Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Emigrant Mortgage Company, Inc.,

Plaintiff,

-against-

Mary Grace Mullen,

"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 tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

Motion Sequence No.: 001; MOT.D
Motion Date: 3/9/12
Submitted: 5/18/12

Index No.: 28285/2010

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 11 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 8; Answering Affidavits and supporting papers, 9 - 11; Replying Affidavits and supporting papers, 12 - 16; it is

ORDERED that this motion (001) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendant Mary Grace Mullen; (2) striking the answer and affirmative defenses interposed by Mary Grace Mullen; (3) pursuant to RPAPL § 1321 appointing a referee to compute amounts due under the subject mortgage; (4) amending the caption by excising the defendants, sued herein as John Doe #1 through John Doe #10; and (4) awarding the costs of this motion to the plaintiff, is determined as indicated below.

The plaintiff commenced this residential foreclosure action by the filing of a summons and complaint on August 3, 2010 alleging that Mary Grace Mullen (hereinafter the defendant mortgagor) defaulted in repaying a note in the principal sum of $800,000.00. The note dated October 9, 2007 provides for the repayment of principal and interest to Emigrant Mortgage Company, Inc. (Emigrant Mortgage) in initial monthly installments in the approximate sum of $7,467.85 for thirty years commencing on December 1, 2007. As security for the loan, the defendant mortgagor gave Emigrant Mortgage a mortgage also dated October 9, 2007 against the real property known as 108 Buell Lane, East Hampton, New York 11937.

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 February 1, 2010 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 the defendant mortgagor's answer dated April 5, 2011. In her answer, the defendant mortgagor admits the execution of the subject note and mortgage, but denies the remaining allegations set forth in the complaint. In her answer, the defendant mortgagor also asserts, inter alia, as affirmative defenses, the plaintiff's lack of capacity to sue, the statute of frauds, the doctrine of unclean hands, documentary evidence, the protections afforded to the defendant by federal legislation relating to lending practices, types of mortgages and foreclosures, and the lack of compliance with the provisions of RPAPL § 1302. The remaining defendants have not appeared or answered the complaint.

According to the records maintained by the Court's computerized database, in compliance with CPLR 3408 settlement conferences were held in this Court's Specialized Mortgage Foreclosure Conference Part on June 17, August 30, October 26 and November 21, 2011. At the last conference, this matter was marked "held" and referred as an IAS case as a loan modification or other settlement had not been achieved. Accordingly, no further settlement conference is required.

The plaintiff now moves for, *inter alia*, an order pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor and striking her answer and affirmative defenses; appointing a referee to compute amounts due; amending the caption by excising the defendants, sued herein as John Doe #1 through John Doe #10, and awarding the plaintiff the costs of this motion. In response, the defendant mortgagor has filed opposition papers. Reply papers have also been filed by the plaintiff.

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]). The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff whereby it is alleged that the plaintiff is the holder and servicer of the mortgage and note and was so at the time of commencement of this action (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). 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*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In opposition to the motion, the defendant mortgagor has offered no arguments in support of any of her pleaded defenses, except the third and fourth affirmative defenses (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see generally*, ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]). 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]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Madison Park Invs., LLC v Atlantic Lofts Corp.***, 33 Misc3d 1215A, 941 NYS2d 538 [Sup Ct, Kings County 2011]). Further, the affirmative defenses set forth in the answer, which are factually unsupported by an affidavit from the defendant mortgagor, are without apparent merit (*see*, ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). Moreover, the affirmation of the defendant mortgagor's attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*e.g.*, ***Zuckerman v City of New York***, 49 NY2d 557, 563, 427 NYS2d 595 [1980]; ***2 N. St. Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]). Contrary to the defendant mortgagor's contentions, she has failed to demonstrate that discovery, which she could have sought by way of a preliminary conference order, is necessary with respect to any defense asserted by her in the answer (*see generally*, ***JP Morgan Chase Bank v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Financial Freedom Acquisition LLC v Malloy***, 2012 NY Misc LEXIS 2037, 2012 WL 1576472, 2012 NY Slip Op 31160U [Sup Ct, Suffolk County, Apr 25, 2012, Pastoressa, J.]). Further, "[t]he mere hope that discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment" (***Lee v T.F. DeMilo Corp.***, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]).

