SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE- BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 3476 Stateview Boulevard, Ft. Mill, SC 29715, *Plaintiff-Appellant,* - against - DONNETTE SMITH, *Defendant-Respondent,* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WALL STREET MORTGAGE BANKERS LTD. DBA POWER EXPRESS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU *Defendants.*	:	To Be Argued By: Aaron Jacobs-Smith 15 Minutes Appellate Division Docket No.: 013-00295

BRIEF FOR DEFENDANT-RESPONDENT

Aaron Jacobs-Smith, of counsel to
Jeanette Zelhof, Esq.
MFY LEGAL SERVICES, INC.
299 Broadway, 4th Floor
New York, NY 10007
Telephone: (212) 417-3700

Attorneys for Respondent Donnette Smith

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Pages

TABLE OF AUTHORITIES (Continued)

Cases (Continued) Pages

TABLE OF AUTHORITIES (Continued)

Cases (Continued) Pages

Statutes

Other Authorities

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether in an interlocutory order the Supreme Court has authority to order tolling of the collection of interest pending a further order or a resolution by settlement.

By issuing one such interlocutory order, the Supreme Court answered the question in the affirmative.

2. Whether the tolling of interest is an allowable equitable remedy in response to a finding that a party violated New York Civil Practice Law and Rules 3408(f) by failing to negotiate in good faith.

By continuing the tolling of interest based on a finding that Appellant violated New York Civil Practice Law and Rules 3408(f), the Supreme Court answered the question in the affirmative.

PRELIMINARY STATEMENT

For almost four years, Appellant has engaged in obstructive and dilatory tactics that have stymied Respondent Donnette Smith's ("Smith") good faith efforts to save her home. After more than a year of submitting and resubmitting mortgage loan modification request packages in the Foreclosure Settlement Conference Part, Smith filed a motion by order to show cause in the Supreme Court requesting summary judgment and equitable relief ("the Motion"). At the first appearance on the Motion, Appellant declined to submit opposition. The

Supreme Court then issued an interlocutory order ("the Order") that kept in place a pre-existing order tolling interest, directed, at Appellant's request, the parties to attend an additional settlement conference, and ordered Appellant to produce documents it had previously refused to furnish in disobeyance of the settlement conference referees' many explicit directives. The Order did not decide the Motion. Unhappy with the consequences of its refusal to submit opposition papers, Appellant now appeals inerlocutorily to this Court to present arguments it should have first made below.[1]

This appeal should not be heard for two reasons. First, the Order did not decide a motion made on notice, and therefore it is not appealable as of right. CPLR 5701(a)(2). Appellant has failed to request leave to appeal. Second, should the Supreme Court enter its decision on the Motion before this Court renders a ruling, the right to this appeal will be terminated.[2]

Smith advances a counterstatement of the questions presented because Appellant grossly mischaracterized the questions at issue, incorrectly describing the Order as a temporary restraining order. Smith did not request a temporary restraining order, nor did the Supreme Court grant such an order. The Supreme

[1] After the issuance of the Order, the Supreme Court allowed Appellant to submit belated opposition to the Motion. At the time of submission of this Opposition Brief, the Supreme Court has recently issued a decision that has not yet been entered and that counsel for Smith has not been able to obtain or review.

[2] As set forth in the preceding footnote, at the time this Brief was submitted, the Supreme Court had issued a decision but the decision had not yet been entered or received by counsel.

Court provided an equitable remedy to prevent Smith from bearing the full costs of Appellant's delay, and issued directives aimed at promoting a negotiated settlement. The underlying order to show cause issued by the duty judge ordered Appellant to show cause why the Supreme Court should not use its equitable powers to toll interest and concomitantly tolled interest pending resolution of the Motion. The subsequent Order at issue here continued the tolling of interest pending a decision on the Motion, or resultion by settlement. As Appellant itself notes, many such orders tolling interest in mortgage foreclosure actions have been issued without any expectation that they will be treated as a temporary restraining order.

Appellant wrongly asserts that there exists no remedy for violation of New York Civil Practice Law and Rules ("CPLR") 3408(f). The language of the statute and the legislative intent make clear that courts have the authority to issue penalties in response to a party's failure to comply with CPLR 3408(f).

Tolling of interest is a remedy employed by courts to incentivize a negotiated settlement, and maintain fairness in the course of a mortgage foreclosure action by placing the costs of delay on the party responsible for causing that delay. Tolling does not rewrite the terms of the mortgage and note, nor does it impose new obligations on either party. Furthermore, Appellant has not specified

which terms of the mortgage and note were purportedly rewritten. The mortgage and note are not a part of the record on appeal.

COUNTERSTATEMENT OF FACTS AND NATURE OF THE CASE

The Hardship that Caused the Default. In 2007, Defendant suffered a disabling accident after which she was no longer able to work. (R. at 42.) As a consequence, she began missing mortgage payments in 2009. (*Id.*) In summer 2009, Smith reached out to ASC, her mortgage servicer and Appellant's agent, to apply for a loan modification to bring her account current.[3] (*Id.*) In a document dated December 16, 2009, Appellant offered Smith a forbearance agreement that required her to make four reduced payments, after which Appellant promised to evaluate her for a loan modification. (R. at 57-58.) Appellant further promised to suspend all foreclosure activities should Smith timely make the payments. (*Id.*) On December 28, 2009, Smith signed the forbearance agreement and mailed it to Appellant along with a check for the first payment, due on January 6, 2010. (R. at 42, 59.) Appellant commenced the subject foreclosure action on January 4, 2010. (R. at 61.)

