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

PRESENT: DONNA M. MILLS PART 58
Justice

ROBERT CHOMICKI,

Plaintiff,

-v-

BANK OF AMERICA, N.A., et al.,

Defendants.

INDEX NO. 100481/12

MOTION DATE

MOTION SEQ. NO. 01, 02, 03

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion ____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits...	1, 2, 5, 10-13
Answering Affidavits– Exhibits	3, 6, 7, 8, 14-16
Replying Affidavits	4, 9

CROSS-MOTION: ✓ YES ____ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM

FILED
MAR 26 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/21/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

ROBERT CHOMICKI,

Plaintiff,

-against-

BANK OF AMERICA, N.A., MERSCORP, INC. (a/k/a MERS, Mortgage Electronic Registration Systems, Inc.), JPMORGAN CHASE BANK, N.A., And JOHN DOES 1-100,000, representing any persons (other than government agencies) claiming any interest in (i) the real property located in Westchester County, New York, with an address of 28 Country Club Lane South, Briarcliff Manor, NY 10510, or (ii) any note or mortgage signed by Robert Chomicki and secured by such real property, or (iii) any securities secured in whole or in part by any interests in such real property,

Defendants.

INDEX NUMBER 100481/2012
Mot. Seq. 001, 002 & 003
DECISION & ORDER

DONNA MILLS, J.:

Motions bearing the sequence numbers 001, 002 and 003 are hereby consolidated for decision. In this action challenging a hypothetical residential foreclosure, defendant JPMorgan Chase Bank, N.A. (Chase) moves to dismiss the complaint, pursuant to CPLR 3211 (a) (3) and (7), or, in the alternative, to change the venue of the action to Westchester County, pursuant to CPLR 507 (Mot. Seq. 001). Defendants Bank of America, N.A. (BANA)[1], and Mortgage Electronic Registration Systems, Inc. (MERS), sued here as MERSCORP, Inc., move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them (Mot. Seq. 002). Plaintiff Robert Chomicki cross-moves for a continuance of Mot. Seq. 002 and a grant of time to conduct limited discovery. Plaintiff also moves, by order to show cause, for leave to file an affirmation and memorandum of law in opposition to Mot. Seq. 001, or, in the alternative, for

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[1]Plaintiff sometimes uses the acronym BOA.

leave to file and serve an amended complaint, pursuant to CPLR 3025 (b) (Mot. Seq. 003).

The action has been discontinued as against MERS, by stipulation of the parties, leaving BANA as the sole movant in Mot. Seq. 002.

The logical path in deciding these motions does not follow their sequence numbers. Instead, they will be examined as follows:

- Plaintiff's motion for leave to file an affirmation and memorandum of law in opposition to Mot. Seq. 001, or, in the alternative, for leave to file and serve an amended complaint, pursuant to CPLR 3025 (b) (Mot. Seq. 003).

- Chase's motion to dismiss the complaint, pursuant to CPLR 3211 (a) (3) and (7), or, in the alternative, to change the venue of the action to Westchester County, pursuant to CPLR 507 (Mot. Seq. 001).

- Plaintiff's cross motion for a continuance of Mot. Seq. 002 and a grant of time to conduct limited discovery.

- BANA's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it (Mot. Seq. 002).

Background

Plaintiff purchased a residence at 28 Country Club Lane South, Briarcliff Manor, NY 10510 (the Property), in or about June 2005, with a mortgage from Countrywide Home Loans, Inc. (Countrywide), in the amount of $1.3 million, secured by a promissory note. This note had an adjustable interest rate, initially at 5.25%, adjustable to a maximum of 9.95%. At the lower interest rate, monthly debt service for interest only was allegedly about $20,000, with the entire principal due at the end of 30 years. BANA eventually acquired Countrywide's assets. The mortgage was registered with MERS, which was identified as the mortgagee of record. Sometime thereafter, the mortgage and note were allegedly sold to one or more John Does. In January 2007, plaintiff obtained a home equity line of credit (HELOC) with Chase, in the amount of $300,000. Plaintiff also owned property at 30 Country Club Lane South, Briarcliff Manor, two doors away, which entailed monthly expenses of about $5,000 for mortgage interest, taxes and insurance.

