**IN THE CIRCUIT COURT FOR THE 2ND JUDICIAL CIRCUIT**

**HAMILTON COUNTY - MCLEANSBORO, ILLINOIS**

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| 21ST MORTGAGE CORPORATION  PLAINTIFF,  -vs-  FRANCES J. BRANCH A/K/A FRANCES JUNE BRANCH; THE BANK OF NEW YORK TRUST COMPANY N.A., AS SUCCESSOR TO JPMORGAN CHASE BANK N.A., AS TRUSTEE RESIDENTIAL FUNDING; UNKNOWN OWNERS AND NON RECORD CLAIMANTS;  DEFENDANTS | CASE NO. 13 CH 16  PROPERTY ADDRESS:  700 E SAINT CHARLES ST a/k/a 700 E SAINT CHARLES AVE  MC LEANSBORO, IL 62859 |

**PLAINTIFF’S COMBINED MOTION FOR SUMMARY JUDGMENT AND TO STRIKE AFFIRMATIVE DEFENSES**

NOW COMES the Plaintiff, 21ST MORTGAGE CORPORATION (the “Plaintiff”), by and through its attorney, Marinosci Law Group, P.C. and for its Motion for Summary Judgment as to the Affirmative Defenses filed by FRANCES BRANCH (the “Defendant”), states as follows:

**FACTS**

On or about December 13th, 2002, Defendant executed a promissory note in the amount of Forty Seven Thousand Twenty Five Dollars and 00/100 ($47,025.00) with Homecomings Financial Network Inc (the “Note”). The Note was secured by a mortgage on 700 E. St Charles Street, McLeansboro, IL 62859 (the “Mortgage”). On or about July 2005 the Note and Mortgage went into default and this action was filed. In response, the Defendant filed her answer and affirmative defenses to the Plaintiff’s complaint. This Motion for Summary Judgment is in response thereto.

**ARGUMENT**

1. **Standard for Summary Judgment**

Plaintiff’s motion is brought pursuant to 735 ILCS 5/15-1506 of the Illinois Mortgage Foreclosure Law (hereinafter “IMFL”) and 735 ILCS 5/2-1005 of the Illinois Code of Civil Procedure. Section 15-1506 of the IMFL provides.

1. Where an allegation of fact in the complaint is not denied by a party’s verified answer or verified counterclaim, or where a party pursuant to subsection (b) of section 2-610 of the Code of Civil Procedure states, or is deemed to have stated, in its pleading that it has no knowledge of such allegation sufficient to form a belief and attaches the required affidavit, a sworn verification of the complaint, of a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required;….and
2. Where all the allegations of fact in the complaint have been proved by verification of the complaint or affidavit, the court upon motion supported by affidavit stating the amount which is due the mortgagee, shall enter judgment of foreclosure as requested in the complaint. 735 ILCS 5/15-1506(a)(West 2010)

Additionally, 735 ILCS 5/2-1005 allows a party to receive summary judgment in its favor “if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005 (West 2010).

The purpose of a summary judgment proceeding is not to try an issue of fact but, rather, to determine whether one exists. *Mydlach v. DaimlerChrysler Corp.,* 226 Ill. 2d 307, 311, 875 N.E.2d 1047, 1052 (2007). Although it has been recognized that summary judgment may sometimes be a drastic means of disposing of certain types of litigation, it is appropriate in cases where there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Collins v. St. Paul Mercury Ins., Co.,* 381 Ill. App. 3d 41, 45, 886 N.E.2d 1035, 1039 (1st Dist. 2008). Mere denials of fact in pleadings do not create a genuine issue which will preclude the entry of a summary judgment. *Joseph W. O’Brien Co. v. Highland Lake Const. Co.,* 9 Ill. App. 3d 408, 292 N.E.2d 205, 209 (1st Dist. 1972). Conclusory statements in affidavits, and unsupported assertions and opinions do not comply with Supreme Court Rule 191(a), and are insufficient to preclude summary judgment. *Geary v. Telular Corp.,* 341 Ill. App. 3d 694, 793 N.E.2d 128, 133 (1st Dist. 2003). The non-movant may not rely on conclusions of law and conclusory factual allegations. *Northern Trust Co. v. County of Lake,* 353 Ill. App. 3d 268, 818 N.E.2d 389, 394 (2nd Dist. 2004).

1. **Plaintiff is Entitled to Summary Judgment because Defendant Defaulted under the Terms of the Note and Mortgage by Failing to make the Monthly Mortgage Payments as the Payments came due.**

Although Defendant generally denied several of the allegations in the Complaint, mere denials, which are contradicted by affidavit, are insufficient to create a genuine issue of material fact. *La Fond v. Pickus,* 63 Ill. App. 3d 785, 786, 380 N.E.2d 1054 (2nd Dist. 1978). To date, Defendant has not offered any legitimate facts or substantiated any of his claims with any facts or evidence which could create a genuine issue of material fact.

