[* 1]

MEMO DECISION and ORDER

INDEX No. 22310/11

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/30/12
ADJ. DATES 2/17/12
Mot. Seq. # 001- MG; Order signed

PEOPLE'S UNITED BANK,	:	JASPAN, SCHLESINGER
	:	Attys. For Plaintiff
Plaintiff,	:	300 Garden City Plaza
	:	Garden City, NY 11530
-against-	:	
	:	JOEL KATIMS, PC
HALLOCK LANDING ASSOCIATES, LLC,	:	Atty. For Defs. Hallock, Malguarnera
NEW YORK STATE DEPARTMENT OF	:	& Miller
TAXATION & FINANCE, WOLFE MILLER,	:	213 Hallock Rd.
SALVATORE MALGUARNERA, ET ALS,	:	Stony Brook, NY 11790
	:	
Defendants.	:	

Upon the following papers numbered 1 to 11 read on this motion by plaintiff for accelerated judgments and the appointment of a referee to compute ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5 ; Replying Affidavits and supporting papers 6-7 ; Other 8-9 (Memorandum); 10-11 (Memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) the instant motion is decided as follows.

In this mortgage foreclosure action, the plaintiff moves for an order: (1) awarding it summary judgment against the answering defendants; (2) deleting as party defendants certain named defendants; and (3) appointing a referee to compute amounts due under the subject mortgage. The motion is considered under CPLR 3215, 3212 and RPAPL § 1321 and is granted.

On August 8, 2011, the plaintiff commenced this action for, among other things, an order consolidating two mortgages given by defendant, Hallock Landing Associates, LLC (hereinafter "Hallock") on May 13, 2005 in connection with it's development of a tract of land situated in Brookhaven with single family residences. The first loan was evidenced by a note in favor of the lender, Bank of Smithtown, in the principal amount of $4,243,750.00 while the second loan was evidenced by

a note in favor of said lender in the principal amount of $650,000.00, both notes bearing the date of May 13, 2005. Defendants, Wolfe Miller and Salvatore Malguarnera, executed contemporaneous written guarantees of the obligations of Hallock under the terms of the May 13, 2005 loan documents. The plaintiff is the successor by merger to the Bank of Smithtown.

Each of the subject notes had a maturity date of November 13, 2007 and each, together with the mortgages contained a provisions barring oral modifications. By a writing dated October 19, 2007, the original lender, the mortgagor Hallock, and the guarantors executed a writing which extended the maturity date of both loans until November 13, 2008. On October 23, 2008, by a like writing, the maturity dates of the mortgage loans was extended for another two additional years until November 13, 2010. After the defendants defaulted in payment of the loans on or before the extended maturity dates, the plaintiff accelerated both and commenced this action to foreclose both loans, upon the court's consolidation of said loans.

Defendants, Hallock and its guarantors, Miller and Malguarnera, appeared herein by answer certified by their counsel on October 28, 2011. Therein, these answering defendants assert two affirmative defenses, namely that they were not notified of a transfer of the notes and mortgages to the plaintiff "as required by law" and that the plaintiff is estopped from prosecuting its claims for foreclosure and sale. The answer further sets forth two counterclaims for the recovery of money damages in the amount of $1,500,000.00. The first of said counterclaims alleges that agents of the plaintiff and/or the original lender made oral assurances that the maturity dates of both loans would continue to be extended and that the defendants relied thereon by making continued investments in the development projects. The second counterclaim rests on similar claims but adds an allegation that the purported oral assurances of the plaintiff and/or its agents were false.

By the instant motion, the plaintiff seeks summary judgment dismissing the affirmative defenses and counterclaims of the answering defendants and summary judgment on its complaint. The plaintiff further seeks an order dropping the unknown defendants as parties and the fixation of the defaults in answering by the remaining defendants. The plaintiff also seeks the issuance of an order of reference in the form of the one attached to the moving papers. Although the defendants oppose the plaintiff's motion, the court finds, for the reasons stated below, that the plaintiff is entitled to the relief demanded.

It is well established that in an action to foreclose a mortgage, a prima facie case is made by the plaintiff's production of the note and mortgage and proof on the part of the defendant/mortgagor and any guarantors of a default in payment or other material terms set forth in the mortgage (*see* ***Garrison Special Opportunities Fund, L.P. v Arthur,*** 82 AD3d 1042, 918 NYS2d 894 [2d Dept 2011]; ***Swedbank, AB v Hale Ave. Borrower, LLC.***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Here, the plaintiff established its entitlement to summary judgment on its complaint by its production of the note and mortgage, the written guarantees, the writings extending the maturity dates of the loans and due evidence of defaults on the part of the answering defendants in payments due thereunder.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses and counterclaims asserted in their answer (*see* ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). In the opposing papers submitted by the defendants on behalf of himself and his co-defendant guarantor, Miller advances claims similar to those asserted in their answer, namely, that the plaintiff agreed to orally extend the maturity date of the loans, waived said maturity dates and/or should be estopped from disavowing such oral modifications and assurances due to the defendants' part performance thereunder and/or their reliance thereon to their detriment. For the reasons stated below, the court rejects these asserted defenses.