The instant action commenced on January 13, 2012 with the complaint asserting causes

of action for a declaratory judgment that defendants BANA, MERS, and John Does have no right to foreclose on the Property (first); a declaratory judgment that all defendants have engaged in predatory lending practices (second); a declaratory judgment that all defendants lack standing to demand mortgage payments or to foreclose on the mortgage (third); breach of contract as against all defendants (fourth); fraud as against defendants BANA, MERS and Chase (fifth); violation of New York General Business Law (GBL) § 349 as against defendants BANA, MERS and Chase (sixth); creating a financial hardship for plaintiff by manipulating securities and real estate markets as against all defendants (seventh); and quieting of title as against all defendants (eighth). Parker Affirmation, Exhibit A (Complaint).

Plaintiff's Order to Show Cause – Mot. Seq. 003

Plaintiff asks leave to file his attorney's affirmation and memorandum of law, both dated November 26, 2012, in further opposition to Chase's summary judgment motion (Mot. Seq. 001), pursuant to 22 NYCRR § 202.1 (b), which allows the court, "[f]or good cause shown, and in the interests of justice," to waive compliance with the Uniform Rules for the Supreme Court. In the alternative, plaintiff asks leave to serve and file an amended complaint, pursuant to CPLR 3025 (b).

Plaintiff's application for leave to file papers, pursuant to 22 NYCRR § 202.1 (b), in further opposition to Chase's summary judgment motion is denied. Plaintiff has failed to show why it would be for good cause and in the interests of justice. On or about October 10, 2012, plaintiff filed an affirmation of counsel in opposition to Chase's motion. In the first prong of the instant motion plaintiff asks leave to serve "a post-submission supplementation of the record." This material pertains to the alternate prong of Chase's motion, the change of venue to Westchester County in the event Chase's motion to dismiss the complaint is denied. Chase relies upon CPLR 507, which provides that "[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." The Property is located wholly within Westchester County.

Chase maintains that plaintiff's desired relief "clearly would affect Borrower's title to, or the possession, use or enjoyment of the subject property." Chase Memorandum of Law at 10 (Mot. Seq. 001); *see Shapiro v Rockville Country Club, Inc.*, 22 AD3d 657, 660 (2d Dept 2005) ("Since the instant action affects the 'possession, use or enjoyment' of a leasehold in real property [CPLR 507], venue was properly transferred from New York County to Nassau County, the county where the property is located"); *Regal Boy Enters. Intl. VII, Inc. v MLQ Realty Mgt., LLC*, 22 AD3d 738, 739 (2d Dept 2005) ("Because the relief sought 'would affect the title to, or the possession, use or enjoyment of, real property' [CPLR 507] located in Dutchess County, venue is proper only in that county"); *see also* 1-13 Bergman on New York Mortgage Foreclosures § 13.01 ("the basic rule [CPLR 507] nonetheless is clearly that the location of the real estate, if within New York State, properly controls the place of trial").

Plaintiff's initial opposition to Chase's contingent request for change of venue focused solely upon principles of forum non conveniens. He ignored CPLR 507. Now, plaintiff claims that, weeks after he submitted his opposition to Chase's motion, he learned of a New York State legislative memorandum in support of a bill on forum non conveniens (Mot. Seq. 003, Exhibit C), and a New York County Supreme Court interim order, dated November 12, 2012, dealing with forum non conveniens in a case similar to the instant action (*id.*, Exhibit B). Both of these documents deal with the issue of forum non conveniens (CPLR 327), not CPLR 507, which Chase correctly relies upon. There is no reason to consider additional papers when they fail to address the issue in dispute.

Further, an interim order of a sister court, actually issued as an alternative to signing an order to show cause, would have no authority, even if on point. Finally, the legislative memorandum plaintiff asks to be considered not only addresses the non-issue of forum non conveniens, it was issued in 1984. Presumably, it was as available for inclusion in plaintiff's papers in early October 2012 as it was in late November 2012.

Plaintiff's motion for leave to amend his complaint is also denied. Leave to amend pleadings "shall be freely given upon such terms as may be just," according to CPLR 3025 (b).

