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SHORT FORM ORDER

COPY

INDEX NO.: 24967-10

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

PRESENT: Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE: 5-23-12
ADJ. DATE: 5-27-12
MOT. SEQ. #: 001-MotD

AMERICAN HOME MORTGAGE SERVICING, INC,

Plaintiff,

-against-

RICHARD MCGHEE a/k/a RICHARD F. MCGHEE; ROSLYN MCGHEE; HSBC BANK NEVADA, N.A., and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants,

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
250 Mile Crossing Blvd., Suite One
Rochester, NY 14624

PETER C. KAITERIS, ESQ.
Attorney for Defendant
Richard McGhee a/k/a
Richard F. McGee
629 Route 112, Suite 1
Patchogue, NY 11772

ROSLYN MCGHEE
Defendant Pro Se
1433 Veranda Chase Drive
Lawrenceville, GA. 30044

Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other Letter - 13; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and striking the defendant Richard McGhee also known as Richard F. McGee's answer and counterclaim; (2) pursuant to CPLR 1024 amending the caption; (3) pursuant to RPAPL § 1321 appointing a referee to compute amounts due; and (4) awarding the costs of this motion to the plaintiff, is determined as indicated below; and it is further

ORDERED that the plaintiff is 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; and it if further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of its entry upon the Calendar Clerk of this Court.

The plaintiff commenced this residential foreclosure action by the filing of a summons and complaint on July 13, 2010 alleging that Richard McGhee also known as Richard F. McGee (hereinafter the defendant mortgagor) defaulted in repaying an a fixed rate note in the principal sum of $150,000.00. The note dated February 15, 2006 provides for the repayment of interest and principal to the original lender, American Home Mortgage (American), in monthly installments of approximately $899.33 for thirty years commencing on April 1, 2006 through to the maturity date March 1, 2036. As security for the loan, the defendant mortgagor and the defendant Roslyn McGhee gave American a mortgage also dated February 15, 2006 against the real property known as 8 6th Avenue, Huntington Station, New York 11746 (the property). The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for American and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The note contains an undated endorsement by American in blank and without recourse. By assignment dated November 18, 2009, MERS as nominee for American allegedly transferred its interest in the mortgage to the plaintiff.

In the complaint, the plaintiff alleges, inter alia, that the defendant mortgagor allegedly defaulted under the terms of the note and mortgage by failing to make monthly payments on September 1, 2009 despite due demand; and that, as a result, the plaintiff has elected to declare due and owing the entire unpaid balance of principal, together with applicable interest. Issue was joined by service of the defendant mortgagor's answer dated August 23, 2010. By his answer, the defendant mortgagor denies all of the material allegations in the complaint and asserts as a "first" counterclaim against the plaintiff'and as a related cross-claim against Roslyn McGhee, fraud in the inducement and in the execution of a deed dated February 15, 2006 whereby the defendant mortgagor transferred his interest in the property as sole tenant to himself and Roslyn McGhee as joint tenants with rights of survivorship.

By his counterclaim and cross-claim, the defendant mortgagor seeks monetary damages and alleges that American, whom he refers to as "the plaintiff," misrepresented the nature of the financial transaction as a "simple refinance" of the property, but that the same included a gift of equity of one-half of his interest therein to "the plaintiff's" employee, the defendant, Roslyn McGhee. By its reply, the plaintiff denies all of material allegations in the defendant mortgagor's counterclaim, and asserts as four affirmative defenses: the defendant mortgagor's failure to state a cause of action; a defense founded upon documentary evidence pursuant to CPLR 3211 (a)(1); all affirmative defenses available pursuant to CPLR 3018 (b); and a bar to the defendant mortgagor's claims pursuant to the doctrines of estoppel, waiver, ratification, laches and/or unclean hands. The remaining defendants have not appeared or answered the complaint (*see*, CPLR 3018 [a]; 3019 [d]), and it is noted that the cross-claim does not demand an answer (*see*, CPLR 3011).

According to the records maintained by the Court's computerized database, in compliance with CPLR 3408 a settlement conference was held in this Court's Foreclosure Conference Part on September 16, 2010. On that date, the defendant mortgagor did not appear or otherwise participate. As a result, this matter was referred as an IAS case. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a as amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and striking the defendant mortgagor's answer and counterclaim; (2) pursuant to CPLR 1024 amending the caption by excising the fictitious defendants named herein as John Doe #1 through John Doe #10; (3) pursuant to RPAPL § 1321 appointing a referee to compute amounts due; and (4) awarding the costs of this motion to the plaintiff. No opposition has been filed in response to the plaintiff's motion.

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]).

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 endorsed note and the mortgage executed by the defendant mortgagor, the assignment, as well as evidence of nonpayment (*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]). As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

The defendant mortgagor failed to raise a triable issue of fact as the general denials set forth in his answer are insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 951 [2d Dept 2010]; ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; ***Greater N.Y. Sav. Bank v 2120 Realty Inc.***, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]; ***ING Bank FSB v DiLuggio***, 2011 NY Misc LEXIS 6507, 2011 WL 7267045, 2011 NY Slip Op 33560U [Sup Ct, Suffolk County, Dec. 28, 2011, Martin, J.]). Further, the defendant mortgagor's answer, consisting solely of general denials, is without apparent merit (*see*, ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]; *cf.*, ***U.S. Bank Natl. Assn. v Madero***, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]). In any event, in instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madison Park Invs., LLC v Atlantic Lofts Corp.***, 33 Misc3d 1215A, 941 NYS2d 538 [Sup Ct, Kings County 2011]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Larry M. Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999]).

