SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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COMPASS BANK,

Plaintiff

-against-

Index No. 52387/2013

NOTICE OF CROSS MOTION, AND OPPOSITION TO MOTION

EARL SIMMONS, TASHERA SIMMONS; AMUSING DIVERSIONS, INC, ENTERPRISE RENT-A-CAR; SERGEY PRIPORIN A/K/A SERGEY PRIOPORINA; IRINA PRIPORINA; OLGA PRIPORINA; DENNIS J. REYNOLDS; SINGER HOLDING CORP.; BILLY SINISTORE; UNITED STATES OF AMERICA (SOUTHERN DISTRICT); NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE # 1-5" AND "JANE DOE # 1-5".

Defendants

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PLEASE TAKE NOTICE OF THE FOLLOWING CROSS MOTION AND OPPOSITION TO MOTION

MOTION BY:	The Law Offices of J.A. Sanchez Attorney for Plaintiff
DATE AND TIME:	February 20th, 2015 at 9:30 am or as soon thereafter as Counsel can be heard
LOCATION:	At the Courthouse, Westchester Supreme Court, 111 Dr. Martin Luther King, Jr., White Plains, NY 10601
SUPPORTING PAPERS:	Affirmation by J.A. Sanchez, Esq. of January 28, 2015, exhibits attached to the affirmation, and upon all the pleadings and proceedings heretofore had herein.
RELIEF REQUESTED:	An Order: (a) denying Plaintiff's motion for summary judgment and for an order of reference, (b) granting Defendant Tashera Simmon's motion for summary judgment dismissing the Complaint for failure to comply with RPAPL Section 1303, or, in the

alternative, (c) vacating the certification for trial and/or restoring this matter to the settlement conference part pursuant to CPLR 3408, and/or granting sanctions for failure to comply in good faith with CPLR 3408; and d) granting such other and further relief as may be just, proper and equitable.

ANSWER/REPLY PAPERS: Prior to the return date of the motion, or any adjournment date agreed upon by the parties or prescribed by the Court.

DATED: New York, New York

January 28, 2015

Yours, etc.

J.A. Sanchez
The Law Offices of J.A. Sanchez
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New York, NY
646.657.5345

To:
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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COMPASS BANK,

Plaintiff

-against-

EARL SIMMONS, TASHERA SIMMONS; AMUSING DIVERSIONS, INC, ENTERPRISE RENT-A-CAR; SERGEY PRIPORIN A/K/A SERGEY PRIOPORINA; IRINA PRIPORINA; OLGA PRIPORINA; DENNIS J. REYNOLDS; SINGER HOLDING CORP.; BILLY SINISTORE; UNITED STATES OF AMERICA (SOUTHERN DISTRICT); NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE # 1-5" AND "JANE DOE # 1-5".

Defendants

----------X

Index No. 52387/2013

AFFIRMATION IN OPPOSITION TO MOTION AND IN SUPPORT OF CROSS MOTION

J. A. SANCHEZ, ESQ., an attorney duly admitted to practice in the Courts of the State of New York, affirms the truth of the following pursuant to R. 2106 CPLR, upon information and belief and based upon the files maintained in his office.

1. This affirmation is submitted in opposition to the Plaintiff's Motion and in support of the instant Cross Motion for an order: (a) denying Plaintiff's motion for summary judgment and for an order of reference, (b) granting Defendant Tashera Simmon's motion for summary judgment dismissing the Complaint for failure to comply with RPAPL Section 1303, or, in the alternative, (c) vacating the certification for trial and/or restoring this matter to the settlement conference part pursuant to CPLR 3408, and/or granting sanctions for failure to comply in good faith with CPLR 3408; and d) granting such other and further relief as may be just, proper and equitable.

2. The rule on motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Department, in the case of *Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 616 N.Y.S.2d 650 (Second Department, 1994):

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact *(Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue *(State Bank v. McAuliffe*, 97 A.D.2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action *(Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324; *Zuckerman v. City of New York, supra*, at 562)."

3. Below are set forth various points of material issues of fact that will require a trial of the action.

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO PRECISELY COMPLY WITH RPAPL § 1303

4. In Paragraph 10 of his Affirmation in Support for Summary Judgment and Order of Reference, the attorneys for Plaintiff, states that " 10. 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, printed on a different colored paper than that of the summons and complaint as can be seen from the affidavit of service attached hereto. The process server effected service upon the mortgagor(s) with the complaint copy of the notification pursuant to RPAPL 1303. An exact photocopy of said Notice is attached hereto, evidencing that the title of the Notice is in bold, 20-point font,

the text of the Notice is in bold 14-point font, it was on its own page and was served with the Summons and Complaint".

5. The issue as to whether the Notice was properly served is a question of fact, for the following reasons.

6. Paragraph 3(a) of Plaintiff's attorney's affirmation makes reference to the filing of a Summons and Complaint and the filing of a Supplemental Summons and Amended Complaint, all of which are alleged to be attached as Exhibit A to Plaintiff's papers, while in fact the Summons and Complaint are not attached as Exhibit A in my copy of Plaintiff's papers, which I find confusing.

7. More importantly, however, the Supplemental Summons and Amended Complaint, and the RPAPL 1303 Notice, are mixed up with one another in Exhibit A, with the RPAPL 1303 Notice being inserted between the first and the second page of the Supplemental Summons, which, if this is the form in which my client was served with these documents, and the presentation of the documents in the motion in this order would suggest that it may have likely have been, *would have been very confusing to my client, Defendant Tashera Simmons*. This is a real issue, since the very purpose of the RPAPL Section 1303 Notice is to help make things less confusing for a person in foreclosure, as this is probably the first time in that person's life that they find themselves in litigation, and when so much is at stake.

8. Everything about RPAPL 1303 is designed to make it easy for a person served with papers in a foreclosure case to quickly, at a glance, determine what they should do when they receive a Summons and Complaint in a foreclosure case. RPAPL 1303 states, in relevant part, "The notice required by this section shall be delivered with the summons

and complaint to commence a foreclosure action. The notice required by this section shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page."

9. *It defeats the very purpose of RPAPL 1303, thus, if Plaintiff, or its process server, is permitted to bury this notice between the pages of the Supplemental Summons and Complaint, and thus, even if the RPAPL 1303 Notice was served, which Defendant Tashera Simmons does not acknowledge, the RPAPL 1303 Notice was entirely defective.* Defendant Tashera Simmons denies having seen the RPAPL 1303 Notice in her Affidavit, and who could blame her if the document was buried within this huge document when she received it, as she is not a lawyer. As she states in her Affidavit attached hereto as Exhibit A:

"4. I will confirm that I did not remember receiving any colored document, that is the RPAPL 1303 Notice, separate but served together with any Summons and Complaint and Supplemental Summons and Amended Complaint. If I had seen such a document, separate from the Summons and Complaint and Supplemental Summons and Complaint, I am sure I would have remembered having received it as it would have stood out from the white documents I was served with."

10. This is a significant issue, for the following reason.

In *Board Of Directors Of House Beautiful v. Godt*, 000485/11 (5-18-2011), 2011 NY Slip Op 21181, the court explains that:

> "RPAPL § 1303 was enacted by the Legislature in July 2006 as part of the Home Equity Theft Prevention Act (HETPA), the provisions of which are set forth in RPL § 265-a. HETPA also amended certain sections of the Banking Law and Real Property Law in addition to the Real Property Actions and Proceedings Law. The intent of HETPA was to afford greater protections to homeowners facing foreclosure. See *First National Bank of Chicago v. Silver*, 73 AD3d 162, 165 (2nd Dept. 2010) citing

Countrywide Home Loans, Inc. v. Taylor, 17 Misc 3d 595 (Suffolk 2007) and L2006, ch308.

> Towards that end, RPAPL § 1303 as most recently amended on January 14, 2010 requires that "[t]he foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to: (a) any mortgager if the action relates to an owner-occupied one-to-four family dwelling; and (b) any tenant of a dwelling unit in accordance with the provisions of this section." The statute sets forth the specific language and procedures of the notice, requiring that it "shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page." The courts have interpreted this notice requirement to be a condition precedent that if not complied with will lead to dismissal of the foreclosure action. See *First National Bank of Chicago v. Silver*, 73 AD3d at 166, citing numerous Supreme Court decisions (citations omitted).

11. Here, there is a dispute over whether Plaintiff has complied with the notice requirement of RPAPL § 1303, which must be complied with in all cases involving owner-occupied one-to-four family dwellings.

