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SHORT FORM ORDER

INDEX NO. 10-2902

SUPREME COURT - STATE OF NEW YORK
IAS PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-10-10
ADJ. DATE 3-15-11
Mot. Seq. # 001 - MG

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AURORA BANK FSB formerly known as Lehman Brothers Bank, FSB,

Plaintiff,

-against-

CSP REALTY ASSOCIATES, LLC, CHRISTINA PATERNO, SALVATORE PATERNO, MILANO CLOTHIERS, INC., "JOHN DOE NO. 1" through "JOHN DOE NO. 20" inclusive,

Defendants,

---X

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SAMUEL J. DiMEGLIO
Referee
46 Green Street
Huntington, New York 11743

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the Plaintiff dated October 22, 2010, and supporting papers (including Memorandum of Law dated ____); (2) Affirmation in Opposition by the Defendants dated November 18, 2010, and supporting papers; (3) Reply Affirmation by the Plaintiff dated March 14, 2011, and supporting papers; (4) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding it summary judgment against the answering defendants (a) striking the defendants' answer; and (b) dismissing the defendants' counterclaims; (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, is granted; and it is

ORDERED that Samuel J. DiMeglio, Jr., Esq. with an office at 46 Green Street, Suite A, Huntington, New York, 631-547-9401 is appointed Referee to ascertain and compute the amount due upon the note and mortgage which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED that pursuant to CPLR 8003(a) the Referee be paid the statutory fee for the computation of the amount due plaintiff.

This is an action to foreclose a Mortgage And Security Agreement dated August 13, 2007 ("the Subject Mortgage") made by the defendant CSP Realty Associates, LLC ("CPS"), as mortgagor, in favor of the Lehman Brothers Bank, FSB ("Lehman") and Empire State Certified Development Corporation ("Empire") with respect to the property located at 245 West Jericho Turnpike, Huntington Station, New York ("the Subject Property").

By way of background, the defendant Milano Clothiers, Inc. ("Milano") is a men's retail store located at the subject property which is owned by the defendants Salvatore and Christina Paterno ("the Paterno Defendants"). On August 13, 2007, CSP allegedly purchased the subject property for the sum of $985,000 with a down payment of $110,000 and the proceeds of two mortgage loans, the Subject Mortgage being a second mortgage. The Subject Mortgage secures a Promissory Note ("the Note") dated August 13, 2007 in the principal amount of $394,000. The Note provides, inter alia, for the payment of interest only from August 15, 2007 to and including August 31, 2007 in the amount of $1,715.43, monthly installments of interest only due on October 1, 2007 and on the first calendar month thereafter to May 1, 2008, and a final installment of the entire principal balance outstanding together with unpaid interest on June 1, 2008. Empire assigned its interest in the Note, Subject Mortgage and certain loan guarantees to Lehman by assignment dated August 13, 2007.

By Secretary's Certificate dated April 12, 2009, Lehman changed its corporate name to Aurora Bank FSB ("the Plaintiff"). After CSP and the Paterno Defendants allegedly defaulted in making the June 1, 2009 payment pursuant to the Note, the Subject Mortgage and the Change Agreement, the Plaintiff allegedly sent a notice of acceleration and default notice dated July 13, 2009 ("the Default Notice") to Milano/Mr. Paterno. This action was commenced after CSP and the Paterno Defendants failed to make payment pursuant to the Default Notice.

The Plaintiff commenced this foreclosure action by the filing of a summons and complaint on January 22, 2010. By its complaint, the Plaintiff alleges, among other things, that it is the current holder of the Note and Subject Mortgage and that said instruments provide that it may demand immediate payment in full of all sums due thereunder and sell in foreclosure all or any part of the Subject Property. The Plaintiff also alleges that beginning on or about on October 1, 2007 and continuing to and including May 1, 2009, payments were made on account of the Note and Subject Mortgage which reduced the principal balance to $393,495.36. The Plaintiff further alleges that the CSP, the Paterno Defendants and Milano (collectively "the Defendants") failed to comply with the terms and conditions of the Note by failing to tender the principal balance due plus accrued interest and fees upon the extended maturity date and that such failure is a default of the Subject Mortgage. The Plaintiff allegedly demanded immediate payment of all amounts due to it pursuant to the Demand Notice dated July 13, 2009. The Plaintiff now demands judgment decreeing the amounts due it for principal, interest, fees and costs, and that the

defendants be barred and foreclosed of all right, title and equity of redemption in the subject property. Moreover, the "wherefore" clause of the complaint also includes a demand that CPS and the Paterno Defendants pay any deficiency that may arise after the sale of the subject premises.

The Defendants have interposed an answer denying some allegations in the complaint and admitting others and asserting various affirmative defenses. By their answer, the Defendants assert seven affirmative defenses in which they allege that the Court lacks personal jurisdiction over them for failure to properly serve them; the complaint fails to state a cause of action upon which the relief in the complaint may be granted as a matter of law; the Plaintiff's own culpable conduct, and a dismissal or reduction of recovery, if any, had by the Plaintiff in proportion with the culpable conduct attributable to the Plaintiff; the failure to name a necessary party; apportionment of damages based upon the culpable conduct of another person not under the control of the answering Defendants; the Plaintiff is guilty of "unclean hands"; and the Plaintiff's claims are void as against public policy. The Defendants also assert two counterclaims. In the first counterclaim, the Defendants claim that the Plaintiff fraudulently induced them to undertake the Subject Mortgage and Guarantees and then failed and/or refused to convert the instant loan from that of a short "bridge" loan to a 20 year permanent loan as allegedly promised and agreed by Empire. The Defendants allege that but for the "representations and agreements of the Plaintiff" and Empire in connection with the Note and Subject Mortgage, they never would have closed on the "bridge" loan, thereby leaving the Defendants without the means to replace and/or satisfy the "bridge" loan with permanent financing. The Defendants claim that by reason of the foregoing, that they have been damaged in the amount of $1,000,000. In the second counterclaim, the Defendants seek an order for specific performance directing the Plaintiff to convert the "bridge" loan herein to a 20 year permanent loan, alleging that they have no adequate remedy at law. With regards thereto, the Defendants claim that the Plaintiff had a duty and contractual obligation to covert the Subject Mortgage from that of a "bridge" loan to a 20 year permanent loan.

In its reply, the Plaintiff denies some allegations in the counterclaims and admits others. By its reply, the Plaintiff asserts four affirmative defenses in which it alleges that the counterclaims fail to state a cause of action; the Plaintiff was relieved of any duty to perform an agreement, if any, with the Defendants based upon the prior breach of the loan agreements; the Defendants waived the right to assert any defenses, counterclaims or offsets by virtue of the instant loan documents; and that the Defendants have an adequate remedy at law as the Defendants alleged money damages, if any, are calculable.

The Plaintiff now moves for an order: (1) pursuant to CPLR 3212 awarding it summary judgment against the answering defendants and striking their answer and dismissing their counterclaims; (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. In support of the motion, the Plaintiff has submitted, inter alia, the pleadings, affidavits of service of the summons and complaint, the Subject Mortgage, the Note, the Commercial Guaranty Agreements dated August 13, 2007 ("the Guarantees"), the Subordination Agreement dated August 13, 2007 ("the Subordination Agreement"), the Change In Terms Agreement dated May 20, 2008 (the "Change Agreement"), the affirmation of counsel and the affidavit of John Kullerstrand ("Kullerstrand") Vice President of Aurora. In his affirmation, counsel asserts that CSP and the Paterno Defendants waived their right to bring all defenses, counterclaims and setoffs by virtue of the waivers in the loan documents. Counsel further argues that the loan instruments do not contain any conditions precedent

such as the extension of a "take out loan" to CSP before CSP and the Paterno Defendants' were obligated to repay the debt.

In his affidavit, Kullerstrand alleges, inter alia, that the Paterno Defendants absolutely and unconditionally guaranteed without limit the performance and discharge of all of CSP's obligations under the Note and Subject Mortgage. Kullerstrand also alleges that the Subject Mortgage loan was originally made to CSP jointly by Empire and Lehman, but was subsequently assigned to Lehman by Assignment dated August 13, 2007 and that the Plaintiff now holds the Note, the Mortgage and the Guarantees. Kullerstrand claims that CSP and the Paterno Defendants breached their respective obligations with respect to the Note and Subject Mortgage, and that the Paterno Defendants breached their obligations with respect to the Guarantees by failing to pay all sums due under said loan instruments on June 1, 2009 ("the Maturity Date"). Additionally, Kullerstrand claims that written demand was made upon CSP and the Paterno Defendants to cure their defaults herein but that they failed to do so.