However, "[a] motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit." *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011) (internal quotation marks and citation omitted); *Weingarten v S & R Medallion Corp.*, 87 AD3d 947, 947 (1st Dept 2011) (motion to amend complaint denied because it "is clearly devoid of merit").

Plaintiff's attorney's affirmation here states that the "proposed amended pleading focuses on ownership or lack of ownership of the negotiable credit agreement (hereinafter, the 'Note') under the New York Uniform Commercial Code, and . . . adds a substantial section entitled 'Venue Selection Allegations.'" Person Aff., ¶ 4. The venue section actually attempts to answer the venue prong of Chase's motion to dismiss, as did the proposed "post-submission supplementation of the record." Here too, plaintiff remains focused on forum non conveniens, and the proposed additional section on venue is without merit.[2]

Ownership of the respective promissory notes is a key factor in the proposed amended complaint. It asserts causes of action for a declaratory judgment that defendants BANA and Chase are not the holders of the promissory notes (first); fraud as against defendants BANA and Chase (second); violation of GBL § 349 as against defendants BANA and Chase (third); reformation of the promissory notes as against defendants BANA and Chase (fourth); a declaratory judgment that the promissory notes are unenforceable by defendants BANA and Chase (fifth); anticipatory breach of contract as against defendants BANA and Chase (sixth); and a declaratory judgment that defendant BANA has no right to enforce its promissory note (seventh).

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[2]Plaintiff offers the interesting argument that exporting cases from New York City has a role "in the present decline of the legal services industry includ[ing] (i) judgeships, law clerks, clerks, librarians, court officers and other positions in the New York Supreme Court; (ii) jobs in the real estate industry; (iii) attorneys, partners and associates; (iv) paralegals and legal secretaries and other positions in law firms; (v) information technology personnel; (vi) librarians and researchers; (vii) proofreaders; (viii) messengers; (ix) managing clerk's office personnel; (x) appellate judges, law clerks and other appellate-related positions; (xi) supplies-related jobs; (xii) appellate and financial printing jobs; (xiii) telephone- and broadband-related jobs; (xiv) networking related jobs; (xv) copier/fax/scanner related jobs; and (xvi) subscribers and advertisers for the *New York Law Journal* and related publications, as well as *The New York Times*." Person Affirm., ¶ 11.

In opposition to the proposed amended complaint, BANA states that it is still the owner and servicer of plaintiff's mortgage loan; the mortgage loan has not been securitized; ownership of the promissory note and mortgage have not been split; there is no pending foreclosure on the Property (plaintiff is current in his payments); and plaintiff was granted a loan modification in 2008. These avowals are important because, throughout his pleadings and papers, plaintiff insists the opposite, supported only by an assertion of "information and belief," never facts.

This prong of plaintiff's motion, asking leave to amend the complaint, shall be denied as devoid of merit. Plaintiff provides no facts particular to his situation in support of his broadly-restated proposed causes of action, or countering BANA's statements above, which eviscerate the proposed amended complaint. He relies upon information and belief in alleging, among other things, a "secret securitization process . . [which] created a secret property interest in Plaintiff's property;" "a fraudulent loan modification program;" "unjust enrichment;" "false representations of material fact;" "various conflicts of interest;" and that Defendants "are looking to create a default." Mot. Seq. 003, Exhibit A, ¶¶ 16, 25, 34C, 40, 73, and 79 (Amended Complaint).

As in the Complaint, plaintiff creates worst-case scenarios based on unproven allegations. He claims that he "is entitled to be treated as if he had applied for and been rejected by BOA for a loan modification agreement at all relevant times because any such applications if made would have been futile" (*id.*, ¶ 27), even though he successfully negotiated a 30% payment reduction with BANA on the loan at issue. He continues in the guise of an innocent investor caught in the maelstrom of global financial misdeeds, in spite of evidence that he is an experienced real estate investor (see below). Now, without providing any evidence, a writing or even alleging a telephone conversation, plaintiff charges that "BOA and Chase are threatening the Plaintiff with foreclosure."

