SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 153803/2012
BROWN, RODNEY H.
vs.
DEUTSCHE BANK NATIONAL TRUST
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 1/11/13

CK
CYNTHIA S. KERN, J.S.C.
J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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RODNEY H. BROWN,

Plaintiff,

Index No. 153803/12

-against-

DECISION/ORDER

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HOLDERS OF THE GSR MORTGAGE LOAN TRUST 2006-OA, BANK OF AMERICA, N.A., BANK OF AMERICA CORPORATION, NB HOLDINGS CORPORATION, COUNTRYWIDE HOME LOANS, INC. (D/B/A Bank of America Home Loans), COUNTRYWIDE FINANCIAL CORPORATION and JOHN DOES 1-20, representing any REMIC trusts, investors, servicers, special servicers, master servicers, banks or other lenders claiming ownership of a promissory note signed illegibly by an unknown claimed "attorney in fact" for Rodney H. Brown in the amount of (I) $400,000 dated June 5, 2006 (Loan #133307005) and/or (ii) a note in the amount of $634,400 dated February 23, 2006,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking, among other things, reimbursement of

mortgage loan payments he made in connection with homes he owns in New York City and Fairhaven, Massachusetts. Defendants Deutsche Bank National Trust Company, as Trustee for Holders of the GSR Mortgage Loan Trust 2006-OA ("Deutsche Bank"), Bank of America, N.A. ("Bank of America"), Bank of America Corporation ("BAC"), NB Holdings Corporation ("NB Holdings"), Countrywide Home Loans, Inc. ("CHL") and Countrywide Financial Corporation ("CFC") (hereinafter collectively referred to as the "defendants") now move for an Order (a) pursuant to CPLR § 3211(a)(1) and (a)(7) dismissing plaintiff's complaint based on (1) documentary evidence; and (2) that the complaint fails to state a cause of action; or, in the alternative, (b) pursuant to CPLR § 327(a) dismissing plaintiff's claims concerning a Massachusetts mortgage on the basis of *forum non conveniens*. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff borrowed $400,000 from Countrywide Bank, N.A. as reflected in the Adjustable Rate Note ("New York Note") dated June 5, 2006. The New York Note was secured by a Loan Security Agreement, dated June 5, 2006 (the "Loan Security Agreement") by which Countrywide Bank, N.A. obtained a security interest in plaintiff's midtown Manhattan condominium located at 227 East 57th Street, New York, New York (the "New York Property"). Plaintiff also borrowed $634,400 from CHL (the "Massachusetts Note"), as reflected in the Mortgage Agreement dated February 23, 2006 by which CHL obtained a security interest in plaintiff's property located at 181 Washington Street, Fairhaven, Massachusetts (the "Massachusetts Property"). For three years, plaintiff routinely made monthly payments toward repayment of the two notes.

Plaintiff alleges that beginning in 2009, defendants securitized his loans and prematurely

recast them, thereby doubling his monthly mortgage payments making it impossible for him to make timely payments and putting him in default. Further, plaintiff alleges that defendants refused to offer plaintiff a loan modification option. Plaintiff commenced the instant action alleging causes of action against defendants for a declaratory judgment, fraud, breach of contract and a violation of New York General Business Law § 349.

In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). Moreover, on a motion to dismiss pursuant to CPLR § 3211(a)(7), the complaint is to be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, "bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence...are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154 (1st Dept 1993).

Defendants' motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiff's first and second causes of action is granted. Plaintiff's first cause of action is for a declaratory judgment that defendants do not own or possess the original notes because they were securitized and thus they have no enforceable interest in either of the two notes. Plaintiff's second cause of

action alleges that defendants fraudulently collected payments from him because they were not the rightful owner in possession of the original notes. While plaintiff asserts that he is not challenging the securitization and transfer of the Notes, but rather the Notes' ownership, his claim is nevertheless based on the allegation that the securitization process of the Notes was improper. However, "courts have uniformly rejected the argument that securitization of a mortgage loan provides the mortgagor a cause of action." *Rodenhurst v. Bank of America*, 773 F.Supp.2d 886, 898-99 (D.Haw. 2011). Further, the securitization of a mortgage loan does not render a note and corresponding security interest unenforceable and unsecured. *See Upperman v. Deutsche Bank Nat'l Trust Co.*, 2010 WL 1610414 (E.D.Va. April 16, 2010). Thus, plaintiff's first and second causes of action must be dismissed.

Additionally, defendants' motion for an Order pursuant to CPLR § 3211 (a)(1) and (a)(7) dismissing plaintiff's third cause of action for breach of contract is granted. Plaintiff's third cause of action alleges bad faith workout negotiations on the ground that defendants' failed to modify plaintiff's loans in a reduced principal amount at the present market interest rate. However, plaintiff does not identify any contractual provision obligating defendants to modify the terms of his loans. Moreover, plaintiff's allegation that defendants have breached an implied covenant of good faith and fair dealing is also dismissed. "Within every contract is an implied covenant of good faith and fair dealing." *Aventine Investment Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 (2d Dept 1999). "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive benefits under their agreement." *Id.* "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the

defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Id.* Plaintiff alleges that "the failure of the Defendants to provide a right of first refusal or offer for the Plaintiff to retain ownership of his property under these terms is a predatory lending practice and a breach of the implied covenant of good faith and fair dealing and industry custom and usage to negotiate workout agreements in good faith with financially troubled borrowers." However, said claim only relates to defendants' alleged failure to modify the terms of plaintiff's loans and does not relate to defendants' enforcement of the terms of the Notes. Further, plaintiff has not identified any actions taken by defendants to deprive him of the benefits of the Notes as plaintiff was not entitled to a modification of his loans pursuant to the Notes. Thus, plaintiff has failed to state a claim for a breach of the implied covenant of good faith and fair dealing.

Moreover, plaintiff's assertion in his opposition papers that "Defendants unilaterally breached the payment provision of the contractual agreement by unjustifiably increasing Plaintiffs' monthly payment" is without merit as this allegation is absent from plaintiff's breach of contract claim contained in the complaint's third cause of action. However, even if plaintiff had included such allegation in his complaint, it still would be insufficient to state a claim for breach of contract pursuant to CPLR § 3211 (a)(1). The New York Note includes a disclosure statement instructing plaintiff that in the event his unpaid principal exceeds the maximum limit, his minimum payment will increase. An identical provision is contained in the Massachusetts Note. While plaintiff argues that defendants prematurely recast the minimum payment by sending him notices notifying him of future increases in his monthly payments, defendants were obligated to do so by the terms of the Notes. Specifically, the Notes state that "The Note Holder

will deliver or mail to [plaintiff] a notice of any changes in the amount of [plaintiff's] monthly payment before the effective date of any change." In compliance with this contractual provision, defendants sent plaintiff notices informing him that if he continued to make only the minimum payment on his loans, his minimum payment on the New York Note would increase effective June 1, 2009 and his minimum payment on the Massachusetts Note would increase effective September 1, 2009. By sending these notices, defendants were in compliance with the contractual terms of the loan agreements. Plaintiff has not alleged that he would not have exceeded the maximum loan amount after the next payment was made but only that by sending him such notices, defendants prematurely recast his minimum payment because he had not yet reached the maximum amount. Thus, plaintiff's third cause of action is dismissed.

Further, defendants' motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiff's fourth cause of action alleging a violation of GBL § 349 is granted on the ground that said cause of action is time-barred. Claims brought pursuant to GBL § 349 are subject to a three-year statute of limitations. *See Morelli v. Weider Nutrition Group, Inc.*, 275 A.D.2d 607 (1st Dept 2000). "Accrual of such a claim...first occurs when a plaintiff has been injured by a deceptive act or practice in violation § 349." *Rabouin v. Metropolitan Life Ins. Co.*, 10 Misc.3d 1061, *10 (Sup. Ct. N.Y. Cty. 2005). Plaintiff alleges in his complaint that "defendants..., on April 29, 2009, prematurely Recast (about doubled) the monthly payments on Plaintiff's New York Pay-Option-Arm-Mortgage...[and] eliminated both Plaintiff's Minimum Payment Option and Plaintiff's Interest Only Payment Option, claiming Plaintiff exceeded his loan's Maximum Negative Amortization Cap," which is the first instance that plaintiff alleges he was injured by defendants' alleged deceptive act. In order for this cause of action to be timely, plaintiff had to

commence the action by April 29, 2012. As plaintiff commenced the instant action on June 19, 2012, his fourth cause of action alleging a violation of GBL § 349 is time-barred and must be dismissed.

Accordingly, defendants' motion for an Order pursuant to CPLR § 3211 (a)(1) and (a)(7) dismissing plaintiff's complaint is granted and the complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 1/11/13

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.