Smith Attempts to Cure the Default. Despite Appellant's failure to comply with the forbearance agreement by filing a foreclosure action, Smith continued making payments. (R. at 26, 43.) She made the four payments required

[3] Hereinafter, ASC and Appellant are referred to collectively as "Appellant."

under the forbearance agreement, with the last payment due April 6, 2010. (*Id.*) After receiving and accepting the fourth payment, Appellant did not offer a modification nor did it provide an explanation for its failure to do so. (*Id.*) Smith continued making payments until Appellant rejected her September 2010 payment, again, without explanation. (R. at 27, 43.)

Smith submitted as many as five complete loan modification applications. (*See* R. at 44, 80, 91, 104, 118.) In response to her first submission, Appellant claimed that the application was incomplete, but did not identify what documents were allegedly missing. (R. at 80.) Appellant rejected the second application, stating only that it was unable to offer an affordable modified loan payment due to "investor guidelines." (R. at 88.) Two and a half months later, Appellant's counsel indicated that a modification might in fact be available, stating, "I just need something that my client would agree to." (R. at 149.) Smith's third, fourth, and fifth applications were submitted while the case was being conferenced in the Foreclosure Settlement Conference Part.

Appellant Abandons the Foreclosure Action in the Shadow Docket.

CPLR 3408(a) requires that settlement conferences be held within 60 days of the filing of the proof of service. The first conference was not held until March 9, 2011, more than a year after the case was commenced. (R. at 29, 61.)

The delay was caused by Appellant's failure to file a request for judicial intervention ("RJI") with its proof of service of the summons and complaint. (R. at 27.) The Chief Administrator of the Courts set forth procedures and rules for CPLR 3408, requiring that an RJI be filed with the proof of service. 22 NYCRR 202.12–a. According to the court rules, a settlement conference is not held until the RJI is filed. *See id.* Smith filed an RJI when she learned that Appellant's failure to file the RJI in accordance with court rules was the source of the delay in scheduling a settlement conference. (R. at 27.)

Appellant's Good Faith Violations in the Foreclosure Settlement Conference Part. The parties were in the Foreclosure Settlement Conference Part for a year, attending seven settlement conferences, prior to the entry of the Order. (R. at 29-38.) The first two conferences were overseen by Referee Douglas, while the subsequent five conferences were presided over by Referee Berson. (*See* R. at 29-38.) On numerous occasions while the matter was assigned to the Foreclosure Settlement Conference Part, the referees directed, and Smith requested, that Appellant produce copies of the mortgage and note. (R. at 5, 39.) Appellant refused to comply. (*Id.*) At the first six conferences the referees directed, and Smith requested, that Appellant produce evidence that it sought a waiver of the investor restrictions which purportedly limited Appellant's ability to offer a loan

modification.[4] (R. at 34, 37.) The Appellant again disobeyed the referees' directives and ignored Smith's requests. (R. at 34, 38.) By February 9, 2012, after six settlement conferences, Smith's loan arrearage exceeded $80,000. (R. at 139.)

On three separate occasions while the subject action was assigned to the Foreclosure Settlement Conference Part, Smith submitted complete loan modification applications. (R. at 91, 104, 118.) The first application was submitted March 9, 2011, the day of the first settlement conference. (R. at 29, 91.) In response to Smith's modification application, Appellant requested the same documents over and over again. (R. at 30-33.)

By the fourth settlement conference, held on October 12, 2011, Appellant had not conducted a review of Smith's modification application. (*See* R. at 29-33.) Appellant's counsel claimed its office had not received any documents. (R. at 33.) After being shown proof of the prior submissions, Appellant's counsel called its office, confirmed that documents were received, but stated that they were now "stale" and too old to be used for modification review.[5] (*Id.*) In an effort to spur

[4] Appellant, through its agent ASC, is a participant in the Treasury Department's Home Affordable Modification Program ("HAMP"). As a participant, Appellant is required to offer homeowners loan modifications according to HAMP terms, should the homeowner meet HAMP eligibility criteria. Where a modification cannot be offered because the investor will not allow changes to the terms of the loan in accordance with HAMP guidelines, the HAMP participant is required to seek a waiver of the impeding restrictions.

[5] When loan modification reviews are not conducted in a timely manner, banks will typically request that homeowners submit updated bank statements and pay stubs, claiming that prior submissions can no longer be used as a basis upon which to make a loan modification decision. The previously submitted documents are labeled "stale."

progress, Referee Berson ordered that Smith submit a new application by October 31, 2011, and that at the fifth settlement conference Appellant send a bank representative to the conference. (R. at 33-34.)

At the fifth settlement conference, held on December 1, 2011, Amber Dieson, a bank representative was present. (R. at 34.) She stated only that a loan modification could not be offered due to an investor restriction. (*Id.*) Both Smith and the referees had requested at the first, second, third, and fourth conferences that Appellant produce evidence that it had sought a waiver of the investor restriction, which Appellant claimed prevented it from offering a loan modification. (*Id.*) No such evidence was produced. (*Id.*) At the conclusion of the fifth conference, Referee Berson directed Appellant to produce evidence that it had provided denial letters that describe the basis for the prior loan modification denials,[6] and again ordered Appellant to produce proof that it had sought wavier of the investor restrictions. (R. at 34-35.) This documentation was to be supplied to Smith on or by December 30, 2011. Additionally, Referee Berson directed Smith to prepare a settlement proposal. (R. at 35.)

On December 13, 2011, Appellant produced two denial letters, one dated November 10, 2010 and the other dated February 22, 2011. (R. at 35, 122-23.)

[6] HAMP requires that when a bank-participant rejects an applicant for a loan modification, it send a "non-approval notice," more commonly referred to as a denial letter. Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages Ch. II § 2.3.2. The denial letter must state the primary reasons for the denial. *Id.*

Neither Smith nor her counsel had ever seen these letters, despite the fact that they were both addressed to Smith. (R. at 36, 50.) The November letter purports to deny Smith's request for a pre-foreclosure sale, but Smith had never made such a request. (R. at 50, 123.) The February letter purports to deny Smith's request for a repayment plan. (R. at 50, 122.) Again, Smith had never submitted such a request to Appellant. (*Id.*)

On January 17, 2012, Smith submitted a settlement proposal to Appellant in accordance with Referee Berson's December 2011 directive. (R. at 36.) Smith offered to make a $15,000 upfront payment should the interest rate be reduced to four percent, and the loan re-amortized over 30 years. (R. at 126.) The upfront payment, in conjunction with the modification to the loan terms, would produce a monthly payment of $1,866.69, which Smith had demonstrated she could afford by escrowing $2,000 every month. (*Id.*)

At the sixth settlement conference, held on January 26, 2012, Appellant did not prepare a response to Smith's settlement proposal and did not produce evidence of a waiver request, as directed by the Referee. (R. at 36-37.) The Referee directed Appellant to respond to the settlement proposal within 15 days. (R. at 37.) Referee Berson again directed Appellant to produce evidence that it had submitted to its investor a request that the investor waive alleged restrictions that prohibited modification of Smith's loan. (*Id.*) Smith presented the purported

denial letters supplied by Appellant, and as evidence of their insufficiency, Referee Berson directed Appellant to produce copies of detailed denial letters at the following conference. (*Id.*) Referee Berson also ordered Appellant to present a copy of the mortgage and note. (R. at 37-38.)

Smith received three more denial letters on February 8, 2012. (R. at 37.) She had never before seen these letters, addressed to her and dated October 13, 2010, February 22, 2011, and December 5, 2011. (R. at 52-53, 128-35.) As with the previous two letters proffered by Appellant during settlement conferences, this next set of three was not responsive to the modification applications Smith submitted. (R. at 52-54.)

In a letter dated February 9, 2012, Appellant rejected Smith's settlement proposal. (R. at 139.) Appellant did not offer a counterproposal or any avenues for settlement. (*Id.*)

At the seventh and final settlement conference, held on March 1, 2012, Appellant provided no explanation of the issues raised by the five denial letters setting forth serial nonresponsive bases for denial of Smith's several loan modification requests. (R. at 38.) Furthermore, Appellant, for the sixth time, violated a referee's directive by failing to produce evidence that it had requested a waiver of the investor restrictions. (R. at 34, 37-38)

During the year that the case was assigned to the Foreclosure Settlement Conference Part, Smith had fallen further behind on her mortgage, with Appellant charging interest and foreclosure-related fees, but come no closer to reaching a settlement. Because the negotiations had been stymied by Appellant's disobeyance of referee directives, submission of duplicative document requests, refusal to timely review Smith's loan modification applications, and failure to produce evidence that it had sought a waiver of investor restrictions to clear the way towards a settlement, Smith requested that the case be released from the Foreclosure Settlement Conference Part. (R. at 39-40.)

The Supreme Court Grants Smith's Order to Show Cause. When Smith learned that the Referee would not be issuing a report regarding the conduct of the parties (R. at 39), she moved on September 25, 2012 by order to show cause for summary judgment and equitable relief. (R. at 17-19.)

In support of her motion, Smith presented a 17-page affirmation from her attorney, Perry S. Friedman, Esq., a 16-page affidavit sworn by Smith, as well as 95 pages of exhibits supporting the factual claims presented in the affirmation and affidavit. (R. at 24-150.) The moving papers clearly document Appellant's persistent and variant violations of CPLR 3408(f)'s requirement that parties in foreclosure settlement conferences negotiate in good faith. (*Id.*) The moving papers further show that Appellant had failed to produce evidence—despite

multiple requests—to support its *prima facie* case that it was the holder of the mortgage and note at the time it commenced the foreclosure action. (*Id.*) Appellant has failed to produce any evidence to controvert Smith's claims. Strikingly, neither the mortgage nor note is part of the record before this court.

The order to show cause, signed by the duty judge, Justice Larry D. Martin, demanded that Appellant show cause (1) why Smith should not be granted summary judgment based upon Appellant's failure to support its allegation that it is the holder of the mortgage and note; and, (2) why it should not be found that Appellant violated CPLR 3408(f) by failing to negotiate in good faith and, as a consequence, why interest should not be tolled, a modification compelled, and the foreclosure action dismissed. (R. at 18-19.) The order to show cause further ordered a stay of the foreclosure proceedings pending a hearing and determination of the order, the tolling of interest, and required that Smith serve Appellant with a copy of the order to show cause along with supporting papers by September 28, 2012. (R. at 19.) The return date for the Motion was set for October 4, 2012. (R. at 18.)