The only new claim in the proposed amended complaint is plaintiff's allegation of breach of contract based upon a consent decree signed by BANA and Chase, among others, on or about June 6, 2012, to settle *United States of America v Bank of America Corp.* (Case

1:12-cv-00361-RMC, US Dist Ct, DC, 2012). Plaintiff claims that he "qualifies for the full $125,000 reduction" in the principal amount of his loans in accord with the consent decree. Amended Complaint, ¶ 87. However, he does not attach the consent decrees for the respective defendants,[3] nor does he describe how he qualifies under either consent decree, to which he is not a party. He does not explain how the $125,000 figure was arrived at, or identify the amount of relief to be afforded to each loan. There is no private right of enforcement to the consent decrees, which "shall be enforceable solely in the U.S. District Court for the District of Columbia." Settlement Terms, § J (2). In brief, the consent decrees did not establish a contract between plaintiff and any of the parties to the federal action, and it cannot serve as the ground for a breach of contract cause of action as against BANA and Chase.

Plaintiff is not granted leave to serve the Amended Complaint because it is devoid of merit, whether it repeats or parallels the Complaint (see discussion below) or attempts to introduce a new cause of action.

Chase's Motion to Dismiss – Mot. Seq. 001

In his Complaint, plaintiff states that he "has a financial hardship and is unable to service" the first mortgage and note and the HELOC.[4] Complaint, ¶ 41. He states that "the Lender knew or should have known" that he was unable to afford these payments.[5] *Id.*, ¶ 36 (D). Plaintiff claims that the large mortgage and the resulting high monthly payments resulted from "[t]he Lender [having] solicited and knowingly accepted artificially high appraisals in support of loan applications," in this instance, "20-25% over the real value" of the Property. *Id.*, ¶¶ 36 (A) and (B). Additionally, plaintiff charges that "[t]the originating mortgage broker, unknown to the Plaintiff, submitted false figures to the Lender." *Id.*, ¶ 36 (C). The mortgage broker and the

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[3]For Chase, see https://www.bringaclaim.com/pdf/JPMorgan-Chase-NMS-Consent-Judgment.pdf; for BANA, see https://www.bringaclaim.com/pdf/Bank-of-America-NMS-Consent-Judgment.pdf. The relevant operative section of both documents is found at Andreoli Opp. Affirm., Exhibit F (Settlement Terms).

[4]Plaintiff refers to the Countrywide mortgage and the HELOC on the Property as two mortgages. The financing of the 30 Country Club Lane South property is not counted as one of the two mortgages.

[5]Plaintiff identifies Countrywide/BANA/MERS as "the Lender." When combined with Chase, plaintiff refers to "the Defendants."

Lender allegedly shared the goal of maximizing their profits at plaintiff's expense. Finally, the Lender "at all relevant times has been maintaining a fraudulent loan modification program in which it fails to reasonably process loan modification applications." *Id.*, ¶ 36 (J). Together, this put plaintiff "in the predictable position of not being able to make the monthly payments[,] . . . threatened with foreclosure and the loss of the Real Property." *Id.*, ¶ 37. If not to plaintiff, these bad results were predictable to the Lender "through its own actions in causing the economy and real estate prices to decline." *Id.*, ¶ 36 (G). The purported scheme worked, because "[p]redictably, the value of the Real Property declined with the economy." *Id.*, ¶ 37. In sum, the Lender's conduct "demonstrate[d] a high degree of moral turpitude and wanton dishonesty as to imply a near criminal indifference to the civil obligations owed . . . to the Plaintiff and millions of other homeowners-mortgagors similarly situated." *Id.*, ¶ 38.

Chase notes that the first cause of action is not directed at Chase. It argues that the second cause of action regarding alleged predatory lending practices, and the seventh cause of action regarding alleged manipulation of securities and real estate markets, are not recognized claims in New York. Plaintiff's second cause of action is labeled "Predatory Lending Practice – Failure to Offer a Loan Modification Agreement in Principal Amount Equal to Present Value of the Real Property and Present Market Rate." Chase contends that plaintiff's inability to meet his two mortgage payments does not extinguish their contract under the HELOC. Chase relies on a long-established doctrine that "when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations." *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 (1920).

Chase also maintains that its alleged failure to offer plaintiff a loan modification does not invalidate the HELOC. It notes that, in his own words, "Plaintiff does not claim that any principal amount of, or rate of interest for, the Chase loan was predatory." Complaint, ¶ 105.

Plaintiff nowhere explains how Chase's alleged failure to offer him a loan modification

agreement is a predatory lending practice, especially in light of his characterization of his Chase loan as not predatory. Plaintiff's major objection to the enforceability of the HELOC is based on doubts about the actual ownership of the associated promissory note. He claims that "Chase has misrepresented its ownership of the Note" (Person Opp. Affirmation, Mot. Seq. 001, ¶ 6), because it "securitized the Note and Mortgage secured by the Real Property by selling the Note and Mortgage to an unknown entity, which then resold various interests or tranches in the Note and Mortgage together with thousands of other notes and mortgages to many thousands of investors throughout the world" (Complaint, ¶ 17). As a result, plaintiff asserts that "the ownership of the Note has been split up from the ownership of the Mortgage, so that the Note is no longer secured by the mortgage, resulting in an unenforceable mortgage." Complaint, ¶ 18.

Plaintiff provides no specific factual or legal support for his position. He cites only cases where causes of action for fraud were not dismissed, pursuant to CPLR 3211. *See MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287 (1st Dept 2011) (*MBIA*); *Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666 (1st Dept 2011) (*Silver Oak*); *Sterling Natl. Bank v Ernst & Young, LLP*, 9 Misc 3d 1129(A), 2005 NY Slip Op 51850(U) (Sup Ct, NY County 2005) (*Sterling*). There is a serious disconnect among the very general legal propositions offered in those cases, the Complaint's cause of action for predatory lending practices, and plaintiff's opposition to Chase's arguments for dismissing this cause of action. On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Plaintiff offers no factual specificity linking Chase's conduct to the second cause of action, and the second cause of action, therefore, shall be dismissed as against Chase. While plaintiff has been ineffective in connecting the issue of ownership of the mortgages to the second cause of

action, this issue will be revisited below when examining other causes of action.

Plaintiff's seventh cause of action is labeled "Manipulating Securities and Real Estate Markets Causing Frustration of Plaintiffs' [sic] Performance under the Two Notes and Mortgages." The Complaint alleges that Chase "participated with other major banks and mortgage lenders to lend money to unqualified borrowers." Complaint, ¶ 100.

> "Because many of the loans were bad and predatory (including BOA's loan to the Plaintiff), the securities market collapsed and the market value of real estate also collapsed, causing an economic crisis . . . , and created a financial hardship for the Plaintiff and made him unable to perform using his own resources on the Two Notes and Mortgages as written."

Id., ¶ 102. Plaintiff contends that the "activities of these Defendants[, in issuing bad loans that caused an economic crisis,] amount to a defense, or a partial defense, for the Plaintiff as to any foreclosure actions by the Defendants." *Id.*, ¶ 105.

The seventh cause of action shall be dismissed as against Chase for several reasons. Chase has not initiated foreclosure proceedings against plaintiff. Plaintiff disclaims that the "Chase loan was predatory." *Id.* He offers no evidence or allegation that the HELOC was inconsistent with New York law. Chase's participation with other major banks and mortgage lenders in the global financial crisis, even if substantiated in detail, as plaintiff fails to do, does not automatically translate into "a financial hardship for the Plaintiff." He does not explain why falling prices for securities and real estate "made him unable to perform," that is, to meet his particular monthly housing payments.

The sixth cause of action alleges violation of GBL § 349, because of the "deceptive acts and practices in the conduct of such defendants' businesses and furnishing of services in the State of New York." Complaint, ¶ 95. The statute provides for a private cause of action by "any person who has been injured by reason of any violation of this section." GBL § 349 (h). A successful plaintiff may recover damages and attorney's fees. Chase correctly maintains that a violation of the statute requires a showing "first, that the challenged act or practice was consumer-

oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v Chemical Bank*, 95 NY2d 24, 29 (2000). Chase contends that plaintiff cannot demonstrate that the acts or practices have a broader impact on consumers at large. "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). Further, "conclusory allegations about defendant's practices with other clients are insufficient to save the claim." *Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 623 (1st Dept 2011). Finally, plaintiff professes no actual harm as a result of Chase's alleged conduct. Injury is a necessary element to prosecuting a claim under GBL § 349 (h), and its absence here requires dismissal of the sixth cause of action as against Chase. *See Stutman*, 95 NY2d at 29.

The fourth cause of action alleges breach of contract because Chase securitized the HELOC's promissory note and mortgage.

> "[This] amounted to a breach of contract with the Plaintiff for a variety of reasons including the loss of an entity with an interest in providing a reasonable loan modification agreement to the Plaintiff, the secret insurance agreements without an insurable interest as alleged above, and leaving the Plaintiff unable to ascertain who is in fact the rightful owner of the Two Notes and Mortgages, creating the risk that multiple parties, including but not limited to Defendants BOA, Chase and MERS, may pursue multiple actions to collect mortgage payments based on one or more of the Two Notes and Mortgages.
>
> This securitization of such Two Notes and Mortgages also amounts to a breach of contract because it has resulted in the unlawful interference, by Defendants BOA, Chase and MERS, with Plaintiff's right to peaceful and undisturbed possession and use of the Real Property through threats of lawsuits from John Does and their potentially thousands of successors in interest."

Complaint, ¶¶ 69-70.

Chase's purported obligation to identify an entity, other than itself, with an interest in providing a reasonable loan modification agreement to plaintiff is his invention. The "secret insurance agreements" allegedly were "credit default swaps insuring collateralized debt

obligations or other derivatives [] to make it more profitable for the Defendants to let the mortgaged properties (including the Plaintiff's property) to go into foreclosure or short sale." *Id.*, ¶ 12. There is no evidence linking this theory to the actual circumstances of this action. No foreclosure has occurred, and plaintiff provides no proof that one is imminent. It is insufficient for plaintiff to claim that bad things may take place, and request relief just in case.

Another concern of plaintiff is that there is a risk that multiple parties may pursue multiple actions against him. In reality, the basis of such a risk is his possible failure to meet his financial obligations, not the securitization of his debt in itself, even assuming that it has occurred. Plaintiff's final concern is the threat of lawsuits disturbing his peaceful and undisturbed possession and use of the Property. Here again, worst-case speculation does not amount to a cause of action. The fourth cause of action for breach of contract shall be dismissed because it consists of no more than conclusory allegations.

The other three causes of action all arise from plaintiff's disputed view of the ownership of the two mortgages and their promissory notes, the Countrywide/BANA/MERS mortgage and the Chase HELOC. These causes of action deal with lack of standing (third); fraud (fifth); and quieting of title (eighth). "None of these Defendants has any actionable or enforceable interest in the Real Property because none of them has produced proof that it owns and/or possesses the original [notes and mortgages]." Chase contends that it "has no obligation to demonstrate it is the holder or assignee of the Note and Mortgage, because Chase has not filed a foreclosure action against the Borrower." Parker Affirmation, Mot. Seq. 001, ¶ 18. On the contrary, Chase argues that plaintiff lacks standing to bring this action against it, because he has not sustained any damages. "Until there is a declared default and the commencement of foreclosure proceedings, there is no justiciable controversy." *Fairhaven Props. v Garden City Plaza,* 119 AD2d 796, 796 (2d Dept 1986); *see Prashker v United States Guar. Co.*, 1 NY2d 584, 592 (1956) ("The courts do not make mere hypothetical adjudications, where there is no presently justiciable controversy before the court, and where the existence of a 'controversy' is dependent upon the happening of future events").

