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SHORT FORM ORDER

INDEX No. 10-46242

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

***PRESENT:***

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-14-12 (#001)
MOTION DATE 3-13-12 (#002)
ADJ. DATE 7-13-12
Mot. Seq. # 001 - Mot D
# 002 - XMD

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR THE ENCORE CREDIT RECEIVABLES TRUST 2005-3,

Plaintiff,

- against -

MOHAMED SAHA-ADAT HOSSAIN, A/K/A MOHAMMED S. HOSSAIN; CADLEROCK JOINT VENTURE LP; CITIBANK SOUTH DAKOTA NA; COMMISSIONER OF TAXATION AND FINANCE CIVIL ENFORCEMENT SECTION-CO-ATC; COMMISSIONER OF THE STATE INSURANCE FUND; JENNIFER KONAKLI; MIDLAND FUNDING LLC; NATIONAL CREDITORS RECOVERY CORP; RUHELLA R. HOSSAIN; S&p CAPITAL INVESTMENTS, INC.; TOWN SUPERVISOR TOWN OF BROOKHAVEN; TOWN SUPERVISOR TOWN OF ISLIP; UNITED PROPERTIES CORPORATION; VICTORIAN GARDENS LLC; "JOHN DOES" AND "JANE DOES", SAID NAMES BEING FICTITIOUS, PARTIES INTENDED BEING POSSIBLE TENANTS OR OCCUPANTS OF PREMISES, AND CORPORATIONS, OTHER ENTITIES OR PERSONS WHO CLAIM, OR MAY CLAIM, A LIEN AGAINST THE PREMISES,

Defendants.

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1-24-13

Upon the following papers numbered 1 to 28 read on this motion to appoint a referee and for summary judgment, and this cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 16 - 20 ; Answering Affidavits and supporting papers 21 - 23 ; Replying Affidavits and supporting papers 26 - 28 ; Other Plaintiff's Memoranda of Law 14 - 15, 24 - 25 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by plaintiff for an order fixing the defaults of the non-appearing defendants, granting summary judgment on its complaint, striking the affirmative defenses and counterclaims in the answer of defendant Mohamed Saha-Adat Hossain, a/k/a Mohammed S. Hossain, an order of reference appointing a referee to compute is granted to the extent of severing and dismissing the second affirmative defense, the third affirmative defense, the fourth affirmative defense, the fifth affirmative defense, the eighth affirmative defense, the ninth affirmative defense, the tenth affirmative defense/first counterclaim, the eleventh affirmative defense/second counterclaim, and the twelfth affirmative defense/third counterclaim in the aforementioned answer of the defendant. The motion is ~~either~~ otherwise denied and the remainder of the action shall continue; and it is further

***ORDERED*** that the cross motion by defendant Mohamed Saha-Adat Hossain, a/k/a Mohammed S. Hossain for an order granting summary judgment in his favor and dismissing the complaint is denied.

On June 27, 2005, defendant Mohammed Saha-Adat Hossain, a/k/a Mohammed S. Hossain ("Hossain") borrowed $248,000 from non-party Encore Credit Corp. d/b/a ECC Encore Credit ("Encore"), executing a note secured by a mortgage on the property known as 130 aka 126 Hospital Road in East Patchogue, New York (the "Property"). By deed dated and recorded September 18, 2007, Hossain transferred a 20% interest in the Property to defendant Ruthella R. Hossain.

Hossain defaulted on the note by failing to make the monthly installments due February 1, 2010 and thereafter. The plaintiff commenced this action in December 2010 to, *inter alia*, foreclose the mortgage on the Property. All of the defendants were served with the summons and complaint in December 2010 and January 2011. Hossain interposed an answer raising affirmative defenses, including lack of standing, and asserted several counterclaims. Ruthella Hossain and the other defendants having failed to answer or otherwise appear in the action, were subsequently served with the additional notices pursuant to CPLR 3215, and remain in default.