Appellant has not appealed from the order to show cause. (Appellant's Br. Statement Pursuant to CPLR 5531 ¶ 6.)

The Supreme Court Hearing on the Order to Show Cause. On October 4, 2012, at the first hearing on the Motion, Justice Martin M. Solomon, the

assigned IAS judge, gave Appellant the opportunity to submit written opposition to the order to show cause. (R. at 9-12; Appellant's Br. 8.) Appellant declined to submit written opposition. (*Id.*)

Justice Solomon heard oral argument on the motion, inquiring into the basis for Smith's motion for summary judgment. (R. at 4-11.) Smith informed Justice Solomon that the referees at the settlement conferences had been requesting a copy of the note for a year, but that Appellant had failed to produce it. (*Id.*) Appellant, in response, claimed that a copy of the note had been previously produced (R. at 5-6), but expressed confusion as to why it should be required to submit an additional copy upon a referee's order. (*See* R. at 8.)

During the course of the hearing, Appellant's counsel repeatedly attempted to talk over Justice Solomon (R. at 9-11), demonstrated indifference to the need to follow referee directives (R. at 8), and evinced a lack of understanding of the hardship caused by its delay, maintaining that seven settlement conferences over a calendar year do not constitute a long negotiation. (*See* R. at 6.)

The Order from which Appellant Appeals. Following the October 4, 2012 initial hearing on the Motion, Justice Solomon signed the Order here at issue. (R. at 14.) The Order did not decide Motion. (R. at 12-14.)

Based upon evidence that Appellant had violated its obligations under CPLR 3408(f), Justice Solomon ordered that interest continue to be tolled "pending

further order of this court or the parties reaching an agreement on the terms of a modification." (R. at 14.) In the first two pages of the Order, Justice Solomon discusses CPLR 3408(f) and the evidence of Appellant's failure to negotiate in good faith. (R. at 12-13.) Because Appellant had refused to submit written opposition to the order to show cause, Justice Solomon could only base his determinations on Smith's account of Appellant's conduct while in the Foreclosure Settlement Conference Part. Justice Solomon noted that Appellant repeatedly failed to comply with directives issued by the referees to produce documents, and asserted that negotiating in good faith requires, *inter alia*, "making reasonable efforts to comply" with the directives of the referees overseeing the settlement conferences. (R. at 13.)

Justice Solomon squarely placed the blame for the lack of settlement progress on Appellant, concluding that the "impasse" was caused by Appellant's refusal to produce proof that it had sought a waiver of investor restrictions and the original note.[7] (*Id.*) Following Appellant's suggestion that further conferences were necessary, Justice Solomon ordered the Referee to hold an eighth settlement conference on October 25, 2012, at which Appellant was to produce the documents it had previously refused to furnish. (R. at 13-14.)

[7] Justice Solomon also faults Appellant for not producing the "investor guidelines" and the pooling and servicing agreement. (R. at 13.) These documents are the source of the investor restrictions, and thus would provide proof that investor restrictions do indeed exist that limit Appellant's ability to modify Smith's loan.

Smith's Motion petitioned the Supreme Court for summary judgment and equitable relief. (R. at 18.) The Order was silent on Smith's motion for summary judgment, and does not contain a clear ruling on the equitable relief requested. (R. at 12-14.) The Motion had requested tolling of interest, a directive requiring Appellant to issue an affordable loan modification, and dismissal of the foreclosure action based on a finding that Appellant violated CPLR 3408(f). (R. at 18.) While the Order at issue reflects that Justice Solomon found CPLR 3408(f) violations, and continued a tolling order, the tolling order is not final. (*See* R. at 12-14.) The tolling order remains in place pending a further order or a settlement. (R. at 14.) Justice Solomon's conclusions regarding CPLR 3408(f) could change in his final ruling on the Motion based on opposition subsequently submitted by Appellant and upon the written decision of the referee following the October 25, 2012 conference held pursuant to the Order.

The Motion has since been decided, but the order has not been entered.[8]

Hearing Subsequent to Issuance of the Appealed-from Order. On February 7, 2013, a further hearing on the Motion was held at which Smith's then counsel requested a 30-day adjournment to substitute counsel. (R. at 153.) Appellant objected. (*Id.*) Justice Solomon granted the adjournment to allow new counsel time to submit reply papers. (R. at 153-54.)

[8] Counsel for Smith received notice of the decision from the New York State Unified Court System's eCourts website: https://iapps.courts.state.ny.us/webcivil/ecourtsMain.

ARGUMENT

I. THIS APPEAL SHOULD NOT BE HEARD BECAUSE APPELLANT HAS NOT REQUESTED LEAVE TO APPEAL AND A DECISION BY THIS COURT COULD BE TERMINATED WHEN THE SUPREME COURT ENTERS ITS JUDGMENT IN THE MATTER

This Court should not hear the subject appeal for two reasons. First, the Order is not appealable as of right, and Appellant has not requested leave to appeal. Second, any decision may be terminated when the Supreme Court enters its decision on the Motion.

A. The Order Is Not Appealable as of Right, and Appellant Failed to Request Leave to Appeal

The Order from which Appellant appeals did not decide a motion on notice. A party can appeal an order to the Appellate Division as of right where the order decides a motion made upon notice. CPLR 5701(a)(2). The motion has not been decided, as Appellant itself admits. (Appellant's Br. 9, stating that the motion "remains pending").