12. Plaintiff may be expected to claim that it is too late to bring up the issue of the RPAPL Section 1303 Notice. Nevertheless, in *First National Bank Of Chicago V. Silver*, 73 A.D.3d 162 [2d Dept 2010], 2010 NY Slip Op 02511, 899 N.Y.S.2d 256, the Appellate Division of the Supreme Court of New York, Second Department held that it is never too late to bring up the issue of the RPAPL Section 1303 Notice. That case involved a defendant's appeal from an order of the Supreme Court, Nassau County (Karen V. Murphy, J.), entered October 7, 2008. The order in question granted plaintiff's motion, among other things, for summary judgment on the complaint and to appoint a referee to compute, and, in effect, denied the cross motion of defendants for summary judgment dismissing the complaint. The Appellate Division of the Supreme Court of

New York, Second Department reversed the lower's court's order, denied the plaintiff's motion for summary judgment on the complaint and to appoint a referee to compute, and then granted the appellant's cross motion for summary judgment dismissing the complaint.

13. In *First National Bank Of Chicago V. Silver*, 73 A.D.3d 162, at 166 the court explained:

> "the courts that have considered the character of the notice have consistently interpreted HETPA's notice requirement as a mandatory condition or condition precedent. That is, the foreclosing party has the burden of showing compliance there-with and, if it fails to demonstrate such compliance the foreclosure action will be dismissed (*see e.g., Butler Capital Corp. v Cavnistra*, 26 Misc 3d 598 [2009]; *Deutsche Bank Trust Ams. v Eisenberg*, 24 Misc 3d 1205[A], 2009 NY Slip Op 51271[U] [2009]; *Citimortgage, Inc. v Villatoro-Guzman*, 2009 NY Slip Op 30983[U] [Sup Ct, Suffolk County 2009]; *HSBC Bank USA, N.A. v Boucher*, 2009 NY Slip Op 31617[U] [Sup Ct, Suffolk County 2009]; *WMC Mtge. Corp. v Thompson*, 24 Misc 3d 738 [2009]; *Countrywide Home Loans, Inc. v Taylor*, 17 Misc 3d at 599)."

14. In *First National Bank Of Chicago V. Silver*, 73 A.D.3d 162, at 169 the court explained that:

> "In the instant matter, the summons and complaint and notice of pendency were filed with the County Clerk on October 16, 2007, after the effective date of RPAPL 1303, thereby requiring compliance with its notice provisions. Since the appellants raised the issue, albeit belatedly, and the foreclosing party failed to meet its burden of establishing compliance with the notice requirements of HETPA, the complaint should have been dismissed."

15. Thus, in order for Plaintiff to seek the remedies it seeks in the instant motion, it must recommence the action. This may seem to be an overly harsh result. However, as the court explained in *First National Bank of Chicago*, statutory notice requirements in a

variety of areas of law may have a harsh result but must, nonetheless, be complied with in order for a Plaintiff or a Petitioner to prevail in the securing of the remedies it seeks:

> "This treatment of statutory notice as a condition precedent appears to be similar to the manner in which courts have treated other statutory notice requirements, that is, the courts place the burden of showing compliance on the party having the requirement to provide the statutory notice.
>
> For example, RPAPL 735 (1) sets out the relevant statutory notice for summary evictions. It provides that
>
> "[s]ervice of the notice of petition and petition shall be made by personally delivering them to the respondent . . . and in addition, within one day after such delivering to such suitable person or such affixing or placement, by mailing to the respondent both by registered or certified mail and by regular first class mail" (emphasis added).
>
> In *Cassidy v County of Nassau* (146 AD2d 595, 597 [1989]), this Court held that a Sheriff's office violated RPAPL 735 (1) because "[t]he documentary evidence from the Sheriff's records established, as a matter of law, that [*4]substituted service of the{**73 AD3d at 168} 72-hour notice was never properly effectuated upon the plaintiff since the personnel in the Sheriff's office had failed to mail copies of the document within one day of posting it." Thus, the eviction was deemed unlawful and the Sheriff was liable for damages.
>
> Real Property Law § 232-a, the relevant provision for notice to terminate a holdover tenant, states that
>
> "[n]o monthly tenant, or tenant from month to month, shall hereafter be removed from any lands or buildings . . . unless at least thirty days before the expiration of the term the landlord or his agent serve upon the tenant, in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy" (emphasis added).
>
> In W54-7 LLC v Schick (14 Misc 3d 49 [2006]), the Appellate Term, First Department, held that a tenant's failure to raise the notice issue in his initial dismissal motion, or to plead it with specificity in his answer, did not serve to relieve the landlord of its burden to establish compliance with statutory requirements. The Appellate Term explained that compliance with statutory notice represents a condition precedent to the maintenance of a summary eviction proceeding, and the burden is on the landlord to prove compliance therewith (id.; see also 170 W. 85th St. Tenants Assn. v Cruz, 173 AD2d 338 [1991]).

The same treatment has been accorded to required statutory notices in other statutes. Vehicle and Traffic Law § 313 provides that

"[e]very notice or acknowledgment of termination for any cause whatsoever sent to the insured shall include in type of which the face shall not be smaller than twelve point a statement that proof of financial security is required to be maintained continuously throughout the registration period and a notice prescribed by the commissioner indicating the punitive effects of failure to maintain continuous proof of financial security and actions which may be taken by the insured to avoid such punitive effects" (emphasis added).

Thus, in a proceeding to stay arbitration of an uninsured motor vehicle claim, this Court held that the cancellation of an automobile insurance policy was ineffective when the notice of{**73 AD3d at 169} cancellation sent by the insurance company lacked the statutorily-mandated statement as to the requirement of proof of financial security (see Matter of Material Damage Adj. Corp. v King, 1 AD3d 439 [2003]; see also Matter of Progressive Northeastern Ins. Co. v Robbins, 279 AD2d 631 [2001]).

General Municipal Law § 50-e explicitly requires the service of a notice of claim as a condition precedent to a suit against a public corporation. In Laroc v City of New York (46 AD3d 760 [2007]), this Court held that municipal defendants were under no obligation to plead, as an affirmative defense in a medical malpractice action, the plaintiff's failure to comply with the statutory notice of claim requirement. Moreover, this Court found that "the defendants' participation in pretrial discovery did not preclude them from raising the untimeliness of the notice of claim" (id. at 761; see also Hall v City of New York, 1 AD3d 254, 256 [2003]).

As in HETPA, all of these statutes contain the word "shall." Moreover, the cases that discussed HETPA all dismissed the complaint where the plaintiff totally failed to show compliance with HETPA's notice requirements, regardless of when the defendant raised the issue. Thus, it is appropriate to place the burden of showing compliance on the foreclosing party. Accordingly, we hold that this is a condition precedent which is the plaintiff's burden to meet, and which does not have to be raised as an affirmative defense in the answer."

16. Any argument Plaintiff may make to have this Court consider it a fact that the notice has been delivered, without any defect, for any prior failure to dispute the same should be rejected for the reasons provided above. It is clearly

Plaintiff's burden to demonstrate its service of the requisite notice in strict compliance with the statute, and Defendant may bring up the issue of Plaintiff's failure to do so at any point in the lawsuit.

17. It should be noted that the RPAPL Section 1303 Notice has nothing to do with jurisdiction, whether that jurisdiction be personal or subject matter jurisdiction. *See Pritchard v Curtis*, 101 AD3d 1502, 1505 [2012] ("Courts have held that the notice requirements of RPAPL 1303 and 1304 are conditions precedent to suit, with the foreclosing party bearing the burden of showing compliance therewith (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102-108 [2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 165-169 [2010]); those decisions did not label these conditions precedent as jurisdictional.")

18. See, also, *Citimortgage, Inc. v. John H. Pembelton, III, et al.*, 39 Misc 3d 455, 462 [2013] ("Although such defense implicates neither a lack of subject matter jurisdiction nor a lack of personal jurisdiction (*see Pritchard v Curtis*, 101 AD3d 1502, 1505 [2012], *supra*), it is not subject to waiver if it is not asserted in a pre-answer motion to dismiss or in an answer (*see* CPLR 3211 [a], [e]). Unlike the defense of a failure to satisfy a contractual condition precedent which must be pleaded (*see* CPLR 3015 [a]; 3018), a party who has timely appeared may raise the absence of or *defective notice defense on motion*, even though it was not included in an answer nor made the subject of a pre-answer motion to dismiss. Since the notice defense remains viable during the pendency of the action it may be raised by a non-defaulting party any time prior to judgment.") [Emphasis Added].

IN THE ALTERNATIVE, THE MATTER SHOULD BE RETURNED TO THE SETTLEMENT CONFERENCE PART TO ENSURE TRUE COMPLIANCE

WITH CPLR SECTION 3408 BEFORE PLAINTIFF MAY MOVE FOR SUMMARY JUDGMENT, AND PLAINTIFF SHOULD BE SANCTIONED FOR FAILURE TO COMPLY IN GOOD FAITH WITH CPLR SECTION 3408

19. Plaintiff's failure to negotiate a modification in good faith with Defendant, in compliance with CPLR Section 3408 (see, *US Bank N.A. v. Sarmiento,* 2014 NY Slip Op 05533 [2d Dep't July 30, 2014], a matter for which I prepared the brief and argued before the 2nd Appellate Division on behalf of the homeowner, Mr. Sarmiento) dictates that Defendant should be sanctioned, by the tolling of all interest accumulated on the debt during the period of Plaintiff's negotiations in bad faith, in accordance with *Sarmiento*, and that the matter be returned to the settlement conference part to ensure true compliance with CPLR Section 3408 before Plaintiff may move for Summary Judgment.

20. CPLR 3408 upon its enactment provided that:

"(a) In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, *for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents*, including, but not limited to determining *whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to*, and for whatever other purposes the court deems appropriate. (b) At the initial conference held pursuant to this section, *any defendant currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person* under section eleven hundred one of this chapter. The court shall determine whether such permission shall be granted pursuant to standards set forth in section eleven hundred one of this chapter. If the court appoints defendant counsel pursuant to subdivision (a) of section eleven hundred two of this chapter, it shall adjourn the conference to a date certain for appearance of counsel and settlement discussions pursuant to subdivision (a) of this section, and otherwise shall proceed with the conference. (c) *At any conference held pursuant to this section, the plaintiff shall appear in person or by counsel*, and if

appearing by counsel, such counsel shall be fully authorized to dispose of the case. The defendant shall appear in person or by counsel. *If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant.* Where appropriate, the court may permit a representative of the plaintiff to attend the settlement conference telephonically or by video-conference."

21. CPLR 3408 was enacted as part of the New York Foreclosure Prevention and Responsible Lending Act of 2008, Chapter 471 of the Laws of New York, 2008, which now requires all residential foreclosure cases to go through a mandatory settlement conference process before proceeding further. The purpose of these settlement conferences is to determine whether the parties can reach a "mutually agreeable resolution to help the defendant avoid losing his or her home." CPLR 3408(a). Specifically, CPLR 3408(a) directs that such conferences are "for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate."

22. Shortly after CPLR 3408 was enacted, it was amended to include a new subsection (f), which states: "Both the plaintiff and defendant *shall negotiate in good faith* to reach a mutually agreeable resolution, including a loan modification, if possible." Foreclosure Prevention, Tenant Protection and Property Maintenance Act of 2009, Chapter 507 of the Laws of New York, 2009 (emphasis supplied). Defendant's attorney has had first-hand knowledge, derived from' years of experience participating in

settlement conferences, that foreclosing plaintiffs, their servicing agents and their counsel regularly engage in conduct that falls far short of the statutory obligation to negotiate "in good faith." Thus, in my brief and oral argument presented to the Appellate Division, 2nd Department, in *Sarmiento,* I urged that the Appellate Division should interpret CPLR 3408 expansively to permit the courts administering mandatory settlement conferences to effectively police violations of the good faith standard. More specifically, I urged that the Appellate Division should reject the narrow interpretation of CPLR 3408 advanced by plaintiff-appellant in *Sarmiento*, which in my opinion could not be reconciled with CPLR 3408's explicit language or intent, and which would effectively conflate the affirmative duty to negotiate in good faith with the absence of "bad faith" or dishonest motives derived from contexts not germane to CPLR 3408 negotiations.

23. The Appellate Division, Second Department, ultimately ruled in the favor of defendant-respondent in *Sarmiento*, affirming the lower court's holding that the foreclosing plaintiff failed to negotiate in good faith. The plaintiff-appellant had argued that the lower court lacked the authority to impose sanctions for violating the good faith requirement of CPLR 3408(f) and further applied the wrong standard in support of its holding. The Second Department rejected both arguments. In summarizing the offending conduct, the Second Department held that "[w]here a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds…such conduct could constitute the failure to negotiate in good faith to reach a mutually agreeable resolution."

24. In the instant case, as discussed in the Defendant's Tashera Simmons Affidavit, Exhibit A, the lack of good faith of Plaintiff was demonstrated by the following.

25. As demonstrated by the Affidavit of Defendant Tashera Simmons, there was no meaningful compliance with the requisites of CPLR 3408 during the settlement conferences held before the court referee:

"5. Moreover, at the CPLR 3408 Settlement Conferences which I attended, without the assistance of a lawyer, as I did not then have the money to hire a lawyer, I do not remember even being offered the opportunity to apply for a modification by anyone. I was never even presented with an application for modification by the Plaintiff's attorney. In fact, it was not even made clear to me that the purpose of those settlement conferences was for me to attempt to negotiate a potential modification with the Plaintiff. At no point was I informed of the nature of the action and my rights and responsibilities as a Defendant. I was only told that I had to appear the next time with an attorney, which I did not have the money to hire at that point, and after appearing at a couple of settlement conferences without an attorney, I was told that there would be no further settlement conferences.

6. It was only after I hired an attorney and asked him about the possibility to refinance the house, that I was told that I would probably not be able to refinance my home (because of the credit issues since I was in foreclosure), but that I might be able to negotiate a modification with the Plaintiff, which is what people in my position normally did. It was at that point in my interview with my new attorney that I informed him, that is what I meant, that thing that is allowing people in foreclosure to under certain circumstances renegotiate their payment terms. At that point, my attorney was shocked that I had actually attended settlement conferences and didn't know the difference between a refinance and a modification, and that is when I told him that none of this was explained to me at the settlement conferences and that I was not, to my memory, even given an application to apply for a modification."

26. Although the statute requires that in the case of a *pro se* litigant, *"the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant."*, it seems that this did not occur. Moreover, apparently she did not engage in any substantive "*settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents*, including, but not limited to determining *whether the parties can reach a mutually agreeable resolution to help the*

defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to".

27. If such advise and discussions had, in fact, occurred, it stands to reason that Defendant Tashera Simmons would have at least known the difference between a refinance and a modification before she came to me. She did not, which suggests that something very odd has occurred here.

28. She should *at the very least* have received a modification package from the Plaintiff at the settlement conferences (which she says she didn't), and been provided with dates by opposing counsel for replying to the same, agreed to before the referee, which would have demonstrated at least some semblance of compliance with the requirement to negotiate in good faith under CPLR 3408, as required by the *Sarmiento* case.

29. Rather, since she didn't appear with counsel, the matter was rather quickly released from the foreclosure settlement conference part. This is a problem, since, as the statute makes clear, it is not a prerequisite for the engaging in good faith negotiations under CPLR 3408 that a *pro se* Defendant appear with counsel. The statute makes it clear that it is not necessary for the Defendant to appear with counsel for these settlement discussions to occur in good faith: "*any defendant currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person* … (c) *At any conference held pursuant to this section, the plaintiff shall appear in person or by counsel … If the*

defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant.

30. Unfortunately, since Defendant Tashera Simmons didn't appear with counsel, Plaintiff's counsel (and even the referee) seemed to be of the impression that CPLR 3408 did not apply to her, and this is at the very least unfortunate and, very likely, appealable error. *Pro se* litigants have, at the very least, the same rights as represented litigants and, rather, as the statute suggests, should be given even more consideration than a represented client, especially given the context of a foreclosure litigation, in which the Defendant is unlikely to have the funds to pay a lawyer (otherwise, they might have the funds to pay their mortgage).

31. Lastly, one might in good faith question whether the statute requires, or even permits, the involvement of the Defendant Amusing Diversions in the CPLR 3408 Settlement Conferences, as the statute reads that the same are "*for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents*", Defendant Amusing Diversions was not a party to the mortgage loan documents, has no relative rights and obligations under the mortgage loan documents, and its input at the settlement conferences were, upon information and belief, for the most part not conducive to arriving at an arrangement on a private contract (the mortgage and the note) that was between the Defendant homeowners and the Plaintiff mortgage holder alone:

32. As Defendant Tashera Simmons states in her affidavit with regard to the settlement conferences:

"7. All I can remember from the settlement conferences was the participation of the Defendant Amusing Diversions, and their efforts to disrupt the conferences, to end the conferences, and their going on and on about the fact that my ex-husband is a famous rapper so that he should be able to pay for the house (neglecting the fact that he had abandoned our family and that we, at that time, were not receiving his assistance at all), all in an effort to ensure that the foreclosure by Plaintiff could proceed and, thus, they could get paid on the lien that they have on the house. This lien on the house, I should add, I believe was unlawfully obtained in any event or, if it was lawfully obtained, was only obtained because of my former husband's failure to defend himself in previous actions by Amusing Diversion, allowing a small debt between them, my husband and Amusing Diversions, to mushroom into a huge debt which permitted them to take, not only a brownstone we owned, but permitted them to put some sort of lien on my present home, in which I have lived for years with my children, which *house is probably worth on the market almost double of what we owe the Plaintiff*."

33. The last portion of the statement in the Affidavit of Defendant Tashera Simmons is significant, as it states that the "*house is probably worth on the market almost double of what we owe the Plaintiff*". This is significant when the Court considers the above arguments, as it demonstrates to the Court that the Plaintiffs would not be irreparably harmed by the Court's consideration of the above arguments of the Defendant Tashera Simmons. The value of the mortgage in question is, upon information and belief, significantly less than the value of the foreclosed home and by permitting this matter to develop as it should have pursuant to CPLR 3408 (or even dismissing it pursuant to RPAPL 1303) it would merely avoid the Plaintiff being able to sell the house for significantly less than it was worth, resulting in either a windfall to the Plaintiff, or a windfall to a potential purchaser of the home at foreclosure. This matter could proceed for some time before the value of the Plaintiff's interest in the mortgage would be even minimally negatively impacted.

34. As Defendant Tashera Simmons states in her Affidavit:

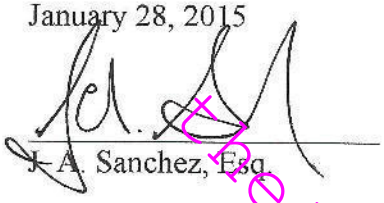
"8. My children and I simply need the opportunity to avail ourselves of mechanisms set forth in the law, mechanisms which were put in place by the legislature and the courts

for very good reasons, to defend ourselves in this action, and to try to keep the home which has been our home for so many years. *I think, moreover, that perhaps if the Court gives me a chance to work something out with the Plaintiff, I will be able to do so in a way that works out well for the Plaintiff, and keeps my family in our home.*

9. We have gone through some rough times, my children and I, and it will not hurt the Plaintiff too much to give us one last chance to see if we can work this out." [Emphasis Added]

35. For the foregoing reasons, Defendant respectfully submits that Plaintiff's Motion for should be denied in its entirety, and Defendant's Cross-Motion should be granted.

January 28, 2015



J. A. Sanchez, Esq.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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COMPASS BANK,

Plaintiff

Index No. 52387/2013

-against-

AFFIDAVIT

EARL SIMMONS, TASHERA SIMMONS; AMUSING DIVERSIONS, INC, ENTERPRISE RENT-A-CAR; SERGEY PRIPORIN A/K/A SERGEY PRIOPORINA; IRINA PRIPORINA; OLGA PRIPORINA; DENNIS J. REYNOLDS; SINGER HOLDING CORP.; BILLY SINISTORE; UNITED STATES OF AMERICA (SOUTHERN DISTRICT); NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE # 1-5" AND "JANE DOE # 1-5".

Defendants

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Tashera Simmons, being duly sworn, deposes and says:

1. I am one of the defendants in the above captioned matter, am the owner of the property which is the subject of this foreclosure action, and I am familiar with, and have personal knowledge of, all of the facts in this case, including the matters set forth herein, except as to matters asserted upon information and belief.

2. I have not previously applied for the relief herein prayed.

3. I make this affidavit in opposition to the Plaintiff's Motion and in support of the instant Cross Motion for an order: (a) denying Plaintiff's motion for summary judgment and for an order of reference, (b) granting Defendant Tashera Simmon's motion for summary judgment dismissing the Complaint for failure to comply with RPAPL Section 1303, or, in the alternative, (c) vacating the certification for trial and/or restoring this matter to the settlement conference part pursuant to CPLR 3408, and/or granting sanctions for failure to comply in good faith with CPLR 3408; and d) granting such other

and further relief as may be just, proper and equitable.

4. I will confirm that I did not remember receiving any colored document, that is the RPAPL 1303 Notice, separate but served together with any Summons and Complaint and Supplemental Summons and Amended Complaint. If I had seen such a document, separate from the Summons and Complaint and Supplemental Summons and Complaint, I am sure I would have remembered having received it as it would have stood out from the white documents I was served with.

5. Moreover, at the CPLR 3408 Settlement Conferences which I attended, without the assistance of a lawyer, as I did not then have the money to hire a lawyer, I do not remember even being offered the opportunity to apply for a modification by anyone. I was never even presented with an application for modification by the Plaintiff's attorney. In fact, it was not even made clear to me that the purpose of those settlement conferences was for me to attempt to negotiate a potential modification with the Plaintiff. At no point was I informed of the nature of the action and my rights and responsibilities as a Defendant. I was only told that I had to appear the next time with an attorney, which I did not have the money to hire at that point, and after appearing at a couple of settlement conferences without an attorney, I was told that there would be no further settlement conferences.

6. It was only after I hired an attorney, and asked him about the possibility to refinance the house, that I was told that I would probably not be able to refinance my home (because of the credit issues since I was in foreclosure), but that I might be able to negotiate a modification with the Plaintiff, which is what people in my position normally did. It was at that point in my interview with my new attorney that I informed him, that

is what I meant, that thing that is allowing people in foreclosure to under certain circumstances renegotiate their payment terms. At that point, my attorney was shocked that I had actually attended settlement conferences and didn't know the difference between a refinance and a modification, and that is when I told him that none of this was explained to me at the settlement conferences and that I was not, to my memory, even given an application to apply for a modification.

7. All I can remember from the settlement conferences was the participation of the Defendant Amusing Diversions, and their efforts to disrupt the conferences, to end the conferences, and their going on and on about the fact that my ex-husband is a famous rapper so that he should be able to pay for the house (neglecting the fact that he had abandoned our family and that we, at that time, were not receiving his assistance at all), all in an effort to ensure that the foreclosure by Plaintiff could proceed and, thus, they could get paid on the lien that they have on the house. This lien on the house, I should add, I believe was unlawfully obtained in any event or, if it was lawfully obtained, was only obtained because of my former husband's failure to defend himself in previous actions by Amusing Diversion, allowing a small debt between them, my husband and Amusing Diversions, to mushroom into a huge debt which permitted them to take, not only a brownstone we owned, but permitted them to put some sort of lien on my present home, in which I have lived for years with my children, which house is probably worth on the market almost double of what we owe the Plaintiff.

8. My children and I simply need the opportunity to avail ourselves of mechanisms set forth in the law, mechanisms which were put in place by the legislature and the courts

for very good reasons, to defend ourselves in this action, and to try to keep the home which has been our home for so many years. I think, moreover, that perhaps if the Court gives me a chance to work something out with the Plaintiff, I will be able to do so in a way that works out well for the Plaintiff, and keeps my family in our home.

9. We have gone through some rough times, my children and I, and it will not hurt the Plaintiff too much to give us one last chance to see if we can work this out.

Dated: January 28, 2015
Queens, N.Y.

Tashera Simmons

Sworn to before me this ___ day of January, 2015

Notary Public

JAY A. SANCHEZ
Notary Public State Of New York
No.025A6196297
Qualified In Queens County
Commission Expires Nov. 10, 2016

Index No. 52387/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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COMPASS BANK,

Plaintiff

-against-

EARL SIMMONS, TASHERA SIMMONS; AMUSING DIVERSIONS, INC, ENTERPRISE RENT-A-CAR; SERGEY PRIPORIN A/K/A SERGEY PRIOPORINA; IRINA PRIPORINA; OLGA PRIPORINA; DENNIS J. REYNOLDS; SINGER HOLDING CORP.; BILLY SINISTORE; UNITED STATES OF AMERICA (SOUTHERN DISTRICT); NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE # 1-5" AND "JANE DOE # 1-5".

Defendants

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NOTICE OF CROSS MOTION AND OPPOSITION TO MOTION

225 Broadway, Suite 1901
New York, NY 10007
Tel. (646) 657-5345
Fax. (646) 390-3214

ATTORNEY'S CERTIFICATION

J.A. SANCHEZ, an attorney duly admitted to the Courts of the State of New York, hereby certifies that the annexed **NOTICE OF CROSS MOTION** and the presentation of said papers and the contentions therein, to the best of my knowledge, and upon information and belief, formed after an inquiry reasonable under the circumstances, are not frivolous as defined in subsection (c) of section 130-1.1 of 22 NYCRR.

Dated: New York, New York

January 28, 2015

J.A. Sanchez