The plaintiff now moves for summary judgment on its complaint, to strike Hossain's answer and for an order of reference pursuant to RPAPL 1321 fixing the defaults of the non-answering defendants and for the appointment of a referee to compute. Hossain cross-moves for summary dismissal of the complaint based on his first and seventh affirmative defenses that the plaintiff lacks standing to bring this action and that the assignment of the mortgage was not executed by a person with authority to do so. Although not alleged as an affirmative defense, Hossain now also cross-moves for summary dismissal of the complaint for failure to include a necessary party, that is, the actual holder of the note and mortgage at the time this action was commenced.

In support of the motion, the plaintiff relies upon the affidavit of Diane Weinberger ("Weinberger"), a director at Select Portfolio Servicing, Inc. ("SPS"), the plaintiff's mortgage servicer and attorney-in-fact. Weinberger asserts that SPS, in its regular course of business, maintains a computer database of loan records and transactions for the mortgages it services, and it is the source

from which she derived her knowledge of the facts. Weinberger further asserts that a true and correct copy of the note is attached to her affidavit, as is a true and correct copy of the subject mortgage which was recorded on August 9, 2005 in the Suffolk County Clerk's Office. According to Weinberger, the loan records reflect that Encore indorsed the note in blank and that it was physically delivered to the plaintiff's document control agent prior to commencing this action. Weinberger also states that "in order to memorialize the assignment of the Note and Mortgage, an assignment (the "Assignment") dated June 30, 2008 was executed" a true and correct copy of which she alleges is also proffered.

It is well settled that a mortgagee establishes a prima facie case entitling it to summary judgment to foreclose a mortgage by presenting the subject mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NHYS2d 611 [2d Dept 2012]; ***Citibank, NA v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***Campaign v Barba***, 23 AD3d 827, 805 NYS2d 86 [2d Dept 2005]; ***Ocwen Federal Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). Here, the plaintiff has demonstrated entitlement to summary judgment on its complaint as the moving papers include a copy of the note, mortgage and evidence of Hossain's default in making payments as agreed. It is thus incumbent upon Hossain to submit proof sufficient to raise a genuine question of fact as to a bona fide defense to his default (***Citibank, NA v Van Brunt Prop., LLC***, *supra*; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

The opposition submitted by Hossain is set forth in his cross-moving papers. Of the twelve affirmative defenses and three counterclaims in his answer, only the First and Seventh affirmative defenses, which challenge the plaintiff's standing are asserted in opposition to the plaintiff's motion. Also asserted in opposition is the procedural defense pursuant to CPLR 3212(f), that the plaintiff's motion is premature as no discovery has been conducted. It is also argued that the motion should be denied because the affidavits submitted in support do not comply with CPLR 2309, and the affirmation does not comply with the Administrative Order issued by the Chief Administrative Judge.

Hossain's argument that the affidavit of Weinberger does not comply with CPLR 2309 is baseless. The first line of the affidavit in support, as well as her other affidavits, all of which were executed in Utah, reads as follows: "Diane Weinberger, being duly sworn, deposes and says the following under the penalties of perjury." This language is sufficient to comply with the requirement of CPLR 2309(b) as it is "in a form calculated to awaken the conscience and impress the mind" that an oath or affirmation has been administered. Moreover, the Certificate of Conformity annexed to Weinberger's affidavit and signed by an attorney licensed to practice law in Utah indicates that the affidavit conforms to the laws for taking oaths and acknowledgments in that State as required by CPLR 2309(c).

Similarly groundless is Hossain's argument that the Administrative Order of the Chief Administrative Judge has not been complied with. Weinberger's affidavit and the affirmation of plaintiff's counsel recite the exact language required by Administrative Order 431/11.

