STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MICHAEL MUNRO,

Plaintiff,

-against-

CLAUDIA CALLANDER,

Defendant.

DECISION and ORDER
INDEX NO. 326-11
RJI NO. 01-11-104548

Supreme Court Albany County All Purpose Term, August 18, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Kurz & Associates, LLC
Michael Kurz, Esq.
Attorney for Plaintiff
2212 Western Avenue
Guilderland, New York 12084

Alexandra Verrigni, Esq.
Attorney for Defendant
865 Riverview Road
Rexford, New York 12148

TERESI, J.:

Following the parties' romantic relationship ending, Plaintiff commenced this action to recover loans he allegedly made to Defendant. Issue was joined by Defendant and discovery is ongoing. Defendant now moves for summary judgment[1] dismissing Plaintiff's complaint, for attorney's fees as a sanction for frivolous conduct and a conditional preclusion order. Plaintiff

[1] Neither Defendant's notice of motion nor her initial motion papers specify the ground, CPLR §3211 or CPLR §3212, upon which she seeks "dismissal of [the] complaint." However, as her motion is premised primarily upon facts alleged in her affidavit, it is necessarily a CPLR §3212 summary judgment motion and it will be reviewed as such.

opposes such motion and cross moves for a CPLR §3103 protective order.[2] Defendant opposed that motion. Because neither party established their entitlement to the above relief, such motions are denied.

Considering Defendant's motion first, it is well established that "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996], quoting Moskowitz v. Garlock, 23 AD2d 943 [3d Dept. 1965]).

The movant "bears the initial burden of demonstrating its entitlement to judgment as a matter of law" (Hickey v. Arnot-Ogden Medical Center, 79 AD3d 1400 [3d Dept. 2010]), "by proffering evidentiary proof in admissible form." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of a genuine issue of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In seeking dismissal Defendant relies upon the Statute of Frauds.[3] Such statute provides, in relevant part, that "[e]very agreement, promise or undertaking is void, unless it [is]... in

---

[2] Plaintiff also moved to compel discovery. As Defendant did not oppose this portion of Plaintiff's motion, it is granted. Defendant shall comply with all outstanding discovery demands outlined in Plaintiff's motion within thirty days of the date of this Decision and Order. In the event Defendant fails to so comply, upon a proper showing, she will be precluded from offering any evidence relative to such demands at the trial of this matter. (CPLR §3126[2]).

[3] Contrary to Defendant's reliance on UCC §2-201, such statute is irrelevant to this action because it does not apply to the loan agreements at issue herein. General Obligations Law §5-701(b)(3) is similarly irrelevant, notwithstanding Defendant's citation to it as controlling authority, as it provides only an exception to the general Statute of Frauds bar.

writing, and subscribed by the party to be charged therewith... if such agreement, promise or undertaking... [b]y its terms is not to be performed within one year from the making thereof..." (General Obligations Law §5-701[a][1]). However, if such an agreement is "susceptible of fulfillment within that [one year], in whatever manner and however impractical... the Statute [of Frauds is]... inapplicable, a writing unnecessary, and the agreement not barred." (D & N Boening v Kirsch Beverages, 63 NY2d 449, 455 [1984]).

Here, Defendant proffered no proof that the alleged oral loan agreements, upon which Plaintiff's claim is based, could not be fulfilled within one year. (Micena v. Katz, 68 AD3d 826 [2d Dept. 2009]). Defendant's mere denial of the loan's existence does not demonstrate her entitlement to judgment as a matter of law. Rather, it establishes only the existence of a material issue of fact that requires a trial. As such, Defendant's motion for summary judgment is denied.

In light of the foregoing and the lack of any demonstrated frivolous argument, Defendant wholly failed to establish her entitlement to attorney's fees as a sanction for frivolous behavior.

Nor has Defendant demonstrated her entitlement to a conditional preclusion order due to Plaintiff's alleged discovery abuses. 22 NYCRR §202.7(a)(2) requires that any "motion relating to disclosure or to a bill of particulars [shall be accompanied by movant's attorney's] affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." No such affirmation, with the details required by 22 NYCRR §202.7(c), was included with Defendant's initial motion papers or her reply papers. (Mironer v. City of New York, AD3d 1106 [2d Dept. 2010]). Moreover, to the extent Defendant sought to "belatedly add new assertions" in her reply, such allegations are rejected and not considered. (Crawmer v. Mills, 239 AD2d 844, 845 [3d Dept.1997]; Albany County Dept. of Social Services

v. Rossi, 62 AD3d 1049 [3d Dept. 2009]). Accordingly, Defendant's motion for a preclusion order is denied.

Turning next to Plaintiff's motion for a protective order, he failed to demonstrate his entitlement to such relief.

It is well established that Plaintiff is required to disclose "upon request... any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (Davis v. Cornerstone Telephone Co., LLC, 78 AD3d 1263 [3d Dept. 2010], quoting Mitchell v. Stuart, 293 AD2d 905 [3d Dept. 2002]). Despite such broad mandate, Plaintiff seeks to prevent Defendant from obtaining facts relevant to "brokerage fee[s]" he obtained from transactions involving Defendant. These facts are specifically relevant to Defendant's "*quid pro quo*" defense, i.e. that Defendant referred mortgage loan transactions to Plaintiff for his agreement to discontinue his collection efforts on the loans at issue herein. Defendant's assertion that these fees are irrelevant because he did not agree to such a "kickback" agreement, which he acknowledges would be illegal, is wholly unavailing. Such denial merely raises an issue of fact, it does not conclusively dispose of the issue. Similarly relevant to Plaintiff's activities as a mortgage broker or originator, and thus the Defendant's "*quid pro quo*" defense, are the complaints made against Plaintiff to New York State's Banking Department. Accordingly, Plaintiff's motion for a preclusion order is denied.

This Decision and Order is being returned to the attorney for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 30, 2011
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 4, 2011, Affidavit of Claudia Callander, dated August 4, 2011, Affirmation of Alexandra Verrigni, dated August 4, 2011, with attached Exhibits "A" - "E".
2. Notice of Cross Motion, dated August 10, 2011; Affidavit of Michael Munro, dated August 10, 2011; Affirmation of Michael Kurz, dated August 8, 2011, with attached Exhibits "1" - "6".
3. Reply of Alexandra Verrigni, dated August 16, 2011, with attached Exhibits "A" - "F".