Dated: November 01, 2017
The following is SO ORDERED:

George W. Emerson, Jr.
UNITED STATES BANKRUPTCY JUDGE

THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

WILLIE H. HOLLEY,
Debtor.

Case No. 15-21208-E
Chapter 13

WILLIE H. HOLLEY,
Plaintiff,

v.

Adv. Proc. No. 15-00340

FIRST CITIZENS NATIONAL BANK,
Defendant.

MEMORANDUM OPINION

This matter is before the Court on the complaint of Willie H. Holley ("Debtor") to determine the validity, priority, or extent of lien, and objection to claim, filed with this Court on October 8, 2015. Defendant, First Citizens National Bank ("Defendant"), filed its answer to Debtor's complaint on November 9, 2015. The Court conducted a trial of the matter on August 29, 2017, at 10:00 a.m.,

at which time the Court took the matter under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (K) and (O). The parties herein have stipulated that this Court has jurisdiction to hear and issue a final decision on the merits of this proceeding.

I. FINDINGS OF FACT AND PROCEDURAL HISTORY

Debtor filed his Chapter 13 Petition on February 5, 2015. On Schedule A, Real Property, Debtor listed a "Life estate subject to remainderman interest" in real property located at 11160 Macon Road, Eads, Tennessee, 38028 ("the Farm Property"). The Debtor listed the value of the Farm Property as $850,600.00, and the amount of secured claim on the Farm Property was listed as $678,597.67. Debtor listed "First Citizens Bank" on Schedule D, Creditors Holding Secured Claims. Debtor described the Bank's claim as, "Property pledged for third party note, 11160 Macon Rd., Eads, TN 38028," with a value of $1,701,200.00, and the amount of the claim as $678,597.67. Debtor further indicated that there was a co-debtor on this claim, and on Schedule H, Debtor listed Donni Holley as the co-debtor on the debt owed to Defendant. Debtor's son, Donni Holley, is the holder of the remainderman interest in the property.

Defendant's claim, filed February 18, 2015, included an attached Open-End Deed of Trust, which secured payment of the $750,000.00 indebtedness owed to Defendant by BP Mechanical Insulation, LLC (the "750K Deed of Trust"). The 750K Deed of Trust was signed by Debtor, Debtor's wife, and Donni Holley.

On February 19, 2015, Defendant filed a motion for relief from the automatic stay of 11

U.S.C. § 362 as to the Farm Property and as to the non-filing co-debtor guarantors of the loan guaranteed by the Deed of Trust. The co-debtor guarantors are Donni Holley, Leroy Powell, and Michael G. Bell. Two separate interim orders have been entered which addressed the Bank's motion. The first order, dated July 29, 2015, allowed the Debtor to market the Farm Property and make adequate protection payments. The property was not sold before the real estate agent's employment agreement expired on October 30, 2015. The second order, dated November 17, 2015, modified the automatic stay to allow the Bank to immediately pursue its collection rights against BP, Michael G. Bell, Leroy Powell, and Donni Holley. The remainder of the relief sought by the Bank (including the right to foreclose on the Farm Property) was held in abeyance pending the outcome of this Adversary Proceeding.

On January 13, 2017, Defendant filed a Motion for Summary Judgment. Plaintiff filed a Response on February 13, 2017, and the Court entered an order denying summary judgment based on the fact that both Debtor and Donni Holley allegedly could not recall, identify or confirm that the signatures on the documents, upon which the Bank claimed its security interest, were actually their signatures. Because the Court was being asked to grant summary judgment on matters of fact which related to the credibility of the Debtor and Donni Holley, the Court denied summary judgment and the case proceeded to trial. (Chapter 13 Case No. 15-21208; Adv. Proc. No. 15-00340, ECF No. 31).

Prior to the trial of the matter, Debtor stipulated that he had executed the 750K Trust Deed, more specifically described below, resolving this issue of fact in Defendant's favor. (Id., ECF No. 53 at ¶ 3).

