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SHORT FORM ORDER

PUBLISH

INDEX
NO.: 37556-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Acting Supreme Court Justice

SELECT PORTFOLIO SERVICING INC.

Plaintiff,

-against-

WILLIAM J. FOWKES
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR CONTINENTAL HOME LOANS INC.
PEOPLE OF THE STATE OF NEW YORK

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

Defendants.

MOTION DATE: 7-11-13 (001)
7-18-13 (002)
ADJ. DATE: _____
MOT. SEQ. #:001-MotD
002-MD

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment and cross motion for reverse summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 16; Answering Affidavits and supporting papers 17 - 20; Replying Affidavits and supporting papers _____; Other _____; (~~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 summary judgment in its favor and against the defendant William J. Fowkes, striking his answer and dismissing the affirmative defenses set forth 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 is determined as indicated below; and it is

ORDERED that this cross motion (002) by the defendant William J. Fowkes for, inter alia, an order: (1) pursuant to CPLR 3025 (b) for leave to file an amended answer; and (2) granting him reverse summary judgment dismissing the complaint on the grounds that the plaintiff lacks standing is denied in its entirety; and it is

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 40 Hollyoak Avenue, East Hampton New York 11937. On December 1, 2006, the defendant William J. Fowkes (the defendant mortgagor) executed an interest-only period, fixed-rate note in favor of Continental Home Loans, Inc. (the lender) in the principal sum of $358,750.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated December 1, 2006 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an endorsed allonge affixed to the note and an assignment of the mortgage, the note and mortgage were allegedly transferred to the plaintiff, Select Portfolio Servicing, Inc.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about March 1, 2010, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on October 8, 2010. According to the records maintained by the Suffolk County Clerk's Office, the plaintiff subsequently re-filed the lis pendens on December 15, 2010, and again on November 6, 2010.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on December 20, 2010. By his answer, the defendant mortgagor admits some of the allegations set forth in the complaint, and denies other allegations therein. The defendant mortgagor also asserts, inter alia, the following affirmative defenses: the lack of personal jurisdiction; lack of standing in that the plaintiff is not the owner and/or holder of the note and mortgage; and the failure to comply with the special summons requirement set forth in RPAPL §1320 as well as the notice requirement of RPAPL §1304. The defendant People of the State of New York (New York) has appeared herein and waived all, but certain, notices. The remaining defendants have neither appeared nor answered the complaint.

According to the records maintained by the court's computerized database, a settlement conference was held before the specialized foreclosure conference part on November 9, 2012. On that date, this case was dismissed from the conference program as the defendant mortgagor did not appear

or participate. Accordingly, the conference requirements imposed by CPLR 3408 have been satisfied; no further conference is required under any statute, law or rule. In any event, the Court notes that the address listed in defendant mortgagor's answer is 300 Pantigo Place, Suite 118, East Hampton, New York 11937, not the subject property. The Court also notes that the defendant mortgagor executed a 1-4 family rider (assignment of rents) dated December 21, 2006, whereby section "6" of the mortgage concerning occupancy of the property by him is deleted (*see*, RPAPL § 1304 [5] [a]; *see*, ***Valley Natl. Bank v Fowkes***, 2012 NY Misc LEXIS 5317, 2012 WL 6055788, 2012 NY Slip Op 32797 [U] [Sup Ct, Suffolk County 2012]).

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and dismissing the affirmative defenses set forth 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.

The defendant mortgagor opposes the plaintiff's motion, and cross moves for, inter alia, an order: (1) pursuant to CPLR 3025 (b) for leave to file an amended answer; and (2) granting him reverse summary judgment dismissing the complaint on the grounds that the plaintiff lacks standing. In opposition to the motion and in support of the cross motion, the defendant mortgagor has submitted the affirmation of counsel and an unverified proposed amended answer. In response, the plaintiff has filed reply/opposition papers.

At the outset, the branch of the cross motion pursuant to CPLR 3025(b) for leave to interpose an amended answer is denied as deficient, since this request is neither supported by a verified answer nor an affidavit of merit made by the defendant mortgagor (*see*, ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; ***Ogman v Mastrantonio Catering, Inc.***, 82 AD3d 852, 918 NYS2d 375 [2d Dept 2011]; ***Gross v Kail***, 70 AD3d 997, 893 NYS2d 891 [2d Dept 2010]). In any event, to the extent that the defendant mortgagor requests leave to amend the answer to assert a standing defense, the same is entirely without merit since the answer already contains this defense (*see*, ***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]). To the extent that the defendant mortgagor moves for an order pursuant to CPLR 3212 granting him reverse summary judgment dismissing the complaint on the grounds that the plaintiff lacks standing, the cross motion denied in its entirety, as without merit, for the reasons set forth below. The Court next turns to the plaintiff's motion for summary judgment.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 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], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

Where, as here, an answer served includes the defense of standing or lack of capacity to sue, 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]). 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, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "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, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v Sullivan***, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], *quoting* ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911])

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201(5) (*see*, UCC 3-104; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see*, UCC § 3-202; § 3-204; § 9-203[g]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Franzese v Fidelity N.Y. FSB***, 214 AD2d 646, *supra*). Furthermore, UCC § 9-203(g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***U.S. Bank, N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the note with an affixed allonge, the

mortgage and the assignment as well as evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*). The plaintiff also submitted proof of compliance with the notice requirements of RPAPL §1320 as well as RPAPL § 1304, if applicable (*see generally*, ***Castle Peak 2012-I Trust v Choudhury***, 2013 NY Misc LEXIS 5510, 2013 WL 6229919, 2013 NY Slip Op 32971 [U] [Sup Ct, Queens County 2013]; ***M & T Bank v Romero***, 40 Misc3d 1210 [A], 977 NYS2d 667 [Sup Ct, Suffolk County 2013]; *see also*, RPAPL § 1304 [3],[5] [a]; ***Valley Natl. Bank v Fowkes***, 2012 NY Slip Op 32797 [U], *supra*; *cf.*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

The plaintiff also demonstrated that, as holder of the note with an endorsed allonge and as the assignee of the mortgage, it has standing to commence this action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*). With respect to standing, the plaintiff submitted, inter alia, the affidavit of its representative, wherein it is alleged that the plaintiff has been in continuous possession of the note and mortgage since September 21, 2010 (*see*, ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***U.S. Bank N.A. v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Additionally, the plaintiff submitted, inter alia, an assignment of the mortgage executed on September 21, 2010, and thereafter duly recorded in the Office of the Suffolk County Clerk, which memorialized the transfer of the note and mortgage to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*; ***OneWest Bank, FSB v Makarow***, 2013 NY Misc LEXIS 6401, 2013 WL 7045735, 2013 NY Slip Op 33544 [U] [Sup Ct, Suffolk County 2013]). Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage by virtue of the written assignment.

Moreover, the plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the defendant mortgagor's 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]). As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). 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]).

A review of the opposing papers shows that the same are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see*, CPLR 3211[e]; ***U.S. Bank Trust N.A. Trustee v Butti***, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]; *see also*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of his pleaded defenses, except as to the plaintiff's alleged lack of standing. The failure by the defendant mortgagor to raise and/or assert each of his remaining pleaded defenses 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*). All unsupported affirmative defenses are thus dismissed.

The assertions by the defendant mortgagor as to the plaintiff's alleged lack of standing, which rest, inter alia, upon alleged defects in the assignment, rife with speculation and innuendo, are rejected as unmeritorious (*see*, ***OneWest Bank FSB v Carey***, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; *see also*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***U.S. Bank N.A. v Cange***, 96 AD3d 825, *supra*; ***CWCapital Asset Mgt., LLC v Charney-FPG 114 41st St., LLC***, 84 AD3d 506, 923 NYS2d 453 [1st Dept 2011]; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]). The plaintiff demonstrated, as indicated above, that the original endorsed note was in its continuous possession since September 21, 2010, a date prior to commencement (*see*, ***U.S. Bank N.A. v Cange***, 96 AD3d 825, *supra*). Additionally, the plaintiff submitted a copy of the recorded assignment of the mortgage executed on September 21, 2010, which memorialized the transfer of the note and mortgage to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). The defendant mortgagor, therefore, failed to establish the merit of his standing defense, or the merits of the branch of the cross motion for dismissal of this action based upon that defense.

Furthermore, the defendant mortgagor has failed to demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see*, CPLR 3212 [f]; ***Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***JP Morgan Chase Bank v Agnello, N.A.***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (***Lee v T.F. DeMilo Corp.***, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]). The remaining contentions advanced by the defendant mortgagor are similarly without merit.

Notwithstanding the general denials in the answer, notably absent from the opposition papers are any allegations by the defendant mortgagor denying his continuous default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagor, the opposition is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses or counterclaims (*see*, CPLR 3211[e]; *see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagor's answer is stricken, and the affirmative defenses set forth therein are dismissed in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Celia Pacheco, Carmen Panini, Jenny Sarango, Blanca Cajeca, Dia Barros, Alex Barros, and Luis Garcia for the fictitious John Doe defendant is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***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.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants MERS as nominee for Continental Home Loans Inc. and New York (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by all of the non-answering defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as set forth above, and the cross motion is denied in its entirety. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: 5.9.2014

Hon. DENISE F. MOLIA, A.J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**