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SHORT FORM ORDER PUBLISH

INDEX No. 13-15575
CAL. No. 16-00719CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-13-16 (001)
MOTION DATE 11-10-16 (002)
ADJ. DATE 12-8-16
Mot. Seq. # 001 - MotD
002 - XMotD

----------X

LOFTY RASHED AHMED,

Plaintiff,

- against -

CARRINGTON MORTGAGE SERVICES, L.L.C., JOHN DOE AND/OR JANE DOE,

Defendants.

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Upon the following papers numbered 1 to 38 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers 24 - 34 ; Answering Affidavits and supporting papers 35 - 36 ; Replying Affidavits and supporting papers 37 - 38 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motions (001 and 002) are hereby consolidated and decided together herein; and it is further

ORDERED that the motion by defendant Carrington Mortgage Services, LLC for summary judgment in its favor dismissing the complaint is granted to the extent indicated, and is otherwise denied; and it is further

ORDERED that the motion by plaintiff Lofty Rashed Ahmed for summary judgment in his favor, improperly denominated as a cross motion, is granted to the extent indicated, and is otherwise denied.

Plaintiff commenced this action to recover damages related to a loan modification agreement he entered into with defendant Carrington Mortgage Services, LLC (hereinafter Carrington), on September 29, 2009. Plaintiff alleges breach of contract, rescission based upon unconscionablity, misrepresentation and

fraud, violation of New York State Banking Law, deceptive acts and practices, violation of the Fair Credit Reporting Act, and a cause of action against "investor defendants." Issue has been joined, discovery is complete and a note of issue has been filed.

Carrington now moves for summary judgment dismissing the complaint. In support of the motion, Carrington submits, among other things, the pleadings, portions of plaintiff's deposition transcript, an affidavit of Elizabeth Ostermann, the mortgage, waiver of property tax escrow, various correspondence, and the loan modification agreement. Plaintiff opposes the motion and moves for summary judgment in his favor. In support of his motion, plaintiff submits cashier checks, his own affidavit, portions of his deposition transcript, various correspondence and the pleadings. The Court notes reply papers by plaintiff on his cross motion for summary judgment, submitted to the Court under cover letter dated December 9, 2016, and date stamped December 20, 2016, have not been considered, as the motions were fully submitted December 8, 2016.

It is undisputed that on May 26, 2006 plaintiff obtained a loan from Mortgage Line Financial Corporation in the amount of $433,500.00, secured by a mortgage in the premises located at 883 Hawkins Avenue, Lake Grove, New York. On July 1, 2007, Carrington assumed service of the loan. On March 9, 2009, plaintiff wrote Carrington and advised that he had experienced medical issues, was unable to work, and requested modification of the loan, a partial payment schedule, and a reduction of the loan's 9% interest rate. On March 10, 2009, Carrington requested plaintiff complete a loan modification hardship package. On May 4, 2009, Carrington notified plaintiff that it intended to waive plaintiff's obligation to pay escrow funds for property tax purposes. Plaintiff testified that he had never seen the waiver prior to his deposition testimony. On September 29, 2009, Carrington modified the loan, and the parties agreed to a new principal balance of $403,700.00, at a fixed interest rate of 5.125%. The loan modification agreement, drafted by Carrington, also provided for a monthly payment of $2,162.33, and specifically stated:

> The modified loan will be escrowed for payment of taxes and/or insurance. The escrow portion of your payment will be $129.08. The escrow portion of your payment may fluctuate periodically based upon the required escrow analysis.

On July 15, 2010, plaintiff received notice from the Suffolk County Treasurer that his property taxes were not being paid. Carrington maintained, despite the clear and unequivocal language of the loan modification agreement, that the May 4, 2009 waiver controlled and that plaintiff was responsible for payment of the real estate taxes on the subject property, and that the escrow of $129.08 was for insurance only. Plaintiff has made 84 payments of $2,162.33 to Carrington, and each of his certified bank checks, cashed by Carrington, are noted for "principle, insurance, and real estate taxes after modification of September 29, 2009." As of August 12, 2016, Carrington has paid $99,790.91 in property taxes to avoid a tax lien sale of the secured subject property.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986];

Zuckerman v City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, *citing* ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

The first cause of action of plaintiff's complaint alleges Carrington breached the loan modification agreement, dated September 29, 2009, by failing to pay property taxes of the secured property. The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract" (***Dunkin' Donuts v Liberatore***, 138 AD2d 559, 559, 526 NYS2d 141 [2d Dept 1988]; *see* ***Chrysler Credit Corp. v Kosal***, 132 AD2d 686, 518 NYS2d 162 [2d Dept 1987]).

Here, Carrington has failed to demonstrated its prima facie entitlement to summary judgment dismissing the first cause of action. The September 2009 loan modification agreement constituted a contract between the parties. Plaintiff performed, as demonstrated by his monthly payments of $2,162.33, to Carrington. It is undisputed that Carrington failed to timely pay the real estate taxes owed on the secured property pursuant to the express terms of the loan modification agreement. Subsequently, Carrington has paid $99,790.91 in property taxes to "to avoid a tax lien sale of its collateral," limiting plaintiff's potential damages. However, in opposition and on the cross motion, plaintiff has demonstrated his entitlement to summary judgment showing, that despite the unambiguous language of the loan modification agreement, Carrington refused to abide by the agreement and charged plaintiff late fees and interest for principle and interest payments it agreed to bring current. Plaintiff has also demonstrated damages with regard to penalties and fees with regard to taxes Carrington paid on plaintiff's behalf, albeit late. Plaintiff has established that Carrington has breached the loan modification agreement, and is entitled to summary judgment as to liability based upon Carrington's failure to timely pay real estate taxes on the secured property and by charging late fees and interest on payments it agreed were current.

The second cause of action demands rescission of the loan modification agreement based upon unconscionablity. An unconscionable contract has been defined as one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms (***Mandel v Liebman***, 303 NY 88, 94, 100 NE2d 149 [1951]). Any determination of unconscionablity generally requires a showing of both procedural and substantive

unconscionablity, requiring an examination of the contract formation process and the alleged lack of meaningful choice (***Gillman v Chase Manhattan Bank***, 73 NY2d at 10–11, 537 NYS2d 787 [1988]). Here, Carrington has demonstrated its prima facie entitlement to summary judgment. Plaintiff testified that on January 27, 2016, a notary public, who was an agent of Carrington, appeared at his home, presented him with the loan modification agreement and "pressured him" into signing it. Plaintiff testified that he was given inadequate time to review the terms of the loan modification, that he could not consult with counsel, and that the presentation at his home, in the evening, "implied an ultimatum." Plaintiff avers that it was "clear to [him] that this payment [$2,162.33] would be a big improvement in [his] monthly mortgage obligation." As such, plaintiff cannot show that the agreement was unreasonable or unfavorable to him. Moreover, plaintiff also testified that he was "exaggerating" when he testified he was told, "sign it or else." Accordingly, the second cause of action is dismissed.

The third cause of action alleges misrepresentation and fraud. Carrington has demonstrated its prima facie entitlement to summary judgment as to this cause of action. The essential elements of a cause of action sounding in fraud are 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 upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (***Orlando v Kukielka***, 40 AD3d 829, 831, 836 NYS2d 252 [2d Dept 2007]). A cause of action rooted in fraud must meet the pleading requirement set forth in CPLR 3016 (b) that "the circumstances constituting the wrong shall be stated in detail" (*see* ***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). A complaint alleging fraud must set forth "the basic facts to establish the elements of the cause of action" (***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). Here, with regard to the loan modification agreement plaintiff has failed to plead a breach of duty separate from, or in addition to, the breach of contract (***North Shore Bottling Co. v Schmidt & Sons***, 22 NY2d 171, 292 NYS2d 86 [1968]). Accordingly, the third cause of action is dismissed.

The fourth cause of action alleges a violation of section 529 (a) of the Banking Law. New York Banking Law, section 595 (a) and the Banking Board's General Regulations do not establish a private cause of action (*see* ***Grimes v Fremont General Corp.***, 933 F Supp 2d 584 [SD NY 2013]). Accordingly, the fourth cause of action is dismissed.

The fifth cause of action alleges deceptive acts and practices pursuant to General Business Law § 349 (a). Section 349 (a) of the General Business Law declares as unlawful "[d]eceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," with no further elaboration of the prohibited conduct. "Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior. The statute itself does not require recurring conduct. Moreover, the legislative history makes plain that this law was intended to 'afford a practical means of halting consumer frauds at their incipiency without the necessity to wait for the development of persistent frauds'" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 25, 623 NYS2d 529 [1995]). Plaintiff, thus, need not show that the defendant committed the complained-of acts repeatedly-- either to the same plaintiff or to other consumers--but instead must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would

not fall within the ambit of the statute (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529). Here, plaintiff has failed to demonstrate that the alleged acts have a broader impact on consumers at large. Accordingly, the fifth cause of action is dismissed.

The sixth cause of action alleges a violation of the Fair Credit Reporting Act (15 USCA § 1681). Carrington has an obligation to (1) provide accurate information, (2) correct and update credit reporting information, (3) provide notice of any disputed reporting, and (4) provide notice of closed accounts (15 USCA §1681 [s] [2]). Carrington admits in its memorandum of law, "Carrington respectfully asserts that to the extent it has issued any negative reporting regarding the loan and mortgage such negative reporting is due to the plaintiff's failure to pay property taxes." The documentary evidence, however, establishes that plaintiff did, in fact, pay the amounts Carrington required in the loan modification agreement. Plaintiff has established, based upon defendant's admissions, that Carrington falsely reported information to credit bureaus, and refuse to correct the information when requested to do so by plaintiff. Accordingly, plaintiff has established his entitlement to summary judgment on his claim under the Fair Credit Reporting Act.

The final cause of action seeks to impose liability against any investor on the loan. Plaintiff has failed to identify the "investors" and has failed to state a cause of action recognized under New York law. Accordingly, the seventh cause of action is dismissed.

Dated: FEB 17 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**