Turning to the substantive arguments, standing is not an element of a mortgagee's claim for foreclosure and sale, but when challenged in a pre-answer motion or by an affirmative defense set forth in an answer, standing must be established by the plaintiff to be entitled to any relief requested in the complaint (*see* ***Bank of New York v Silverberg***, 86 AD3d 280, 926 NYS2d 532 [2d Dept 2011] ; ***Wells***

***Fargo Bank Minnesota v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (***Deutsche Bank Nat. Trust Co. v Rivas***, 95 AD3d 1061, 1061-1062, 945 NYS2d 328 [2d Dept 2012], quoting ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 108, 923 NYS2d 609 [2d Dept 2011]; *see* ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). "An assignment of the mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it" (***HSBC Bank USA v Hernandez***, *supra* at 843; *see* ***Bank of New York v Silverberg***, *supra*). However, a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and vest standing in the plaintiff, since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto (*see* ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of New York v Silverberg***, *supra*; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]).

In his cross motion challenging plaintiff's standing, Hossain maintains that the note does not contain an indorsement, and no proof has been submitted to demonstrate that Encore delivered the note to plaintiff. Hossain also argues that the purported Assignment is invalid because (1) MERS as the assignor, had no authority to assign the note, and (2) it was signed by a known robo-signer. In opposition to the cross motion and in further support of its motion, the plaintiff has proffered another "true and correct copy" of the subject note, however, this time an endorsement in blank by Encore is attached. Plaintiff's counsel explains that the indorsement was inadvertently omitted from the moving papers.

Where a note is payable to order, it is negotiated by delivery with any necessary indorsement (McKinney's Cons Laws of NY, Book 62½, UCC § 3-202[1]). The indorsement must be written on the note "or on a paper so firmly affixed thereto as to become a part thereof" (*id.* at § 3-202[2]). As explained in the Official Comment following UCC § 3-202, when the indorsement is affixed to an instrument, it is called an allonge (*id.* at 102). "An indorsement in blank specifies no particular indorsee and may consist of a mere signature...and becomes payable to bearer and may be negotiated by delivery alone until specifically indorsed" (*id.* at § 3-204[2]).

The belatedly proffered note to which is attached a purported indorsement by Encore is insufficient to confer standing upon the plaintiff. There is no explanation as to why the indorsement was not placed on the actual note. The plaintiff does not indicate that a copy of the purported indorsement was actually affixed to the subject note so as to become an allonge. As further explained in the Official Comment following UCC 3-202, at page 102, "a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation." Moreover, the indorsement does not contain any identifying information to relate it to the subject note as it simply contains a stamp on an otherwise blank sheet of paper that reads:

Pay To The Order Of

Without Recourse
Encore Credit Corp.
California Corporation

_____

Christopher Ledezma
Sr. Shipping Analyst

There is a signature on the line, above which is written in "dba ECC Encore Credit". Notwithstanding, it is undated and the papers before the court do not contain any proof as to when the note was negotiated. Additionally "[t]he affidavit from the plaintiff's servicing agent did not give any factual details of a physical delivery of the note" (***HSBC Bank USA v Hernandez***, 92 AD3d 843, *supra* at 844). Therefore, Hossain has raised questions of fact as to whether a valid transfer of the note was made to the plaintiff by an indorsement and if plaintiff had physical possession thereof prior to commencing this action (*see* ***Deutsche Bank Nat. Trust Co. v Haller***, —AD3d—, 2012 WL 5503577, 2012 NY Slip Op 07619 [2d Dept]); ***HSBC Bank USA v Hernandez***, *supra*; ***Deutsche Bank Nat. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]).

As to the Assignment dated June 30, 2008, neither Weinberger's affidavit nor plaintiff's counsel's affirmation addresses Hossain's contention that it was robo-signed. Rather, the contention is addressed in the plaintiff's memorandum of law in opposition to the cross motion. "[I]t is well settled that '[u]nsworn allegations of fact in [a] memorandum of law are without probative value'" (***Byrd v Roneker***, 90 AD3d 1648, 1649, 936 NYS2d 434 [4th Dept 2011], quoting ***Zawatski v Cheektowaga-Maryvale Union Free School Dist.***, 261 AD2d 860, 690 NYS2d 463, *lv denied* 94 NY2d 754, 700 NYS2d 427 [1999). Therefore, the memorandum of law is insufficient to refute the issue raised by Hossain as to the viability of the signature on the Assignment.

In any event, the mortgage agreement signed by Hossain indicates that MERS is the nominee for Encore and for purposes of recording the mortgage, is the mortgagee of record. Even though the Assignment indicates that MERS assigned the mortgage together with the note to plaintiff, there is nothing in the papers before the court to indicate that the note was transferred to MERS or that MERS ever had possession of the note. Thus, the Assignment even if valid, standing alone is insufficient to establish that plaintiff had standing to commence this action (*see* ***Bank of New Y ork v Silverberg***, 86 AD3d 274, *supra*). Therefore, those portions of the plaintiff's motion for summary judgment on the complaint, to fix the defaults of the non-appearing defendants and for the appointment of a Referee to compute the amount due are denied. As issues of fact exist as to standing, the portion of the cross motion to dismiss pursuant to CPLR 1003 for failure to name the actual owner/holder of the note and mortgage is denied.

The remainder of the plaintiff's motion is decided as follows. First, it is noted that other than the standing issue (first affirmative defense) and the related issue of the Assignment (seventh affirmative defense), Hossain has not submitted any opposition to the plaintiff's argument to dismiss the remaining affirmative defenses and the counterclaims. Instead, Hossain, in essence, argues that summary judgment should be denied in order for him to conduct discovery (CPLR 3212[f]).

Addressing Hossain's discovery argument, pursuant to CPLR 3212(f), if it appears from affidavits submitted in opposition to the motion for summary judgment "that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." However, "[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Wyllie v District Attorney of Count of Kings***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]). Mere hope based on speculation and surmise that discovery will reveal the existence of triable issues of fact is insufficient to forestall the grant of summary judgment in a defendant's favor (*see id.*). Here, Hossain has failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. Consequently, there is no need to delay the determination of the remainder of the plaintiff's motion by virtue of CPLR 3212(f) (*see* ***Freiman v JM Motor Holdings NR 125-139, LLC***, 82 AD3d 1154, 920 NYS2d 189 [2d Dept 2011]).

The second affirmative defense alleges that the plaintiff failed to serve Hossain with the default notice as required by the terms of the mortgage. Attached to Weinberger's affidavit are several letters from SPS informing Hossain of his default under the terms of the note and mortgage for failure to make payments as agreed. As required under the note and mortgage each letter set forth the amount due and afforded Hossain an opportunity to cure the default. Therefore, plaintiff has established that it complied with the terms of the note and mortgage (*see* ***Indymac Bank, FSB v Kamen***, 68 AD3d 931 [2d Dept 2009]). Thus, the plaintiff is entitled to summary judgment and the second affirmative defense is hereby severed and dismissed.

In the third affirmative defense, it is alleged that plaintiff "acted with unclean hands, in bad faith, and unconscionably, and should be estopped from proceeding herein." It is well-settled that the doctrine of unclean hands is not a defense to a mortgage foreclosure action (*see* ***Jo-Ann Homes v Dwortetz***, 25 NY2d 112, 302 NYS 599 [1969]). Thus this affirmative defense is severed and summarily dismissed.

As to unconscionability, such assertion is related to the fourth affirmative defense, and the twelfth affirmative defense/third counterclaim, the gravamen of which is the plaintiff failed to investigate Hossain's creditworthiness or ability to repay the note and mortgage. Hossain is attempting to invoke violations of Banking Law §§ 6-l and 6-m which can create issues of fact as to unconscionability (*see* ***Emigrant Mortg. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012]). Here, however, no such issues exist.