Donni Holley testified at the trial of this matter that he was a member of BP, along with two other business partners. Debtor and Donni Holley both testified that they agreed that the Farm

Property served as collateral for a series of business loans obtained by BP. The Farm Property initially served as collateral for a loan made to BP by First Bank, who is not a party to this adversary proceeding, prior to the transactions with Defendant.

On July 9, 2007, BP obtained a $475,000.00 term loan from Defendant and obtained a $500,000.00 line of credit which matured on July 10, 2008. A $975,000.00 Trust Deed ("975K Trust Deed"), securing the term loan and line of credit, was executed by Debtor and Donni Holley and then recorded. On October 28, 2008, the 750K Trust Deed was executed by Debtor and Donni Holley, and recorded as Instrument No. 08143834. The 750K Trust Deed secured a $750,000.00 line of credit to BP. Debtor and Donni Holley also executed a Loan Modification Agreement on October 28, 2008 ("LMA"). The LMA modified the 975K Trust Deed to $475,000.00 because the $500,000.00 line of credit it also originally secured had expired. The $475,000.00 term loan remained in place, secured by the modified 975K Trust Deed.

The $475,000.00 term loan was paid off, and the modified 975K Trust Deed was released. BP drew down all of the secured $750,000.00 line of credit, then defaulted. Defendant commenced foreclosure proceedings on the Farm Property, which secured the 750K Trust Deed. Debtor then filed his Chapter 13 bankruptcy petition, listing Defendant as his only creditor. Debtor then filed this Adversary Proceeding. Debtor's complaint alleges that had he understood the documents he was signing, neither he nor his wife would have signed them. (Chapter 13 Case No. 15-21208; Adv. Proc. No. 15-00340, Compl., ECF No. 1, ¶ 8). Debtor alleged that Defendant knew or should have known that Debtor was unsophisticated and likely to not understand the loan documents. (Id. ¶ 10). Debtor also alleges that Defendant "had a duty to act with respect to the Debtor with fairness and in a commercially reasonable manner... and that the bank may have actively or negligently

represented the transaction to Debtor." (Id. ¶ 11).

Prior to the trial on Debtor's complaint, the Court orally granted Defendant's motion in limine, which sought to exclude arguments, statements, documents, or words to the effect that the Trust Deed (Instrument No. 08143834) signed by the Debtor secured an amount less than $750,000.00, or that the parties intended such Trust Deed to secure an amount less than $750,000.00. The Court found that the 750K Trust Deed was clear and unambiguous and any extraneous evidence regarding its terms violated the parole evidence rule and would be properly excluded. *See, e.g.*, *Ramco-Remodel America Corp., v. Wallis* (*In re Ramco-Remodel America Corp*), 536 B.R. 206, 210 (Bankr. W.D. Tenn. 2015).

At the trial of this matter, both Donni Holley and Debtor testified that if they had understood what they were being asked to sign on October 28, 2008 (i.e., the 750K Trust Deed), they would not have executed the loan documents that day. Donni Holley testified that he believed that on the day of the loan closing, he was only signing documents which would reduce the interest rate on the loan. Debtor testified that Mike Bell, another member of BP, had asked him to come to the bank and told him that "it was nothing but the interest rate."

Debtor and Donni Holley both testified that they did not have attorneys present at the October 28, 2008, loan closing, but that at past loan closings, they had hired counsel to represent them. No one explained to Debtor and Donni Holley what they were signing, nor did they ask for an explanation. It is clear from the trial testimony, however, that both Donni Holley and Debtor failed to even read what they were signing at the loan closing on October 28, 2008. Both testified that the documents were being circulated quickly at the loan closing and that they would not have had time to read and understand what was being circulated for signature. They did not protest

against the speed at which documents were being passed for signature and did not object to what they were signing.

Both Debtor and Donni Holley testified that they believe that a representative of Defendant should have explained the transaction to them or prevented them from signing documents which they now believe were not in their best interest. Further, when Debtor learned that BP was delinquent on the loan which was secured by the Farm Property, he went to one of Defendant bank's branches to inquire about the status of the loan and the bank would not answer his questions.