The first affirmative defense, in which it is alleged that the plaintiff lacks capacity to sue herein (*see*, CPLR 3211 [a] [3]), is factually unsupported and without merit (*see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, *supra*). The plaintiff already demonstrated its prima

facie showing of entitlement to judgment as a matter of law (*see*, ***Wells Fargo Bank v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Further, in support of the motion, the plaintiff has submitted an affidavit of merit from an officer of the plaintiff by which it is alleged that the plaintiff was and still is the holder and servicer of the subject mortgage and note. As noted above, in response to this motion the defendant mortgagor has neither alleged nor demonstrated that the plaintiff does not exist as a valid legal entity. Nor has the defendant mortgagor alleged that the plaintiff does not have the authority to sue herein. Accordingly, the first affirmative defense is stricken.

With respect to the second affirmative defense based upon the statute of frauds, the defendant mortgagor has failed to allege or prove any facts supporting this defense (*see*, ***Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC***, 78 AD3d 746, 911 NYS2d 157 [2d Dept 2010]; ***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, 868 NYS2d 101 [2d Dept 2008]). All of the loan agreements were in writing and signed by the defendant mortgagor (*see*, Gen Oblig § 5-701; *see also*, ***EMC Mortg. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]). Accordingly, the second affirmative defense is stricken as entirely without merit.

The third affirmative defense, which pleads the doctrine of unclean hands, is stricken as the defendant mortgagor has 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], *abrogated on other grounds by* ***Butler v Catinella***, 58 AD3d 145, *supra*; ***CFSC Capital Corp. XXVII v W. J. 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 fourth affirmative defense of contributory and comparative negligence does 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 fourth affirmative defense is stricken.

The fifth affirmative defense that documentary evidence bars the plaintiff's claims for foreclosure and sale is belied by or unsupported by the record and otherwise without basis in fact or law (*see*, ***Wells Fargo Bank v Karla***, 71 AD3d 1006, *supra;* ***U.S. Bank, N.A. v Flynn***, 27 Misc3d 802, 897 NYS2d 855 [Sup Ct, Suffolk County 2010]). 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 established its prima facie entitlement to summary judgment. Therefore, the fifth affirmative defense is stricken.

The sixth affirmative defense is stricken as the defendant mortgagor has failed to come forward with any admissible evidence showing that the loan was unconscionable or that the plaintiff engaged in predatory loan practices or bad faith with respect to the subject loan (*see*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787[1988]; ***Citibank, N.A. v Walker***, 12 AD3d 480, *supra*; *abrogated on other grounds by* ***Butler v Catinella***, 58 AD3d 145, *supra*; ***CFSC Capital Corp. XXVII v W. J. Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, *supra*; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994]; ***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.]; ***10 Connor Lane v C. Connor Lane Assoc.***, 2011 NY Misc LEXIS 2584, 2011 WL 2283791, 2011 NY Slip Op 31439 [Sup Ct, Suffolk County, May 10, 2011, Martin, J.]). The loan instruments submitted by the plaintiff in support of its motion, which included the note, mortgage, adjustable-rate rider and early prepayment/modification rider, demonstrate that the terms of the same were fully set forth in the loan documents. Further, in this instance, the defendant mortgagor played a role in inducing the plaintiff 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]).

The seventh affirmative defense that the plaintiff failed to give proper notice to the defendant mortgagor pursuant to RPAPL § 1302 is stricken as entirely without merit. In the complaint, the plaintiff alleges that it is the holder and owner of the subject mortgage and note, and that it complied with Banking Law §§ 595-a and 6-l or 6-m, if applicable, and RPAPL §1304 of the RPAPL (Complt., ¶ 5). Since the defendant mortgagor denied information or knowledge sufficient to form a belief as to the allegations set forth in paragraph "5" of the verified complaint in her answer (Ans., ¶ 3), this defense is clearly frivolous.

Even when viewed in the light most favorable to defendant mortgagor, her submissions are insufficient to raise a triable issue of fact as to the affirmative defenses (*see*, ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, *supra*; ***Cochran Inv. Co. Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the prima facie showing made by the plaintiff of its entitlement to summary judgment (*see*, ***Valley Natl. Bank v Deutsche***, 88 AD3d 691, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]). 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*). Accordingly, the defendant mortgagor's answer and the affirmative defenses contained therein are stricken in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the defendants, sued 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*,

Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer, 67 AD3d 872, *supra*). All future proceedings shall be captioned accordingly.

Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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***, 201 AD2d 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 is signed as modified by the Court.

Dated: 12/6/2012

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**