To support its claim that the Order is appealable as of right, in a footnote, Appellant states that the Order "was entered following a motion made on notice." (Appellant's Br. 9 n.2.) This is a misstatement of the law. It is not enough that an order simply follows a motion sequentially. CPLR 5701(a) requires that the order decide the motion: "An appeal may be taken to the appellate division as of right in an action … from an order … where the motion it decided was made upon notice."

Thus, to be appealable as of right, the order must actually decide the motion. *See, e.g., Samaroo v. Bogopa Serv. Corp.*, 106 A.D.3d 713, 714-15, 964 N.Y.S.2d 255, 257 (App. Div. 2d Dep't 2013) (finding that a party may not appeal from an order that "merely defers disposition of a motion until trial"); *Cortez v. Ne. Realty Holdings, LLC*, 78 A.D.3d 754, 757, 911 N.Y.S.2d 151, 154 (App. Div. 2d Dep't 2010) (concluding that an evidentiary ruling "made in advance of trial on motion papers" is not appealable as of right.)

Appellant appears to implicitly argue that the motion was *de facto* decided because the Order granted "most of the ultimate relief" Smith sought. (Appellant's Br. 10.) Not only does Appellant fail to provide any statutory or jurisprudential support for this legal principle, but it is simply not true that the Order granted most of the relief sought by Smith. She requested summary judgment, which was not granted in the Order. (R. at 12-14, 18.) She further requested tolling of interest, a directive requiring Appellant to issue an affordable loan modification, and dismissal of the foreclosure action based on a finding that Appellant violated CPLR 3408(f). (R. at 18.) Only the request for tolling was granted, and only on a provisional basis. (R. at 14.)

Because the Order did not decide a motion made on notice, Appellant cannot appeal from the Order as of right. Appellant did not request leave to appeal, and as a consequence, this appeal must be dismissed.

B. The Right to Direct Appeal of the Order Will Be Terminated upon Entry of a Final Judgment

The right to appeal an order terminates with the entry of the final judgment in the matter. *Matter of Aho*, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 651 (1976); Jonathan K. Cooperman, *New York Practice Series – Commercial Litigation in New York State Courts*, § 55:23 (3rd ed. 2012) (citing *Matter of Aho* for the proposition that, "the right of direct appeal from a nonfinal order terminates with the entry of final judgment").

Since the time this appeal was lodged, the Supreme Court decided Smith's motion. While entry of the final judgment has not yet occurred, it undoubtedly will soon. Appellant will be free to appeal the Supreme Court's final decision on the motion, but to the extent that the final decision supersedes or modifies the Order, a decision on the Order will be rendered merely academic. *See Peris v. W. Reg'l Off-Track Betting Corp.*, 255 A.D.2d 899, 680 N.Y.S.2d 346, 347 (App. Div. 4th Dep't 1998) (holding that "no appeal lies from the first order" where it had been modified in a material respect by a subsequent order); *Kurtis v. Allstate Ins. Co.*, 43 A.D.2d 954, 352 N.Y.S.2d 37, 38 (App. Div. 2d Dep't 1974) (finding that the appeal of a judgment amended by a subsequent judgment was "academic" and thereby unappealable).

In deciding Smith's motion, the Supreme Court likely reached a decision regarding whether tolling of interest is warranted. (R. at 18.) If the Supreme Court

found that Appellant did not violate its good faith obligations under CPLR 3408(f), it was free to lift the tolling order, or even bar its enforcement during the time it was in effect. Since the date the tolling order has been in place, no funds have been exchanged, and no actions have been taken by the parties that would require undoing.

II. A TOLLING ORDER IS NOT REVIEWED UNDER PRELIMINARY INJUNCTION STANDARDS

This court has stated the factors to be considered when assessing whether a remedy provided for a violation of CPLR 3408(f) is appropriate. *Wells Fargo Bank, N.A. v. Meyers*, 966 N.Y.S.2d 108, 118 (App. Div. 2d Dep't 2013). "In the absence of a specifically authorized sanction or remedy in the statutory scheme, the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case." *Id.* (concluding its discussion of available remedies for violations of CPLR 3408(f)).

A tolling order is a permissible remedy for a violation of CPLR 3408(f). A mortgage foreclosure action is an action in equity. *Notey v. Darien Const. Corp.*, 41 N.Y.2d 1055, 364 N.E.2d 833 (1977). In adjudicating actions in equity, courts have discretion over the interest rate charged and the period over which it accrues. CPLR 5001 ("in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion"). Thus, in a

foreclosure action, the court has authority to toll interest, rendering it a permissible remedy.

Tolling interest is an appropriate remedy for violations of CPLR 3408(f). In the case at issue, the tolling order was appropriate for two reasons. First, the tolling order placed the cost of delay on the party responsible for the delay; in so doing, it promoted basic fairness. The record is replete with examples of Appellant-caused delay.[9] As of February 9, 2012, after nearly a year in the Foreclosure Settlement Conference Part, the arrears on Smith's loan exceeded $80,000. (R. at 139.) Prior to the entry of the Order, Smith bore the full cost of Appellant's delay, while Appellant in fact benefitted from its bad acts as the size of a potential judgment increased. The Order furthered equity by removing the reward to Appellant for its dilatory tactics. The second reason that tolling of interest was appropriate is that it was used to incentivize Appellant to act in a manner that would achieve the purpose of the settlement conference negotiations: to "negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." CPLR 3408(f). The Order stated that tolling would cease should the parties reach "an agreement on the terms of a modification." (R. at 14.)

[9] *See, e.g.,* R. at 27, 30-39.

Many courts have seen fit to issue orders tolling interest in mortgage foreclosure cases when a party violated its duty to negotiate in good faith. *See, e.g., Wells Fargo Bank, N.A. v. Ruggiero,* 2013 N.Y. Slip Op. 50871(U) (Sup. Ct. Kings Cty.) (discussing, post-*Wells Fargo Bank, N.A., v. Meyers*, the remedies available under CPLR 3408(f), and ordering, *inter alia*, the tolling of the collection of interest due to the bank's failure to negotiate in good faith)*; HSBC Bank USA, Nat. Ass'n v. McKenna*, 37 Misc. 3d 885, 916, 952 N.Y.S.2d 746, 769 (Sup. Ct. Kings Cty. 2012) (barring the recovery of interest from the date of default due to bank's violation of CPLR 3408(f)); *Emigrant Mortgage Co. Inc. v. Corcione*, 28 Misc. 3d 161, 170, 900 N.Y.S.2d 608, 614-15 (Sup. Ct. Suffolk Cty. 2010) (ordering the imposition of $100,000 in exemplary damages, and barring the collection of all interest, fees and costs, and advances charged on the account from the date of default owing in part to bank's failure to negotiate in good faith), *vacated upon settlement*, 2010 WL 7014850 (Sup. Ct. Suffolk Cty. Oct. 14, 2010); *Bank of Am. N.A. v. Lucido,* 35 Misc.3d 1211(A), 2012 N.Y. Slip Op. 50655(U) (Sup. Ct. Suffolk Cty.) (finding the plaintiff's "repeated and persistent failure and refusal to comply with the lawful orders of the Court including those which directed production of documentation that was essential to address critical issues in the present matter" to constitute a lack of good faith, and imposed as remedy, *inter alia*, the prohibition of the collection of all sums secured by the mortgage from the

time of default, including interest); *Deutsche Bank Trust Co. of Am. v. Davis*, 2011 N.Y. Slip Op. 51238(U) (Sup. Ct. Kings Cty.) (leaving in place an order tolling interest, and staying the action until plaintiff moves to resume negotiations in good faith upon a finding that the bank did not negotiate in good faith, due in part to dilatory tactics consisting of five modification applications which were never properly reviewed); *BAC Home Loans Servicing v.* Westervelt, 2010 N.Y. Slip Op. 51992(U) (Sup. Ct. Dutchess Cty.) (disallowing the collection of any interest or arrears from the date of a loan modification denial, in part based on a determination that the bank failed to negotiate in good faith).

Every statutory and jurisprudential authority relied upon by Appellant to support its position that it was improper for the Supreme Court to order the tolling of interest is inapposite. Appellant's argument rests upon the unsupported premise that to toll interest as a remedy for a CPLR 3408(f) violation is to grant a temporary restraining order. (*See* Appellant's Br. 1-5, 9-16.) Appellant only cites to case law, statutes, and secondary sources that discuss preliminary injunctions and temporary restraining orders to support its argument that the tolling order was improperly granted—tellingly, none of the case law concerns a mortgage foreclosure action or CPLR 3408. (Appellant's Br. 9-16.) Nowhere in its brief does Appellant attempt to establish that a tolling order is a temporary restraining order. Appellant seeks to impose requirements for the grant of a tolling order for a

violation of CPLR 3408(f) that are directly at odds with those articulated by this Court. This amounts to a gross overreach and a clear attempt to greatly curtail the Supreme Court's discretion.

As Appellant itself states, (Appellant's Br. 10), the purpose of a preliminary injunction is to prevent a party from engaging in conduct that would "render the judgment ineffectual." CPLR 6301. A temporary restraining order is used to prevent "immediate and irreparable injury" pending a hearing on a preliminary injunction. *Id.* By contrast, a tolling order imposed as a remedy for violations of CPLR 3408(f) seeks to redress the harm caused by the violations, and to further CPLR 3408's statutory purpose.

III. THE SUPREME COURT HAS AUTHORITY TO ORDER REMEDIES FOR VIOLATIONS OF CPLR 3408(F), INCLUDING THE SUSPENSION OF INTEREST

Appellant first openly ignores this Court's recent ruling in *Wells Fargo Bank, N.A., v. Meyers* by arguing that no remedy can be assessed for violations of CPLR 3408(f). *See* 966 N.Y.S.2d 108, 118 (App. Div. 2d Dep't 2013). This Court in fact directed courts to "employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case." *Id.*

Then, Appellant attempts to distort the *Meyers* ruling by claiming that the decision prohibits the tolling of interest. (Appellant's Br. 22-23.) Not only is Appellant incorrect in asserting that a tolling order rewrites the terms of a contract,

but in the case at issue, the terms of the contract are not in the record, rendering Appellant's argument factually unsupported.

A. The Supreme Court Has Authority to Provide Remedies for Violations of CPLR 3408(f)

As with any question of statutory interpretation, the inquiry begins with the text. *See* N.Y. Stat. Law § 76 (stating that where the text is clear, other means of interpretation are disallowed). CPLR 3408(f) states that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." To read the statute in a manner that disallows the imposition of a remedy in response to a violation of its prescription would amount to erasing the "shall" from the text. N.Y. Stat. Law § 76 (requiring that every word, if possible, be given effect); *see also, In re New York & Brooklyn Bridge*, 72 N.Y. 527 (1878) ("In construing a statute effect must be given, if practicable, to all of the language employed"). Without the opportunity for enforcement, CPLR 3408(f) would be transformed from a mandate to a suggestion or aspiration. The "shall" would be understood as "may" or "should." Such a transmogrification should be avoided if at all possible.

The Chief Administrator of the Courts, in its procedures and rules promulgated to implement CPLR 3408(f), makes clear that the courts have enforcement authority: "The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or

subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner." 22 NYCRR 202.12–a(c)(4).

It is clear that the Legislature intended CPLR 3408(f) to be enforced by the courts. In Section 10–a(1) of chapter 507 of the Laws of 2009, the Chief Administrator of the Courts is given authority to promulgate rules that "may include granting additional authority to sanction the egregious behavior of a counsel or party."

Finally, this Court has acknowledged that the Supreme Court has authority to enforce CPLR 3408(f): "It would certainly seem that CPLR 3408(f) and 22 NYCRR 202.12–a(c)(4) both provide the courts with the authority to take some action where a party fails to satisfy its obligation to negotiate in good faith." *Meyers*, 966 N.Y.S.2d at 115.

For jurisprudential support, Appellant advances incorrect readings of two decisions issued by this Court interpreting CPLR 3408(f) and attempts to fit the square peg of inapplicable case law into the round hole of the questions at issue.

In *Indymac Bank, F.S.B. v. Yano-Horoski*, this Court found that a specific remedy—cancellation of the mortgage and note—was impermissible as a sanction for violation of CPLR 3408's good faith requirement. 78 A.D.3d 895, 896, 912 N.Y.S.2d 239, 240-41 (App. Div. 2d Dep't 2010). The decision did not discuss tolling of interest or, more broadly, the range of remedies that are allowable. *Id.*

As to the Supreme Court's equitable powers, this Court found only that "there was no acceptable basis" for canceling the mortgage and note, not that equitable powers are unavailable when enforcing CPLR 3408(f).

Appellant then attempts to cobble together this Court's decisions in *Meyers* with *Kolb v. Strogh*, 158 A.D.2d 15, 558 N.Y.S.2d 549 (App. Div. 2d Dep't 1990), ignoring the clear incongruities. (Appellant's Br. 21-22.) *Kolb* did not arise out of a foreclosure action. 158 A.D. 2d at 16, 558 N.Y.S.2d at 549. Instead, it is a medical malpractice case in which this Court ruled that courts are not authorized to sanction a party that violates a procedural statute requiring the filing of a certificate of merit within 90-days after service of the summons and complaint. *Id.* at 21, 558 N.Y.S.2d at 553.

Again, in *Myers* this Court held that:

> [T]he courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case. What may prove appropriate recourse in one case may be inappropriate or unauthorized under the circumstances presented in another. Accordingly, in the absence of further guidance from the Legislature or the Chief Administrator of the Courts, the courts must prudently and carefully select among available and authorized remedies, tailoring their application to the circumstances of the case.

Meyers, 966 N.Y.S.2d at 118. Appellant, invoking *Kolb*, attempts to argue that there exist no "appropriate, permissible, and authorized remedies." The enforcement suggested under *Kolb* is not direct enforcement of a statute, but rather enforcement of a court's order. 158 A.D.2d at 22, 558 N.Y.S.2d at 553 (requiring

courts to rely upon CPLR 3126, granting the power to impose penalties for failure to comply with an order, to compel compliance with a procedural statute). A requirement that the Supreme Court use such a roundabout means of enforcement is in direct conflict with *Meyers*.

More generally, Appellant's argument that no remedies can be imposed for violations of CPLR 3408(f) because the Legislature failed to authorize sanctions fails. (Appellant's Br. 17-22.) Appellant relies chiefly on *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 550 N.Y.S.2d 572 (1989). *Id.* The law applied by the *Kolb* court to reach its decision derives almost exclusively from *Tewari*. 158 A.D.2d at 21, 558 N.Y.S.2d at 553. *Tewari* is also a medical malpractice case, and there the Court of Appeals held that dismissal could not be imposed as a remedy for the violation of a statutory notice requirement where (1) the "plain language of" the statute and "the rules promulgated thereunder do not provide any authority for the imposition of the sanction"; and (2) "the legislative history of the statute" does not suggest "that the Legislature intended that dismissal be an authorized sanction." 75 N.Y.2d at 11, 550 N.Y.S.2d at 576. As discussed *supra*, the court rules promulgated under CPLR 3408(f) do in fact provide authority for the imposition of a remedy, requiring that courts "ensure that each party fulfills its obligation to negotiate in good faith." 22 NYCRR 202.12–a(c)(4). Furthermore, the Legislature clearly contemplated sanctions when it instructed the Chief Administrator of the Courts

that it may promulgate rules to sanction egregious behavior. 2009 Sess. Law News of N.Y. Ch. 507 (S. 66007).

