Smith v Bank of New York Mellon Corp.
2013 NY Slip Op 33047(U)
December 2, 2013
Supreme Court, New York County
Docket Number: 154346/2012
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

CLARA R. SMITH,
Plaintiff,

-against-

INDEX NO. 154346/12

MOTION SEQ. NO. 001

THE BANK OF NEW YORK MELLON CORPORATION, BANK OF AMERICA, N.A., GREEN TREE SERVICING, LLC and JOHN DOES 1-10,representing any other REMIC trusts, depositors, servicers, special servicers, master servicers, banks or other lenders claiming ownership of (i) a promissory note dated May 12, 2005 in the principal amount of $176,000 and signed by Clara R. Smith, or (ii) a credit line agreement in the principal amount of $28,300 dated August 24, 2005 signed by Clara R. Smith,
Defendants.

The following papers were read on this pre-answer motion by the defendant Green Tree Services, LLC to dismiss the complaint and plaintiff's cross-motion to amend the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: Yes No

Motion Sequences 001 and 002 are hereby consolidated for purposes of disposition.

This is an action brought by Clara R. Smith (plaintiff) on July 8, 2012, for declaratory judgment to determine the owner, possessor and location of two promissory notes executed by the plaintiff (i) in the principal amount of $176,000 dated May 12, 2005, (the Note) and (ii) in the maximum principal amount of $28,300 dated August 24, 2005, (the 2nd Note) (collectively, the Notes) against plaintiff's property located at 15 Campbell Street, Amityville, New York 11701, in Suffolk County. There is no foreclosure action currently pending regarding these Notes, though

plaintiff has stopped making payments on these Notes since May of 2011. Nonetheless, plaintiff seeks monetary damages for the return of payments made to any of the defendants for the period that they were not the lawful Note holders.

Plaintiff alleges that the Notes were assigned by their payee, directly or indirectly, to one or more underwriters and the Real Estate Mortgage Investment Conduit (REMIC) trustees and servicers in New York County, New York, which operates pursuant to New York Law, for purposes of securitization. Plaintiff alleges that because of the securitization process, including the possibility of unrelated assignments of, borrowing against and pledging of the Note by Wall Street financial institutions, it is not clear to the plaintiff who is the owner of the Notes and whether plaintiff should satisfy the notes with the defendants. The causes of action plead in plaintiff's complaint are for the following relief: a declaratory judgment that the defendants: have no enforceable right and interests in the Notes on the Property (first); have engaged in fraud and have collected monthly note payments under false pretenses (second); violated New York General Business Law (GBL) § 349 and thus plaintiff is entitled to a preliminary and permanent injunction to stop these unlawful practices (third); have created a financial hardship for plaintiff by manipulating securities and real estate markets and as a result plaintiff seeks a reformation of the Note with a reduction in the principal and interests rate (fourth); have breached the real estate contract ("Failing to Offer a Note in a Reduced Principal Amount at the Present Market Interest Rate") (fifth). In the sixth cause of action, claimed only as against Bank of America, N.A. (BOA), plaintiff asserts that BOA prejudiced the plaintiff by an anticipatory breach of the Settlement Agreement between BOA and the 50 State Attorneys General in which BOA agreed to reduce the principal amount of the Note for the homeowners who qualified under the terms of the Settlement Agreement.

Plaintiff further alleges that the proper venue is the Court in New York County, not Suffolk County since: (1) the physical location of the Notes are now in New York county, New

York, grouped together with about 3,000 other similar notes and mortgages signed by homeowner-mortgagors from the 50 States of the United States (for a total sale price of about $1 billion); (2) they were sold and physically delivered to underwriters in New York County, New York, as the subject of a public offering of securities based on such package of approximately 3,000 notes and physically turned over to a New York REMIC trust for holding by it in New York County, New York under a Pooling and Servicing Agreement, which states that it is governed and to be construed under New York Law; (3) that witnesses to these facts are located in New York County, New York; and (4) defendants are headquartered in New York County, have offices in New York County, or are qualified to do business in New York State and are doing business in New York County.