Generally, a written agreement which includes a proscription against oral modifications can only be changed by an "executory agreement * * * in writing" (General Obligations Law [GOL] § 15–301[1]). Where a contract, including a mortgage or guarantee, is unambiguous and contains a clause prohibiting amendment other than in writing within the contemplation of GOL § 15–301(1), alleged oral modifications of such contracts are ineffective to preclude enforcement thereof or other contractual remedies available to the plaintiff (*see* ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***B. Reitman Blacktop, Inc. v Missirlian***, 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]; ***Wasserman v Harriman***, 234 AD2d 596, 651 NYS2d 620 [2d Dept 1996]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996]); *see also* ***Martin v Liberty Mut. Ins. Co.,*** ____ AD3d ____, 2012 WL 503597 [2d Dept 2012]).

Nevertheless, an oral modification of a written mortgage may be enforceable where the party seeking to uphold the modification partially performs under its terms, detrimentally relies on the modification and the partial performance is unequivocally referable to the modification (*see* General Obligations Law § 5–703[4]; ***Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group***, 93 NY2d 229, 689 NYS2d 674 [1999]; ***Chemical Bank v Sepler***, 60 NY2d 289, 469 NYS2d 609 [1983]; ***Rose v Spa Realty Assocs.***, 42 NY2d 338, 343, 397 NYS2d 922 [1977]; ***Martini v Rogers***, 6 AD3d 404, 774 NYS2d 378 [2d Dept 2004]). Under the doctrine of part performance, the acts of part performance must have been those of the party insisting on the contract, not those of the party insisting on the Statute of Frauds (*see* ***Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group***, 93 NY2d 229, *supra*). Unsubstantiated, vague and conclusory allegations of the existence and terms of any such oral modification are insufficient, as detailed factual allegations are required to establish a modification (*see* ***Money Store of New York, Inc. v Kuprianchik***, 240 AD2d 398, 658 NYS2d 1019 [2d Dept.1997]; ***Wasserman v Harriman***, 234 AD2d 596, *supra; Can-Am Dev. Corp. v Meldor Dev. Corp.*, 214 AD2d 695, 625 NYS2d 600 [2d Dept 1995] (*alleged oral extension of maturity date*); ***FGH Realty Credit Corp. v VRD Realty Corp***. 231 AD2d 489, *supra*; (*alleged oral extension of interest rate*); ***Bank of Smithtown v Boglino***, 254 AD2d 319, 678 NYS2d 640 [2d Dept 1998] (*alleged oral extension of payments dates*).

Here, the defendants offer only vague, conclusory and unsubstantiated allegations regarding the purported issuance of oral assurances that the maturity dates of the loans would be extended. Such allegations lack the requisite specificity required to overcome the requirement of a writing. Under these circumstances, the no oral-modification clause set forth in the mortgages coupled with the lack of a writing extending the maturity date beyond the last extended date of November 13, 2010 bars enforcement of the defendants' claimed oral modifications (*see* General Obligations Law § 15-301; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, *supra*; ***Can-Am Dev. Corp. v Meldor Dev. Corp.***, *supra*).

The no oral modification statute of frauds set forth in GOL §15-301 does not, however, preclude a litigant from asserting claims of estoppel or waiver on the part of the party claiming the statutory bar under GOL §15-301 (*see* ***Rose v Spa Realty Assocs.***, 42 NY2d 338, *supra*; ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 184, 451 NYS2d 663 [1982]). Under principles of New York jurisprudence, a waiver is a voluntary relinquishment of a known right, which would have been enforceable, but for the waiver (*see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 178, 451 NYS2d 663 [1982]). A waiver should not be lightly presumed (*see* ***Gilbert Frank Corp. v Federal Ins. Co.***, 70 NY2d 966, 525 NYS2d 793 [1988]; ***Fish King Enter. v Countrywide Ins. Co.***, 88 AD3d 639, 930 NYS2d 256 [2d Dept 2011]), and vague an unsubstantiated allegations of the conduct constituting the alleged waiver are not sufficient (*see* ***Manufacturers and Traders Trust Co. v David G.***, 242 AD2d 943, 665 NYS2d 949 [4th Dept 1997]).

