v Orichello*, 33 Misc3d 1230A, 941 NYS2d 537 [Sup Ct, Dutchess County, Dec. 11, 2011, Pagones, J.]). In any event, the remaining proposed affirmative defenses and the four proposed counterclaims lack sufficient particularity pursuant to CPLR 3013 and 3016 (b) (*see, Black v Chittenden*, 69 NY2d 665, 511 NYS2d 833 [1986]; *Stein v Doukas*, 2012 NY Slip Op 6203 [2d Dept, Sept. 19, 2012]; *High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; *Jones v OTN Enter., Inc.*, 84 AD3d 1027, 1028, 922 NYS2d 810 [2d Dept 2011]; *Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691, 897 NYS2d 103 [2d Dept 2010]; *cf., Cammarota v Drake*, 285 AD2d 919, 727 NYS2d 809 [3d Dept 2001]).

Accordingly, the motion by the plaintiff is denied and the cross motion by the defendants Lanzetta is determined as indicated above. In view of the foregoing, the proposed order submitted by the plaintiff has been marked “not signed.”

Dated: April 3, 2013

  
 Hon. ELIZABETH H. EMERSON, J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION