MEMORANDUM DECISION/ ORDER

INDEX No. 15313/13

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 7/22/15
SUBMIT DATE: 11/13/15
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD
CDISP: YES

US BANK NATIONAL ASSOCIATION, as Trustee for Mastr Asset Backed Securities Trust 1006-AM2, Plaintiff, -against- JANET M. SAMUELS, AMERICAN GENERAL HOME EQUITY, INC., CAPITAL ONE BANK, USA, NA, SHADAE PUSEY, Defendants.	GROSS POLOWY, LLC Attys. For Plaintiff 1775 Wehrle Dr. - Ste. 100 Williamsville, NY 14221 HELSOP & KALBA, LLP Attys. For Defendant Samuels 147 Prince St. - Ste. 21 Brooklyn, NY 11201

Upon the following papers numbered 1 to 10 read on this motion by the plaintiff for confirmation of the report of the referee to compute and issuance of a judgment and cross motion by defendant Saumuels to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-7; Answering Affidavits and supporting papers 8-9; Replying Affidavits and supporting papers 10; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for an order confirming the report of the referee to compute and for the issuance of a judgment of foreclosure and sale is considered under RPAPL Article 13 and is granted; and it is further

ORDERED that the cross motion (#003) by defendant, Janet M. Samuels, for an order dismissing the complaint pursuant to CPLR 3211 is considered thereunder and under CPRL 3408, 3215 and RPAPL Article 13 and is denied.

The plaintiff commenced this action in June of 2013 to foreclose the lien of a February 23, 2006 mortgage given by defendant, Janet M. Samuels, to Aames Funding Corporation d/b/a Aames Home Loan, to secure a mortgage note of the same date likewise given by defendant Samuels. By a written assignment of said note and mortgage executed by an officer of Aames Funding Corporation d/b/a Aames Home Loan on February 28, 2006, the note and mortgage were transferred to the plaintiff. The loan went

into default in February of 2008 and remains in default to date. Following service of the summons and complaint in June of 2013, defendant Samuels defaulted in answering as did the remaining defendants served with process. In March of 2014, the plaintiff moved for an order of reference on default and such motion was granted by order dated October 23, 2014.

By the instant motion (#002), the plaintiff moves for an order confirming the report of the referee to compute and the issuance of a judgment of foreclosure and sale. The motion is opposed by defendant Samuels in cross moving papers prepared by her counsel and affidavit by the defendant herself. She therein admits that she defaulted in payment obligations due to diminishment in her income but she contends that the plaintiff and its agents are to blame because they took advantage of her naivety, lack of knowledge and sophistication in the legal processes in which she was enveloped. Defense counsel claims that defendant Samuels is entitled to a dismissal of the complaint pursuant to CPLR 3211 under a host of theories, including the abandonment of the plaintiff's claim pursuant to CPLR 3215(c), its failure to comply with statutory notice requirements imposed by RPAPL § 1303 and § 1304 and a long list of unpleaded affirmative defenses including a purported lack of standing, laches, and non-engagement in loss mitigation. In addition, defendant Samuels claims, in her affidavit in support of her cross motion, that her default in answering should be excused because of her own naivety in understanding the ramifications of her defaults in payment and in answering the complaint, defalcations on the part of a mortgage loan servicing company she retained to provide free "legal advice" and the plaintiff's conduct in failing to negotiate a resolution in good faith.

For the reasons stated below, the plaintiff's motion (#002) is granted while the defendant's cross motion (#003) is in all respects denied.

Absent a valid jurisdictional or abandonment defense, a party in default may not appear in the action and contest the plaintiff's right to relief unless the defaulter can establish grounds for the vacatur of his or her default (*see* ***Southstar III, LLC v Enttienne***, 120 AD3d 1332, 992 NYS2d 548, 549 [2d Dept 2014]; ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; ***Schwartz v Reisman***, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013]; ***U.S. Bank N.A. v Gonzalez***, 99 AD3d 694, 694–695, 952 NYS2d 59 [2d Dept 2012]; ***McGee v Dunn***, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]). "'A defendant who has failed to appear or answer the complaint must generally provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer'" (***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], *quoting*, ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *see* ***Mannino Dev., Inc. v Linares***, 117 AD3d 995, 2014 WL 2198432 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Lafazan***, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]; ***JP Morgan Chase Bank v Palma***, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]; ***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 889, 890, 909 NYS2d 403[2d Dept 2010]; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; ***Equicredit Corp. of Am. v Campbell***, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]).

Here, counsel for defendant Samuels asserts that the plaintiff abandoned its claim for foreclosure and sale as contemplated by CPLR 3215(c) because the plaintiff failed to move for judgment within the

one year time limitation period from the default in answering prescribed by that statute. For the reasons stated, the court finds this claim to be wholly lacking in merit.

CPLR 3215(c) requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default occurs or demonstrate sufficient cause why the complaint should not be dismissed as abandoned. In all cases wherein the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (*see* ***GMAC Mtge., LLC v Todaro,*** 129 AD3d 666, 9 NYS3d 588 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Combs,*** 128 AD3d 812, 2015 WL 2214013 [2d Dept 2015]; ***HSBC Bank, USA, N.A. v Alexander,*** 124 AD3d 839, 4 NY3d 47 [2d Dept 2015]; ***Mortgage Elec. Registration Sys., Inc. v Smith***, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]; ***Jones v Fuentes***, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; ***Norwest Bank Minnesota, N.A. v Sabloff***, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; ***Brown v Rosedale Nurseries, Inc.***, 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

In the mortgage foreclosure arena it is well settled that foreclosing plaintiffs may not be deemed to have abandoned their claims under CPLR 3215(c) when they take "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference" under RPAPL 1321(1) within one year of the defendant's default (***Klein v Cyprian Prop., Inc.***, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; *see* ***Wells Fargo Bank, N.A. v Combs,*** 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015]; ***HSBC Bank, USA, N.A. v Alexander,*** 124 AD3d 839, 4 NYS3d 47 [2d Dept 2015]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). "It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default to avoid dismissal pursuant to CPLR 3215(c)" (***US Bank Natl. Ass'n v Dorestant***, 131 AD3d 467, 15 NYS3d 142 [2d Dept 2015]; *see* ***Wells Fargo Bank, N.A. v Combs***, 128 AD3d 812, *supra*). "Where application is made to the court for the entry of a default judgment within one year of the defendant's default, the court may not refuse to enter judgment or dismiss the complaint as abandoned pursuant to CPLR 3215(c)" (***Nowicki v Sports World Promotions***, 48 AD3d 435, 851 NYS2d 270 [2d Dept 2008]). An application is made at the time its is served (*see* CPLR 2211). The outcome of a timely 3215(c) application is irrelevant because it is the mere interposition of an application for a default judgment within one year of the default that suffices for purposes of CPLR 3215(c) (*see* ***HSBC Bank USA, N.A. v Alexander,*** 124 AD3d 838, *supra*; ***Brown v Rosedale Nurseries, Inc.***, 259 AD2d 256, 257, 686 NYS2d 22 [1st Dept 2009]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, *supra*).

Here, the record reflects that the moving defendant was served with process on June 12, 2013 by personal, in-hand delivery and that her time to answer or appear expired twenty days thereafter. The record further reflects that the plaintiff's motion for a default judgment was interposed in March of 2013, which was well within the one year time frame imposed by CPLR 3215(c). The fact that it was not granted by the Justice then assigned to this action until October 23, 2014 is of no consequence under the controlling appellate case authorities cited above. The demand for dismissal of the complaint as abandoned pursuant to CPLR 3215(c) is thus denied.

Defense counsel's claims that the complaint should be dismissed due to a failure on the part of the plaintiff to comply with notice pursuant to RPAPL §1303 and § 1304 are unsupported by a denial of

receipt by his client. Defense counsel's claims are thus asserted without personal knowledge of material facts and are belied by the affidavits and other proofs submitted on this motion and the record maintained by the court in this action. The demands for dismissal of the complaint on these grounds are thus denied (*see* ***Deutsche Bank Natl. Trust Co. v Quinn***, 120 AD3d 609, 990 NYS2d 885 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Gosdin***, 119 AD3d 639, 989 NYS2d 609 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]). In addition, this claim is precluded in light of defendant Samuel's default in answering and the absence of any successful application to vacate such default (*see* ***PHH Mtge. Corp. Celestin***, 130 AD3d 703, 11 NYS2d 871 [2d Dept 2015]).

Equally unavailing is the standing defense asserted by the defense counsel as grounds for dismissal of this action or a denial of the plaintiff's motion. The law is now well settled that the standing of a foreclosing plaintiff is not an element of its claim but instead is merely an affirmative defense which is waived by a mortgagor defendant's failure to assert it in either a timely pre-answer motion to dismiss or in an answer (*see* ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 568, 996 NYS2d 130 [2d Dept 2015]; ***Deutsche Bank Trust Co. Am. v Cox***, 110 AD3d 760, 973 NYS2d 662, [2d Dept 2013]; ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, *supra*; ***U.S. Bank Natl. Ass'n v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Once waived, a standing defense and others contemplated by CPLR 3211(a), may not be resurrected and used to support an untimely motion to dismiss pursuant to CPLR 3211 because the untimely assertion of a motion to dismiss pursuant to CPLR 3211(a) "will not operate to relieve a party's default in pleading" (***Wenz v Smith***, 100 AD2d 585, 473 NYS2d 527 [2d Dept 1984]; *see* ***EMC Mtge. Corp. v Gass***, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; ***U.S. Bank N.A. v Gonzalez***, 99 AD3d 694, *supra*; ***McGee v Dunn***, 75 AD3d 624, 625, 625, 906 NYS2d 74 [2d Dept 2011] *supra*; ***Holubar v Holubar***, 89 AD3d 802, 802–803, 934 NYS2d 710 [2011]; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, *supra*). Nor may a waived standing defense be asserted as opposition to a motion for summary judgment (*see* ***Bank of New York Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***Warsowe Acquisition Corp. v DeNoble***, 116 AD3d 949, 983 NYS2d 859 [2d Dept 2014]; ***Deutsche Bank Trust Co. Am. v Cox***, 110 AD3d 760, *supra*; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, *supra*; ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***HSBC Bank, USA v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***U.S. Bank Natl. Ass'n v Eaddy***, 79 AD3d 1022, 914 NYS2d 901 [2010]). Finally, a waived standing defense may not be used to support an application to vacate a default under discretionary vacatur statutes such as CPLR 3012(d) or CPLR 5015(a)(1) (*see* ***Wells Fargo Bank, Natl. Ass'n v Laviolette***, 28 AD3d 105, 410 NYS3d 538 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Simmons***, 125 AD3d 930, 5 NYS3d 175 [2d Dept 2015]; ***U.S. Bank, N.A. v Bernabel***, 125 AD3d 541, 5 NYS3d 372 [1st Dept 2015]; ***Citibank, N.A. v Swiatkowski***, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

Contrary to the contentions of defense counsel, a lack of standing on the part of a foreclosing plaintiff is not an element of its claim for foreclosure and sale nor is it jurisdictional in nature so as to warrant dismissal of a complaint for such relief (*see* ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42

AD3d 239, 242-244, *supra*; *see also* ***Wells Fargo Bank, N.A. v Ali,*** 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2013]; ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Bank of New York v Mulligan***, 119AD3d 716, 989 NYS2d 295 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Gioia***, 114 AD3d 766, 980 NYS2d 535 [2d Dept 2014]; ***Citimortgage, Inc. v Friedman,*** 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]). Instead, a standing challenge is merely an affirmative defense that is waived unless it is asserted in a timely pre-answer motion to dismiss or in a timely served answer (*see* ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, *supra*; ***U.S. Bank Natl. Ass'n v Denaro***, 98 AD3d 964, *supra*; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, *supra*; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, *supra*; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, *supra*). Accordingly, a foreclosing plaintiff must provide evidence of its standing in moving for accelerated judgments or at the trial of the action *only* in those cases wherein the plaintiff is not the original lender and standing has been placed in issue by a defendant's timely assertion of that defense in his or her answer (*see* ***Wells Fargo Bank, N.A. v Ali,*** 122 AD3d 726, *supra*; ***Midfirst Bank v Agho***, 121 AD3d 343, *supra*).

Here, defendant Samuels waived the defense of standing by her failure to assert it in either a pre-answer motion to dismiss or timely served answer. The demands for dismissal of the complaint due to a purported lack of standing on the part of the plaintiff are rejected as wholly lacking and merit.

Defendant Samuels' claims that the complaint should be dismissed or the plaintiff's motion denied because she failed to understand the nature and import of her failure to answer the complaint and that she relied upon a free legal services firm and the statements of the plaintiff or its agents are wholly unavailing. It is well settled that ignorance of or confusion about legal processes do not constitute a defense to a claim for foreclosure and sale (*see* ***Wells Fargo Bank, NA v Besemer***, 131 AD3d 1047, 16 NYS2d 819 [2d Dept 2015]; ***Chase Home Fin., LLC v Minott***, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Lafazan***, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]; ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). In addition, defendant Samuels does not deny receipt of the summons personally delivered to her with the notices required by RPAPL 1303 and 1320 warning her that she should "[s]peak to an attorney or go to the court," and that she "must respond by serving a copy of the answer" or risk the loss of her home (*see* ***Chase Home Fin., LLC v Minott***, 115 AD3d 634, *supra*; *see also* ***Emigrant Bank v Wiseman***, 127 AD3d 1013, 6 NYS3d 670 [2d Dept 2015]; ***HSBC Bank USA, Natl. Ass'n v Rotimi***, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2015]).

Defendant Samuel's further claim that the complaint is subject to dismissal or that the plaintiff's motion should be denied because the plaintiff has not negotiated, in good faith, a loan modification or other resolution of the claims advanced in the complaint is rejected as lacking in merit. It is now clear that a lender is not required to modify a loan at a CPLR 3408 conference but instead, is only required to negotiate in good faith (*see* ***Flagstar Bank, FSB v Walker*** 112 AD3d 885, 977 NYS2d 359 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 23, *supra*] ["*it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties*"]; *see also* ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra*). Moreover, "[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[ ], and [the] plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Bank of America, Natl. Ass'n v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014],

quoting ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 638, *supra*; *see also* ***PHH Mtge. Corp. v Hepburn***, 128 AD3d 659, 10 NYS3d 102 [2d Dept 2015]).

The reason underlying the forgoing rules are derived from well established principles of contract law which have long provided that this court nor any others may not direct a party to a contract to rewrite it or to enter into new terms or other agreements, since such a direction would clearly violate the Contract Clause of the United States Constitution (*see* ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, *supra*; *see also* ***PHH Mtge. Corp. v Hepburn***, 128 AD3d 659, *supra*; ***Citibank, N.A. v Barclay***, 124 AD3d 174, 999 NYS2d 375 [1st Dept 2014]; ***Flagstar Bank, FSB v Walker***, 112 AD3d 885, *supra*; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra*]). There is thus no duty on the part of a lender or its successor-in-interest to modify the terms of a loan. Instead, there is a statutorily imposed duty upon the plaintiff and the borrower in mortgage foreclosure actions to engage in good faith negotiations to resolve the claim by a settlement that is aimed at keeping the borrower in his or her home, if possible (*see* CPLR 3408; ***U.S. Bank, N.A. v Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept. 2014]; ***Bank of New York v Castillo***, 120 AD3d 598, 991 NYS2d 446 [2d Dept 2014]; ***Flagstar Bank, FSB v Titus***, 120 AD3d 469, 991 NYS2d 110 [2d Dept 2014]).

Even if bad faith on the part of a foreclosing plaintiff has been established, which is not the case here, such bad faith does not give rise to a defense to the foreclosure action or other "basis for preventing the plaintiff from enforcing the terms of its mortgage" (***Citibank, N.A. v Van Brunt Props., LLC***, 95 AD3d 1158, 1159, 945 NYS2d 330 [2d Dept 2012]; *see also* ***Indymac Bank, F.S.B. v Yano-Horoski***, 78 AD3d 895, 912 NYS2d 239 [2d Dept 2010]). Instead, it constitutes conduct for which the court may impose some form of sanction (*see* ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, *supra*), including a toll on interest otherwise collectable by the plaintiff under the terms of the loan documents (*see* ***U.S. Bank Natl. Ass'n v Smith***, 123 AD3d 914, 999 NYS2d 468 [2d Dept 2014]).

The remaining contentions of defense counsel are likewise devoid of merit, including the claim that the plaintiff is not entitled to an order confirming the report of the referee to compute due to purported omissions and defalcations on his part (*see* ***LBV Prop. v Greenport Dev. Co.***, 188 AD2d 588, 591 NYS2d 70 [2d Dept 1992]; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 7077, *supra*]; ***Blueberry Inv. Co. v Ilana Realty***, 184 AD2d 906, 585 NYS2d 564 [2d Dept 1992]; *see also* ***Deutsche Bank Natl. Trust Co. v Zlotoff***, 77 AD3d 702, 908 NYS2d 612 [2d Dept 2010]; ***Sears v First Pioneer Farm Credit, ACA***, 46 AD3d 1282, 850 NYS2d 219 [3d Dept 2007]; ***Federal Deposit Ins. Corp. v 65 Lenox Rd. Owners Corp.***, 270 AD2d 303, 704 NYS2d 613[2d Dept 2000]; ***Adelman v Fremd***, 234 AD2d 488, 651 NYS2d 604 [2d Dept 1996]; ***One West Bank v Rojas***, 46 Misc3d 1228[A], 9 NYS3d 594 [Sup. Ct. Suffolk County 2015]). Defendant Samuels admitted that she defaulted in her payment obligations under the terms of the note and mortgage and she has not contested the calculations set forth in the report of the referee to compute. Defense counsel's complaints about the purported untimeliness of the motion to confirm are rejected as the failure to comply therewith are mere irregularities.

All remaining demands for a denial of the plaintiff's motion that are advanced in the cross moving papers of defendant Samuels, including the reply papers, are rejected as lacking in merit. The challenges to the plaintiff's proof and purported defenses asserted in the opposing papers were either waived by the defendant's failure to appear in this action by answer (*see* ***Mortgage Elec. Registration Sys., Inc. v Holmes***, 131 AD3d 680, 2015 WL 5023782 [2d Dept 2015]; ***Bayview Loan Serv. LLC v***

Bernard, 130 AD3d 850, 12 NYS2d 894 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Laviolette***, 128 AD3d 1054, *supra*) or are unavailable due to the defendant's failure to establish grounds to vacate his default (*see* ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, *supra*). Defense counsel's belated request advanced in his reply affirmation that the court consider the cross motion as one seeking to vacate the defendant's default in answering, notwithstanding that such relief was not noticed in the cross moving papers, is rejected on procedural grounds since this request constitutes new matter asserted first in reply papers and thus may not considered by the court (*see* ***Maurischat v County of Nassau***, 81 AD3d 793, 916 NYS2d 235 [2d Dept 2011]).

In addition, the prior adjudication of the defendant's default contained in the order issued on October 23, 2014 on the plaintiff's prior motion for default judgments and the appointment of a referee to compute precludes the court from entertaining defense counsel's request to treat the cross motion as one for a vacatur of defendant Samuel's default in answering. Relief from that October 23, 2014 order is available only on a motion made pursuant to CPLR 5015(a)(1-5) which requires its interposition by Order to Show Cause so that the court may direct the method and manner of notice to be given as mandated by CPLR 50515(a) (*cf.*, CPLR 3012[d]; ***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 66, 970 NYS2d 260 [2d Dept 2013]). In any event, no reasonable excuse for the default in answering or in opposing the plaintiff's prior motion on the part of defendant Samuels was put before the court in her submissions which is a requirement for the granting of a discretionary vacatur under CPLR 5015(a)(1) (*see* ***Citibank, N.A. v Boyce***, 131 AD3d 439, 13 NYS3d 911 [2d Dept 2015]; ***Wells Fargo v Besemer,*** 131 AD3d 1047, 16 NYS3d 819 [2dDept 2015]; ***Wells Fargo Bank, N.A. v Mazzara***, 124 AD3d 875, 875, 2 NYS3d 553 [2d Dept 2015]).

The plaintiff's motion (#002) for confirmation of the report of the referee to compute and for the issuance of a judgment of foreclosure and sale is granted. The moving papers sufficiently demonstrated the plaintiff's entitlement to such relief while the submissions of the defendant Samuels failed to establish any grounds for a denial of the plaintiff's demands for relief. Accordingly the plaintiff's motion (#002) is in all respects granted.

Proposed Judgment of Foreclosure and Sale, as modified by the court to reflect the issuance of this memo decision and order, is signed simultaneously herewith.

DATED: 12/4/15

THOMAS F. WHELAN, J.S.C.