On August 14, 2012, defendants demanded a change of venue, pursuant to CPLR 511(a) and (b), from New York County to Suffolk County on the basis of CPLR 507, which states that venue of an action affecting real property shall be in the county in which any part of the property is situated. Plaintiff opposed the demand for a change of venue. Before the Court is defendant Green Tree Servicing, LLC's (Green Tree) pre-answer motion, filed on October 23, 2012, to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) (motion sequence 001), and a pre-answer motion, filed on November 13, 2012, by defendants Bank of New York Mellon Corporation (Bank of NYM) and Bank of America, N.A. (BOA) to dismiss the amended complaint pursuant to CPLR 3211(a)(7) (motion sequence 002).[1] Also before the Court are plaintiff's cross-motions, filed on December 11, 2012, for leave to file an amended complaint pursuant to CPLR 3025 in both sequences 001 and 002. No discovery has taken place nor has

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[1] The Court notes that in BOA's notice of motion, BOA states it is seeking to dismiss the Amended Complaint, which it states was filed by plaintiff on July 8, 2012. However, the original summons and complaint were filed on July 8, 2012, and to date, no amended complaint has been filed. The Court will treat this mistake as a clerical error, and the motion will be decided as if the notice of motion properly states that it is a motion to dismiss the complaint. This does not prejudice a substantial right of any party since the motion was fully briefed as a motion to dismiss the original complaint (*see* CPLR 2001).

a Preliminary Conference been held in this matter.

In support of its motion, Green Tree asserts that plaintiff's complaint should be dismissed because plaintiff has not alleged any actual or compensable damages with regard to the 2nd Note. More specifically, Green Tree contends that the first cause of action declaring that the defendants have no enforceable interest in the Notes is non-justiciable as the defendants have not declared the Notes to be in default, nor have the defendants commenced a legal proceeding to recover damages for non-payment. Moreover, Green Tree argues that plaintiff could not have sustained damages as a result of Green Tree's actions with regards to the 2nd Note as Green Tree did not become the servicer of that note until at least six months after plaintiff stopped payment on the 2nd Note. With regards to the second cause of action, Green Tree argues that it must be dismissed because plaintiff fails to plead the alleged fraud with sufficient particularity pursuant to CPLR 3016(b), and the third cause of action under GBL § 349 should be dismissed as this lawsuit involves a private contract and not an injury to the public. Green tree argues that the fourth and fifth causes of action should be dismissed because frustration of contractual performance is a defense to foreclosure inapplicable here and Green Tree is under no legal obligation to modify the loan, respectively.

In support of their motion, Bank of NYM and BOA argue that this action must be dismissed as plaintiff fails to plead a justiciable controversy regarding the servicing or ownership of the Notes, that NY GBL § 349 provides no recourse here, that the fourth and fifth causes of action are not recognized causes of action in New York, and that plaintiff does not have standing to enforce the Consent Judgment between the United States, 49 state attorney generals, and BOA.

In support of her cross-motions to amend the complaint, plaintiff maintains that the proposed Amended Complaint makes changes to meet the pleading objections of the defendants in their motion to dismiss, including more specific allegations as to fraud, more

specificity about the Plaintiff's damages in support of her complaint for declaratory relief, and allegations demonstrating an actual controversy, and that it should be granted. Plaintiff's proposed Amended Complaint asserts the following causes of action: (1) declaratory judgment that defendants are not in chain of title and authorized to act by someone in chain of title; (2) recovery of monies paid by mistake to defendants (quantum meruit, unjust enrichment, contract implied by law); (3) fraud, as against BOA and Green Tree; (4) violation of NY GBL 349, as against BOA and Green Tree; (5) action for reformation of the Notes; and (6) declaratory judgment and breach of contract ("Failing to Offer a Note in a Reduced Principal Amount at the Present Market Interest Rate").

In opposition to Green Tree's motion plaintiff argues, *inter alia*, that Green Tree and predecessors were the servicer and agent for an undisclosed principal and have been unwilling to name the principal. Thus, plaintiff argues that under the law the predecessor servicers and Green Tree stand in the place of the undisclosed principal, and for such reason Green Tree is liable for the payments made to earlier servicers on behalf of the undisclosed principal and any holders of the 2nd note to which the undisclosed principal is the successor in interest. Plaintiff maintains that unless the holder of the 2nd Note and proof of ownership is revealed by Green Tree, there is no way to determine if Green Tree is authorized to demand payments from the plaintiff or to institute a foreclosure action against the plaintiff. Moreover, it is plaintiff's contention that in her Amended Complaint she sufficiently sets forth damages as a result of Green Tree's withholding of the identity of the owner of the 2nd Note, which includes among other reasons, that without litigation and declaratory relief the likelihood of any reasonable loan modification is remote, thus rendering plaintiff unable to keep her home, plaintiff will be unable to communicate with the owner in an effort to obtain a loan modification agreement, and not being able to know who has ownership of the two notes and mortgages puts a cloud on the title to plaintiff's mortgaged property and reduces its value if and when the plaintiff tries to sell the