The determination of unconscionability is a matter of law for the court to decide (***Emigrant Mortg. Co., Inc. v Fitzpatrick***, *supra*). Here, "[a]ssuming, without deciding, that the asserted unconscionability... of the note and mortgage is an affirmative defense to the underlying default...[Hossain] failed to demonstrate that 'no reasonable and competent person would accept [the] terms, which are so inequitable as to shock the conscience" (internal citations omitted) (***LaSalle Bank Nat. Assn v Kosarovich***, 31 AD3d 904, 906, 820 NYS2d 144 [3d Dept 2006]; *see also* ***Emigrant Mortg. Co., Inc. v Fitzpatrick***, *supra*). That Hossain "may have struck a bad bargain does not excuse his default" (***LaSalle Bank NA v Kosarovich***, *supra* at 906). Moreover, Hossain is a medical oncologist, and a businessman with several investment properties. He has not submitted any evidence of an "inequality in bargaining power...or an imbalance in [his] understanding and acumen" (***Emigrant Mortg.***

***Co., Inc. v Fitzpatrick***, *supra* at 1170). In any event, neither section of the Banking Law applies, as both sections require the mortgaged premises "be occupied by the borrower as the borrower's principal dwelling (*see* Banking Law §§ 6-l[1][e][iv] and 6-m[1][d][iv]). Hossain admitted in an application to modify his loan that the Property is used to generate rental income and for his medical oncology practice. Therefore, the third and fourth affirmative defenses and the twelfth affirmative defense/third counterclaim are hereby severed and summarily dismissed.

The fifth affirmative defense of improper service is also severed and summarily dismissed. This defense has been waived as Hossain did not move to dismiss on this ground within 60 days after service of his responsive pleading (*see* CPLR 3211[e]).

The plaintiff has also established its entitlement to summary judgment dismissing the sixth affirmative defense alleging fraud. Critical to a fraud claim is that the basic facts are alleged to establish the elements of the cause of action. CPLR 3016(b) requires that the circumstances constituting the alleged wrong be stated in detail (*see* ***Lanzi v Brooks***, 54 AD2d 1057, 388 NYS2d 946 [1976], *affd* 43 NY2d 778, 402 NYS2d 384 [1977]). Here, Hossain has failed to specifically plead the acts or conduct allegedly engaged in to support this defense. Furthermore, "although it is well settled that an assignee of a mortgage takes it subject to the equities attending the original transaction (internal quotation marks and citation omitted), [the plaintiff] cannot be required to answer in damages for alleged misrepresentations committed by [Encore] in connection with the making of the [original] mortgage loan" (***US Bank National Assn v McPhearson***, 33 Misc 3d 1219[A], 2012 NY Slip Op 50742[U], 2012 WL 1521862 [Sup Ct Queens County]). In any event, the facts establish Hossain made payments on the mortgage note from June 2005 until February 2008, which conduct is "inconsistent with repudiation and constitute acquiescence and assent to [the terms thereof]" (***Feinstein v Levy***, 121 AD2d at 499, 500, 503 NYS2d 821 [1st Dept 1986]). Therefore, Hossain's defense of fraud cannot be sustained.

In the eighth affirmative defense, Hossain alleges that the causes of action are barred by the statute of limitations. An action to foreclose a mortgage may be brought to recover each unpaid installment due within the six-year period immediately preceding the commencement of the action (CPLR 213[4]). Once a mortgage debt has been accelerated, the entire amount becomes due and the statute of limitations begins to run on the entire debt (***Wells Fargo Bank, N.A. v Burke***, 94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]). "[T]he borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan, and such notice must be clear and unequivocal" (internal citations omitted) (*id.* at 983). Here, from the papers submitted, the court cannot determine when the plaintiff accelerated the maturity date. Moreover, as there is an issue as to whether plaintiff has standing, commencing the instant foreclosure action may not be sufficient to put Hossain on notice of the option to accelerated the debt (*see id.*). Nevertheless, it has been less than six years since Hossain failed to make a payment, therefore the statute of limitations has not expired. Thus, the eighth affirmative defense is hereby severed and dismissed.

The ninth affirmative defense, that the plaintiff and/or its agents agreed to a modification of the loan is baseless. Hossain does not cite to the law or any provision in the note or mortgage, to establish that, upon his default, the plaintiff had a legal obligation to modify the loan terms (*see* ***JP Morgan Chase Bank, NA v Ilardo***, 36 Misc 3d 359, 940 NYS2d 829 [Sup Ct Suffolk County 2012]). Moreover, Hossain was offered but defaulted on a trial modification extended to him under the Home Affordable

Modification Program, commonly know as HAMP. Thus the ninth affirmative defense is severed and dismissed.