The interpretation of a contract is a question of law and therefore may properly be decided on a motion for summary judgment. *Premier Title Co. v. Donahue,* 328 Ill. App. 3d 161, 164, 765 N.E.2d 513, 516 (2nd Dist. 2002). The primary goal in construing a contract is to give effect to the intent of the parties. *Donahue,* 328 Ill. App. 3d at 164. When the language of a contract is clear, a court must determine the intent of the parties solely from the plain language of the contract, and that language must be given its plain and ordinary meaning. *Id.* Plaintiff contends, and Defendant has not alleged to the contrary, that the language and terms of the Mortgage and Note are unambiguous such that this Court may definitively construe the parties’ intentions.

The Northern District of Illinois’ interpretation and application of Illinois contract law is particularly compelling regarding the parties’ obligations under a promissory note and mortgage when determining whether a borrower is in default. In *Zollicoffer,* the court stated that a borrower’s failure to make the monthly mortgage payments is not a minor or technical breach of the promissory note and mortgage, since the failure to do so defeats the parties’ bargained for objectives, causes a disproportionate prejudice to the lender, and that the general custom and usage consider this type of breach to be material. *Fireman’s Fund Mrtg. Corp. v. Zollicoffer,* 719 F. Supp. 650, 656-57 (N.D. Ill. 1989).

Relying on Illinois precedent, the court in *Zollicoffer* went on to state that a breach of the duty to make payments under a contract is material and that this principal is strongest with respect to a breach of the obligation to make payments under a note and mortgage. *Zollicoffer,* 719 F. Supp. at 656 (citing, *F.E. Holmes & Sons Constr. Co., Inc. v. Gualdoni Electric Services, Inc.,* 105 Ill. App. 3d 1135, 435 N.E.2d 724 (5th Dist. 1982); *B&C Elec. Inc. v Pullman Bank and Trust Co.,* 96 Ill. App. 3d 321, 421 N.E.2d 206 (1st Dist. 1981); *Brady Brick & Supply Co. v. Lotito,* 43 Ill. App. 3d 69, 356 N.E.2d 1126 (2nd Dist. 1976)). In fact, a borrower’s obligation to make the monthly mortgage payment is the primary obligation under the mortgage, and the only obligation under the promissory note. *Zollicoffer,* 719 F. Supp. at 656.

Under Illinois law, Plaintiff need not prove non-payment by the borrower in order to establish a prima facie case for foreclosure; rather, it is required only to introduce the note and mortgage, at which time the burden shifts to the non-movant to prove her affirmative defense. *Financial Freedom v. Kirgis,* 377 Ill. App. 3d 107, 131, 877 N.E.2d 24, 44 (1st Dist. 2007)(citing, *Boudinot v. Winter,* 91 Ill. App. 106 (1900)). Plaintiff attached to its Complaint copies of the Mortgage and Note. *See* Exhibit A and Exhibit B to Plaintiff’s Complaint. The burden thus shifts to the Defendant to prove an affirmative defense. *Pan-American Life Ins. Co. v. Invex Holdings, N.V.,* 1997 WL 72078, 2 (N.D. Ill. Feb. 14, 1997). This includes the affirmative defense of payment. *Id*.

Plaintiff has actually gone above and beyond its burden, by not only introducing the Note and Mortgage, but also demonstrating Defendant’s lack of payment. Plaintiff’s possession of the Note authorizes Plaintiff to enforce the Note and provides it with the necessary standing to initiate these foreclosure proceedings.

Having failed to comply with her contractual obligations, Plaintiff initiated these foreclosure proceedings against Defendant and has sought to recover its security interest. As the duty to make payments under a Note and Mortgage constitutes a material breach, the Court is more than justified in finding this loan to be in default. Defendant has neither provided proof of payments showing that the loan was not in default, nor has he raised any meritorious defenses to the undisputed facts established of record. By contrast, the Affidavit in support of the Motion for Summary Judgment of 21st MORTGAGE CORPORATION, the servicing agent for this Note and Mortgage, affirmatively establishes that Defendant is in default, and has been since July 2005. *See* Affidavit in support of the Motion for Summary Judgment, attached hereto and made a part hereof as “**Exhibit 1**”. There are no genuine issues of material fact and Plaintiff has established that it is entitled to the entry of judgment in its favor as a matter of law.

1. **There are no Genuine Issues of Material Facts with respect to Defendant’s Affirmative Defenses.**

**FIRST AFFIRMATIVE DEFENSE**

Defendant’s first affirmative defense is that “Plaintiff Failed to Administer Loan in A Commercially Reasonable Manner.” The essential allegation of the affirmative defense is that Plaintiff “failed to add mortgage insurance to the loan.” As an initial matter, Plaintiff is the current party of interest. Further, the affirmative defense is wholly opaque in terms of which party is alleged to have taken which action, as Defendants refer to the actions of their own successor’s in interest, somehow alleging that another party has assumed their debt and other responsibilities of the mortgage and note.