In opposition to this motion, the Defendants have submitted, among other things, the affirmation of counsel and the affidavit of the defendant Salvatore Paterno. In his affidavit, Paterno alleges that he and his wife were led to believe that, through the Plaintiff's involvement with the U.S. Small Business Administration ("SBA"), the short term "bridge loan" which was originally set to mature on June 1, 2008 would be converted into a 20 year permanent second mortgage loan by the Plaintiff. He also alleges that the Plaintiff knew or should have reasonably known that the Defendants did not have the financial ability to satisfy a lump sum acceleration of the short term Subject Mortgage. According to Paterno, he never expected that he would have to satisfy the Subject Mortgage in full on the Maturity Date. Paterno contends that the Plaintiff's failure to convert the bridge loan to a long term loan is an act of "bad faith" and that this, in turn, was the sole cause of the Defendants' default herein. In his affirmation, counsel contends that the Defendants have raised an issue of fact as to whether the Plaintiff's alleged actions created the default upon which the foreclosure is sought.

In its reply papers, counsel argues that the alleged defenses raised by the Defendants relate to events which occurred after the execution of the waivers. Counsel asserts that the Defendants have failed to proffer any evidence such as a loan denial letter that Empire or the Plaintiff ever offered or even promised to offer CSP a long term loan commitment. Moreover, counsel contends that the Defendants have not proffered any evidence that the Plaintiff acted or failed to act in way that caused the Defendants failure to repay the debt herein, and that if such evidence had been offered, the Defendants waived the right to assert any defenses or counterclaims.

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*, ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; ***Washington Mut. Bank FA v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***Yildiz v Vural Management Corp.***, 61 AD3d 970, 877 NYS2d 466 [2d Dept 2009]; ***Daniel Perla Associates, LP v 101 Kent Associates, Inc.***, 40 AD3d 677, 836 NYS2d 630 [2d Dept 2007]). 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" (***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]; *see*,

Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 183, 451 NYS2d 663 [1982]).

A party establishes a prima facie case of entitlement to summary judgment on a guaranty by proving: (1) the underlying obligation, (2) the guaranty executed by the defendant, and (3) a failure to make payments according to the terms of the underlying obligation and the guaranty (*see*, ***Provident Bank v Giannasca***, 55 AD3d 812, 866 NYS2d 289 [2d Dept. 2008]; ***Verela v Citrus Lake Development, Inc.***, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]; ***Northport Car Wash Inc. v Northport Car Care***, LLC, 52 AD3d 794, 859 NYS2d 378 [2d Dept 2008]; ***JP Morgan Chase Bank v Gamut-Mitchell, Inc.***, 27 AD3d 622, 811 NYS2d 777 [2d Dept 2006]). As a general rule, a waiver of the right to assert a setoff or counterclaim is not against public policy and will be enforced in the absence of fraud or negligence in the disposition of collateral (***Fleet Bank v Petri Mech. Co.***, 244 AD2d 523, 524, 664 NYS2d 462 [2d Dept 1997]). It is settled, however, that "'specific disclaimers contained within an agreement can provide an effective defense against allegations in a complaint which assert that the agreement was executed in reliance upon oral misrepresentations'" (***Schooley v Mannion***, 241 AD2d 677, 678, 659 NYS2d 374 [3d Dept 1997]).

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*, ***Standard Federal 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***, 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.***, 50 AD2d 108, 376 NYS2d 728 [4th Dept 1975], *appeal 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.***, *supra*, at 318, 639 NYS2d 283; ***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]).

Thus, 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 (*see*, ***Channel Master Corp. v Aluminum Ltd. Sales, Inc.***, 4 NY2d 403, 407, *supra*; ***113-14 Owners Corp. v***

Gertz, 123 AD2d 850, 851, 507 NYS2d 464 [2d Dept 1986], *appeal 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 Communications v MCI Telecommunications Corp.***, 248 AD2d 453, 454, 669 NYS2d 376 [2d Dept 1998]). 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]).

The Note provides, inter alia, that in the event of a default under the Note and the Subject Mortgage or any other related instrument, the holder of the Note "may at its option, without notice to CSP, such notice being expressly waived, declare the entire unpaid principal balance, together with all accrued but unpaid interest thereon, any prepayment charge and all other sums owing, immediately due and payable."

Concerning default, section 2.1 of the Subject Mortgage provides, in relevant part, that the debt shall become immediately due and payable at the option of Lehman "if any portion of the [d]ebt is not paid within ten (10) days of the due date or if the [d]ebt is not paid in full on maturity". As to non-waiver, section 2.9 of the Subject Mortgage provides, inter alia, that "the failure of [Lehman] to insist upon strict performance of any term of th[e] Mortgage shall not be deemed to be a waiver of any term of th[e] Mortgage. Section 2.9 further provides, in relevant part, at subsection (iii), that CSP shall not be relieved of its obligation to pay the debt as provided for in the Note and Subject Mortgage by reason of, among other things,

> any agreement or stipulation between [CSP] and any subsequent owner or owners of the [subject property] or other person extending the time of payment or otherwise modifying or supplementing the terms of the Note, [the Subject] Mortgage ... and, in the latter event, [CSP] shall continue to pay the [d]ebt at the time and in the manner provided in the Note and th[e Subject] Mortgage, as so extended, modified and supplemented, unless expressly released and discharged from such obligation by [Lehman] in writing.

As to liability, section 2.10 of the Subject Mortgage provides, that CSP's obligation to pay the debt in accordance with the provisions of the Note and Subject Mortgage "shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to the Note or th[e Subject] Mortgage". Additionally, section 2.10 states, inter alia, that CSP "absolutely, unconditionally and irrevocably waives any and all right to assert any setoff, counterclaim or crossclaim of any nature whatsoever with respect to the obligation of [CSP] to pay the [d]ebt in accordance with the provisions of the Note and th[e Subject] Mortgage."

With respect to modifications, section 3.17 of the Subject Mortgage provides, inter alia, that it may only be modified, amended or changed by an agreement in writing signed by [CSP] and [Lehman] and may only be released, discharged or satisfied of record by an agreement in writing by [Lehman]." Section 3.17 further states, inter alia, that "[n]o waiver of any term, covenant or provision of th[e

Subject] Mortgage shall be effective unless given in writing by [Lehman] and if so given by [Lehman] shall only be effective in the specific instance in which given." Moreover, Section 3.17 contains a merger clause which provides that the Note, the Subject Mortgage and the other related instruments constitute "the entire agreement" between the parties and that "no oral or other agreement, understanding, representation or warranty exists with respect to the loan secured hereby other than those set forth in the Note, th[e Subject] Mortgage and the other [l]oan [d]ocuments."

By Subordination Agreement dated August 13, 2007, defendants Milano, CSP and Lehman agreed that all of Milano's right, title and interest in the subordinated lease and Subject Property was subordinated in all respects to Lehman's lien and superior indebtedness. Also, by Commercial Guaranty Agreements dated August 13, 2007 ("the Guarantees"), the Paterno Defendants unconditionally guaranteed the obligations of CSP contained in the Note and Subject Mortgage to Lehman. The Guarantees specify, among other things, that they are "a guaranty of payment and performance and not of collection" so that the Guarantees can be enforced against the Paterno Defendants even when other remedies have not been exhausted. The Guarantees also provide, in relevant part, that they are "continuing" guarantees and that the Paterno Defendants "absolutely and unconditionally" guarantee full and punctual payment and satisfaction of the indebtedness of CSP to Lehman, and the performance and discharge of all of CSP's obligations "under the Note and Related Documents." Additionally, the Guarantees provide, inter alia, that the Paterno Defendants represent and warrant to CSP that "no representations or agreements of any kind have been made to [g]uarantor[s] which would limit or qualify in any way the terms of the Guarant[ees]." Further, the waiver section of the Guarantees provides, in relevant part, that the Paterno Defendants "waive[] any and all rights or defenses" arising by reason of "[] any modification of change in terms of the Indebtedness, whatsoever, including without limitation, the renewal, extension, acceleration, or other change in the time payment of the Indebtedness is due and any change in the interest rate". Moreover, the Guarantees state that the Paterno Defendants as guarantors understand that the waivers contained in therein are "unconditional and irrevocable waivers of substantive rights and defenses to which [g]uarantor[s] might be otherwise entitled under state and federal law." Moreover, the amendments section of the Guarantees contain merger clauses providing that the "Guarant[ees], together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in th[e] Guarant[ees]."