Debtor believes that Defendant should have explained the loan documents to him at the closing, prior to him signing them, and believes Defendant's failure to communicate the status of the loan to BP demonstrates that Defendant was trying to "cover up what was being done."

II. DISCUSSION

Debtor failed to demonstrate any representation to the Court, misleading or otherwise, made by Defendant, which might be considered a fraudulent or negligent misrepresentation. At the trial of this matter, no evidence was presented to the Court that Defendant made any type of representation to Debtor, upon which Debtor relied. The making of a representation is an essential element of both negligent misrepresentation and fraudulent misrepresentation. *Dixon v. Producers Agriculture Ins. Co.,* 198 F. Supp. 3d 832, 837 (M.D. Tenn. 2016).

Further, Debtor and Defendant were not in a fiduciary relationship which would indicate that Defendant had a duty to advise Debtor concerning the October 28, 2008, transaction. Debtor presented no evidence showing that Defendant assumed any responsibility for Debtor's affairs or had a fiduciary duty to act on Debtor's behalf. Debtor presented the Court with no evidence to demonstrate that he had a special relationship with Defendant in any way.

Other than pledging the Farm Property as collateral in connection with the loan made to BP, who was Defendant's customer, Debtor did not have any other dealings with Defendant. This does not suffice to establish fiduciary responsibility on the part of Defendant. *See Macon County Livestock Market, Inc. v. Kentucky State Bank, Inc.*, 724 S.W.2d 343, 351 (Tenn. App. 1987). "Tennessee common law generally does not impose fiduciary or similar duties on banks with respect to their customers, depositors, or borrowers absent special circumstances." *Power & Telephone Supply Company, Inc. v. Suntrust Banks, Inc., et al*, 447 F.3d 923, 932 (6th Cir. 2006)(citations omitted). Debtor has presented no special circumstances which would negate the general rule in this case.

Debtor also testified that he did not read the documents he signed on October 28, 2008. In Tennessee, the general rule is that one who signs a contract is under a duty to learn its contents and that if he fails to read or otherwise learn the contents of a contract, he signs at his own peril and cannot thereafter deny his contractual obligations. The presumption is that a signer knows the contents of a contract, or will suffer the consequences of his own negligence if he does not. *Beasley v. Metropolitan Life Insurance Co.*, 229 S.W.2d 146, 148 (Tenn. 1950). Debtor's complaint alleges that Defendant knew or should have known that Debtor was unsophisticated and likely to not understand the documents he was signing. (Chapter 13 Case No. 15-21208; Adv. Proc. No. 15-00340, ECF No. 1, Compl. ¶ 10). Debtor did not present any evidence to the Court that he was under a disability or medically incapacitated in such a way that he could not have known what he was signing.

Debtor had hired counsel on previous occasions to assist him with loan transactions. Debtor did not ask for an explanation as to what he was signing and does not deny the fact that he signed

the documents without reading them. Debtor did not object to signing the documents and did not present the Court with any evidence that he signed the documents under duress. Debtor presented the Court with no proof that showed that Defendant knew or should have known any facts about Debtor's alleged lack of sophistication or understanding.

The Court has determined that the 750K Deed of Trust was clear and unambiguous and that parole evidence is not admissible to determine the 750K Deed of Trust's meaning or effect. *Ramco-Remodel America Corp., v. Wallis* (*In re Ramco-Remodel America Corp*), 536 B.R. 206, 210 (Bankr. W.D. Tenn. 2015). The Debtor is bound by the terms of the 750K Deed of Trust as well as the other documents he signed during the October 28, 2008, loan closing.

Debtor's complaint alleges that Defendant had a duty to act with respect to the Debtor with fairness and in a commercially reasonable manner. The Debtor has not demonstrated the existence of such a duty. Tennessee law places a duty of good faith and fair dealing in the performance and enforcement of every contract. *Dick Broadcasting Company, Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 660 (Tenn. 2013). The Debtor's alleged claims against Defendant arise from the formation of the contract between the parties, not to the performance of the contract or to its enforcement. The common law duty of good faith in the performance of a contract does not apply to the formation of a contract. *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 687 (Tenn. 1996).

Debtor also alleges that "the proof may show that the Bank may have actively or negligently misrepresented the transaction to Debtor." At trial, Donni Holley repeatedly testified that Defendant never made any representations to him or to the Debtor. The Debtor also testified that Defendant did not make a misrepresentations to him.

The Court is not unsympathetic to Debtor's circumstances. Debtor's farm and home serve as collateral for a loan made to a third party. That loan is now in default and Defendant is seeking to assert its rights pursuant to the contract documents. Pledging one's property as collateral for a loan to a third party is not without risk. Signing loan documents without reading them is not without risk. The fact that the Debtor failed to appreciate these risks, does not create liability on Defendant's part.

At the hearing on this matter, counsel for Debtor called Donni Holley, Debtor, and Defendant's Special Assets Manager and Senior Vice President, Stan Avis ("Avis"). None of the testimony elicited from Mr. Avis by Debtor's counsel was relevant to the matters at hand. Mr. Avis testified that he only dealt with loans after they went into default and had nothing to do with the procedures or policies for making loans.

At the conclusion of Debtor's proof, counsel for Defendant moved for judgment on the findings pursuant to Fed. R. Civ. P. 52(c), as made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052(c). Rule 7052(c) allows the court, once a party is fully heard and the court finds against a party on an issue, to enter judgment against that party on any claim that can be maintained only with a favorable finding on that issue. A court should enter a judgment under Rule 52(c) when a party has finished presenting evidence and that evidence is deemed by the judge to be insufficient to sustain the party's position. Further, such motion should be granted where the plaintiff fails to make out a prima facie case, or despite a prima facie case, the court determines that the preponderance of evidence goes against the plaintiff's claim. *Giza v. Amcap Mortgage, Inc.*, (*In re Giza*), 458 B.R. 16, 23-24 (Bankr. D. Mass. 2011)(citations omitted).

Debtor here has failed to provide any evidence that Defendant made any misrepresentations.

Debtor has failed to prove that Defendant had any duty toward Debtor or failed in any duty toward Debtor. Debtor has failed to prove that Defendant did anything wrong whatsoever.

The testimony elicited at trial demonstrated that the Debtor did not read the loan documents that he signed on October 28, 2008. The testimony at trial demonstrated that the Debtor did not understand the loan documents that he signed on October 28, 2008. In Tennessee, a person who has the ability and opportunity to inform himself of the contents of a writing before he executes it will not be allowed to avoid the contract by showing that he was ignorant of its contents or that he failed to read it. *Solomon v. First American Nat'l Bank of Nashville*, 774 S.W.2d 935, 943 (Tenn. App. 1989). Some courts have found such inaction to be gross negligence. *Id.* Debtor is attempting to avoid the consequences of signing loan documents that he failed to read. Debtor may have been misled in his belief as to what he was signing, but he failed to provide the Court with any evidence that it was Defendant that misled him.

Counsel for Defendant's final argument was that the relief sought by Debtor's complaint was unavailable to him under 11 U.S.C. § 1322(b)(2) because Debtor's complaint was a veiled attempt to impermissibly alter the terms of a deed of trust on his residence. The Court notes that § 1322(b)(2) provides that a Chapter 13 plan "may modify the rights of holders of secured claims," and then goes on to exclude those claims secured only by a security interest in real property that is the Debtor's principal residence from such permitted plan provisions. *See Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106 (1993). If the plan proposed by Debtor in his Chapter 13 case violates § 1322(b)(2), i.e. attempts to modify Defendant's rights as the holder of a security interest in Debtor's principle residence, that issue may be handled through the confirmation process in Debtor's Chapter 13 case. The Court will not address the applicability of 11 U.S.C. § 1322(b)(2)

here.

The Court has now found against the Debtor on every issue and claim upon which his complaint is based, and as such finds that judgment should be entered **FOR DEFENDANT.**

IT IS SO ORDERED.