property in a short sale. Additionally, plaintiff argues that GBL § 349 is applicable as homeowners are consumers and activities directed to unlawful taking away of a homeowner's home can and do cause consumer injury. Plaintiff also asserts that in her original complaint she alleges the elements of fraud with sufficient particularity and in the amended complaint she only separates the allegations of fraud against Green Tree and BOA into different paragraphs. Plaintiff asserts that the 4th Cause of Action for reformation of the note is appropriate based on the defendant's unclean hands which frustrated plaintiff's performance under the Notes and Mortgages, which is a defense in a foreclosure action. Moreover, plaintiff argues that Green Tree had an obligation to negotiate an agreement in good faith, and it failed to do so.

In opposition to Bank of NYM and BOA's motion plaintiff argues, *inter alia*, that she has alleged a justiciable controversy and that a declaratory judgment action is the appropriate way to enable the plaintiff to know who owns the Notes and with whom the Plaintiff should be dealing for mortgage relief. Similarly to her arguments in opposition to Green Tree's motion, plaintiff asserts that Bank of NYM and BOA's actions create consumer injury and are directed to the public at large such that GBL § 349 is applicable, she pleaded fraud with sufficient particularity, reformation of the note is appropriate based on the defendants' unclean hands which frustrated plaintiff's performance under the Notes and Mortgages, which is a defense in a foreclosure action, and that defendants had an obligation to negotiate an agreement in good faith, and failed to do so.

The Court notes that plaintiff withdraws her 6th Cause of Action entitled "Anticipatory Breach of Contract - Failure to Reduce Note by $125,000 pursuant to BOA's Settlement Agreement with 50 State Attorneys General."

In opposition to the cross-motion and in further support of its motion, Green Tree asserts that the original complaint's deficiencies are not cured by Plaintiffs proposed amendment because the thrust of plaintiff's claims remains unchanged: (1) she claims that she

has been damaged by the securitization of her mortgage notes and seeks a declaration of the owners/possessors of same; and (2) she claims she is financially unable to pay her mortgages and is entitled lo a loan modification to allow her to do so. Green Tree contends that the first cause of action for declaratory relief is not sustainable and is premature, her claim for recovery of money paid by mistake is unactionable against Green Tree as it was the servicer of the loan six months after she stopped remitting payments, her claim for fraud lacks merit and is still insufficiently pleaded, her claims under GBL 349 should be dismissed because plaintiff cannot prove she was harmed by a deceptive act of Green Tree, her fifth cause of action should be dismissed as against Green Tree because she has alleged no conduct specifically on Green Tree's part, and finally, the sixth cause of action should be dismissed because Green Tree is not required by law or contract to modify her loan.

In opposition to the cross-motion and in further support of their motion, Bank of NYM and BOA contend, much like Green Tree does, that the proposed Amended Complaint fails to cure the fatal defects in the original complaint, and that plaintiff still fails to state a cause of action. More specifically they maintain, among other things, that plaintiff still has not shown the existence of justiciable controversy; plaintiff was offered a modification of her loan which she rejected, thus her cause of action relying on defendants' failure to negotiate a workout agreement in good faith should be dismissed; plaintiff's cause of action under GBL § 349 is still meritless and generalizations regarding the experience of homeowners in general is insufficient to meet the public injury requirement; and her cause of action for reformation of the note due to unclean hands is inapplicable as unclean hands is a defense in a foreclosure action whereas no foreclosure action has been commenced.

In a letter dated April 5, 2013, counsel for BOA notified the Court of a recent decision by Justice Donna Mills entered on March 26, 2013, in an action entitled *Chomicki v Bank of America, et al.*, New York County pending under Index No. 100481/2012, a copy of which was

attached thereto. In her decision Justice Mills granted respective motions by defendants to dismiss and for summary judgment, thereby dismissing Chomicki's complaint which similarly challenged a hypothetical residential foreclosure. BOA states that the *Chomicki* action was instituted by the same plaintiff's counsel as the herein action, containing similar causes of action and raising virtually the same legal issues that are raised by plaintiff in this action. Plaintiff did not submit any opposition to the letter. The Court also notes that counsel for plaintiff filed another action approximately one month prior to this action which similarly challenges a hypothetical residential foreclosure and is pending before this Court entitled *Wright v Bank of America, N.A., Merscorp Holdings, Inc., et al.*, bearing Index No. 153533/12 (Wright action). The Wright action asserts nearly identical causes of action and asserts nearly the same claims as the case at bar, as well as the claims asserted in the *Chomicki* action.

DISCUSSION

A. Plaintiff's Cross-Motion for Leave to Amend

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . .[and] [l]eave shall be freely given upon such terms as may be just . . . ." (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989]. The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . . " (*Ancrum,* 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]; *Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

The Court finds that plaintiff's proposed Amended Complaint is without merit. Despite

the inclusion of some new allegations and the withdrawal of one cause of action and the tweaking of others, the proposed Amended Complaint is still insufficient to solve the lack of controversy deficiency, nor cure the remaining deficiencies in the original complaint. Moreover, plaintiff's reliance on recent Court of Appeals decision in *IRB-Brasil Resseguros, S.A. v INEPAR Invs., S.A.,* (20 NY3d 310 [2012]) in her reply brief is misplaced. Thus, plaintiff's cross-motion to amend the complaint, pursuant to CPLR 3025(b), is denied.

B. Defendants' Motions to Dismiss

CPLR 3211(a) provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> [1] A defense is founded upon documentary evidence;
> [7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995];

Demas v 325 W. End Ave. Corp., 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff's allegations for breach of contract]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). A 3211(a)(7) motion to dismiss "is solely directed to the inquiry of whether or not the pleading, considered as a whole, fails to state a cause of action. Looseness and verbosity must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading" (*id.* at 64-65 [internal citation omitted]).

The Court finds that in looking to the substance of the pleading rather than to its form (*see Foley v D'Agostino,* 21 AD2d at 64), and in viewing the complaint in the light most favorable to the plaintiff and affording the plaintiff the benefit of every possible inference (*see Leon v Martinez*, 84 NY2d at 87-88), the Court finds that the plaintiff's claims cannot survive a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), as the complaint fails to raise cognizable legal theories upon which relief can be granted. Specifically, there is

no foreclosure proceeding pending, and as such there is no controversy at issue to be determined. "Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]; *see* CPLR 3001). "Until there is a declared default [on either Notes] and the commencement of foreclosure proceedings, there is no justiciable controversy" (*Fairharven Props. v Garden City Plaza*, 119 AD2d 796, 796 [2d Dept 1986] ["The courts do not make mere hypothetical adjudications, where the is no presently justiciable controversy before the court, and where the existence of a 'controversy' is dependent upon the happening of future events. If foreclosure does occur, there will be time to litigate the priority of liens on the property."]; *Prashker v United States Guarntee Co.*, 1 NY2d 584, 592 [1956]). Accordingly, the first cause of action for a declaratory judgment is dismissed.

In order to plead a claim for fraud, "the complaint must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*FNF Touring LLC v Transform America Corp.*, __AD3d__, 2013 NY Slip Op 07248 [1st Dept 2013], quoting *Mardarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotations omitted]). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (FNF Touring LLC, 2013 NY Slip Op 07248 at *1, citing *Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486 [2008]). The purpose behind the pleading requirement "is to inform a defendant with respect to the incidents complained of" (*Pludeman*, 10 NY3d at 491). Here, plaintiff fails to allege the elements of fraud with sufficient particularity to withstand a motion to dismiss as, among other things, plaintiff does not indicate any injury or damages as a result of defendants' conduct, thus the cause of action for fraud is dismissed as against all defendants.

In order to state a cause of action under GBL § 349, a plaintiff must allege that the

defendant's conduct was: (1) consumer-oriented; (2) deceptive or misleading in a material way; and (3) that plaintiff suffered injury as a result thereof (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]; *Gomez-Jimenez v New York Law School*, 36 Misc3d 230 [Sup Ct, NY County 2012]). Moreover, "conclusory allegations about defendant's practices with other clients are insufficient" (*Golub v Tanenbaum-Harber Co. Inc.*, 88 AD3d 622, 623 [1st Dept 2011]).

The Court finds that plaintiff fails to meet the threshold requirement to demonstrate that defendants' "acts or practices have a broader impact on consumers at large," and that this is not just a "private contract dispute[], unique to the parties . . . [which] would not fall within the ambit of the statute" (*Oswego*, 85 NY2d at 85). Accordingly, this cause of action is also dismissed.

Plaintiff's fourth cause of action is entitled "Manipulating Securities and Real Estate Markets Causing Frustration of Plaintiff's Performance under the Note." Plaintiff alleges that:

> The Defendants participated with Fannie Mae, major banks and mortgage lenders to lend money to unqualified borrowers (i.e., "subprime loans") at substantially higher interest rates and risks than the average mortgage loan and immediately resell these high-risk subprime loans to investment banking firms (Complaint ¶ 41).

Plaintiff further alleges that:

> Because many of the loans were bad and predatory, the securities market collapsed and the market value of real estate also collapsed, causing an economic crisis (i.e., a severe recession or a depression) in the United States and elsewhere in the world, and helped to create a financial hardship for the Plaintiff and her family (*id.* at ¶ 43).

The aforesaid actions of the defendants, according to plaintiff, amounts to a defense or at least a partial defense to any action brought by the defendants for non-payment. Moreover, plaintiff

asserts that she is entitled to a reformation of the Note including a reduction in principal on the Note and a reduction in interest on both loans. As stated by this Court earlier, there is no current foreclosure action regarding plaintiff's property, and the frustration of performance of the contract doctrine is inapplicable here. Similar to the plaintiff in *Chomicki,* plaintiff alleges that the loans were "bad and predatory" without any offer of proof to substantiate that assertion. Moreover, even accepting allegations as true, plaintiff fails to prove how the aforementioned actions by defendants "helped to create a financial hardship" for her and her family, such that she was unable to continue to make payments. For all of these reasons, this cause of action must be dismissed as it fails to state a cognizable cause of action.

Plaintiff's fifth cause of action is labeled "Declaratory Judgment and Breach of Contract (Failing to Offer a Note in a Reduced Principal Amount at the Present Market Interest Rate)." In support of this cause of action, plaintiff asserts, *inter alia*, that:

> The Plaintiff has a financial hardship resulting from the deteriorating economy, the decline in market and rental value of real estate generally and the Plaintiff's real property specifically and related reduction in income, and for more than the past year has been unable to service the existing Note and Note2 based on the outstanding principal amounts thereof (Complaint ¶ 51)
>
> . . .
>
> The Plaintiff has the capacity to make monthly payments based on a Restructured Note (see ¶¶ 47-48 above), and as such she should have an option to do so (*id.* at ¶ 52).
>
> . . .
>
> the failure of the Defendants and the Lender to provide a right of first refusal or offer for the Plaintiff to retain ownership of her property under these terms is a predatory lending practice and a breach of industry custom and usage and the implied covenant of good faith and fair dealing to negotiate workout agreements in good faith (*id.* at ¶ 54).

Moreover, as a result of the aforementioned actions by defendants, plaintiff alleges she is entitled to a declaratory judgment, under CPLR 3001 and 3017, that "[t]he Defendants and Lender and any successors in interest have forfeited their rights under the Note and 2nd Note to sell the property securing the Note by its/their failure to provide the Plaintiff with the foregoing

option to retain ownership of the property securing the two notes" (*id.* at ¶ 64). The Court finds that this cause action must also be dismissed for failing to state a cognizable cause of action under New York law. Plaintiff's failure to make payments does not support a legal claim for a declaration that defendants have forfeited their rights to foreclose on the property, nor does it require the defendants to give plaintiff the option to make payments at a reformed rate. Specifically, recent case law has held that a mortgage lender is under no legal obligation to modify a loan (*see Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., N.Y., Inc.*, 35 Misc3d 1228[A], 2012 NY Slip Op 50921[U], * 6 [Sup Ct, Suffolk County 2012] ["As this court recently held, there is no obligation on the part of a mortgage lender to renegotiate the terms of a mortgage loan, even in cases involving home loans that are secured by mortgages on family residences"]; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc3d 359, 378 [Sup Ct, Suffolk County 2012] ["a judicially imposed directive compelling the plaintiff to specifically perform a modification agreement, to which it had not assented and was not required to so assent by law, constitutes an unreasonable resort to equitable principles to override long-standing principles of contract law"]).

Lastly, with regards to plaintiff's sixth cause of action asserted against only BOA for anticipatory breach of contract, plaintiff has withdrawn this cause of action in opposition to defendants' motions, and thus the Court need not address the merits of this claim.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's cross-motions to amend the complaint, pursuant to CPLR 3025(b), are denied (motion sequences 001 and 002); and it is further,

ORDERED that defendant Green Tree Services, LLC's pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7) is granted (motion sequence 001), and the complaint is dismissed as asserted against it; and it is further,

ORDERED that defendants Bank of New York Mellon Corporation and Bank of America, N.A.'s pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted (motion sequence 002), and the complaint is dismissed as asserted against it; and it is further,

ORDERED that within 30 days of Entry, counsel for Green Tree Services, LLC is directed to serve a copy of this Order with Notice of Entry upon all the parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/2/13

PAUL WOOTEN J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**