Plaintiff repeats the allegation in the Complaint that, "[u]pon information and belief, the 2nd mortgage [the Chase HELOC] is under water, in that the present value of the Real Property, after deducting the amount allegedly due on the Note and Mortgage has no security under the 2nd Mortgage." In his opinion, this is an injury constituting a justiciable controversy. He claims support from the cases named above, *MBIA*, *Silver Oak* and *Sterling*. However, none of these cases provides a holding that comports with plaintiff's position. In *MBIA*, the Court found a causal link between defendant's alleged fraudulent conduct and plaintiff's damages, because the "allegations are sufficient to show loss causation since it was foreseeable that MBIA would suffer losses as a result of relying on [defendant's] alleged misrepresentations about the mortgage loans." 87 AD3d at 296. In the instant action, plaintiff offers no example of misrepresentations by Chase in providing him a loan that was admittedly not predatory. Chase's purported bad conduct was not in misrepresenting the HELOC, but either in offering it to plaintiff in the first place and/or securitizing it subsequently. The *MBIA* opinion, in fact, steps away from the conclusion plaintiff searches for. "It cannot be said, on this pre-answer motion to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and credit crisis." *Id.* By contrast, plaintiff argues for a macroeconomic explanation of his anticipated woes, rather than examining his specific dealings with Chase.

In *Silver Oak*, "plaintiffs sufficiently allege loss causation since it was foreseeable that they would sustain a pecuniary loss as a result of relying on [defendant's] alleged misrepresentations" to invest in a dishonest scheme that later collapsed. 82 AD3d at 667. Only the measure of plaintiffs' loss was undetermined when the *Silver Oak* action commenced. In the instant action, not even the first shoe has dropped.

In *Sterling*, plaintiff sued a company's auditor for fraud and abetting fraud after the company's principals pleaded guilty to bank fraud. The U.S. Attorney charged that the company "engaged in a scheme of fictitious metal trades that defrauded major international banks and financial institutions of $600 million." 9 Misc 3d 1129(A), *2. The injuries were realized; they were well beyond foreseeable.

Plaintiff's conjuring up the threat of foreclosure does not make the third, fifth and eight causes of action into justiciable controversies. They shall be dismissed, pursuant to CPLR 3211 (a) (3) and (7). In all, the complaint shall be dismissed in its entirety.

Had the complaint not been dismissed in its entirety, Chase's application for a change of venue to Westchester County from New York County would be granted. The Property is located wholly within Westchester County. CPLR 507 provides that "[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." Chase maintains that plaintiff's desired relief "clearly would affect Borrower's title to, or the possession, use or enjoyment of the subject property." Chase Memorandum of Law at 10 (Mot. Seq. 001); *see Shapiro*, 22 AD3d at 660; *Regal Boy,* 22 AD3d at 739.

Plaintiff opposes the contingent request for change of venue on the ground of forum non conveniens. He argues thoroughly on this basis. However, Chase's motion is made pursuant to the statutory directive of CPLR 507. Therefore, an analysis of possibly influential factors for venue, appropriate to the issue of forum non conveniens, is unwarranted, and had the motion to dismiss the complaint in its entirety not been granted, a change of venue to Westchester County would have been granted.

BANA's Summary Judgment Motion and Plaintiff's Cross Motion– Mot. Seq. 002

On June 5, 2008, the then-Countrywide loan was modified, reducing plaintiff's monthly payment to $10,808.40 from $15,460.14, a fact omitted from the Complaint. Chibnik Support Aff., Exhibit 3 (Mot. Seq. 002). BANA states that it is the current owner of plaintiff's mortgage and note. Andreoli Support Affirm., ¶ 3. As of the filing of BANA's motion, plaintiff was current in his payments, and there was no pending foreclosure proceeding on this mortgage. *Id.*, ¶ 5.

BANA attaches its request for documents, dated June 29, 2012, and plaintiff's response, dated September 17, 2012. *Id.*, Exhibits 3 and 4. Plaintiff submitted only a copy of a Department of Justice press release, dated after commencement of the instant action, as the

evidence of BANA's purported predatory lending practices, fraudulent loan modification program, and intention to not grant loan modifications, as well as the futility of plaintiff submitting a loan modification application. Plaintiff answered almost every other request by BANA for documentation regarding the Complaint's causes of action with the assertion that "the information requested is not in Plaintiff's possession, custody or control."

In turn, BANA responded to plaintiff's discovery demands, dated September 17, 2012, by filing the instant summary judgment motion. Plaintiff, in opposition to the motion and in support of his cross motion, asks for additional time to conduct discovery

> "to be able to prove that BANA is not the owner of the Note and Mortgage, . . . to prove that BANA has been engaged in loan modification fraud, . . . to prove that such activities by BANA [as selling real estate interests at inflated prices] entitle the Plaintiff to a decrease in the monthly amount he is paying BANA, . . . [and] to obtain evidence showing that the activities of Countrywide in providing the terms of note and mortgage for the financing transaction were unsuitable for the Plaintiff and should not have been given."

Person Affirm., ¶¶ 13-16 (Mot. Seq. 002).

Plaintiff states that he needs this information because "Defendants have a history of denying reasonable loan modification applications merely because they can, . . . BANA generally does not review loan applications with any objective standards . . . [and] to enable me to try to avoid litigation by direct dealing with the owner of the Note and Mortgage." Chomicki Aff., ¶ 2 (Mot. Seq. 002). Plaintiff acknowledges the June 5, 2008 loan modification for the first time in his affidavit, but describes it as "provid[ing] only temporary relief." *Id.*, ¶ 9. That transaction lowered his monthly payment on the BANA mortgage to $10,808.40 from $15,460.14, a 30% reduction. He claims that he cannot afford even this adjusted amount, and asserts that, in spite of BANA's previous willingness to negotiate with him, "it has become known that BANA was only pretending to consider loan applications and required a homeowner to be in default before BANA would even permit and application." *Id.*

Plaintiff throughout claims that he "never had the financial capability of handling a monthly payment of this magnitude and this was known to Countrywide at the time the loan was

made" (Memorandum of Law in Support of Cross Motion at 15), putting him in "the predictable position of not being able to make the monthly payments" (Complaint, ¶ 37). Plaintiff's posture of not recognizing the financial burden he was assuming in 2005, in the face of the knowledge and predictability he attributes to his lender, is belied by his record in real estate transactions, which he fails to acknowledge. BANA claims that "Plaintiff entered into no less than fifteen (15) mortgages prior to the mortgage at issue in this action," and attaches documents pertaining to each. Andreoli Affirm. in Further Support, ¶ 10 and Exhibit 3 (Mot. Seq. 002). These transactions include a $115,000 loan dated April 7, 1995, a $160,000 loan dated March 6, 1998, a $330,000 loan dated September 12, 2003, and a $767,000 loan dated November 10, 2003.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). BANA's motion for summary judgment shall be granted and plaintiff's cross motion for a continuance and time for limited discovery shall be denied, because plaintiff offers no facts to accompany the Complaint's allegations. Plaintiff alleges that "Defendants have a history," "BANA does not generally," and "it has become known that BANA was only pretending," without offering one name, date, place or transaction in support. Ironically, the only undisputed facts here are BANA's reduction of his monthly loan payment by 30%, and plaintiff's extensive record of real estate transactions and financing. Plaintiff never asserts that he made a more recent effort to modify his debt service, rather he relies on his pessimistic imaginings to claim the futility of any such approach. Adding to the confusion is plaintiff's unwillingness to accept BANA as the owner of his mortgage and note, in spite of its avowal of ownership, when it has offered him relief in the past, while he seeks a secret owner to bargain with.

Accordingly, it is

ORDERED that defendant JPMorgan Chase Bank, N.A.'s motion to dismiss the complaint, pursuant to CPLR 3211 (a) (3) and (7), is granted, and the complaint is dismissed

with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs (Mot. Seq. 001); and it is further

ORDERED that defendant Bank of America, N.A.'s motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it, is granted, and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs (Mot. Seq. 002); and it is further

ORDERED that plaintiff Robert Chomicki's cross motion for a continuance of Mot. Seq. 002, and a grant of time to conduct limited discovery, is denied; and it is further

ORDERED that plaintiff's motion for leave to file an affirmation and memorandum of law in opposition to Mot. Seq. 001, or, in the alternative, for leave to file and serve an amended complaint, pursuant to CPLR 3025 (b), is denied in its entirety (Mot. Seq. 003).

DATED: March 21, 2013

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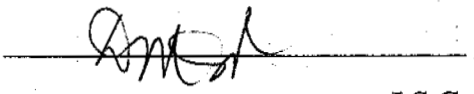

J.S.C.

DONNA M. MILLS, J.S.C.