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SHORT FORM ORDER

INDEX
NO.: 32714-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 23 - SUFFOLK COUNTY

PRESENT: Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 10-28-11
ADJ. DATE 08-02-12
Mot. Seq. # 001-MotD
Mot. Seq. # 002-XMD

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U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE ON BEHALF OF THE HOLDERS OF THE TERWIN MORTGAGE TRUST 2006-1, ASSET-BACKED SECURITIES, TMTS SERIES 2006-1,

Plaintiff,

-against-

DAMIEN FIELDS; TISHANNA HUTCHINSON; WINTHROP UNIVERSITY HOSPITAL EFCU; "JOHN DOE #1-5" AND "JANE DOE #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants,

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Upon the following papers numbered 1 to 25 read on these motions for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers 10 - 15; Answering Affidavits and supporting papers 16 - 23; Replying Affidavits and supporting papers 24 - 25; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and striking the answer and affirmative defenses of the defendants Damien Fields and Tishanna Hutchinson; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (3) amending the caption is determined solely to the extent indicated below; and it is

ORDERED that this cross motion (002) by the defendants Damien Fields and Tishanna Hutchinson for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in their favor and dismissing the plaintiff's complaint pursuant to CPLR 3211 (a)(1) and (3) insofar as asserted against them (but improperly denominated a motion for dismissal pursuant to CPLR 3211); and (2) pursuant to CPLR 3212 awarding partial summary judgment in their favor on certain of their counterclaims alleging violations of General Business Law § 349 and Regulation Z (12 CFR part 226) promulgated under the Truth In Lending Act (15 USC §§ 1601-1665) is denied in its entirety; and it is

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

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

This is an action to foreclose a mortgage on residential property known as 39 East Sycamore Street, Central Islip, New York 11722 (the property). Damien Fields (Fields) allegedly executed an adjustable rate note dated September 29, 2005 (the note) in favor of Mortgageit, Inc. (Mortgageit) agreeing to pay the principal sum of $230,000 at the initial rate of 8.350% beginning on December 1, 2005 through to November 1, 2035, the maturity date. To secure said note, Fields and the defendant Tishanna Hutchinson (collectively the defendant mortgagors) executed a mortgage (the mortgage) also dated September 29, 2005 on the property. The note bears an undated, blank endorsement without recourse by Mortgageit. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for Mortgageit and its successors and assigns and that for the purposes of recording the mortgage MERS was the mortgagee of record. MERS as nominee for Mortgageit allegedly transferred the mortgage and note to U.S. Bank National Association, as Indenture Trustee on behalf of the Holders of the Terwin Mortgage Trust 2006-1, Asset-Backed Securities, TMTS Series 2006-1 (the plaintiff) by assignment dated August 4, 2010 and recorded on August 31, 2010.

The defendant mortgagors allegedly defaulted on his monthly payment of interest on April 1, 2010 and each month thereafter. Thereafter, the plaintiff allegedly sent the defendant mortgagors notices of default as well as a 90-day notice pursuant to RPAPL § 1304. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a summons and complaint on September 2, 2010. In the complaint, the plaintiff alleges, inter alia, that the defendant mortgagors failed to comply with the conditions of the subject note and mortgage by failing to pay portions of principal, interest, taxes, insurance premiums, escrow and other charges, and that the plaintiff elected to call due the entire amount secured by the mortgage. The plaintiff also alleges that it is the owner of record of the note and mortgage securing the subject property. In response, the defendant mortgagors served an answer denying the material allegations of the complaint, asserting fourteen

affirmative defenses and interposing nine counterclaims seeking monetary and punitive damages as well as an award of attorneys' fees. In substance, the defendant mortgages allege that Mortgageit engaged in predatory lending tactics, in violation of state and federal law, by fraudulently inducing the defendant mortgagors to enter into an unconscionable mortgage transaction with an adjustable rate note which they could not afford. The defendant mortgagors further allege that by reason of the assignment of the subject mortgage to the plaintiff by MERS, Mortgageit's conduct may be imputed to the plaintiff. In its reply, the plaintiff, as a defendant on the counterclaims, denied the allegations set forth in each of the counterclaims. None of the other defendants have answered or appeared herein.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and striking the answer and affirmative defenses of the defendants Damien Fields and Tishanna Hutchinson; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (3) amending the caption. The defendant mortgagors oppose the plaintiff's motion and cross move for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in their favor and dismissing the plaintiff's complaint pursuant to CPLR 3211 (a)(1) and (3) insofar as asserted against them (but improperly denominated a motion for dismissal pursuant to CPLR 3211); and (2) pursuant to CPLR 3212 awarding partial summary judgment in their favor on certain of their counterclaims alleging violations of General Business Law § 349 and Regulation Z (12 CFR part 226) promulgated under the Truth In Lending Act (TILA) (15 USC § 1601, *et seq.*). In response to the cross motion, the plaintiff has filed opposition papers and the defendant mortgagors have filed a reply.

Initially, the notice of cross motion is procedurally defective to the extent that the defendant mortgagors request dismissal pursuant to CPLR 3211 instead of summary judgment pursuant to CPLR 3212 (b) based upon CPLR 3211 (a)(1) and (a)(3) grounds. To the extent that the defendant mortgagors cross move for an order dismissing the complaint against them based upon a lack of standing, the cross motion should have been labeled as one for summary judgment made pursuant to CPLR 3212, since it was made after joinder of issue (*see*, ***Hertz Corp. v Luken***, 126 AD2d 446, 510 NYS2d 590 [1st Dept 1987]). Further, the Court notes that the cross motion is procedurally defective in that the relief sought in the notice of cross motion is partially inconsistent with the relief sought in counsel's affirmation in support of the cross motion. Specifically, while the notice of cross motion requests summary judgment based upon CPLR 3211 (a)(1) and (a)(3) grounds, or lack of capacity to sue, the defendant mortgagors assert a lack of standing as an affirmative defense in their answer and in their moving papers. Therefore, it appears that the defendant mortgagors are seeking summary judgment dismissing the complaint based on the plaintiff's alleged lack of standing (*see*, ***Wells Fargo Bank Minn. Natl. Assn. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]; ***New York Community Bank v Holland***, 2012 NY Misc LEXIS 789, 2012 WL 756599, 2012 NY Slip Op 30411U [Sup Ct, Suffolk County, Feb. 15, 2012, Martin, J.]).