Turning to the counterclaim, 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 (***New York Univ. v Contl. Ins. Co.***, 87 NY2d 308, 316, 639 NYS2d 283 [1995]; ***Sabo v Delman***, 3 NY2d 155, 162, 164 NYS2d 714 [1957]).

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]). 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 Telecomms. 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. Inc.***, 78 AD2d 837, 837-838, 433 NYS2d 168 [1st Dept 1980]; *see*, ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]).

By its submissions, the plaintiff, as a defendant on the counterclaim, established its prima facie entitlement to judgment as a matter of law by showing that American, as its predecessor, owed no duty to the defendant mortgagor to prevent either its agents or Roslyn McGhee from inducing him to enter into the subject mortgage transaction, or the transfer of an ownership interest in the property (*see*, ***Euba v Euba***, 78 AD3d 761, 911 NYS2d 402 [2d Dept 2010]; ***Mathurin v Lost & Found Recovery, LLC***, 65 AD3d 617, 884 NYS2d 462 [2d Dept 2009]; ***Beckford v Northeastern Mtge. Inv. Corp.***, 262 AD2d 436, 692 NYS2d 412 [2d Dept 1999]; ***Wells Fargo Bank, N.A. v Enoyam***, 2010 NY Slip Op 32046U, 2010 NY Misc LEXIS 3611 [Sup Ct, Queens County, Aug 3, 2010, Weiss, J.]; *see also*, ***Emigrant Mtge. Co. Inc. v Fitzpatrick,*** 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012], *revg in part*, 29 Misc3d 746, 906 NYS2d 874]).

Further, 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, 897 NYS2d 649 [2d Dept 2010]). To the extent that the defendant mortgagor signed an indenture to McGhee, without reviewing it or knowing the contents of it, he risked that the transaction at issue would be more than a simple refinance (*see generally*, ***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.]). The loan instruments submitted by the plaintiff in support of its motion, which included the note and the mortgage, demonstrate that the terms of the same were fully set forth in the loan documents. The plaintiff also submitted a copy of the recorded indenture dated February 15, 2006 and sworn to before a notary public, whereby the defendant mortgagor transferred his interest in the property as sole tenant to himself and Roslyn McGhee as joint tenants with rights of survivorship (*see*, ***Heaven v Gowan***, 40 AD3d 583, 835 NYS2d 641 [2d Dept 2007]).

Moreover, the counterclaim, which is based upon fraudulent misrepresentations and fraudulent concealment, is deficient as failing to meet the heightened pleading requirements of CPLR 3016 (b) (*see*, ***Stein v Doukas***, 98 AD3d 1024, 951 NYS2d 173 [2d Dept 2012]; ***High Tides, LLC v DeMichele***, 88 AD3d 954, *supra*; ***Jones v OTN Enter., Inc.***, 84 AD3d 1027, 922 NYS2d 810 [2d Dept 2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 897 NYS2d 103 [2d Dept 2010]; *cf.*, ***Black v Chittenden***, 69 NY2d 665, *supra*). In the counterclaim, the defendant mortgagor has not set forth the dates or details of any alleged misrepresentations made specifically by American's representatives or by Roslyn McGhee to him (*see*, ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, *supra*; ***U.S. Bank Natl. Assn. v Fields***, 2012 NY Misc LEXIS 4025, 2012 WL 3647712, 2012 NY Slip Op 32204U [Sup Ct, Suffolk County, Index No.: 10-32714, Aug. 14, 2012, Pines, J.]; ***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.]).

In any event, as the motion is unopposed, the defendant mortgagor has failed to come forward with any evidence substantiating his contention that American's agents fraudulently induced him to execute the subject mortgage and indenture (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Chemical Bank v Bowers***, 228 AD2d 407, 643 NYS2d 653 [2d Dept 1996]; *see also*, ***Scarsdale Natl. Bank & Trust Co. v Stein***, 151 AD2d 468, 542 NYS2d 257 [2d Dept 1989]; ***Barclays Bank of New York, N.A. v Sokol***, 128 AD2d 492, 512 NYS2d 419 [2d Dept 1987]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). There is also no evidence that American, as the original mortgagee, had any relationship with Roslyn McGhee, or participated in or had knowledge of Roslyn McGhee's alleged fraudulent conduct (*see*, ***Miller Planning Corp. v Wells***, 253 AD2d 859, 678 NYS2d 340 [2d Dept 1998]; ***Chemical Bank v Bowers***, 228 AD2d 407, *supra*).

Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; *see generally*, ***Hermitage Ins. Co. Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor and against the defendant mortgagor (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagor's answer is stricken and the counterclaim is dismissed. The defendant mortgagor's cross-claim against Roslyn McGhee, however, is severed and continued (see, CPLR 3212 [e], [1]).

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the fictitious defendants named herein as John Doe #1 through John Doe #10, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the defendant, HSBC Bank Nevada, N.A, (HSBC) since HSBC never interposed an answer to the complaint (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; ***Emigrant Savs. Bank v Sia***, 2012 NY Misc LEXIS 3377, 2012 WL 3134214, 2012 NY Slip Op 31854U [Sup Ct, Suffolk County, July 11, 2012, Martin, J.]). Accordingly, the default of HSBC is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established a default in answering or appearing by HSBC, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vt. Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia, Ltd. v Smith***, 201AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The plaintiff's request for the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment.

Accordingly, this motion by the plaintiff is determined as indicated above. The proposed order appointing a referee to compute pursuant to RPAPL § 1321 has been signed simultaneously herewith as modified by the Court.

Dated: December 10, 2012

Hon. Denise F. Molia

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION