[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Goodman Justice

PART 17

Howard, Martin

- v -

Citimortgage, Inc.

INDEX NO. 105454/11

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Renew, Reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided per attached decision (short form)

Dated: 12/23/11

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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MARTIN HOWARD,

Plaintiff,

Index No. 105454/11

-against-

CITIMORTGAGE, INC.; 138-140 VILLAGE OWNERS CORP.; ACQUA CAPITAL LLC; AND ALL UNKNOWN PARTIES CLAIMING BY, THROUGH, UNDER, AND AGAINST THE HEREIN INDIVIDUAL DEFENDANT(S) WHO ARE NOT KNOWN TO BE DEAD OR ALIVE, WHETHER SAID UNKNOWN PARTIES MAY CLAIM AN INTEREST AS PURCHASERS, SUCCESSORS, GRANTEES, OR OTHER CLAIMANTS,

Defendants.

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Emily Jane Goodman, J.:

Motions bearing sequence numbers 002 and 003 are consolidated for disposition.

This is a foreclosure action in connection with 270 shares of stock owned by plaintiff Martin Howard (Howard) in defendant 138-140 Village Owners Corp., which owns the building located at 138 West 10th Street in New York City. In motion sequence 002, Howard moves, pursuant to CPLR 2221, for an order granting renewal/reargument of this court's order, dated June 13, 2011, which denied Howard's motion for a preliminary injunction to nullify the sale of his shares. In motion sequence 003, defendant Citimortgage, Inc. (Citimortgage) moves, pursuant to CPLR 3211 (a)

(1) and (7), for an order dismissing the complaint. Howard cross-moves for a default judgment against Citimortgage.

Background

According to the complaint, in March of 1991, 138-140 Village Owners Corp. granted Howard a proprietary lease for apartment 2FE. At the same time, he received a loan from defendant Citimortgage, for $63,000, at an interest rate of 11.125%, using the apartment as a security interest. Howard's monthly payment was $605.92.

The complaint states that, at some point, Howard lost his job and was not able to make payments in October, November and December of 2010, totaling $1817.76. He states that on January 14, 2011 he submitted a payment for $800, but Citimortgage returned the check on January 25th, together with information about how to apply for a loan modification. Howard alleges that, in the meantime, on January 18, 2011, he received a notice of default from Citimortgage's counsel, overstating the outstanding amount due as $3202.54.

The complaint states that Howard eventually found alternative work and would be able to make payments under a loan modification. It further states that he submitted a loan modification packet to Citimortgage on February 10, 2011. However, on March 26th, 2011, Howard received a notice of sale from Citimortgage's counsel stating that a sale would take place on March 30, 2011. The

complaint states that an auction did, in fact, take place on March 30th and defendant Acqua Capital LLC was the successful bidder.[1] The amount of the winning bid was $250,000.

Howard commenced this action in May of 2011, setting forth causes of action for, among other things, fraud, negligence and predatory lending. Howard then moved for an order granting a preliminary injunction and nullifying the sale of his shares. This court denied the motion in an order dated June 13, 2001. The court noted, among other things, that Howard's counsel failed to appear for a hearing on the injunction motion and failed to notify the court or opposing counsel. Instead, a "per diem" attorney appeared on plaintiff's behalf, with no knowledge of either the case or why plaintiff's regular counsel had failed to appear.

Motion Sequence 002

Plaintiff moves, pursuant to CPLR 2221, for an order granting either reargument or renewal of this court's June 13, 2011 order denying the motion for a preliminary injunction.

CPLR 2221 (d)(2) provides that a motion for leave to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior

[1] Acqua Capital asserts that the actual buyer was its principal, Louis Zazzarino.

motion." CPLR 2221 (e) (2) provides that a motion for leave to renew must "be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." Moreover, the movant must set forth a reasonable justification for failing to present such facts on the prior motion. CPLR 2221 (e) (3).

Here, as set forth below, plaintiff has demonstrated that Citimortgage failed to conform with UCC 9-611 (f)(1), which requires that notice of disposition of the collateral be sent to the debtor at least ninety days before such disposition. Moreover, it is undisputed that the purchaser of the shares has not yet been approved by the co-op board, and as such, may not yet qualify as a purchaser under the provisions of UCC Article 9. This is an issue which requires additional briefing by the parties. As such, the motion for reargument is held in abeyance pending the submission of additional papers, pursuant to the schedule set forth below.

Motion Sequence 003

Citimortgage moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint. Plaintiff cross-moves for a default judgment against Citimortgage on the grounds that Citimortgage failed to either serve an answer or make a pre-answer motion to dismiss in a timely fashion. Citimortgage cross-moves,

pursuant to CPLR 2004, for an order accepting its motion to dismiss as timely served, in the event that the court determines that the motion was in fact untimely.

A. Default

Howard argues that Citimortgage was served with a summons and complaint on May 24, 2011, at their offices at 399 Park Avenue in Manhattan, and then again on May 26th at their legal offices in Long Island City. Citimortgage appeared by serving a pre-answer motion to dismiss on June 22nd, which is more than twenty days from both dates on which the summons and complaint were served. *See* CPLR 320, 3012 (a). As such, Howard argues that Citimortgage defaulted in appearing.

However, it is undisputed that Howard originally served Citimortgage via service on the Secretary of State, on May 23, 2011. As such, Citimortgage was required to appear within thirty days. *See* CPLR 320, 3012 (c). Therefore, Citimortgage's service of its motion to dismiss on June 22nd was timely and Howard's cross motion for a default judgment is denied. Citimortgage's cross motion for an order accepting its motion to dismiss as timely served is denied as moot.

B. Dismissal

"On a motion to dismiss pursuant to CPLR 3211, the pleading is

to be afforded a liberal construction." *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009), citing *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference." *Id.*, citing *Leon v Martinez*, 84 NY2d at 87.

1. Ninety-Day Notice

Plaintiff's first cause of action alleges that the notice of default sent by Citimortgage did not conform to the ninety-day advance notice requirement set forth in UCC 9-611 (f)(1), which provides that

> In addition to such other notification as may be required pursuant to subsection (b) of this section and section 9-613 of this article, a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative interest, an additional pre-disposition notice as provided herein.

The complaint alleges that the notice sent by Citimortgage on January 18, 2011 is deficient because it was sent less than ninety days prior to the March 30, 2011 sale. Citimortgage states that

this cause of action should be dismissed because it provided an earlier notice on July 7, 2010, which was more than ninety days before the sale. Plaintiff argues that the July 7th notice is insufficient because it was sent in response to his default in making a payment in June of 2010, which he remedied by making the missed payment the following month. As such, he contends that Citimortgage was required to send a new notice after he defaulted again.

The purpose of the ninety-day notice is to afford owners of cooperative shares protections similar to those provided to the owners of real property under RPAPL 1303. *Stern-Obstfeld v Bank of Am.*, 30 Misc 3d 901, 905 (Sup Ct NY County 2011). The notice is designed to warn owners that they could be in danger of losing their homes and it must contain very specific information about counseling services and other resources available to assist cooperative apartment homeowners in obtaining help. *See Id.* at 905-906. Here, Citimortgage has not demonstrated that this cause of action should be dismissed.

It is undisputed that, after Howard defaulted in making payments for October, November and December of 2010, Citimortgage sent a pre-disposition notice dated January 18, 2011. However, that notice was sent less than the ninety days before the date of the sale, and, therefore, plaintiff has adequately alleged that such notice does not comply with the requirements of the statute.

Citimortgage has also not demonstrated that the July 7, 2010 notice satisfied its requirements under the statute. That notice was sent in response to Howard's default in June of 2010, which, it is undisputed, he cured a month later. Citimortgage argues that there is nothing in the statute that requires that a new notice be sent every time there is a default. Moreover, it argues that once a notice has been sent, it should be presumed that the borrower is aware that he or she has alternatives to foreclosure.

Citimortgage's arguments are unpersuasive. First, the statute specifically and clearly states that when a default occurs which leads to a potential disposition of the borrower's shares, the secured party must send notice of such disposition to the borrower no less than ninety days prior to the disposition. Here, the defaults which led to the proposed sale were the defaults in October, November and December of 2010. Thus, after such defaults, Citimortgage was required to send Howard adequate notice before disposing of the property. The July 7th notice was sent in response to the June 2010 default, which was not the default that led to the proposed sale. Thus, the July 7th notice cannot be used to satisfy Citimortgage's obligations under the statute.

Moreover, there is no support in the statute for Citimortgage's argument that once a notice is sent, the borrower should be presumed to have been given adequate notice on an ongoing basis in connection with later defaults. In fact, such an

interpretation would be contrary to the purpose of the statute, which is specifically to provide borrowers with protections from foreclosure. Moreover, it would raise questions as to how long such a presumption should last. Therefore, the motion to dismiss the first cause of action is denied.

2. Format

The second cause of action alleges that the notice of default did not conform to UCC 9-611 (f) in terms of the format and style requirements set forth in the statute. The statute provides, among other things, that the notice of default:

> shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the notice required by subsection (b) of this section, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.

The notice must also contain specific information about counseling services and other matters that could assist co-op owners in obtaining help when faced with the loss of a home. *See Stern-Obstfeld v Bank of Am.*, 30 Misc 3d at 905-906.

Here, the complaint does not specify any ways in which the format of the notice of default did not comply with the statute. Similarly, plaintiff's opposition to this motion also fails to specify anything about the format of the notice which was inadequate. Therefore, this cause of action is dismissed.

3. Inadequate Time

Plaintiff's third cause of action alleges that the notice of sale was insufficient under UCC 9-612 (b) because it did not allow him enough time to take necessary action to avoid the sale. UCC 9-612 (b) provides that:

> In a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

Based on this section, plaintiff argues that he was entitled to at least ten days notice of the sale, which took place on March 30, 2011. Plaintiff states that he received the notice of sale on March 26, 2011.

Defendants contend that this cause of action should be dismissed because they gave him fourteen days notice of the sale, which they contend was a reasonable amount of notice. Defendants state that they sent the notice of sale by certified mail on March 16, 2011. Defendants do not submit proof of such mailing.

In general, whether a notification is sent within a reasonable amount of time is a question of fact. UCC 9-612 (a); *see Coxall v Clover Commercial Corp.*, 4 Misc 3d 654, 659 (Civ Ct, Kings County 2004). Here, questions of fact exist as to when the notice of sale was sent and when it was received by plaintiff. As such, a question of fact remains as to whether the notice was sent within

a reasonable amount of time for plaintiff to take any necessary actions to attempt to prevent the sale. Therefore, the motion to dismiss this cause of action is denied.

4. Lack of Notice

Howard's fourth cause of action alleges that the sale should be set aside because the notice of sale was invalid because 138-140 Village Owners Corp. was not given notice of the sale. However, even assuming the truth of this assertion, it does not support a cause of action on plaintiff's behalf. Any such cause of action would exist on behalf of the corporation. Despite being a shareholder in the corporation, Howard has not demonstrated that he has standing to assert a claim on its behalf to set aside the sale. Therefore, this cause of action is dismissed.

5. Commercially Reasonable

The fifth cause of action alleges that the sale was not commercially reasonable under UCC 9-610. Howard alleges that the value of the cooperative apartment is currently around $300,000 based on comparative sales and, at the time of the notice of default, he was in arrears a total of $1817.76. He also alleges that the outstanding loan balance was $47,508. In light of these numbers, he alleges that the sale was not a commercially reasonable disposition of the property.

UCC 9-627 (b) provides that a disposition of collateral is commercially reasonable if it is made:

> (1) in the usual manner on any recognized market;
> (2) at the price current in any recognized market at the time of the disposition; or
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

"The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." *DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 322 (1st Dept 2004) (internal quotations omitted). UCC 9-627 (a). "Courts have consistently declined to disturb a foreclosure sale upon a challenge to amount recovered for the collateral, except in the narrow circumstance where the price alone is so inadequate as to shock the court's conscience." *DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d at 322.

Here, Howard has not demonstrated that the sale price of the shares was so inadequate as to shock the court's conscience. The shares were sold for $250,000. Howard speculates, without proof, that the value of the shares was at least $300,000. However, even assuming the truth of his assertion, the disparity in price is insufficient to render the sale price commercially unreasonable.

Further, Howard has not set forth any law to demonstrate that

the sale was commercially unreasonable under UCC 9-627 (b) based on the disparity between the alleged value of the apartment and either the loan balance or the amount of the arrears. Therefore, this cause of action is dismissed.

6. Accelerated Payment

Howard's sixth cause of action alleges that Citimortgage violated UCC 1-208, which provides that:

> A term providing that one party...may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Plaintiff alleges that defendant could not have deemed itself insecure because had been making payments on the loan for twenty years and had missed only a few payments. Moreover, he asserts that the amount of the outstanding balance was small compared to the value on the property and defendant failed to make a good faith effort to work out the arrears though less harsh means. As such, he alleges that the sale violates the good faith requirements of UCC 1-208.

This cause of action is dismissed. First, as defendants point

out, UCC 1-208 applies to situations in which the contract allows a party to accelerate performance either "at will" or when it deems itself insecure. Neither of those terms applies here. The contract at issue here required Howard's default as a precondition to acceleration of the loan. Citimortgage did not have the ability to accelerate the loan either "at will" or when it deemed itself insecure.

In any event, Howard fails to adequately allege bad faith on Citimortgage's part in accelerating the loan. It is undisputed that Howard was in default of several payments, giving Citimortgage a good faith basis to believe that the prospect of his performance had been impaired.

7. Negligence

Plaintiff's seventh cause of action is for negligence. He alleges that the January 25th letter from Citimortgage, which contained information on applying for a loan modification, was misleading because it led him to believe that Citimortgage was "sincere in its offer to consider him for a loan modification." Complaint, ¶ 36. He further alleges that the January 18th notice of default overstated the outstanding amount owed as $3202.54.

Plaintiff alleges that these two letters prevented him from taking remedial action and caused him to go deeper into debt instead of resolving the matter.

"'It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.'" *LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1303 (4th Dept 2011), quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). Moreover, such duty must arise from circumstances extraneous to the contract rather than from elements of the contract. *Id.*

Here, plaintiff has not alleged a breach of a duty independent of the parties' contractual obligations. It is undisputed that Citimortgage sent the letter at issue pursuant to the terms of the parties' contract. Therefore, at most, this cause of action alleges that defendant breached that contract by sending an incorrect notice in terms of the amount of the arrears.

Furthermore, there is nothing in the complaint to support the allegation that the sending of the letter prevented plaintiff from resolving the matter. Therefore, this cause of action is dismissed.

8. Predatory Lending

Plaintiff's eighth cause of action alleges that Citimortgage misled him about its intention to consider him for a loan modification, overstated the amount of his arrears, charged late fees based on that overstated amount and conducted a non-judicial

sale which failed to comply with the relevant provisions of the UCC. Howard asserts that these actions constituted predatory lending on defendant's part because they made it difficult for him to "maintain his rights."

This cause of action is dismissed. Although plaintiff refers, generally, to the existence of several federal statutes, including the Truth-In-Lending Act, as well as NY Banking Law 6-I, plaintiff makes no attempt to demonstrate how his loan, which was issued in 1991, is covered by any of those statues. Such assertions are insufficient to state a claim for predatory lending. *See Tribeca Lending Corp. v Bartlett*, 84 AD3d 496, 497 (1st Dept 2011); *Wells Fargo Bank, N.A. v Rolon*, 24 Misc 3d 1216(A), 2009 NY Slip Op 51477(U)(Sup Ct, Queens County 2009).

9. Good Faith and Fair Dealing

Howard alleges that Citimortgage breached the implied covenant of good faith and fair dealing by misleading him about its intention to consider him for a loan modification, by overstating the amount of his arrears and by charging late fees based on that overstated amount. He alleges that these actions illustrate an intent to frustrate his ability to protect his rights and reach an equitable resolution.

"The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do

anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Moran v Erk*, 11 NY3d 452, 456 (2008) internal quotations and citations omitted. "'This implied obligation encompasses any promise which a reasonable person in the position of the promisee would be justified in understanding was included' in a contract and 'is breached when a party to [the] contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.'" *Kosowsky v Willard Mountain, Inc.*, ___ AD3d ___, ___ NYS2d ___, 2011 WL 5984277, *3 (3d Dept 2011), quoting *Just-Irv. Sales v Air-Tite Bus. Ctr.*, 237 AD2d 793, 794 [3d Dept 1997).

Here, plaintiff has not demonstrated that defendant deprived it of any rights. Citimortgage was not obligated to modify Howard's loan. Nor does the complaint set forth any facts to demonstrate that Citimortgage prevented him from curing the default. Therefore, this cause of action is dismissed.

10. Fraud

Plaintiff's tenth cause of action is for fraud. He alleges that Citimortgage overstated his arrears and assessed late fees based on the inflated assessment of arrears. He alleges that the actual arrears amounted to $1817.76, while Citimortgage computed it

as $3202.54. Plaintiff alleges that Citimortgage held him in default and refused further payments based on this inflated amount.

"In order to establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 (1st Dept 2011).

This cause of action is dismissed. Even assuming that Citimortgage incorrectly calculated the amount owed, the complaint fails to allege any facts to demonstrate either knowledge of that falsity by Citimortgage or justifiable reliance by plaintiff. Plaintiff had the ability to make his own determination as to the amount he believed to be correct and has not demonstrated that he justifiably relied on the amount set forth by Citimortgage to his detriment.

11. Unjust Enrichment

Plaintiff's eleventh cause of action is for unjust enrichment. He alleges that Citimortgage overstated the amount of the arrears and assessed late fees based on the inflated assessment of arrears. He further asserts that Citimortgage unlawfully proceeded with non-judicial foreclosure sale of the cooperative apartment allegedly valued in excess of $300,000, in order to recover an outstanding balance of $47,508.

"Unjust enrichment is a quasi-contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.'" *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 (1st Dept 2011), quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009). "The plaintiff must show that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" *Id.*, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, [2011].

Here, there is an actual agreement between the parties, in the form of the loan agreement, which governs the parties' obligations. Moreover, Citimortgage would not receive the apartment after the sale of the shares, or any money in excess of the amount owed to it. Therefore, plaintiff has not stated a claim for unjust enrichment.

Accordingly, it is

ORDERED that plaintiff's motion for renewal/reargument (sequence 002) is held in abeyance, and the parties are instructed to contact Part 17 to arrange a briefing schedule; and it is further

ORDERED that defendant's motion to dismiss the complaint is granted to the extent that the second, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action are

dismissed and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for a default judgment is denied.

DATED: December 23, 2011

This Constitutes the Interim Decision and Order of the Court

ENTER:

J.S.C.

EMILY JANE GOODMAN