On May 20, 2008, CSP and Lehman executed a Change In Terms Agreement whereby the parties agreed that the maturity date of the Note and Subject Mortgage was extended until June 1, 2009. Pursuant to the Change Agreement, the term of the Note was extended giving CSP an additional twelve months of interest only payments with final payment of principal plus accrued interest due and payable on June 1, 2009. The Change Agreement further provided, inter alia, that the terms of the original obligation, mortgage and other agreements between the parties remained unchanged and in full force and effect. Moreover, the Change Agreement expressly states that consent by Lehman thereto was not a waiver of Lehman's right to strict performance of the original obligation. By Reaffirmation of Guaranty dated May 20, 2008, the Paterno Defendants agreed that the Guarantees continued in full force and effect in favor of Lehman as general continuing guarantees. The Reaffirmation also provides that the Paterno Defendants ratify, reaffirm and remake each and all promises and covenants in the Guarantees in favor of Lehman.

The Plaintiff made a prima facie showing of its entitlement to summary judgment by submitting

proof of the existence of the Subject Mortgage and the underlying Note and nonpayment pursuant to the terms of the Note and Guarantees (*see*, ***Argent Mtge. Co. v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***EMC Mtge. Corp. v Riverdale Assoc.***, 291 AD2d 370, 737 NYS2d 114 [2d Dept 2002]). The burden thus shifted to the Defendants 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*, ***EMC Mtge. Corp. v Riverdale Assoc.***, 291 AD2d 370, *supra*; ***Paterson v Rodney***, 285 AD2d 453, 727 NYS2d 333 [2d Dept 2001]). The opposition papers submitted by the Defendants shows that they have offered no proof or arguments in support of any of their pleaded affirmative defenses other than arguments in support of the first and second counterclaims (*see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The first affirmative defense that the Court lacks jurisdiction over the Defendants 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 Defendants 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]).

With respect to the second affirmative defense, the Defendants assert that the Plaintiff has failed to state a cause of action upon which the relief in the complaint may be granted as a matter of law. 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 Note, the Subject Mortgage and the Guarantees for which the Defendants are in default (*see*, ***Bancorp v Pompee***, 918 NYS2d 574, 918 NYS2d 574 [2d Dept 2011]). Additionally, the Defendants have not cross moved to dismiss the complaint on the grounds herein (*see*, ***Butler v Catinella***., 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]), and, in any event, the Plaintiff has established its prima facie entitlement to summary judgment ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631[2d Dept 1996]). Therefore, the second affirmative defense is stricken.

The third and fifth affirmative defenses of contributory and comparative negligence do not constitute a defense to this mortgage foreclosure action. The concept of apportioning culpable conduct is one related to tort. Since the claims asserted by the Plaintiff in this case sound in breach of contract, as opposed to tortious conduct, an affirmative defense based upon the notion of culpable conduct is unavailable herein (*see*, CPLR 1401; ***Pilewski v Solymosy***, 266 AD2d 83, 698 NYS2d 660 [1st Dept 1999]; ***Nastro Contracting v Augusta***, 217 AD2d 874, 629 NYS2d 848 [3d Dept 1995]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). Thus, the third and fifth affirmative defenses are stricken.

Regarding the fourth affirmative defense, the Defendants have not proffered any submissions to demonstrate that the Plaintiff failed to join a necessary party in this action (*see*, CPLR 1001; CPLR 3211 [a] [10]; RPAPL § 1311). Therefore, the fourth affirmative defense must be dismissed.

The sixth affirmative defense of "unclean hands" is stricken as the Defendants have failed to come forward with any facts demonstrating that the Plaintiff's conduct was immoral or unconscionable

(*see*, ***Citibank, N.A. v Walker***, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994]).

The seventh affirmative defense is stricken as entirely without merit. The instant foreclosure action, which was commenced as a result of the alleged breach of the various loan documents and the Guarantees, is clearly a justiciable controversy which is not void as against public policy (*see*, RPAPL § 1301, *et seq.*). Appellate authorities have repeatedly held that "[a] plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through production of the mortgage, the unpaid note and evidence of a default" (***Wells Fargo Bank v Cohen***, 80 AD3d 753, 755, 915 NYS2d 56 [2d Dept 2011]). Further, under the circumstances presented here, which is discussed in more detail below, the Defendants' waiver of the right to assert a setoff or counterclaim is not against public policy (***Fleet Bank v Petri Mech. Co.***, 244 AD2d 523, *supra*).

With respect to the first and second counterclaims, the Plaintiff demonstrated its prima facie entitlement to judgment as a matter of law by establishing that there is no contractual provision or fiduciary relationship which would have obligated it to furnish the Defendants with a long term mortgage loan (*see*, ***Euba v Euba***, 78 AD3d 761, 911 NYS2d 402 [2d Dept 2010]; ***O'Connell v Soszynski***, 46 AD3d 644, 847 NYS2d 605 [2d Dept 2007]). The Subject Mortgage, the Guarantees, the Change Agreement and the Reaffirmation Agreement provide that the loan documents herein constitute the entire agreement between the parties and that there would be no oral modification or extension of the mortgage loan unless agreed in writing. As the Plaintiff demonstrated its prima facie showing, the burden shifts to the Defendants.

In opposition, the Defendants 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 long term mortgage loan to the Defendants, or that it acted in "bad faith" or that the Defendants had even timely secured a mortgage commitment from Empire (*see,* ***O'Connell v Soszynski***, 46 AD3d 644, *supra;* ***Fine Arts Enterprises, N.V. v Levy***, 149 AD2d 795, 539 NYS2d 827 [3d Dept 1989]; *cf.*, ***Wells Fargo Bank, N.A. Meyers***, 30 Misc 3d 697, 913 NYS2d 500 [Sup Ct, Suffolk County, Nov 10, 2010, Sweeney, J.]). Further, the Defendants' allegations supporting their counterclaims sound in failure to perform future acts, which amounts to simply an alleged breach of contract (*see,* ***Hotel 71 Mezz Lender LLC v Mitchell***, 63 AD3d 447, 880 NYS2d 67 [1st Dept 2009]; ***Orix Credit Alliance v R. E. Hable Co.***, 256 AD2d 114, 682 NYS2d 160 [1st Dept 1998]). The fraud alleged here is not collateral or extraneous to the loan documents, but relates directly to the alleged breach of contract; and there is no claim that the Plaintiff breached a duty separate and apart from its contractual duties (*see*, ***D'Ambrosio v Engel***, 292 AD2d 564, 741 NYS2d 42 [2d Dept], *lv denied*, 99 NY2d 503, 753 NYS2d 806 [2002]). Also, the Defendants in no way explain how or when the alleged representations by officers or employees of the Plaintiff were found to be false and no proof has been offered to support the claim that the representations were false when made. Thus, the Defendants have neither established that they were fraudulently induced into executing the Note, the Subject Mortgage and the Guarantees by the Plaintiff (*see*,***Cohen v Houseconnect Realty Corp.***, 289 AD2d 277, 734 NYS2d 205 [2d Dept 2001]; ***Scarsdale Nat'l Bank v Stein***, 151 AD2d 468, 542 NYS2d 257 [2d Dept 1989]), nor have they established that if fraud were in fact committed by Empire against them, that the Plaintiff had actual knowledge of the fraud and that it was required to disclose the same by virtue of a fiduciary or confidential relationship or

superior knowledge of the essential facts that would render nondisclosure inherently unfair (*see*, ***Euba v Euba***, 78 AD3d 761, *supra*; ***Barrett v Freifeld***, 77 AD3d 600, 908 NYS2d 736 [2d Dept 2010]; ***National Union Fire Ins. Co. of Pittsburgh, P.A. v Red Apple Group, Inc.***, 273 AD2d 140, 710 NYS2d 48 [1st Dept 2000]; ***Beckford v Northeastern Mortg. Inv. Corp.***, 262 AD2d 436, 692 NYS2d 412 [2d Dept 1999]). Moreover, since the express terms of the Subject Mortgage, Guarantees and Change In Terms Agreement contain merger and waiver clauses stating that they cannot be changed or terminated orally, the Defendants cannot now claim to have justifiably relied on verbal assurances allegedly made by officers or employees of the Plaintiff regarding a possible future takeout loan (*see*, ***Titus v Mortgage Enter., Ltd.***, 304 AD2d 746, 760 NYS2d 66 [2d Dept 2003]; ***Merchants Nat'l Bank & Trust Co. v Syracuse Eagles Hockey Club Corp.***, 58 AD2d 1004, 397 NYS2d 38 [4th Dept 1977]). The bare assertion that certain representatives of the Plaintiff made oral promises of a "take out loan" is not enough to create an issue of fact (*see*, ***New York State Urban Dev. Corp. v Garvey***, 98 AD2d 767, 469 NYS2d 789 [2d Dept 1983]). Instead, the Defendant's counterclaims are supported only by their conclusory allegations which are insufficient to defeat summary judgment (*see*, ***Jin Sheng He v Sing Huei Chang***, 2011 NY Slip Op 3035 [2d Dept, Apr 12, 2011]; ***Quest Commerical, LLC v Rovner***, 35 AD3d 576, 825 NYS2d 766 [2d Dept 2006]; ***Loan Am. Fin. Corp. v Talboom***, 163 Misc 2d 199, 620 NYS2d 221 [Sup Ct, Suffolk County, Oct 4, 1994, Doyle, J.]). Accordingly, where "bad faith" has not been shown, as here, specific performance as demanded in the second counterclaim is not appropriate (*see*, ***Huntington Mining Holdings, Inc. v Cottontail Plaza, Inc.***, 60 NY2d 997, 471 NYS2d 267 [1983]; *cf.*, ***Kraitenberger v Aloow Realty Corp.***, 172 AD2d 647, 568 NYS2d 448 [2d Dept 1991]).

In any event, the express terms of the Guarantees, the Change In Terms Agreement and the Reaffirmation of Guaranty which are absolute and unconditional preclude the Defendants from raising any defenses or counterclaims including fraudulent inducement and breach of the covenant of good faith and fair dealing which are not reserved (*see*, ***Citibank v Papinger***, 66 NY2d 90, 495 NYS2d 309 [1985]; ***Fortress Credit Corp. v Hudson Yards, LLC***, 78 AD3d 577, 912 NYS2d 41 [1st Dept 2010]; ***Hotel 71 Mezz Lender LLC v Mitchell***, 63 AD3d 447, *supra*; ***Sterling Nat'l Bank v Biaggi***, 47 AD3d 436, 849 NYS2d 521 [1st Dept 2008]). Thus, the first and second counterclaims are dismissed.

Under these circumstances, the Court finds that the Defendants failed to rebut the Plaintiff's prima facie showing of its entitlement to summary judgment (*see*, ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 895 NYS2d 199 [2d Dept 2010]; ***North Fork Bank v Computerized Quality Separation Corp.***, 62 AD3d 973, 879 NYS2d 575 [2d Dept 2009]). The Plaintiff, therefore, is awarded summary judgment striking the Defendants' answer and dismissing the Defendants' counterclaims (*see*, ***Raven Elevator v Finkelstein***, 223 AD2d 378, 636 NYS2d 292 [1st Dept 1996]). Accordingly, the Plaintiff is entitled to summary judgment in its favor against the Defendants for the relief set forth in the complaint for foreclosure and a deficiency judgment (*see*, CPLR 3212; RPAPL § 1321; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, *supra*; ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*).

Since the Plaintiff has been awarded summary judgment against the Defendants it is also entitled to an order appointing a referee to compute amounts due under the Note, the Subject Mortgage and Guarantees (*see*, RPAPL § 1321; ***Vt. Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Consequently,

the Court appoints Samuel J. DiMeglio with an office at 46 Green Street, Huntington, New York, as a Referee, to ascertain and compute the amounts due the Plaintiff and any other encumbrances and for related charges, and to examine and report to the Court with all convenient speed whether the mortgaged premises may be sold in separate parcels. If required, the Referee may take testimony in Suffolk County relating to the amount due or to separate parcels pursuant to RPAPL § 1321. The proposed order appointing a referee to compute, as modified by the Court, has been signed simultaneously herewith.

Dated: 9/7/11

PETER H. MAYER, J.S.C.