In the tenth affirmative defense/first counterclaim, Hossain alleges that the plaintiff and/or its predecessors allegedly engaged in a variety of activities which violated the Truth-In-Lending Act, 15 USC § 1601, *et seq.* ("TILA") and seeks rescission of the note and mortgage and monetary damages . Specifically, Hossain alleges that the plaintiff and/or its predecessor in interest, acted to mislead, overcharge and defraud him in the application process, loan closing and in servicing the subject mortgage. It is also alleged that the plaintiff, including its loan servicer, failed to comply with the obligations under the TILA by failing to provide a proper good faith estimate of the closing costs, modifying the terms of the mortgage loan by increasing the interest rate and closing costs on the day of the closing without prior notice, failed to provide him due and proper notice to cancel, and exerted undue duress upon him to close the loan under modified terms and at a cost that he did not want. Again, although Hossain has the burden of proof on his affirmative defenses and counterclaims, he has not offered an affidavit or evidence to substantiate his conclusory contentions (*see* ***US Bank, NA v Pia***, 73 AD3d 752, 901 NYS2d 104 [2d Dept 2010]). With regard to rescission, Hossain's right to do so expired on June 27, 2008, three years after the loan transaction was consummated (*see* ***Bankers Trust v McFarland***, 192 Misc 2d 328, 743 NYS2d 804 [Sup Ct Nassau County 2002], citing 15 USC § 1635[f]). Thus, since this affirmative defense and counterclaim were asserted in Hossain's answer which was served in 2011, any clam for rescission is untimely (*see* ***Bankers Trust v McFarland***, *supra* citing ***Beach v Ocwen Federal Bank***, 523 US 410, 118 SCt 1408 [1998]). Therefore the tenth affirmative defense/first counterclaim must be severed and dismissed.

In his eleventh affirmative defense and second counterclaim, Hossain seeks damages for alleged violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 USC § 2601, *et seq.*, and the Fair Debt Collection Practices Act ("FDCPA"), 15 USC § 1692, *et seq.* Assuming, without deciding that RESPA applies, 12 USC § 2615 provides that nothing "shall affect the validity or enforceability of any loan, loan agreement, mortgage or lien made or arising in connection with a federally related mortgage loan." Thus, it has been held that a violation under RESPA is not a valid defense to a mortgage foreclosure action (*see* ***Patriot Nat. Bank v Amadeus B, LLC***, 29 Misc 3d 1217[a], 918 NYS2d 399 [Sup Ct, New York County 2010]; ***Deutsche Nat. Bank Trust Co. v Campbell***, 26 Misc 3d 1206[A], 906 NYS2d 779 [Sup Ct, Kings County 2009]; ***Fremont Inv. & Loan v Haley***, 23 Misc 3d 1138[A], 889 NYS2d 505 [Sup Ct Queens County 2009]). As to the FDCPA, the purpose of which is to eliminate abusive debt collection practices (*see* 15 USC § 1692[e]), Hossain has not offered any specifics as to how this act was violated. Moreover, it has been held that mortgage companies or its servicing agents collecting debts are not "debt collectors" under the FDCPA (*see* ***Wood v Capital One Services, LLC***, No. 5:09-CV-1445, Slip Op, 2012 WL 4364494 [NDNY 2012]; ***Muniz v Bank of America, NA***, No. 11 Civ. 8296, Slip Op, 2012 WL 2878120 [SDNY]; *see also* ***Perry v Stewart Title Co.***, 756 F.2d 119, 1208 [5th Cir. 1985]). Therefore, the eleventh affirmative defense/second counterclaim are severed and dismissed.

Finally, as a preliminary conference has not been held in this action, the parties' counsel are directed to appear at 9:30 a.m. on February 27, 2013, for such a conference.

Dated: January 11, 2013

W. Gerard Asher
J.S.C.

**____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION**