To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR INDYMAC INDA MORTGAGE LOAN, TRUST 2007-AR8, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-AR8,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 52684/2017
Seq Nos. 1&2

MICHAEL GIULIANI, CHRISTINE MANUEL, MSW FLORIDA CAPITAL LLC, COMMISSIONER OF TAXATION AND FINANCE,
"JOHN DOE #1 through 'JOHN DOE #12,", the last twelve Names being fictitious and unknown to the plaintiff, the Persons or parties intended being the tenants, occupants, Persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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WOOD, J.

The following documents were read in connection with plaintiff's motion and moving defendant Christine Manuel (appearing in the action as Christine Giuliani) ("defendant") opposition, and cross-motion :

Plaintiff's Notice of Motion, Revised Memorandum of Law, Counsel's Affirmation, Exhibits, Affidavit of Indebtedness, Affidavit of Mailing, Proposed Order.
Defendant's Counsel's Affirmation in Opposition, Defendant's Affidavit, Memorandum of Law
Defendant's Notice of Cross-Motion, Counsel's Affirmation, Defendant's Affidavit, Exhibits, Memorandum of Law, Exhibits
Plaintiff's Counsel's Affirmation in Opposition to Cross-Motion,

Defendant's Affidavit, Defendant's Counsel's Affirmation in support of cross motion to amend verified amended answer, Exhibits, Memorandum of Law.
Plaintiff's Affirmation in Opposition to Defendant's Amended Cross-Motion to Amend Answer.
Defendant's Reply Affidavit, Reply Memorandum of Law.
Plaintiff's Reply Affirmation in further support of its motion for Summary Judgment.

In this foreclosure action, on or about September 26, 2007, defendant Michael Giuliani, former husband of defendant ("Borrower"), executed and delivered a note in the original principal amount of $1,080,000, and Borrower and defendant executed a mortgage secured by real property known as 37 West Lane, South Salem. Borrower defaulted on the mortgage loan by failing to make the payment and has failed to cure the default.

Plaintiff now brings the instant application for summary judgment; for default judgment against the non answering defendants; for the appointment of a referee to compute the amount due plaintiff; to amend the caption; and for such other and further relief as the Court may deem just and proper. Defendant opposes the motion, and cross moves to amend the verified answer and counterclaim to add claims for fraud.

NOW based upon the foregoing, the motion is decided as follows:

A proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory,

unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Plaintiff sustained its initial burden of demonstrating entitlement to judgment as a matter of law by tendering proof of the existence of the note, mortgage, and defendants' default in payment (Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [1997]). In opposition, defendant contends that plaintiff took an assignment of the Giuliani mortgage in 2010 after IndyMac ceased to exist. The assignment was allegedly signed by one "Suchan Murray", an infamous robo-signer. Defendant disputes whether Murray even signed the assignment. Defendant also references a 60 minute expose and an article from an online conspiracy website titled "Who is Linda Green?" as proof that an employee of IndyMac (plaintiff's predecessor in interest) was likely a "robo-signer". Thus, defendant

argues that there must have been fraud here because the assignments were executed after Indy Mac closed down in 2008 and the assignments involved the same assignors and assignees.

Plaintiff explains that the assignments were executed by MERS as nominee for IndyMac so it does not matter that IndyMac no longer existed at the time the assignments were executed. MERS had authority to execute the assignments because the mortgage was executed in favor of MERS as nominee for IndyMac. In any event, the Court of Appeals has held that alleged defects in assignments of mortgage are irrelevant because the note and not the mortgage is the dispositive instrument that conveys standing to foreclose under New York law" (Aurora Loan Srvs. LLC v Taylor, 25 NY3d [2d Dept 2015]).

Defendant also claims that her signature on the loan documents was obtained by fraud, and that plaintiff has unclean hands. Defendant urges the court to consider the alleged wrongful conduct of plaintiff in its promoting, creating and bundling of residential mortgage backed securities based on mortgages exactly like this one.

Defendant also claims that her mortgage broker told her that he worked with IndyMac Bank, and he guaranteed he could reduce her monthly mortgage payments to one that she could afford. To do this, she was allegedly informed that her husband would have to make the application. The mortgage broker introduced her to the lawyer who would represent her in the loan closing, who she had learned was her mortgage broker's cousin. She signed a deed giving her former husband a 100% joint and survivor interest in the premises. Based upon the mortgage representation, she decided not to sell her home, but to let her then husband follow through with the refinance. She signed two pieces of paper put in front on her at the closing. She alleges that she did not see the entire mortgage documents, and specifically, she did not see the entire adjustable rate rider which is annexed to

plaintiff's complaint. She was also told that she would have no liability to repay the loan because she did not sign the mortgage note. She claims that the Uniform Residential Loan Application was signed by only her former husband and is false, including that her former husband did not own the premises for 6 years, and he was not earning $30,000 per month. She believes that her former husband failed to read this paper at the closing. She claims she did not read it and it was not offered for her to do so. In 2008, defendant lost her job; and subsequently her husband left her.

Defendant admits that she signed the loan application at the closing, without substantially reviewing it or knowing its contents. Taking into consideration the parties arguments, defendant could not have justifiably relied upon any oral misrepresentations concerning the benefits of refinancing that may have been made by her mortgage broker and others, inasmuch as the record shows that borrower and defendant were given Notice of Right to Cancel, and Truth–in–Lending Disclosure Statements that apprised them of what their payment obligations would be, and with written notice of their right to cancel the loan transactions within three business days (McMorrow v Dime Sav. Bank of Williamsburgh, 48 AD3d 646, 647–648 [2d Dept 2008]). Thus, defendant failed to show not only that she actually relied on the misrepresentation, but also that such reliance was reasonable (McMorrow v Dime Sav. Bank of Williamsburgh, 48 AD3d 646, 647–48).

Further, the loan documents sufficiently disclosed the terms of the loan. As a general rule, the signer of a written agreement is deemed to be conclusively bound by its terms, in the absence of a showing of fraud, duress or some other wrongful act by a party to the contract (Mattera v Mattera, 125 AD2d 555, 557 [2d Dept 1986]). To the extent defendant and the Borrower signed the mortgage application at the closing without reading it, and thus were unaware it contained incorrect and exaggerated figures, they risked that plaintiff would be induced to give them a loan in an amount

they could not afford. There is no evidence that defendant requested and was refused, an opportunity to read the papers, consult with an attorney or someone else, have the documents explained to her, or adjourn the closing.

In any event, defendant has failed to support this defense with any factual allegation indicating an absence of meaningful choice on their part, and there is no sufficient evidence here that the mortgagee was aware of facts that would "lead a reasonable prudent lender to make inquiries of the circumstances of the transaction at issue" (Mortgage Elec. Registration Sys., Inc. v Rambaran, 97 AD3d 802, 804 [2d Dept 2012]).

With regard to defendants' remaining affirmative defenses and any cross-claims, plaintiff has submitted sufficient proof to establish, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (Becher v Feller, 64 AD3d 672 [2d Dept 2009]). It was incumbent upon defendant 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 (Argent Mortgage Co., LLC v Mentesana, 79 AD3d 1079, 1080 [2d Dept 2010]). Thus, as here, where defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts may be deemed admitted as there is "in effect, a concession that no question of fact exists" (Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]). The failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal (Starkman v City of Long Beach, 106 AD3d 1076 [2d Dept 2013]).

For these reasons, plaintiff's motion for summary judgment and an order of reference and other relief sought is granted.

As for defendant's cross motion under CPLR 3025, "a party may amend his or her pleading,

or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." "The granting of leave to amend a pleading is in the sound discretion of the trial court and the exercise of the court's discretion will not be lightly disturbed" (Henderson v Gulati, 270 AD2d 308, 309 [2d Dept 2000]). One will generally be freely given leave to amend their pleadings under CPLR 3025(b), "unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit. (Maldonado v Newport Gardens, Inc., 91 AD3d 731 [2d Dept 2012]). "In exercising its discretion, the court will consider how long the amending party was aware of the facts upon which the motion was predicated, and whether a reasonable excuse for the delay is offered" (Caruso v Anpro, Ltd., 215 AD2d 713 [2d Dept 1995]). It must be noted that, "mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side." (Edenwald Contracting Co., Inc. v City of New York, 60 NY2d 957, 959 [2d Dept 1983] citing Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3025:5, p. 477). Also, "the general rule is that the legal sufficiency or merits of proposed amendments will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt" (Ficorilli v Thomsen, 262 AD2d 602, 603 [2d Dept 1999]).

Further, it is well settled that leave to amend a pleading should be granted where there is no significant prejudice or surprise to the opposing party and where the documentary evidence submitted in support of the motion indicates that the proposed amendment may have merit"

(Zito v County of Suffolk, 81 AD3d 722, 724 [2d Dept 2011]). Prejudice, is not found in the mere exposure of the defendant to greater liability but, instead "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position (Loomis v Civetta Corinno Const. Corp., 54 NY2d 18, 23 [1981]).

Here, defendant has failed to provide this Court with any facts supporting her claim of fraud (cf., CPLR 3016 [b]). "To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury" (Oko v Walsh, 28 AD3d 529 [2d Dept 2006]). CPLR 3016(b) provides that an action for fraud must be pled "with particularity, including specific dates and items, if necessary and insofar as practicable."

Here, defendant seeks to amend her answer to insert a claim for fraud more than a year after this action was commenced. In light of defendant's submissions, her basis for the fraud claim lacks any factual support, and from this record are speculative and conclusory. Thus, defendant's cross-motion is denied.

Further, "a party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (CitiMortgage, Inc. v Guillermo, 143 AD3d 852, 854 [2d Dept 2016]). As is the case here,

the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion (HSBC Bank USA, Nat. Ass'n v Armijos, 151 AD3d 943, 944 [2d Dept 2017]).

The arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit. This constitutes the Decision and Order of the Court.

NOW, THEREFORE, based upon the stated reasons, it is hereby:

ORDERED, that plaintiff's motion (Seq 1) for summary judgment, an order of reference appointing a referee to compute the amount due, and other relief sought in plaintiff's motion is granted, as modified in the proposed order appointing a referee to compute pursuant to RPAPL §1321 shall be signed coincident herewith; and it is further

ORDERED, that defendant's cross-motion (Seq 2) to amend her complaint is denied; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the Clerk and the parties within ten (10) days of entry, and file proof of service within five (5) days of service; in accordance with NYSCEF protocols; and it is further

ORDERED, that the Clerk shall mark his records accordingly.

Dated: December 14, 2018
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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