Here, there is no true claim of a waiver on the part of the plaintiff by virtue of its knowing relinquishment of any of its rights under the terms if loan documents as written (*see* ***Massachusetts Mut. Life Ins. Co. v Gramercy Twins***, 199 AD2d 214, 606 NYS2d 158 [1st Dept 1993]). Rather, the defendants have asserted a claim that the loan should be modified due to purported assurances to that effect made by the plaintiff or its agents (*see* ***US Bank v 23rd St. Dev., LLC.***, 25 Misc3d 1214{A), 901 NYS2d 911 [Sup Ct NY County 2009]). Morever, because the plaintiff's purported waiver of the maturity dates set forth in the loan documents remains executory, any such waiver may be construed as withdrawn by virtue of the plaintiff's demands for payment and by its commencement of this action (*see* ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d at 737, 918 NYS2d 514 [2d Dept 2011]).

The defendants' claims of estoppel are equally unavailing. The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (***Agress v Clarkstown Cent. School Dist.***, 69 AD3d 769, 771, 895 NYS2d 432 [2d Dept 2010]). The requirement that there be a clear and unambiguous promise is not met by references to a course of conduct between the parties (*see* ***Southern Fed. Sav. and Loan Assn. of Georgia v 21-26 East 105th St. Assoc.***, 145 BR 375, 383 [SD, NY1991], *aff'd*, 978 F2d 706 [2d Cir 1992]). In addition, the conduct relied upon to establish estoppel must *not* be otherwise compatible with the agreement between the parties as written (*see* ***Rose v Spa Realty Assocs.***, *supra*). To establish a claim of equitable estoppel, three elements must be established: (1) conduct which amounts to a false representation or concealment

of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts (*see* ***River Seafoods, Inc. v JPMorgan Chase Bank***, 19 AD3d 120, 796 NYS2d 71 [1st Dept 2005]).

As in the case of a waiver, unsubstantiated, vague and conclusory allegations of facts allegedly giving rise to a claimed estoppel are insufficient to establish the estoppel, especially in cases where in the statutory requirement of a writing exists (*see* ***Prudential Home Mtge. Co., Inc. v Cermele***, 226 AD3d 357, 640 NYS2d 254 [2d Dept 1996]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NY.2d 572 [2d Dept 1995]. Here, the opposing papers submitted by the defendants in opposition to the plaintiff's motion were insufficient to raise any question of fact on the asserted defense of estoppel (*see* ***Money Store of New York, Inc. v Kuprianchik***, 240 AD2d 398, *supra*; ***Wasserman v Harriman***, 234 AD2d 596, *supra*). These circumstances render the answering defendants' Second affirmative defense and First counterclaim legally insufficient.

The defendants' second counterclaim sounding in fraudulent misrepresentation is also without merit. A claim for fraudulent misrepresentation rests upon a material misrepresentation of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]). In order to plead a valid cause of action sounding in fraud, the complaint must set forth all of the elements of fraud, including the making of material representations by the defendant to the plaintiff (*see* ***Garelick v Carmel***, 141 AD2d 501, 502, 529 NYS2d 126 [2d Dept.1988]). Here, there are insufficient allegations of the making of a material misrepresentation on the part of the plaintiff or justifiable reliance thereon by the defendants. These circumstances serve to establish a lack of merit regarding the defendants' Second counterclaim sounding fraudulent misrepresentation (*see* ***High Tides, LLC v DeMichele,*** 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; ***Cohen v Houseconnect Realty Corp.***, 289 AD2d 277, 734 NYS2d 205 [2d Dept 2001]).

In view of the foregoing, those portions of the instant motion wherein the plaintiff seeks summary judgment dismissing the affirmative defenses and counterclaims of the answering defendants is granted. Summary judgment is further awarded to the plaintiff on its First, Second and Third causes of action (sounding in foreclosure of the Second and First mortgages and counsel fees).

Summary judgment is also granted with respect to the plaintiff's Fourth cause of action sounding in declaratory relief for consolidation of the First and Second mortgages, in light of the commonality of the date of the execution of the two mortgages, the absence of intervening encumbrancers and the absence of opposition thereto. The court thus declares the Second mortgage to be consolidated with the First mortgage so as to have equal priority with that of the First mortgage, thereby allowing both to be sold at but one public auction of the premises. The two remaining causes of action (both labeled "Fifth") are posited in the alternative to the Fourth cause of action and are thus dismissed as academic.

Those portions of the instant motion wherein the plaintiff seeks an order dropping, as party defendants, the unknown defendants listed in the caption and an amendment of the caption to reflect same is granted.

The moving papers further established the default in answering on the part of the remaining defendants, none of whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the answering defendants and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Perla v Real Prop. Holdings, LLC***, 23 Misc3d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]; ***HSBC Mtg. Serv., Inc. v Alphonso***, 16 MIsc3d (A), 2007 WL 2429711 [Kings County Sup. Ct. 2007]).

The proposed order of reference attached to the moving papers, as modified by the court, has been signed and shall be forthwith served, together with a copy of this decision, upon all persons entitled to such service.

DATED: 3/7/12

THOMAS F. WHELAN, J.S.C.