Seller v Citimortgage, Inc.
2013 NY Slip Op 30373(U)
January 29, 2013
Supreme Court, New York County
Docket Number: 652001/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD, *Justice* PART 49

DANIEL and BRENDA SELLER, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

CITIMORTGAGE, INC.,

Defendant.

INDEX NO. 652001/2011

MOTION DATE Sept 21, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss.

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

Cross-Motion: ☐ Yes ☑ No

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

Upon the foregoing papers, it is ordered that the motion to dismiss is decided in accordance with the accompanying decision and order.

Dated: January 29, 2013

O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION PART 49

---x

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---x

DECISION AND ORDER

Index No.: 652001/2011
Mot. Seq. 001

O. PETER SHERWOOD, J.:

Defendant CitiMortgage ("Citi") moves to dismiss this putative class action[1] pursuant to CPLR 3013, 3211(a)(7) and 3211(a)(1) on the grounds that the complaint lacks sufficient particularity, fails to state a cause of action, and is barred by documentary evidence.

THE TROUBLED ASSET RELIEF PROGRAM

This action by Daniel and Brenda Seller ("plaintiffs") on behalf of themselves and similarly situated homeowners in New York who have outstanding mortgages serviced by Citi, is one of many such actions across the country spawned by the well intentioned Emergency Economic Stabilization Act of 2008 (PL 110–343, enacted as 12 USCA § 5201-5261) and the programs established thereunder. One such program was the Troubled Asset Relief Program ("TARP" [12 USC §§ 5201-5261]). As described by one judge:

> TARP directed the Secretary of the Treasury to implement a plan that seeks to maximize assistance for homeowners and allowed the Secretary to use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures. Under this authority, the Department of the Treasury announced the Making Home Affordable Program in February 2009, which included the Home Affordable Mortgage Program ("HAMP" [12 USC § 5219a]). HAMP was aimed at helping homeowners who were in, or were at immediate risk of being in, default on their home loans by reducing monthly payments to sustainable levels.

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[1] Plaintiffs initially brought this action in federal court (see complaint filed in Southern District Court in February 2011, 2011 WL 683129). In May 2011, plaintiffs voluntarily dismissed that litigation and shortly thereafter (July 2011) commenced the instant action.

(*Thomas v JP Morgan Chase & Co.*, 811 F Supp 2d 781, 786-787 [SD NY 2011, Scheindlin, J.], citations omitted; see also 1 Mortgages and Mortgage Foreclosure in New York § 17:7).

HAMP was capitalized with $50 billion of TARP funds. Under the terms of the program, dozens of mortgage lenders and servicers, including Citi, received financial incentives from the federal government to modify existing home loan mortgages so as to reduce monthly mortgage payments of homeowners seeking to avoid foreclosure (*see Wigod v Wells Fargo Bank, N.A.*, 673 F3d 547, 556 [7th Cir 2012]). Homeowners who sought to modify their mortgages pursuant to HAMP had to complete Trial Period Plan ("TPP") agreements and furnish various documents to the lender (*see Flagstar Bank, FSB v Walker*, 37 Misc 3d 312, 312-313 [Sup Ct, Kings County 2012]).

"Citi entered into a Service Participation Agreement ('SPA') with Fannie Mae in July 2009, acting as an agent of the U.S. Department of the Treasury. . . . In entering into the SPA, Citi agreed to 'perform the loan modification and other foreclosure prevention services' for 'all mortgage loans it services, whether it services such mortgage loans for its own account or for the account of another party'" (*Costigan v CitiMortgage, Inc.*, 2011 WL 3370397, *1 [SD NY, Aug. 2, 2011, No. 10-Civ.-8776(SAS), Scheindlin, J.], citations omitted). The SPA also required Citi to identify mortgage loans that could be subject to permanent modification; evaluate the borrower's eligibility by collecting financial and other information; offer TPPs whereby borrowers make reduced monthly payments for three months; offer permanent modifications to borrowers who successfully complete their TPPs; and notify such borrowers in writing whether they were found eligible for relief (*see id.* at *1-*2).

FACTS

The facts are taken from the complaint and are assumed true for purposes of this motion. Plaintiffs are New York homeowners who have an outstanding mortgage serviced by Citi. In January 2009, they contacted Citi seeking to reduce their monthly mortgage payment of $2,120 (complaint, ¶ 27). Citi's Loan Mitigation Department told plaintiffs that to qualify for the loan modification they had to be delinquent in their mortgage payments. Plaintiffs were instructed to make four months of mortgage payments at the reduced rate of $1,610 per month and to submit a hardship package at the end of the four-month period *(id)*. Citi also falsely represented to plaintiffs that their credit rating would not be negatively impacted as a result of the reduced payments *(id)*.

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Plaintiffs complied with Citi's payment instructions for the four-month period but were then told by Citi that the proposed loan modification was no longer available and they should look into the HAMP loan modification program (¶ 28). In September 2009, Citi determined that plaintiffs were "pre-approved" for the HAMP modification (¶ 29) and furnished them with a written agreement to enter into a three-month HAMP TPP providing for monthly mortgage payments of $1,812.23, with the final payment due on or before December 1, 2009 (¶ 30). Notwithstanding their compliance with the TPP agreement, plaintiffs were not offered a permanent HAMP loan modification (¶¶ 31-32). Instead, they were instructed by Citi to continue making the $1,812.23 payments, submit additional documentation, and contact Citi periodically to check the status of their loan (¶¶ 32-33). For several months plaintiffs complied with Citi's requests, including a request to make their monthly payments by phone for which they were charged a fee of $25 per call (¶ 34).

On June 8, 2010, plaintiffs were advised by Citi that they were pre-approved for the loan modification but on June 15, 2010, they received a letter from Citi notifying them their mortgage loan was in default and they must pay a past-due amount of $14,991.87, including $81.89 in late charges and $186.00 in delinquency-related expenses (¶¶ 35-36). On June 28, 2010, plaintiffs enrolled in a six-month auto withdrawal program whereby Citi automatically withdrew plaintiffs' monthly payments from their bank account (¶ 37). On September 13, 2010, Citi dropped plaintiffs from the HAMP loan modification program on the ground that they failed to provide requested documentation, which had in fact been provided several times (¶ 39). Even though plaintiffs had complied with all of Citi's requests, on December 9, 2010, Citi sent plaintiffs a notice of foreclosure, claiming that their mortgage was in default (¶ 41). Thereafter, Citi advised plaintiffs that they were potentially eligible for an "in-house" (non-HAMP) loan modification if they paid $24,505.64 to bring their mortgage loan current, along with Citi's accruing attorneys' fees (¶ 43). By April 15, 2011, the amount plaintiffs owed on their mortgage had climbed to $31,255.21 (*id.*).

Despite plaintiffs' compliance with all of the terms of the TPP agreement they were never offered a final HAMP modification (¶ 44). Further, Citi caused plaintiffs' credit score to be lowered and at all relevant times (since the start of the loan application process) subjected them to a constant stream of telephone calls from Citi's debt collectors, including multiple daily calls at odd hours (¶ 45). Plaintiffs allege that they sacrificed time, money and lost other alternatives to Citi's loan modification, in reliance on Citi's promises that compliance with the terms of Citi's loan

modification programs would result in a permanent HAMP loan modification, but despite their compliance with Citi's instructions and the TPP agreement, Citi claims plaintiffs owe $26,643.85, including attorneys' fees and late fees.

Based on the foregoing, plaintiffs assert four causes of action for (i) breach of contract [the TPP agreements]; (ii) breach of the implied covenant of good faith and fair dealing; (iii) promissory estoppel; and (iv) deceptive practices in violation of New York General Business Law ("GBL") § 349. Plaintiffs seek class certification, declaratory and injunctive relief, actual damages, restitution, and interest, costs and attorneys' fees.

CITI'S MOTION TO DISMISS

In support of its motion to dismiss, Citi first contends that the complaint fails to state a viable claim because the TPP agreement does not promise a permanent loan modification. It is merely a step in a loan application process. Plaintiffs do not allege that Citi signed their TPP agreement, found them qualified under HAMP or sent them a permanent loan modification agreement. Citi adds that plaintiffs cannot use state law claims to circumvent the substantial body of federal caselaw holding that HAMP does not create a private right of action.

According to Citi, plaintiffs' first cause of action for breach of contract must be dismissed because courts have repeatedly held that a TPP agreement which is not signed by the lender or servicer, is not an enforceable contract. Moreover, the TPP agreement does not identify the essential terms of a permanent loan modification such as the principal amount of the modified loan, the loan's duration, the interest rate, any escrow payments owed, or the amount of any balloon payment, if applicable, and therefore is not an enforceable offer for a loan modification. Citi argues further that the complaint fails to allege adequate consideration for a loan modification because reduced TPP payments and the submission of documents as part of the loan application process do not qualify as consideration.

Plaintiffs respond that Citi breached the TPP agreement by failing to timely offer or deny in writing a permanent loan modification at the end of the trial period. According to plaintiffs, the TPP agreement provides a specified time frame (the trial period) for performance by both parties and Citi's failure to act within the trial period mandates that it grant a permanent loan modification to plaintiffs. Plaintiffs argue that the TPP agreement contains the essential terms of a permanent loan

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modification. Those terms are specifically identified pursuant to a "strict mathematical formula" set forth in HAMP which is designed to reduce monthly loan payments to 31% of the borrower's monthly gross income. According to plaintiffs, Citi waived its argument that there is no enforceable contract when Citi failed to uphold its end of the bargain to notify borrowers of their ineligibility in writing at the end of the trial period. Plaintiffs add that they have provided additional consideration by virtue of their compliance with additional conditions and requirements imposed by Citi that were not contained in the original loan documents.

Citi argues that the second cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed because an unenforceable contract (the TPP agreement) cannot support an implied covenant claim. Citi also argues that even if the TPP agreement was an enforceable contract, it does not contain an offer for a permanent loan modification and plaintiffs may not use an implied covenant to create one. Citi further asserts that plaintiffs cannot claim that Citi hurt their credit rating because the TPP agreement says nothing about credit ratings and the Fair Credit Reporting Act ("FCRA") prohibits states from imposing limits on furnishing credit information to consumer reporting agencies. Citi adds that the cover letter accompanying the TPP agreement informed plaintiffs that Citi "may report you as delinquent to credit reporting agencies even if you made your trial period payments on time"; that plaintiffs were, in fact, delinquent in that their TPP payments were less than the amount required by the loan documents; that plaintiffs' claim that Citi improperly processed their loan modification request is an impermissible attempt to enforce HAMP; that the complaint fails to allege that plaintiffs paid the charges and fees referred to therein; that such charges and fees were properly imposed; and that plaintiffs were admittedly in default because they did not submit the full amount of the monthly mortgage payment for two years.

In response, plaintiffs argue that Citi wilfully impeded and delayed the loan application process to wrongfully secure a financial windfall at plaintiffs' and similarly situated homeowners' expense by repeatedly losing, misplacing or failing to consider plaintiffs' income-related documents; wilfully delaying the document review and income-related verification process in order to profit from default fees, late fees, penalties and interest; failing to act with due diligence; and failing to properly train and supervise its employees and agents.

As to the third cause of action based on the doctrine of promissory estoppel, Citi argues that the claim should be dismissed because the TPP does not contain the required "clear and

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unambiguous" language that Citi would permanently modify plaintiffs' loan, and plaintiffs could not reasonably rely on any purported promise of a permanent loan modification since the relevant TPP agreement language is conditional.

Plaintiffs reply that they have stated a cause of action because they allege that they have complied with all conditions precedent to a permanent loan modification under the TPP agreement for over a year and had a right to expect Citi to either return a fully executed copy of the TPP agreement or timely notify plaintiffs in writing that they were not qualified for a permanent loan modification.

As to the fourth cause of action based on GBL § 349, Citi argues that the claim should be dismissed because the TPP agreement form is a federally approved document and the statute expressly exempts conduct that complies with federal law. According to Citi, plaintiffs' reliance on GBL § 349 represents a transparent attempt to evade the absence of a private right of action under HAMP. Additionally, this cause of action must be dismissed because the complaint does not allege that Citi agreed to withhold negative credit information or that Citi furnished such information to credit agencies. Moreover, the statute applies to consumers at large, not private disputes unique to the parties.

In response, plaintiffs assert that Citi engaged in deceptive practices resulting in injury to plaintiff by making numerous false material representations, wrongfully causing plaintiffs' credit rating to be impaired, and wrongfully charging plaintiffs interest, late fees and other fees. Regarding Citi's argument that HAMP provides no private right of action, plaintiffs contend that their statutory claim is not based on HAMP but rather on Citi's materially false and deceptive representations to plaintiffs and other similarly situated homeowners. Plaintiffs argue further that FCRA preemption does not apply to Citi's material misrepresentations or give Citi a license to mislead homeowners about the impact of Citi's loan modification program on homeowners' credit.

DISCUSSION

CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." Plaintiffs' complaint (at least with respect to plaintiffs) readily meets this minimal requirement.

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The standards applicable to a motion to dismiss pursuant to CPLR 3211(a)[7] are well known. "It is axiomatic that on a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]), the court is required to view every allegation of the complaint as true and resolve all inferences in favor of the plaintiff regardless of whether the plaintiff will ultimately prevail on the merits" (*344 E 72 Limited Partnership v Dragatt*, 188 AD2d 324 [1st Dept 1992], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). 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 AD2d 154 [1st Dept 1993], citation omitted). In weighing whether plaintiff has stated a cause of action, the court may also consider affidavits submitted by plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636 [1976]).

Dismissal pursuant to CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; see also *Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000]) and the documentation definitively disposes of the claim (see *Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]). The parties base their arguments on the TPP, and the primary documentary evidence relied on by Citi is plaintiffs' TPP agreement.

A. Breach of Contract

Plaintiffs base their breach of contract claims on the first paragraph of the TPP agreement, which provides that "[i]f I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 [regarding income verification] continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement ("Modification Agreement") as set forth in Section 3" (see October 5, 2011 Affirmation of Therese Craparo, Exhibit E, p 1).

Plaintiffs' argument assumes that the conditions constitute an offer which becomes binding on Citi as soon as plaintiffs satisfy them. It ignores other language in the TPP agreement which states that "[t]he Plan will not take effect unless and until both [plaintiffs] and [Citi] sign it and [Citi] provides [plaintiffs] with [Citi's] signature." Citi's signature does not appear on the TPP

agreement signed by plaintiffs. That fact distinguishes this case from the few cases plaintiffs rely on to avoid dismissal of the breach of contract cause of action . For example, in *Wigod v Wells Fargo Bank, N.A.* (673 F3d 547 [7th Cir 2012]), the Seventh Circuit held a TPP agreement to be an enforceable offer for a permanent loan modification. However, as the Seventh Circuit recited, the plaintiff in *Wigod* signed the TPP agreement, returned it to the bank together with the first of four modified trial period payments and "[the bank] then executed the TPP Agreement and sent a copy to [plaintiff] . . . " (*id* at 558).

Even if Citi had executed the TPP agreement and delivered it to plaintiffs, the breach of contract claim still cannot survive the motion to dismiss. Although the language in the TPP agreement relied on by plaintiffs supports their claim, Paragraph F of the TPP agreement provides that:

> If prior to the Modification Effective Date (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; **or** (iii) the Servicer determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate.

(TPP Agreement, ¶ F, emphasis added). In addition, Paragraph G states that:

> I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, **and** (iii) the Modification Effective Date has passed"

(*id.*, p. 2 , emphasis added). Thus, the TPP agreement is not an enforceable contract. "Several courts have already held that the TPP does not constitute a binding contract for permanent modification" (*Costigan*, 2011 WL 3370397, *7; *see also JPMorgan Chase Bank v Ilardo*, 36 Misc3d 359, [Sup Ct, Suffolk County 2012] [applying New York contract law]). The TPP agreement "is explicitly not an enforceable offer for [a] loan modification" (*Morales v Chase Home Fin.*, 2011 WL 1670045, *5 [ND Cal, Apr. 11, 2011, No. C 10-02068 JSW]). Rather, the TPP agreement is "simply a part of the application process, which plaintiff was willing to complete in the hope that [the servicer] would modify the loan" (*id.*)

In an alternative argument (not advanced in the complaint), plaintiffs assert that Citi breached the TPP agreement by failing to timely offer or deny in writing the permanent loan

modification at the end of the trial period. The agreement on which plaintiffs rely never became effective and thus cannot be the basis for a breach of contract claim because, as previously noted, the TPP agreement provides that "[t]his Plan will not take effect unless and until both [plaintiffs] and [Citi] sign it and [Citi] provides me with a copy of this Plan with [Citi's] signature." The complaint does not allege that Citi ever signed the TPP agreement and that Citi provided plaintiffs with a signed copy. Thus as discussed above, this case is unlike *Wigod*. Moreover, nothing in the TPP agreement requires Citi either to send plaintiffs a denial letter by a time certain or to tender plaintiffs a permanent loan modification. To the contrary, the TPP agreement provides that if Citi does not provide plaintiffs with "a fully executed copy of [the] Plan and the Modification Agreement ... the Loan Documents will not be modified and [the] Plan will terminate absent an agreement of the parties to extend the trial period (*see Johnson v Nationstar Mortg.*, 2011 WL 6306681, at *2 [Minn Ct App, Dec. 19, 2011, No. A11-884]). Any alleged failure to notify the borrower of its decision prior to the Modification Effective Date does not trigger an obligation of the lender to give the borrower a permanent modification (*see Thomas*, 2011 WL 3273477 at *2; *Pennington v HSBC Bank*, 2011 WL 6739609, at *2 [WD Tex, Dec. 22, 2011, No. A–10–CA–785 LY]). The first cause of action which alleges breach of contract must be dismissed (*see, e.g.*, *JPMorgan Chase Bank*, 36 Misc 3d 359; *Pandit v Saxon Mortgage Svs., Inc.*, 2012 WL 4174888 [ED NY, Sept. 17, 2012, No. 11–CV–3935(JS)(GRB), Seybert, J.]). The TPP agreement empowers Citi to terminate a borrower from the HAMP program unilaterally merely by not executing the TPP agreement for any reason or no reason. That is exactly what plaintiffs allege has happened in this case.

B. Breach of Covenant of Good Faith and Fair Dealing

Plaintiffs' second cause of action for breach of the covenant of good faith and fair dealing must also be dismissed "because any such claim must be based on an enforceable contract between the parties" (*Gotham Boxing Inc. v Finkel*, 18 Misc 3d 1114(A), 2008 N.Y. Slip Op. 50020(U), *7 [Sup Ct, NY County 2007, Fried, J.], citing *Schoor v Guardian Life Insurance Co.*, 44 AD3d 319 [1st Dept 2007] [dismissal of claim for breach of the implied covenant of good faith and fair dealing upheld because plaintiff "did not demonstrate the existence of a valid contract from which such a duty would arise"]; see also *Pandit*, 2012 WL 417888, at *5). No such contract is alleged in this case.

C. Promissary Estoppel

Plaintiffs' third cause of action based on promissory estoppel fares no better. A claim based upon promissory estoppel must allege "a clear and unambiguous promise" by defendant upon which plaintiffs reasonably relied to their detriment" (see *401 Hotel L.P. v MTI/The Image Group, Inc.*, 251 AD2d 125, 126 [1st Dept 1998]; see also *Kaye v Grossman*, 202 F3d 611, 615 [2d Cir 2000, Sotomayor, J.] [under New York law promissory estoppel requires a "clear and unambiguous promise"]). Here, Citi's obligations under the TPP agreement were explicitly conditioned upon the document being fully executed.

D. General Business Law § 349

Plaintiffs' fourth cause of action asserts a claim for violation of GBL § 349. The threshold question with respect to this claim is whether it is preempted by federal law, in this case the Home Owners' Loan Act (12 USC § 1461, *et seq.*) As a general rule, state statutes such as GBL § 349 are not preempted when "they simply seek to enforce truthfulness, which is expected of federal thrift institutions as a baseline matter" even though they may have "an incidental impact on lending relationships" (see *Midovin v Downey Savings and Loan Association, F.A.*, 834 F Supp 2d 95, 114 [ED NY 2011], and cases cited therein). However, when state law is invoked to regulate matters such as granting of mortgages and imposing loan-related fees, which are specifically under federal aegis, then that law is deemed preempted. Thus, GBL § 349 may not be employed to assert "claims which attempt to establish extra-contractual substantive requirements upon federal savings associations which more than incidentally affect lending operations" (*id.* at 115, citing *McAnaney v Astoria Financial Corp.*, 665 F Supp 2d 132, 167 [ED NY 2009]).

Plaintiffs disavow that the GBL §349 claim is based on an alleged violation of the HAMP guidelines. Plaintiffs state that their GBL §349 claim is based on Citi's materially false representations to plaintiffs. Plaintiffs suggest that Citi falsely instructed them to reduce their mortgage payments in order to obtain eligibility for a loan, and that Citi falsely represented that plaintiffs' credit would not be adversely affected by their participation in the loan modification program with Citi. To the extent plaintiffs base their claims on the assertion that Citi made materially false and deceptive representations to plaintiffs, the GBL §349 cause of action is not preempted.

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Neither the complaint nor plaintiffs' papers submitted in opposition to the motion to dismiss allege that Citi promised to withhold negative information about plaintiffs to credit agencies while they operated under the TPP. Even if such a claim had been made, the assertion would be utterly refuted by the TPP agreement which states that Citi "may report your loan as delinquent to the credit reporting agencies even if you make your trial period payments on time." The fourth cause of action must be dismissed.

Accordingly, it is hereby

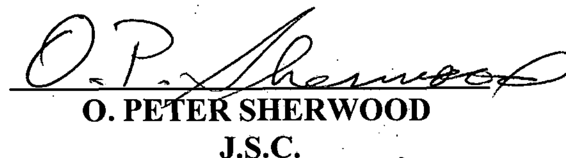
ORDERED that the motion to dismiss the complaint is GRANTED and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: January 29, 2013

E N T E R,



O. PETER SHERWOOD
J.S.C.