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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Kevin Jones,

) No. CV 09-2129-PHX-JAT

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Plaintiff,

) **ORDER**

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vs.

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Bank of America,

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Defendant.

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The Court has reviewed the parties' filings and it appears the following facts are undisputed:

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1. Plaintiff purchased a residence via two loans from Defendant.

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2. Plaintiff bought insurance on both loans for disability or death.

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3. Plaintiff also bought insurance on the first loan for unemployment.

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4. Plaintiff applied for and received 12 months of payment forgiveness on the first loan due to his unemployment.

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5. Two weeks after Plaintiff became unemployed, Plaintiff became disabled as defined by both insurance contracts.

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Defendant argues that Plaintiff is not entitled to benefits from the disability insurance for either loan because both loans required Plaintiff to be continuously employed for three months prior to his disability, and Plaintiff's unemployment two weeks prior to his disability renders him ineligible to receive any disability benefits. Additionally, with respect to loan

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1 2 only, Defendant argues that even if Plaintiff were entitled to some benefits, he is
2 nonetheless in default on the loan because Plaintiff would have to have made the first 90 days
3 of payments before the disability insurance would become active and Plaintiff failed to do
4 so.

5 Plaintiff replies with various moral platitudes and grandiose statements, but very little
6 substance.¹ For the Court to consider Plaintiff's arguments they must be recharaterized as
7 legal theories supported by factual arguments. Accordingly, the Court will require
8 supplemental briefing on the following issues:

- 9 1. Plaintiff argues that his work history is "substantial compliance" with the three
10 months prior work requirement. Reply at 4. Plaintiff also suggests his work
11 history is a "de minimus shortage of contractual requirements." Reply at 9.
12 Plaintiff shall address any legal theory under which the Court could rewrite the
13 prior-work- requirement of the contract and find "substantial compliance" or "de
14 minimus shortage" to be a basis for not holding Plaintiff to the express terms of
15 the contract. The Court will not find in Plaintiff's favor on a "substantial
16 compliance" or "de minimus shortage" theory unless in his supplemental brief
17 Plaintiff states a legal basis for this argument, with citation to applicable case
18 law. For example, if Plaintiff argues that as a matter of contract interpretation the
19 Court should average Plaintiff's prior work history over three months to
20 determine whether it would rise to 30 hours per week, Plaintiff must argue both
21 law and facts which would allow such an interpretation.
- 22 2. Plaintiff argues that he was not shown or advised of the eligibility requirements
23 for benefits. Reply at 3. Plaintiff also argues that the requirements were not
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25 ¹ For example, Plaintiff states, "In an orderly society, allowing contractual provisions
26 to be enforced that destroy reasonable consumer insurance expectations causes fear,
27 forfeiture and dislocations of persons and their families." Reply at 8. Plaintiff offers no law
28 and no facts to explain this statement. Plaintiff's next sentence is, "De Minimus Non Curat
Lex (Not the Limerick)." Again, this statement comes with no citation to either law or facts
in this case.

1 within the “four corners” of the insurance contract. *Id.*² The Court does not
2 know what legal basis Plaintiff is attempting to fit within for being excepted from
3 the three-month-prior-work requirement by this argument. Plaintiff shall file a
4 supplemental brief on this issue. The Court will not find in Plaintiff’s favor on
5 a “lack of knowledge” theory unless in his supplement brief Plaintiff states a
6 legal basis for this argument, with citation to applicable case law.

- 7 3. Plaintiff argues that the three-month-prior-work requirement is contrary to
8 “reasonable consumer insurance expectations.” Reply at 8. Normally, the test
9 of “reasonable expectations” is applied when a party is arguing that a contract is
10 one of adhesion. *See Maxwell v. Fidelity Financial Services, Inc.*, 907 P.2d 51,
11 56 (Ariz. 1995); *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013,
12 1015-17 (Ariz. 1992). Plaintiff never actually makes a legal or factual argument
13 that this is a contract of adhesion.³ Therefore, Plaintiff shall file a supplement
14 identifying whether he is advancing an adhesion theory. If yes, Plaintiff is
15 cautioned that the Court will not issue a preliminary injunction on this basis
16 unless he cites and applies the correct Arizona law to the facts of this case.
- 17 4. Plaintiff argues that Defendant’s conduct was “unconscionable.” Reply at 9. The
18 Court is unclear what legal argument Plaintiff is making. Because Plaintiff is
19 referencing Defendant’s conduct, Plaintiff may be making an unclean hands
20 argument. However, the party seeking equitable relief, in this case Plaintiff, is
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23 ² The Court notes the contract Plaintiff signed says, “There are eligibility
24 requirements, conditions and exclusions that could prevent you from receiving benefits under
25 Borrowers Protection Plan. You may find a complete explanation of eligibility requirements,
26 conditions and exclusions in the following portions of the Borrowers Protection Plan
27 Addendum: For Disability Protection refer to Section II; paragraph a, paragraph b, paragraph
28 c and paragraph d.” Doc. #26-5 at 9.

³ And, even if it was a contract of adhesion, such conclusion alone would not make
the contract unenforceable. *Broemmer*, 840 P.2d at 1016.

1 the one who must have clean hands.⁴ Therefore, the Court will not grant Plaintiff
2 a preliminary injunction on this theory unless Plaintiff explains in his
3 supplemental brief how it applies to this case.

- 4 5. “Unconscionability” has its own specific meaning in terms of contract
5 enforceability. However, the Court looks at the contract itself, and not
6 Defendant’s post-contract-conduct to determine procedural or substantive
7 unconscionability. *Maxwell*, 907 P.2d at 57-58.⁵ Here, many of Plaintiff’s
8 factual assertions perhaps could fit within the rubric of unconscionability.
9 However, having carefully reviewed Plaintiff’s filing, the Court does not see that
10 Plaintiff has actually made this argument, and certainly Plaintiff has not cited any
11 law which would support such an argument. Accordingly, the Court will not
12 analyze whether the three-month-prior-work requirement is unconscionable
13 unless, in his supplemental brief, Plaintiff expressly makes an unconscionability
14 argument both citing to and applying the correct law to the facts of this case.
- 15 6. Plaintiff also says in a heading, without law or argument, “Equitable Estoppel.”
16 Reply at 9. The Court will not grant relief on an “equitable estoppel” theory
17 unless in his supplemental brief Plaintiff cites law, and applies said law to the
18 facts of this case, explaining how “equitable estoppel” should prevent Defendant
19 from foreclosing on the home.

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22 ⁴ Under the unclean hands doctrine, a court will not grant equitable relief to a party
23 "tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . .
24 ." *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 877 (9th Cir. 2000).

25 ⁵ Procedural or process unconscionability is concerned with
26 “unfair surprise,” fine print clauses, mistakes or ignorance of
27 important facts or other things that mean bargaining did not
28 proceed as it should. Substantive unconscionability is an unjust
or “one-sided” contract.

Maxwell, 907 P.2d at 57-58.

1 7. Defendant argues Plaintiff did not purchase unemployment insurance for loan 2.
2 In his supplemental brief, Plaintiff shall state explicitly whether he disputes this
3 factual assertion, and if yes, based on what evidence. If Plaintiff does not dispute
4 this factual assertion, Plaintiff shall explicitly state whether he disputes
5 Defendant's factual assertion that before being entitled to disability benefits,
6 Plaintiff had to wait 90 days from the date of the disability, and if yes, based on
7 what evidence. If Plaintiff does not dispute this factual assertion, Plaintiff shall
8 advise the Court whether he made the payments on loan 2 for the first 90 days
9 following his disability.

10 8. Both parties discuss whether Defendant could be liable for the tort of bad faith
11 based on a breach of the covenant of good faith and fair dealing in the contracts.
12 Generally, the Court finds that "bad faith" even if applicable, is remediable by
13 money damages. *See Stanley v. Univ. of Calif.*, 13 F.3d 1313, 1320-21 (9th Cir.
14 1994) (to obtain a preliminary injunction, moving party must demonstrate that his
15 remedy at law was inadequate; to the extent he is seeking money damages, his
16 remedy at law is adequate). Therefore, a claim of bad faith cannot be the basis for
17 a preliminary injunction and the Court will not consider those arguments at this
18 time unless Plaintiff explains in his supplemental brief how Defendant's alleged
19 failure to respond in a timely manner is not remediable by money/tort damages.

20 Based on the foregoing,

21 **IT IS ORDERED** that Plaintiff shall file a supplemental brief addressing all issues
22 above by noon, Monday, December 7, 2009.⁶

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24 ⁶ The Court notes that this schedule does not give Defendant an opportunity — other
25 than at the hearing — to respond to Plaintiff's supplemental brief. If Defendant seeks such
26 an opportunity, and the parties can stipulate to postpone the trustee sale of the residence, the
27 parties may stipulate to continue the preliminary injunction hearing and stipulate to a longer
28 briefing schedule. The parties **MUST** file any such stipulation with the Court. However,
based on the Court's understanding that the sale is scheduled for December 9, 2009, if the
parties cannot reach such a stipulation, the deadlines in this Order will control.