In any case, Defendant’s affirmative defense is not a defense to a mortgage foreclosure action. The test of whether a defense constitutes an affirmative defense is whether the defense gives color to the opposing party’s claim and then asserts new matter by which the apparent right is defeated. *Vanlandingham v. Ivanow*, 245 Ill. App. 3d 348, 357 (4th Dist. 1993). The admission of the apparent right is inferable from the affirmative defense. *Id.* Whether there is a mortgage insurance policy has no material impact on whether Defendant defaulted on the subject mortgage. Accordingly, Defendant’s first affirmative defense does not raise a genuine issue of material fact.

**SECOND AFFIRMATIVE DEFENSE**

Defendant’s second affirmative defense is “misrepresentation.” For the purposes of this pleading, Plaintiff assumes that Defendant intended to argue that common law fraud voided the mortgage. For a number of reasons, defendant’s second affirmative defense must fail.

Defendants argue that the mortgage broker that was involved in the origination of the loan made alleged misrepresentations regarding mortgage insurance. Defendants then attempt to impute this purported fraud onto original lender Homecomings Financial Network, arguing that the mortgage broker acted as Homecoming’s agent because it was allowed to complete and submit loan applications to Homecoming, which relied and depended fully on the broker’s representations as to the applicant’s income and the accuracy of their financial information. The Appellate Court has explicitly rejected this very argument. In *Farrell v. Lincoln Nat. Bank***,** 24 Ill.App.3d 142 (1st Dist. 1974), mortgagors attempted to impute the purported misconduct of the mortgage broker to the lender on the same basis as the instant Defendants have. However, in affirming the trial court’s ruling that the mortgage broker was not acting as the agent of the lender the Appellate Court offered the following analysis:

The plaintiffs point to the fact that before the loan was made Bankers Consultants obtained information relating to the financial condition of the plaintiffs, a preliminary title report for the plaintiffs' residence, for which it was compensated by the Bank and similar information important to a lender; that the Bank relied exclusively on the information supplied by the brokers and did not examine the property of the plaintiffs; and that the brokers prepared the notes, the trust deed, the disclosure statement, and the notice of rescission.

It is not unusual, as the Bank points out, for third persons, e.g., home improvement contractors, automobile dealers, real estate brokers, attorneys and accountants to assemble credit information for a lending agency. Could anyone suggest that an automobile dealer, anxious to sell a car to a person who required financing, became the agent of the lender because the dealer compiled credit information for the lender's use? We think not. Nor could the fact that the brokers typed in the blank spaces on the printed documents create an inference of any agency relationship. Needless to say, a loan broker gets no fee unless the borrower successfully negotiates the loan. The broker may understandably perform any number of accommodations for the lender in an effort to induce him to make the loan. But those acts of accommodation are based on self-interest and not on any desire to further the interests of the lender.

*Id.* at 148-149. Accordingly, the fact that Homecoming may have relied exclusively on the information provided by the broker and that it did not perform an independent investigation of the borrower’s financial information clearly is not a sufficient basis for imputing the purported misconduct of the broker onto Wells. Defendants’ therefore must be dismissed with prejudice, as they have not and indeed cannot establish that Wells made a false statement of material fact to them, which is a mandatory element in pleading and proving a claim for common law fraud. *Lidecker v. Kendall College*, 194 Ill.App.3d 309, 314 (1st Dist. 1990).

Furthermore, Defendants’ arguments fail because they were under a duty to know the terms of their loan when they entered into the loan transaction. Illinois law provides that a party may not bring a claim for fraud with respect to alleged misrepresentation regarding the terms of instrument when he has an opportunity to review the terms of the instrument. *Leon v. Max E. Miller & Son, Inc.*, 23 Ill.App.3d 694 (1st Dist. 1974). In *Leon*, the Appellate Court provided as follows with respect to fraud claims such as the claim made by Defendants:

One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. (17 C.J.S. Contracts s 137b.) And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations.

23 Ill.App.3d at 699-700. Accordingly, Defendants cannot complain in hindsight that the terms of their loan were unfavorable, as they clearly had an opportunity to review the loan documents and learn their contents before they executed them. As such, Defendants second affirmative defense must fail.

**CONCLUSION**

The Note, endorsed in blank, along with the assignment of mortgage and supporting affidavit demonstrate that the Plaintiff has standing to bring this foreclosure action. Defendant fails to properly raise any affirmative defenses to prevent the entry of judgment in Plaintiff’s favor. As such, there are no genuine issues of material fact and Plaintiff has established that it is entitled to the entry of judgment in its favor as a matter of law.

**WHEREFORE**, Plaintiff, 21st MORTGAGE CORPORATION, respectfully requests that this Honorable Court grant Summary Judgment in its favor and against Defendant, FRANCES BRANCH, and for such other relief as this Court deems just and equitable.

Respectfully submitted,

21st MORTGAGE CORPORATION

Plaintiff’s Attorney

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