The holdings of *Tewari* and *Kolb* are further distinguishable because the statutes the courts were seeking to enforce were procedural, and the courts had not invoked equitable powers. *Tewari*, 75 N.Y.2d at 7, 550 N.Y.S.2d at 574 (overruling the lower court's dismissal that was based on plaintiff's failure to timely file a "notice of dental, medical or podiatric malpractice action" under CPLR 3406(a)); *Kolb*, 158 A.D.2d at 22, 558 N.Y.S.2d at 553 (denying a motion to dismiss for violation of the requirement under CPLR 3012–a to timely file the certificate of merit). CPLR 3408, by contrast, is a remedial statute. *Wells Fargo Bank v. Van Dyke*, 101 A.D.3d 638, 639, 958 N.Y.S.2d 331, 332 (App. Div. 1st Dep't 2012). And here, when the Supreme Court ordered tolling, its authority did not arise solely from CPLR 3408, but also from its posture as a court sitting in equity. *See Mortg. Elec. Registration Sys., Inc. v. Horkan*, 68 A.D.3d 948, 948, 890 N.Y.S.2d 326 (App. Div. 2d Dep't 2009) (observing that in the foreclosure context, "[o]nce equity is invoked, the court's power is as broad as equity and justice require") (internal quotations omitted).

B. Tolling Interest Is Not Rewriting the Contract

Appellant's contention that tolling interest is a "*per se* impermissible sanction" (Appellant's Br. 22) relies on an incorrect reading of *Meyers*, and fails in application to the case at bar because the argument is unsupported by the record.

The mortgage and note are not a part of the record. The contract term that Appellant contends the tolling order rewrites therefore is not subject to this Court's review. In an effort to paper-over the contract term's absence, Appellant cites, using the signal "see," to references made to loan terms in the Affirmation, Affidavit, and Complaint. (Appellant's Br. 22.) The loan terms listed in the Complaint are allegations, not facts. Importantly, none of these citations identifies a provision of the contract with which the Order interferes.

When this Court in *Meyers* held that courts cannot "rewrite the contract that the parties freely entered into," it was in response to an order by the court below that Wells Fargo be compelled to enter into a specific loan modification agreement with the borrower. 966 N.Y.S.2d at 116-17. This Court further observed that such a remedy runs afoul of CPLR 3408(f)'s purpose to have the parties reach a "mutually agreeable resolution." *Id.* at 117. By contrast, a tolling order does not impose new contractual obligations on the parties. Instead, it temporary imposes a financial penalty on a party. As no money is exchanged upon the imposition of a tolling order, such a remedy can be easily unwound should a court reverse course

and find that tolling was inappropriate. In the case at bar, if the Supreme Court found, based on opposition submitted by Appellant that tolling was not justified, the Court may merely vacate its prior order.

The Order is also materially different from the prohibited remedy in *Meyers* in that it directly furthers CLPR 3408(f)'s purpose. It was imposed by the Supreme Court "pending the parties reaching an agreement on the terms of a modification," and was made in conjunction with a directive that the parties appear at an additional settlement conference. (R. at 14.) By denying Appellant the economic benefit of delay upon a showing that it had engaged in dilatory tactics and had demonstrated intransigence, the Supreme Court sought to incentivize Appellant to negotiate in good faith. (*See* R. at 12-14.)

This Court specifically considered interest tolling as a remedy for CPLR 3408(f) violations, and declined to rule it impermissible. *Meyers*, 966 N.Y.S.2d at 116 (citing to a host of lower court decisions imposing, *inter alia*, tolling as a remedy for good faith violations). The only court to consider a tolling remedy in light of the *Meyers* decision found no incompatibility. *Wells Fargo Bank, N.A. v. Ruggiero*, 2013 NY Slip Op 50871(U) (Kings Cty. Sup. Ct.) (discussing the remedies available post-*Meyers* and concluding that it is permissible to bar the plaintiff from recovering all attorney's fees, legal costs, and interest accruing from

the date of the first settlement conference, and to require that the bank pay the homeowner's legal costs).

CPLR 5001(a) grants courts discretion over the interest charged in equitable actions: "in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." Ruling in a foreclosure action that plaintiff cannot charge interest incurred due to plaintiff's delay, this court explained, "[i]n an action of an equitable nature, the recovery of interest is within the court's discretion." *Dayan v. York*, 51 A.D.3d 964, 965, 859 N.Y.S.2d 673, 674 (App. Div. 2d Dep't 2008), *citing* CPLR 5001(a).

Prohibiting the imposition of tolling because it interferes with the contractual terms of the mortgage and note would produce absurd results. Given that the remedy amounts to a financial penalty, a court could simply assess a fine in the amount of the interest on the debt rather than order that interest be tolled. Such an equivalency exposes the fatuity of Plaintiff's argument.

CONCLUSION

For the foregoing reasons, the Appellant's appeal should be denied. In the alternative, the Supreme Court's Order should be affirmed.

Respectfully submitted,

By: _____

Aaron Jacobs-Smith, of counsel to
Jeanette Zelhof, Esq.
MFY LEGAL SERVICES, INC.
299 Broadway, 4th Floor
New York, NY 10007
Telephone: (212) 417-3700

Attorneys for Respondent Donnette Smith

Date: July 8, 2013
New York, NY

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 7,532.

_____

Aaron Jacobs-Smith, of counsel to
Jeanette Zelhof, Esq.
MFY LEGAL SERVICES, INC.
299 Broadway, 4th Floor
New York, NY 10007
Telephone: (212) 417-3700

Attorneys for Respondent Donnette Smith

Date: July 8, 2013
New York, NY