In support of the motion for summary judgment against the defendant mortgagors, the plaintiff offers the pleadings, affidavits of service, a copy of the mortgage, note, an adjustable rate rider, and interest-only addendum to adjustable rate rider, the assignment, the two affidavits of the assistant vice president of the plaintiff's servicer/attorney-in-fact, Specialized Loan Servicing, Inc., (Specialized) and the affirmation of counsel. In his affidavit of merit, Specialized's assistant vice president alleges, inter

alia, that he has knowledge of the facts and circumstances herein by his review of the complaint and the plaintiff's records concerning this matter. The officer also alleges that the plaintiff is the holder of the note and mortgage herein and that the defendant mortgagors defaulted in payment of the loan obligation to the plaintiff on April 1, 2010. In his other affidavit, the officer alleges, among other things, that the plaintiff is the current holder of the note and mortgage by assignment dated August 4, 2010. In his affirmation, counsel avers, inter alia, that a notice of foreclosure settlement conference was served upon the defendant mortgagors via their counsel and that they failed to appear at the conference held on June 24, 2011.

In opposition to the plaintiff's motion and in support of the cross motion, the defendant mortgagors submit, among other things, the affidavit of Fields and an affirmation of counsel. In his affidavit, Fields alleges, inter alia, that he and his wife were "induced" into refinancing based upon an adjustable rate loan and that "the [p]laintiff" did not verify their income prior to making the loan. According to Fields, "the [p]laintiff" represented to the defendant mortgagors that they had a good credit score. Field also alleges that his wife was unemployed at the time they applied for the mortgage. In his affirmation counsel contends, inter alia, that the affidavit of the assistant vice president of the plaintiff's servicer is hearsay because the affiant did not personally service the defendant mortgagors' account. At the outset, this argument is unavailing in light of the affiant's unchallenged assertion of personal knowledge of the defendant mortgagors' default (*see*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]).

It is well settled that the proponent of a summary judgment motion bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Norwest Bank Minnesota, N.A. v Sabloff***, 297 AD2d 722, 723, 747 NYS2d 559 [2d Dept 2002]). Failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposition papers (***De Santis v Romeo***, 177 AD2d 616, 616, 576 NYS2d 323 [2d Dept 1991]). Nevertheless, in the course of deciding a summary judgment motion, the court is empowered to search the record and award summary judgment to a non-moving party (*see*, CPLR 3212 [b]; ***Wilkinson v Skinner***, 34 NY2d 53, 356 NYS2d 15 [1974]).

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228A, __NYS2d__, 2012 NY Slip Op 50921U [Sup Ct, Suffolk County, May 22, 2012, Whelan, J., slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, i.e., one having "a plausible ground or basis which is fairly arguable and of substantial character" (*see*, ***Feinstein v Levy***, 121

AD2d 499, 500, 503 NYS2d 821 [1st Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, *supra*).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]). In the instant case, the plaintiff produced the note and the mortgage executed by the defendant mortgagor as well as evidence of non-payment and the acceleration/default notice (*see*, ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). When the issue of standing in a foreclosure action is placed in issue, however, it is incumbent upon the plaintiff to establish its standing to be entitled to the relief of foreclosure and sale (***Citimortgage, Inc. v Stosel***, 89 AD3d 887, 888, 934 NYS2d 182 [2d Dept 2011]).

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

In this case, the issue of standing cannot be determined as a matter of law based upon the papers submitted because there is a question of fact as to whether the plaintiff was the lawful holder of the note when it commenced this action (*see*, ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]). If MERS, as nominee of the Lender was not the owner of the note, as it appears, it would have lacked the authority to assign the note to plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to plaintiff would be a nullity (*see*, ***Kluge v Fugazy***, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). The plaintiff also failed to establish that the note was physically delivered to it prior to the commencement of this action (*see*, ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]). Specialized's officer affirmed that the original note is in the possession of the plaintiff, but he did not state any factual details concerning when the plaintiff

received physical possession of the note and thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action (*see*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra*; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). In the instant case, however, the plaintiff has alleged facts in this matter, which if proven, would demonstrate standing (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra*; ***Wells Fargo Bank, N.A. v Enyonam***, 2010 NY Misc LEXIS 3611, 2010 WL 3115877, 2010 NY Slip Op 32046U [Sup Ct, Queens County, Aug. 3, 2010, Weiss, J.]; *see generally*, ***Saxony Ice Co. v Ultimate Energy Rest. Corp***., 27 AD3d 445, 810 NYS2d 344 [2d Dept 2006]). The plaintiff was not obligated to supply evidentiary support for its assertions in view of the defective notice of motion (*see*, ***U.S. Bank Natl. Assn. v McPherson***, 35 Misc3d 1219A, __NYS2d__ [Sup Ct, Queens County, Apr. 24, 2012, McDonald, J.]). Therefore, the branch of the cross motion for summary judgment dismissing the complaint based on lack of standing, and the branch of the plaintiff's motion seeking to strike the eleventh affirmative defense of lack of standing, are both denied (*see,* ***U.S. Bank Natl. Assn. v Cange***, 2012 NY Slip Op 4735 [2d Dept, June 13, 2012]; ***HSBC Mtge. Corp. v MacPherson***, 89 AD3d 1061, 934 NYS2d 428 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, *supra*). The Court now turns to the defendant mortgagors' other affirmative defenses and counterclaims.

As first and second affirmative defenses and first and second counterclaims, the defendant mortgagors assert that "the [p]laintiff" violated Federal Reserve Board Regulation Z (Regulation Z) (12 CFR part 226) promulgated under the (TILA) (15 USC § 1601, *et seq*.). The relevant provisions of TILA apply to consumer credit transactions where the lender takes a security interest in the consumer's residence (*see*, 15 USC § 1635; ***WM Specialty Mtge., LLC v Sparano***, 68 AD3d 987, 989, 892 NYS2d 408 [2d Dept 2009]). TILA gives the consumer an unconditional right to rescind the transaction within three days of (1) the consummation of the transaction, or (2) the delivery of certain required disclosures and rescission forms to the consumer, whichever occurs later (*see*, 15 USC § 1635 [a]; ***WM Specialty Mtge., LLC v Sparano***, 68 AD3d 987, *supra* at 989). However, where the required information and forms have never been delivered to the borrower, the right to rescind is extended to three years after the date of the consummation of the transaction (*see*, 15 USC § 1635 [f]; ***WM Specialty Mtge., LLC v Sparano***, 68 AD3d 987, *supra* at 989). Further, the expiration of the statutory period for commencement of a TILA will not bar the interposition of a defense thereunder by a consumer where the defense arises out of the same transaction as the one sued upon (*see*, ***Community Natl. Bank & Trust Co. v McClammy***, 138 AD2d 339 525 NYS2d 629 [2d Dept 1988]; CPLR 203 [c]).

The plaintiff failed to meet its prima facie burden as a matter of law dismissing the first and second counterclaims as its submissions do not include documentary evidence that Mortgageit and/or the plaintiff provided the defendant mortgagors with copies of a Truth-In-Lending disclosure statement or a HUD-1 settlement statement (*see*, ***Accredited Home Lenders v Hughes***, 22 Misc3d 323, 866 NYS2d 860 [Sup Ct, Essex County, Nov. 5, 2008, Dawson, J.]; *cf.*, ***Emigrant Mtge. Co., Inc. v Blizzard***, 2011 NY Misc LEXIS, 2011 NY Slip Op 31088U [Sup Ct, Richmond County, Apr. 25, 2011, Maltese, J.]; ***Emigrant Mtge. Co. Inc. v Patton***, 2010 NY Misc LEXIS 5204, 2010 WL 481392, 2010 NY Slip Op 32994U [Sup Ct, NY County, Oct. 22, 2010, Friedman, J.]; *see generally*, ***Bank of Am., N.A. v Gowrie***, 2011 NY Misc LEXIS 1110, 2011 WL 1101030, 2011 NY Slip Op 30658U [Sup Ct, Queens County, Feb. 25, 2011, Agate, J.]). While the plaintiff alleges that a notice of right to rescind was provided to the defendant mortgagors, a copy of same has not been annexed to the moving papers. Also, there are no allegations

by the plaintiff as to whether a HUD-1 statement was provided to the defendant mortgagors. To the extent that the defendant mortgagors seek to recover actual and statutory damages under TILA for failure to provide required disclosures, they also failed to demonstrate, prima facie, their entitlement to summary judgment as they have submitted no proof or arguments in support of the first and second counterclaims (*see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). To the extent that the defendant mortgagors refer in their first affirmative defense and counterclaim to an assignment by "Meridian Residential" (Meridian), Meridian is not a party to this action and its nexus, if any, to Mortgageit and to the plaintiff has not been set forth by the defendant mortgagors in their pleading. Nor has Meridian's connection to Mortgageit, if any, been disclosed or refuted in any of the moving papers. Additionally, there is an issue of fact as to whether the property was and is used by the defendant mortgagors as their principal residence (*see*, 15 USC § 1635[a]). Where, as here, there are many unresolved issues of fact as to whether the plaintiff and/or Mortgageit or non-party Meridian violated the disclosures requirements of TILA, summary judgment is not appropriate (*see*, ***Bankers Trust Co. of Cal., N.A. v Ward***, 269 AD2d 480, 703 NYS2d 504 [2d Dept 2000]; ***First Trust Natl. Assn. v Chiang***, 242 AD2d 599, 662 NYS2d 136, 662 NYS2d 137 [2d Dept 1997]; ***April M's Enters., Inc. v Scott***, 178 AD2d 572, 577 NYS2d 471 [2d Dept 1991]; *see also*, 15 USC §1635 [a], [f]; 12 CFR 226.23 [a] [3]; ***WM Specialty Mtge., LLC v Sparano***, 68 AD3d 987, *supra*).

The first and second affirmative defenses based upon alleged violations of TILA are stricken, however, as a claimed violation of that section does not constitute an affirmative defense to a claim for foreclosure (*see*, ***La Salle Bank Nat. Assn. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]). In any event, the defendant mortgagors have not submitted any proof or arguments in support of the first and second affirmative defenses. Thus, the facts, as alleged in the plaintiff's moving papers as to these defenses, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Madison Park Invs., LLC v Atlantic Lofts Corp.***, 33 Misc3d 1215A, 941 NYS2d 538 [Sup Ct, Kings County, Oct. 18, 2011, Cutrona, J.]).

By their third and fourth affirmative defenses and counterclaims, the defendants allege deceptive business practices and violations of General Business Law § 349. Generally, a representation by a lender that a borrower can afford to repay a prospective loan is an expression of opinion of present or future expectations, which is not actionable and cannot form the basis for an affirmative defense (*see*, ***Goldman v Strough Real Estate, Inc.***, 2 AD3d 677, 770 NYS2d 94 [2d Dept 2003]; ***Crossland Sav., F.S.B. v SOI Dev. Corp.***, 166 AD2d 495, 560 NYS2d 782 [2d Dept 1990]). Furthermore, the legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors (*see*, ***Std. Fed. Bank v Healy***, 7 AD3d 610, 777 NYS2d 499 [2d Dept 2004]; *see also*, ***Walts v First Union Mtge. Corp.***, 259 AD2d 322, 686 NYS2d 428 [1st Dept 1999]).

The essential elements of a cause of action for fraud are "representation of a material existing fact, falsity, scienter, deception, and injury" (***Channel Master Corp. v Aluminum Ltd. Sales, Inc***, 4 NY2d 403, 407, 176 NYS2d 259 [1958]). A party that has fraudulently induced another to enter into a contract may be liable in tort for damages (*see*, ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283

[1995]; ***Sabo v Delman***, 3 NY2d 155, 164 NYS2d 714 [1957]; ***Wegman v Dairylea Coop., Inc.***, 50 AD2d 108, 376 NYS2d 728 [4th Dept 1975], *lv dismissed* 38 NY2d 918, 382 NYS2d 979 [1976]). A cause of action to recover damages for fraud, though, will not lie if the only fraud alleged relates to a breach of contract (***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, *supra* at 318; ***Stangel v Zhi Da Chen***, 74 AD3d 1050, 1052, 903 NYS2d 110 [2d Dept 2010]). General allegations that a defendant entered into an agreement with the intention not to perform are insufficient to support a claim for fraud (*see*, ***McGee v J. Dunn Constr. Corp.***, 54 AD3d 1010, 864 NYS2d 553 [2d Dept 2008]).

To establish a cause of action for fraudulent inducement in conjunction with the action for breach of contract, the plaintiff must show that defendant breached a duty distinct from his contractual duties, not simply that he failed to fulfill promises of future acts (*see*, ***Weitz v Smith***, 231 AD2d 518, 647 NYS2d 236 [2d Dept 1996]). Thus, a plaintiff must present proof that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations (***Channel Master Corp. v Aluminum Ltd. Sales, Inc.***, 4 NY2d 403, *supra* at 407; ***113-14 Owners Corp. v Gertz***, 123 AD2d 850, 851, 507 NYS2d 464 [2d Dept 1986], *lv denied* 70 NY2d 604, 519 NYS2d 1027 [1987]). Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016 (b) (***Black v Chittenden***, 69 NY2d 665, 668, 511 NYS2d 833 [1986]; ***Priolo Communs. v MCI Telecommunications Corp.***, 248 AD2d 453, 454, 669 NYS2d 376 [2d Dept 1998]).

A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance, and damages, an allegation that the defendant had a duty to disclose material information and that it failed to do so (***High Tides, LLC v DeMichele***, 88 AD3d 954, 957, 931 NYS2d 377 [2d Dept 2011]). Where a cause of action is based on a misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; *see*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]). Further, the parol evidence rule does not bar a party from showing that a written agreement was obtained by fraudulent inducement; however, in order to defeat a summary judgment motion, such evidence must be genuine and based on proof, not conclusory assertions (***Hogan & Co. v Saturn Mgt.***, 78 AD2d 837, 837-838, 433 NYS2d 168 [1st Dept 1980]; *see*, ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]).

Section 349(a) of the General Business Law declares as unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (General Business Law § 349[a]). Although the statute is "directed at wrongs against the consuming public" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 24, 623 NYS2d 529 [1995]), it allows a private right of action by any person who has been injured by a violation of the section (*see*, General Business Law § 349[h]). "To assert a viable claim under General Business Law § 349(a), a plaintiff must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages" (***Lum v New Century Mtge. Corp.***, 19 AD3d 558, 559, 800 NYS2d 408 [2d Dept 2005]; *see*, ***Koch v Acker, Merrall & Condit Co.***, 18 NY3d 940, 944 NYS2d 452 [2012]; ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892 [2000]; ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177 [1999]). In addition, a plaintiff must

prove "actual" injury to recover under the statute, though not necessarily pecuniary harm (***Stutman v Chemical Bank***, 95 NY2d 24, *supra* at 29). Justifiable reliance by the plaintiff, however, is not an element of the statutory claim (*see*, ***Koch v Acker, Merrall & Condit Co.***, 18 NY3d 940, 944 NYS2d 452 [2012]).

The third and fourth affirmative defenses are dismissed as a claimed violation of General Business Law § 349 and claimed deceptive business practices do not constitute affirmative defenses to a foreclosure action (*see*, ***La Salle Bank Nat. Assn. v Kosarovich***, 31 AD3d 904, *supra*; ***U.S. Bank Natl. Assn. v McPherson***, 35 Misc3d 1219A, *supra*).

To the extent that the third counterclaim alleging a violation of Section 349(a) of the General Business Law is based upon a TILA violation, the defendant mortgagors failed to establish its prima facie entitlement to judgment as a matter of law as there are unresolved issues of fact whether the plaintiff and/or Mortgageit made, if required, disclosures of fees and the right to rescind as demonstrated above (*see*, 15 USC § 1601, *et seq.*; ***Aurora Loan Servs., LLC v Thomas***, 53 AD3d 561, 862 NYS2d 89 [2d Dept 2008]; ***Popular Fin. Servs., LLC v Williams***, 50 AD3d 660, 855 NYS2d 581 [2d Dept 2008]; ***Bank of Am., N.A. v Gowrie***, 2011 NY Slip Op 30658U, *supra*; *cf.*, ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012], *revg* 29 Misc3d 746, 906 NYS2d 874).

To the extent that the third counterclaim is based upon fraudulent concealment, however, this counterclaim is deficient as a matter of law as it is not supported by factual allegations containing the details constituting the alleged wrong with sufficient particularity (*see*, CPLR 3016 [b]; ***High Tides, LLC v DeMichele***, 88 AD3d 954, *supra* at 957; ***Jones v OTN Enter., Inc.***, 84 AD3d 1027, 1028, 922 NYS2d 810 [2d Dept 2011]). Instead, the defendant mortgagors have merely alleged that "the plaintiff and its agents" mislead them concerning closing fees and the contents of the subject mortgage documents, i.e., the fact that the loan is negatively amortizing (*see*, ***Emigrant Mtge. Co., Inc. v Blizzard***, 2011 NY Misc LEXIS 1954, 2011 NY Slip Op 318088U [Sup Ct, Richmond County, Apr. 25, 2011, Maltese, J.]).

The defendant mortgagors did not establish their entitlement to summary judgment on the fourth counterclaim alleging a violation of General Business Law § 349 and based upon an alleged fraudulent misrepresentations with respect to the extension of credit to them (*see*, ***U.S. Natl. Bank v Pia***, 73 AD3d 752, 901 NYS2d 104, *lv dismissed*, 15 NY3d 903, 912 NYS2d 571 [2010]; ***Patterson v Somerset Invs. Corp.***, ___ AD3d___, 2012 NY Slip Op 4726 [2d Dept, June 13, 2012]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 897 NYS2d 103 [2d Dept 2010]; ***Gendot Assocs. Inc. v Kaufold***, 2012 NY Misc LEXIS 1131, 2012 WL 1141238, 2012 NY Slip Op 30599U [Sup Ct, Suffolk County, Mar. 7, 2012, Spinner, J.]). The loan instruments submitted by the plaintiff in support of its motion, which included the note, mortgage, adjustable rate rider and interest-only addendum to adjustable rate rider, demonstrate that the terms of the same were fully set forth in the loan documents.

Although an individual mortgagor who has been the victim of misleading practices by a mortgagee has been held to have a remedy under General Business Law § 349 (*see e.g.*, ***Popular Fin. Servs., LLC v Williams***, 50 AD3d 660, 855 NYS2d 581 [2d Dept 2008]), in this instance, the defendant mortgagors played a role in inducing Mortgageit to make the loan. It is well settled that a party who signs a document

without any valid excuse for having failed to read it is "conclusively bound" by its terms (***Gillman v Chase Manhattan Bank***, 73 NY2d 1, 11, 537 NYS2d 787 [1988]; *see*, ***KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.***, 72 AD3d 650, 650-651, 897 NYS2d 649 [2d Dept 2010]). To the extent that the defendant mortgagors signed a mortgage application to Mortgageit, without reviewing it or knowing its contents, they risked that Mortgageit would be induced to give them a loan which they allegedly could not afford (*see*, ***Stephenson v Terron-Carrera***, 2012 NY Misc LEXIS 2915, 2012 WL 2636004, 2012 NY Slip Op 31614U [Sup Ct, Suffolk County, June 5, 2012, Gazzillo, J.]). Indeed, "the fact that the [defendant mortgagors] sought and received a loan [that] [they] [allegedly] could not afford does not mean that [they] can now proceed on a [*General Business Law*] Section 349 claim against the [plaintiff as the assignee of Mortgageit] that made [their] [purported] mistake possible" (***Hayrioglu v Granite Capital Funding, LLC***, 794 F Supp2d 405, 413 [US Dist Ct, ED NY 2011]; *see*, ***Patterson v Somerset Invs. Corp.***, __AD3d__, *supra*; ***Emigrant Mortgage Co. v Fitzpatrick***, 95 AD3d 1169, *supra*). Accordingly, the documentary evidence submitted by the plaintiff conclusively established that the defendant mortgagors have no cause of action pursuant to General Business Law § 349 based upon fraud in the inducement as asserted in the fourth counterclaim (*see*, ***Patterson v Somerset Invs. Corp.***, 2012 NY Slip Op 4726, *supra*).

Further, the defendant mortgagors have also failed to support the fourth counterclaim with any factual allegation indicating an absence of meaningful choice on their part (*see*, ***King v Fox***, 7 NY3d 181, 818 NYS2d 833 [2006]). Even if Mortgageit extended an unaffordable loan to the defendant mortgagors at the time of consummation, evidence, if any, that Mortgageit's decision to lend money to the defendant mortgagors was unwise is insufficient by itself to raise a triable issue of fact as to whether Mortgageit engaged in fraudulent or unconscionable conduct or whether the subject loan itself was unconscionable (*see*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988]; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 2012 NY Slip Op 4707 [2d Dept, June 13, 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Citibank, N.A. v Walker***, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004], *abrogated on other grounds by* ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]).

In their moving papers, the defendant mortgagors have not set forth any specific facts as to their ability to repay the subject mortgage loan. Nor have they set forth any specific evidence regarding their education, financial status, or access to legal or financial counsel, the availability of other types of loans, or any deception or high pressure tactics utilized by the plaintiff (*see*, ***Emigrant Mortgage Co. v Fitzpatrick***, 95 AD3d 1169, *supra*). Further, the defendant mortgagors have neither alleged nor offered any evidence relating to the industry standards for residential loans at the time the subject loan was issued (*see*, ***Emigrant Mortgage Co. v Fitzpatrick***, 95 AD3d 1169, *supra*). Moreover, to the extent that the fourth counterclaim is premised upon the defendant mortgagors' assertion that "the plaintiff" and its agents failed to properly verify the information provided to them in relation to the mortgage application, the defendant mortgagors make no allegation of any contractual or fiduciary relationship between them, the plaintiff and Mortgageit or its unnamed agents (*see*, ***Beckford v Northeastern Mtge. Corp.***, 262 AD2d 436, 692 NYS2d 412 [2d Dept 1999]). In the absence of any such relationship, Mortgageit and the plaintiff, as the assignee of Mortgageit, owed no duty of care to the defendant mortgagors to ascertain the accuracy of the information provided to Mortgageit as part of the application process (*see*, ***Euba v Euba***,

78 AD3d 761, 911 NYS2d 402 [2d Dept 2010]; ***Beckford v Northeastern Mtge. Inv. Corp.***, 262 AD2d 436, *supra*; ***Chemical Bank v Bowers***, 228 AD2d 407, 643 NYS2d 653 [2d Dept 1996]). In light of the foregoing, the fourth affirmative defense is stricken and reverse summary judgment dismissing the fourth counterclaim, pursuant to CPLR 3212 (b), is awarded to the plaintiff.

The fifth affirmative defense and counterclaim asserted by the defendant mortgagors, alleging a violation of the Real Estate Settlement Procedures Act (RESPA) (12 USC § 2601, *et seq.*; USC § 2607), is based upon their claim that "broker fees" allegedly paid by non-party Meridian and "charged by its brokers" were, in essence, not performed or excessive in light of the services performed. RESPA applies to lenders who offer federally related mortgage loans (*see*, 12 USC § 2605; ***Deutsche Bank Natl. Trust Co. v Campbell***, 26 Misc3d 1206A, 906 NYS2d 779, 2009 NY Slip Op 526780 [Sup Ct, Kings County, Dec. 23, 2009, Miller, J.]). RESPA requires mortgage lenders and mortgage brokers (to the extent they are not the lender's exclusive agent), to disclose the costs associated with real estate closings (12 USC § 2603; 24 CFR § 3500.7; ***Fremont Inv. & Loan v Haley***, 23 Misc3d 1138A, 889 NYS2d 505, 2009 NY Slip Op 51186U [Sup Ct, Queens County, June 11, 2009, Rios, J., slip op, at 11]). Section 2603 of RESPA provides for the use of a standard form, commonly known as a "HUD-1," for the statement of settlement costs to be used in connection with real estate transactions in the United States which involve federally related mortgage loans. RESPA requires that a lender or mortgage broker provide an informational booklet to a borrower seeking to finance the purchase of residential real estate, so the borrower can better understand the nature and costs of real estate settlement services (***Fremont Inv. & Loan v Haley***, 23 Misc3d 1138A, *supra,* slip op, at 12]). It also requires the lender or mortgage broker to provide the borrower with a written good faith estimate, disclosing the amount or range of charges for specific settlement services, costs and fees incurred with the mortgage before the credit is extended, or within three days of receiving the loan application, whichever happens first (12 USC § 2604[c]; 24 CFR 3500.7[a], [b]).

A RESPA violation does not adversely affect the validity or enforceability of a federally related mortgage loan (12 USC § 2615; ***Fremont Inv. & Loan v Haley***, 23 Misc3d 1138A, *supra,* slip op, at 12). Thus, a disclosure violation of RESPA does not constitute a valid defense to a mortgage foreclosure (***Deutsche Bank Natl. Trust Co. v Campbell***, 26 Misc3d 1206A, *supra,* slip op, at 8; ***Fremont Inv. & Loan v Laroc***, 21 Misc3d 1124A, 873 NYS2d 511, 2008 NY Slip Op 521660 [Sup Ct, Queens County, Oct. 8, 2008, Weiss, J., slip op, at 6]; *see*, 12 USC § 2605). Moreover, RESPA does not create a private right of action for rescission for failure to disclose settlement costs (***Fremont Inv. & Loan v Haley***, 23 Misc3d 1138A, *supra*, slip op, at 13). The plaintiff on a RESPA claim bears the burden of proving a RESPA violation (***In re Knowles***, 442 BR 150, 157, 2011 Bankr LEXIS 2 [Bankr App Panel, 1st Cir 2011]; ***In re Tomasevic***, 275 BR 103, 114, 2001 Bankr LEXIS 1838 [Bankr MD Fla 2001]) (*borrower bears the burden of persuasion as to the mortgagee's alleged violation of RESPA*).

