SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MELROSE CREDIT UNION,

Plaintiff,

- against -

LEONID SOYFERMAN,

Defendant.

- x

Index No.: 706724/2017

Motion Date: 11/29/17

Motion No.: 98

Motion Seq.: 1

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo. of Law....	EF 10 - 24
Affirmation in Opposition-Exhibits.....	EF 26 - 31
Memorandum of Law in Reply.....	EF 32 - 33

This is an action for replevin and breach of contract arising out of a fixed rate balloon note and additional covenants to promissory note and security agreement dated May 16, 2013, executed by defendant in favor of plaintiff.

Based on the record before the Court, by letter dated May 8, 2017, plaintiff notified defendant of his default under the note and made demand for the payment. As defendant did not cure his default, plaintiff commenced this action by filing a summons and complaint on May 17, 2017. Defendant joined issue by service of a verified answer on July 5, 2017. Plaintiff now moves for summary judgment and seeks possession of the New York City Taxi Medallion No. 8A88, with rate card and vehicle.

In support of the motion, plaintiff submits an affidavit of merit from Steven R. Sala, Chief Lending Officer of plaintiff Melrose Credit Union (MCU). Based on his personal knowledge and his review of plaintiff's business records, Mr. Sala affirms that

defendant executed a fixed rate balloon note in the original principal amount of $400,000. To secure the obligation, defendant executed and delivered to plaintiff a Security Agreement dated May 16, 2013. Plaintiff was granted a security interest in New York City Taxi Medallion No. 8A88, with rate card and vehicle (collectively hereinafter the Collateral). Plaintiff filed a UCC-1 Financing Statement with the New York State Secretary of State. Pursuant to the terms of the note, defendant was required to remit successive monthly payments of principal and interest, followed by a final balloon payment due upon the maturity date of the note, May 15, 2016. Interest accrued on the outstanding principal balance at the right of 3.5% per annum. Defendant defaulted under the terms of the loan by failing to pay the full amount due on the maturity date.

Based on the submitted copies of the executed note and security agreement and Mr. Sala's affidavit evidencing defendant's default, plaintiff contends that it is entitled to summary judgment.

In opposition, defendant submits an affidavit dated November 15, 2017, affirming that he tried to refinance the debt with plaintiff. He personally visited plaintiff's office in December 2016, January 2017, and once again in February 2017 to bring the requested documents in connection with the refinancing of his loan. Plaintiff took no action regarding the application, despite promises to move forward with it. On multiple occasions, plaintiff's representatives have made specific promises to help him refinance the loan and he reasonably relied on the promises to refinance. Additionally, he continued to make payments under the note after the default in May of 2016. Plaintiff accepted the payments without any objections.

Defendant's counsel argues that the motion is premature as discovery has taken place. Counsel further contends that plaintiff failed to provide adequate notice of the breach. Specifically, counsel points to Paragraph 6(B) of the note which provides:

> "If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which had not been paid and all interest that I owe on that amount. That date must be at least 30 days after the date on which notice is delivered or mailed to me."

The default letter dated May 8, 2017, provides "[w]e hereby demand payment on behalf of MCU. If MCU does not receive the full amount due under the loan documents within five days of the date of this letter, it will commence an action against you." Counsel contends that the Default Notice is defective as it provides a shorter time to make the full payment than is required by Section 6(B) of the note. Additionally, counsel contends that the Default Notice is insufficient as it fails to state the amount due to plaintiff and violates the Fair Debt Collection Practices Act (FDCPA) Section 1692g, which requires a debt collector to provide debtors with written notice of the amount of the debt and their validation rights.

Lastly, defendant's counsel contends that as the note and the security agreement do not prohibit oral modifications to the terms of the loan, there is a question of fact as to whether defendant reasonably relied on the promises to refinance and whether there was an oral modification of the terms of the contract.

In an action for recovery on a promissory note, it is well settled that a plaintiff meets its initial burden of demonstrating entitlement to summary judgment by "proving the existence of the subject note and nonpayment according to its terms" (Quest Commercial, LLC v Rovner, 35 AD3d 576, 576 [2d Dept. 2006]; see Verela v Citrus Lake Development, Inc., 53 AD3d 574 [2d Dept. 2008]; Kowalski Enterprises, Inc. v SEM Intern. LLC, 250 AD2d 648 [2d Dept. 1998]; Moezinia v Baroukhian, 247 AD2d 452 [2d Dept. 1998]). To state a cause of action for replevin, a plaintiff must allege that he or she is lawfully entitled to possess certain property, and that the defendant has unlawfully withheld the property form the plaintiff (Khoury v Khoury, 78 AD3d 903 [2d Dept. 2010]; Matter of Bolin v Nassau County Bd. of Coop. Educ. Servs., 52 AD3d 704 [2d Dept. 2008]). Additionally, after a default, the secured party may take possession of the collateral (see UCC 9-609).

Here, plaintiff has met its initial burden by submitting the affidavit of Mr. Sala attesting to defendant's default under the terms and conditions of the annexed executed note and security agreement.

In opposition, defendant failed to raise a triable issue of material fact. Plaintiff has no obligation to modify the loans and defendant's desire to refinance the loans is not a defense to this action (see Wells Fargo Bank, N.A. v Meyers, 108 AD3d 9 [2d Dept. 2013]; Wells Fargo Bank, N.A. v Van Dyke, 101 AD2d 638 [1st Dept. 2012]). Moreover, the note specifically provides that "THE

LENDER IS UNDER NO OBLIGATION TO REFINANCE THE LOAN". Although defendant claims that he reasonably relied on an oral promise from plaintiff's representatives, a signed writing is required to modify an obligation without consideration (see GOL 5-1103). Moreover, defendant's waiver defense is meritless. Section 6(C) of the note, titled "No waiver By Note Holder", provides:

> "Even If, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time."

Therefore, even though plaintiff did accept payments after the default, plaintiff did not waive its right to pursue the full amount due under the note. Additionally, plaintiff failed to establish that plaintiff intended to relinquish its right to pursue the full amount due under the note (see City of New York v New York State, 40 NY2d 659 [1976]).

Regarding defendant's argument that plaintiff failed to comply with the with Section 6(B) of the note, a default notice was not required as the note herein had already matured. Even if the notice of default provision did apply, Section 6(B) of the note does not require a default notice. Rather it provides that "the Note Holder may send" a default notice. Lastly, defendant's argument that plaintiff's default notice violated FDCPA Sections 1692g and 1692e also fails because the loan at issue is not covered by the FDCPA because it is a commercial loan (see US Bank Nat. Ass'n v McPherson, 35 Misc3d 1219[A][Sup. Ct., Queen Cnty. 2012]).

Lastly, defendant failed to identify any facts or information that may exist or that he seeks in furtherance of his defense to plaintiff's motion (see CPLR 3212[f]). The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin,81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Additionally, this Court notes that defendant does not contest the existence of the note, security agreement, or default thereunder.

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that plaintiff's motion for summary judgment is granted.

The proposed Order and Judgment has been signed simultaneously herewith.

Dated: December 5, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C