To the extent that the defendant mortgagors assert in their fifth counterclaim an objection to "broker fees," which they allegedly paid in connection with the loan, they have not alleged the identity of the non-party broker, and they have failed to offer any evidentiary proof that the mortgage broker violated any law or committed any fraud in charging such fee; nor have they alleged that Mortgageit or

the plaintiff owed them a duty to monitor and control the mortgage broker (*see generally*, ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]). Therefore, the defendant mortgagors have failed to show the manner in which Mortgageit or the plaintiff allowed non-party Meridian to allegedly violate RESPA. In any event, the defendant mortgagors failed to demonstrate that the subject loan is a federally related mortgage loan as they have not submitted any proof or arguments in support of their claim of a RESPA violation (*see*, 12 USC § 2602; ***Fremont Inv. & Loan v Laroc***, 21 Misc3d 1124A, *supra*). Accordingly, the fifth affirmative defense alleging a RESPA violation is stricken (*see*, ***Fremont Inv. & Loan v Haley***, 23 Misc3d 1138A, *supra*).

In the sixth affirmative defense and counterclaim, the defendant mortgagors assert waiver and promissory estoppel and based upon an alleged fraudulent misrepresentations in connection with a purported oral forbearance and "a government subsidized loan modification" application. An agreement to forbear or to modify the mortgage loan must be in writing and signed by the party to be charged (*see*, General Obligations Law § 15-301; ***Metropolitan Bank of Syracuse v Brennan***, 48 AD2d 254, 368 NYS2d 914 [4th Dept 1975]). The no oral modification statute of frauds set forth in GOL §15-301 does not, however, preclude a litigant from asserting claims of estoppel or waiver on the part of the party claiming the statutory bar under GOL §15-301 (*see*, ***Rose v Spa Realty Assocs***., 42 NY2d 338, 397 NYS2d 922 [1977]; ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 184, 451 NYS2d 663 [1982]). Under principles of New York jurisprudence, "[w]aiver is an intentional relinquishment of a known right and should not be lightly presumed" (***Gilbert Frank Corp. v. Federal Ins. Co.***, 70 NY2d 966, 968, 525 NYS2d 793 [1988]; ***Fish King Enters. v Countrywide Ins. Co.***, 88 AD3d 639, 930 NYS2d 256 [2d Dept 2011]). Vague and unsubstantiated allegations of the conduct constituting the alleged waiver, however, are not sufficient (***Manufacturers and Traders Trust Co. v David G. Schlosser & Assocs.***, 242 AD2d 943, 665 NYS2d 949 [4th Dept 1997]).

Where a contract, including a mortgage or guarantee, is unambiguous and contains a clause prohibiting amendment other than in writing within the contemplation of GOL § 15-301(1), alleged oral modifications of such contracts are ineffective to preclude enforcement thereof or other contractual remedies available to the plaintiff (*see*, ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***B. Reitman Blacktop, Inc. v Missirlian***, 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]; ***Wasserman v Harriman***, 234 AD2d 596, 651 NYS2d 620 [2d Dept 1996]).

"The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (***Agress v Clarkstown Cent. Sch. Dist.***, 69 AD3d 769, 771, 895 NYS2d 432 [2d Dept 2010]). The requirement that there be a clear and unambiguous promise is not met by references to a course of conduct between the parties (*see*, ***Southern Federal Sav. and Loan Assn. of Georgia v 21-26 East 105th Street Associates***, 145 BR 375, 383 [SD NY 1991], *aff'd*, 978 F2d 706 [2d Cir 1992]). In addition, the conduct relied upon to establish estoppel must not be otherwise compatible with the agreement between the parties as written (*see*, ***Rose v Spa Realty Assocs.***, 42 NY2d 338, 397 NYS2d 922 [1977]; ***Southern Federal Sav. and Loan Assn. of Georgia v 21-26 East 105th Street Associates***, 145 BR 375, *supra*). To establish a claim of equitable estoppel, three elements must be

established: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts (*see*, ***River Seafoods, Inc. v JPMorgan Chase Bank***, 19 AD3d 120, 796 NYS2d 71 [1st Dept 2005]). As in the case of a waiver, unsubstantiated, vague and conclusory allegations of facts allegedly giving rise to a claimed estoppel are insufficient to establish the estoppel, especially in cases where in the statutory requirement of a writing exists (*see*, ***Prudential Home Mtge. Co. v Cermele***, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995]).

Nevertheless, an oral modification of a written mortgage may be enforceable where the party seeking to uphold the modification partially performs under its terms, detrimentally relies on the modification and the partial performance is unequivocally referable to the modification (*see*, General Obligations Law § 5-703 [4]; ***Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group***. 93 NY2d 229, 689 NYS2d 674 [1999]; ***Chemical Bank v Sepler***, 60 NY2d 289, 469 NYS2d 609 [1983]; ***Martini v Rogers***, 6 AD3d 404, 774 NYS2d 378 [2d Dept 2004]). Under the doctrine of part performance, the acts of part performance must have been those of the party insisting on the contract, not those of the party insisting on the Statute of Frauds (*see*, ***Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group***, 93 NY2d 229, 689 NYS2d 674 [1999]). Unsubstantiated, vague and conclusory allegations of the existence and terms of any such oral modification are insufficient, as detailed factual allegations are required to establish a modification (*see*, ***Money Store of New York, Inc. v Kuprianchik***, 240 AD2d 398, 658 NYS2d 1019 [2d Dept 1997]; ***Wasserman v Harriman***, 234 AD2d 596, 651 NYS2d 620, *supra*).

The plaintiff demonstrated its prima facie entitlement to judgment as a matter of law with respect to the sixth affirmative defense by establishing that there is no contractual provision or fiduciary relationship which would have obligated it to furnish the defendant mortgagors with a loan forbearance or a modification (*see*, ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 491, 647 NYS2d 229 [1996], *lv dismissed* 89 NY2d 981, 656 NYS2d 739 [1997]; ***Euba v Euba***, 78 AD3d 761, *supra*; ***Golombek v Monahan***, 2 AD3d 1405, 768 NYS2d 879 [4th Dept 2003]; *see generally*, ***O'Connell v Soszynski***, 46 AD3d 644, 847 NYS2d 605 [2d Dept 2007]). In this case, the note and mortgage contain proscriptions against oral modification of any of the terms of the instruments. Specifically, the note and mortgage expressly provide that there is no waiver by the note holder if the note holder accepts partial payments or if Mortgageit does not require immediate payment in full in the event of a default (*see*, the plaintiff's Exhibit "A", note at section "7[D]"; mortgage at section "1" and "12" [a], [b]). The mortgage also provides Mortgageit may allow the defendant mortgagors to delay or change the amount of periodic payments due under the note, but that the defendant mortgagors will still be fully obligated under the subject note and mortgage unless Mortgageit agrees to release them in writing (*see*, the plaintiff's Exhibit "A", mortgage at section "12"). As the plaintiff demonstrated its prima facie showing, the burden shifts to the defendant mortgagors.

In opposition, the defendant mortgagors failed to raise a triable issue of fact by demonstrating by documents or other evidentiary proof that the plaintiff had a duty or contractual obligation to extend a mortgage loan modification to them, or that it acted in bad faith (*see*, ***O'Connell v Soszynski***, 46 AD3d

644, *supra*; ***Prudential Home Mtge. Co. v Cermele***, 226 AD3d 357, *supra*; ***Fine Arts Enterprises, N.V. v Levy***, 149 AD2d 795, 539 NYS2d 827 [3d Dept 1989]; ***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228A, *supra*; ***Aurora Bank FSB v CSP Realty Assoc. LLP***, 2011 NY Misc LEXIS 4365, 2011 WL 4345008, 2011 NY Slip Op 32407U [Sup Ct, Suffolk County, Sept. 7, 2011, Mayer, J.]; *cf.*, ***Wells Fargo Bank, N.A. Meyers***, 30 Misc 3d 697, 913 NYS2d 500 [Sup Ct, Suffolk County, Nov. 10, 2010, Sweeney, J.]). The record is also devoid of any evidence of a waiver of any right to foreclose on the part of the plaintiff (*see*, ***Fleet Bank v Pine Knoll Corp.***, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; ***Southold Sav. Bank v Cutino***, 118 AD2d 555, 499 NYS2d 169 [2d Dept 1986]; ***Dime Sav. Bank v Dooley***, 84 AD2d 804, 444 NYS2d 148 [2d Dpt 1981]; ***Ford v Waxman***, 50 AD2d 585, 375 NYS2d 145 [2d Dept 1975]). Moreover, the defendant mortgagors have not offered any extrinsic evidence of a written modification agreement. Nor have they submitted any evidence that a modification application was ever submitted to the plaintiff. Instead, the defendant mortgagors' pleading offers only vague, conclusory and unsubstantiated allegations regarding the purported oral assurances that this foreclosure action would be stayed until a determination was made and that the action would be terminated as long the defendant mortgagors were not in default on any future modification agreement. These allegations lack the requisite specificity required to overcome the requirement of a writing (*see*, ***Manufacturers and Traders Trust Co. v David G. Schlosser & Assocs.***, 242 AD2d 943, *supra*; ***Money Store of New York, Inc. Kuprianchik***, 240 AD2d 398, *supra*; ***Wasserman v Harriman***, 234 AD2d 596, *supra*; ***Connecticut Natl. Bank v Hack***, 186 AD2d 387, 588 NYS2d 180 [1st Dept 1992]).

The defendant mortgagors have also not shown that they were mislead or that they "significantly and justifiably relied" on the alleged oral assurances (*see*, ***Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., LP.***, 7 NY3d 96, 106, 817 NYS2d 606 [2006]). Under these circumstances, the no oral-modification clause set forth in the note and mortgage, coupled with the lack of a signed writing modifying the loan by reducing the interest rate or otherwise, bars enforcement of the defendant mortgagors claimed oral modification (*see*, General Obligations Law § 15-301; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***People's United Bank v Hallock Landing Assoc., LLC***, 2012 NY Misc LEXIS 1129, 2012 WL 1049999, 2012 NY Slip Op 30603U [Sup Ct, Suffolk County, Mar. 7, 2012, Whelan, J.]). In any event, the defendant mortgagors have not offered any arguments in support of the sixth affirmative defense and counterclaim. A defendant in a foreclosure action who seeks to avoid summary judgment against it where there have been unquestionable defaults, must meet a threshold of believability if it claims that there was an oral promise to forgo or delay foreclosure (***New York State Urban Dev. Corp. v Garvey***, 98 AD2d 767, 771, 469 NYS2d 789 [2d Dept 1983]). The bare assertion that certain representative of the mortgagee made such a promise is not enough to create an issue of fact (***New York State Urban Dev. Corp. v Marcus Garvey Brownstone Houses, Inc.***, 98 AD2d 767, *supra* at 771; *cf.*, ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, *supra* at 185). Accordingly, the sixth affirmative defense is stricken and reverse summary judgment dismissing the sixth counterclaim, pursuant to CPLR 3212 (b), is awarded to the plaintiff.

The seventh counterclaim to recover damages for the intentional infliction of emotional distress, based upon allegations of fraudulent inducement and fraudulent misrepresentations, fails to state a cause of action as the claimed acts of the plaintiff do not rise to the level of extreme and outrageous conduct which is necessary to sustain such a cause of action (*see*, ***Howell v New York Post. Co., Inc.***, 81 NY2d 115, 596 NYS2d 350 [1993]; ***Capellupo v Nassau Health Care Corp.***, 2012 NY Slip Op 5490 [2d Dept, July 11, 2012]; ***Bernat v Williams***, 81 AD3d 679, 916 NYS2d 614 [2d Dept 2011]). To the extent the defendant mortgagors allege negligent infliction of emotional distress as a seventh counterclaim, the claimed acts of the plaintiff do not state a cause of action since the plaintiff's alleged conduct cannot be said to unreasonably endanger the defendant mortgagors' safety or cause them to fear for their safety (*see*, ***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]; ***Crispino v Greenpoint Mtge. Corp.***, 2 AD3d 478, 769 NYS2d 553 [2d Dept 2003]; ***Wells Fargo Bank, N.A. v Enyonam***, 2010 NY Slip Op 32046U, *supra*). Accordingly, reverse summary judgment dismissing the seventh counterclaim, pursuant to CPLR 3212 (b) is awarded to the plaintiff (*see generally*, ***Ural v Encompass Ins. Co. of Am.***, 2012 NY Slip Op 5407 [2d Dept, July 5, 2012]). The seventh affirmative defense is stricken as the allegations of intentional/negligence infliction of emotional distress do not constitute an affirmative defense to a claim for foreclosure (*see generally*, ***Chase Manhattan Bank v Douglas***, 61 AD3d 1135, 877 NYS2d 488 [3d Dept 2009]; ***La Salle Bank Nat. Assn. v Kosarovich***, 31 AD3d 904, *supra*).

In the eighth affirmative defense and counterclaim, the defendant mortgagors allege that the plaintiff breached a duty of good faith and fair dealing with them in connection with a purported loan modification agreement. A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (***Canstar v Jones Constr. Co.***, 212 AD2d 452, 453, 622 NYS2d 730 [1st Dept 1995]; *see*, ***Bostany v Trump Organization, LLC***, 73 AD3d 479, 901 NYS2d 207 [1st Dept 2010]; ***Hawthorne Group v RRE Ventures***, 7 AD3d 320, 323, 776 NYS2d 273 [1st Dept 2004]). This affirmative defense, which is not supported by any evidence, is stricken as legally insufficient (*see*, ***Bear v Complete Off. Warehouse Corp.***, 89 AD3d 877, 934 NYS2d 179 [2d Dept 2011]). A defense that merely pleads conclusions of law without supporting facts is insufficient and fatally deficient (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). In any event, the plaintiff has no duty to modify the defendant mortgagors' mortgage obligation (*see*, ***JP Morgan Chase Bank, N.A. v Illardo***, __Misc3d__, 940 NYS2d 829 [Sup Ct, Suffolk County, Mar. 5, 2012, Whelan, J.]). Upon searching the record, the eighth counterclaim, which is duplicative of the sixth and seventh counterclaims alleging, inter alia, fraudulent misrepresentations and sounding in breach of contract, is dismissed (*see*, CPLR 3212 [b]; ***Barker v Time Warner Cable, Inc.***, 83 AD3d 750, 752, 923 NYS2d 118 [2001]; ***Deer Park Enters., LLC v Ail Sys., Inc.***, 57 AD3d 711, 712, 870 NYS2d 89 [2008]).

By their ninth affirmative defense and counterclaim, the defendant mortgagors assert that the complaint fails to state a cause of action. The defendant mortgagors did not cross move to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]), and, in any event, the complaint in this action is sufficient to set forth a cause of action for foreclosure. Specifically, the complaint sufficiently alleges that the plaintiff is the holder of the subject note and mortgage for which the defendant mortgagors are in default (*see*, ***Bancorp v Pompee***, 82 AD3d 935, 918

NYS2d 574 [2d Dept 2011]). Therefore, the ninth affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see, **Old Williamsburg Candle Corp. v Seneca Ins. Co. Inc.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). Upon searching the record, however, the ninth counterclaim is dismissed as the mere allegation that the plaintiff failed to state a cause of action does not support an independent cause of action (*see*, CPLR 3211 [b]).

The tenth affirmative defense, which is repetitive of the fourth affirmative defense, is stricken as the defendant mortgagors have failed to come forward with any admissible evidence showing that the loan was unconscionable or that the plaintiff or Mortgageit engaged in predatory loan practices with respect to the subject loan (*see*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, *supra*; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 2012 NY Slip Op 4707, *supra*; *see also*, ***JP Morgan Chase Bank, N.A. v Illardo***, __Misc3d__, *supra*). Moreover, there is no indication that the note and mortgage had been executed under duress (*see*, ***Gould v McBride***, 29 NY2d 768, 326 NYS2d 565 [1971]).

The twelfth affirmative defense asserting equitable estoppel, based upon fraud in the inducement in connection with the subject mortgage, and which is unsupported by sufficient factual allegations or evidentiary proof, is stricken (*see*, ***Glenesk v Guidance Realty Corp.***, 36 AD2d 852, 321 NYS2d 685 [2d Dept 1971], *abrogated on other grounds by* ***Butler v Catinella***, 58 AD3d 145, *supra*; ***Fremont Inv. & Loan v Haley***, 23 Misc3d 1138A, *supra*; *cf.*, ***Golden Eagle Capital Corp. v Paramount Mgt. Corp.***, 88 AD3d 646, 931 NYS2d 632 [2d Dept 2011]).

The thirteenth affirmative defense, which is in the nature of a counterclaim in that it seeks an award for costs, disbursements and legal fees, including attorneys fees, is stricken as without merit. It is well settled that the successful party in litigation may not recover attorneys' fees except, where authorized by the parties' agreement, statutory provision or court rule (***U.S. Underwriters Ins. Co. v City Club Hotel, LLC***, 3 NY3d 592, 597-98, 789 NYS2d 470 [2004]). The defendant mortgagors have failed to establish a predicate for such relief. Further, New York does not recognize a separate cause of action to impose sanctions pursuant to 22 NYCRR 130-1.1(c) (***Greco v Christoffersen***, 70 AD3d 769, 771, 896 NYS2d 363 [2d Dept 2010]). Accordingly, the thirteenth affirmative defense, which fails to state a cause of action or a cognizable defense, is stricken as without merit (*see*, ***JP Morgan Chase Bank, N.A. v Luxor Capital, LLC***, 32 Misc3d 1245A, 938 NYS2d 227 [Sup Ct, New York County, July 25, 2011, Bransten, J.]).

The fourteen affirmative defense, which alleges that the Court lacks jurisdiction over the defendant mortgagors, is stricken as they do not allege that they were not properly served with process herein (*see*, ***Associates First Capital Corp. v Wiggins***, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). In any event, this defense was waived as the defendant mortgagors failed to move to dismiss the complaint against them on this ground within 60 days after serving their answer (*see*, CPLR 3211 [e]; ***Reyes v Albertson***, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; ***Dimond v Verdon***, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]).

The defendant mortgagors' argument that they were deprived of a mandatory settlement conference pursuant to CPLR 3408 (L 2009, c 507, § 25. subd e) lacks merit. According to the records maintained by the Court's computerized database, a settlement conference was held in the Specialized Mortgage Foreclosure Conference Part on June 24, 2011. These records also show that notice of the conference was mailed in accordance with the Court's standard practice to the defendant mortgagors at the subject property and their Florida residence as well as to their counsel herein and that it was not returned to the court as undeliverable. On June 24, 2011, however, this case was marked to indicate that there was no appearance or participation from the defendant mortgagors. As a result, this case was referred to IAS Part 23. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required. The "stipulation" referred to by counsel for the defendant mortgagors was never filed with the Court, and, in any event, is a nullity as a case cannot be indefinitely "removed" from the settlement conference calendar. The defendant mortgagors also failed to offer proof to show that the plaintiff agreed to forbear from prosecuting this action during any period of negotiations (*see*, General Obligations Law § 15-301; ***Metropolitan Bank of Syracuse v Brennan***, 48 AD2d 254, 368 NYS2d 914 [4th Dept 1975]; ***Emigrant Mtge. Co. Inc. v Berger***, 14 Misc3d 1202A, 831 NYS2d 359 [Sup Ct, Suffolk County, Dec. 13, 2006, Spinner, J.]). The remainder of the defendant mortgagors' contentions lack merit.

Accordingly, the motion by the plaintiff is determined as indicated above. The plaintiff is awarded partial summary judgment striking the defendant mortgagors' first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, twelfth, thirteenth and fourteenth affirmative defenses, and the cross motion by the defendant mortgagors is denied in its entirety. Reverse summary judgment dismissing the defendant mortgagors' fourth, sixth, seventh, eighth, and ninth counterclaims, pursuant to CPLR 3212(b), is awarded to the plaintiff.

In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Counsel are hereby directed to appear for a conference before the Court on September 13, 2012, at 10:00 a.m.

Dated: 8/14/12

Emily Pines
Hon. EMILY PINES, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**