

<b>Field v Citimorgage, Inc.</b>
2013 NY Slip Op 32505(U)
October 11, 2013
Sup Ct, NY County
Docket Number: 151912/2012
Judge: Anil C. Singh
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

PRESENT: \_\_\_\_\_  
Justice

PART 61

Index Number : 151912/2012  
FIELD, STEPHEN R.  
vs.  
CITIMORTGAGE  
SEQUENCE NUMBER : 002  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion tofor \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

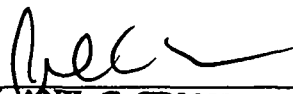
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/11/13

  
\_\_\_\_\_, J.S.C.  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

- 1. CHECK ONE: .....  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 61

-----X

STEPHEN R. FIELD,  
Plaintiff,

DECISION AND  
ORDER

-against-

Index No.  
151912/2012

CITIMORTGAGE, INC.,  
Defendant.

-----X

HON. ANIL C. SINGH, J.:

Defendant moves to dismiss the complaint pursuant to CPLR 3211, contending that it gave plaintiff proper notice required by UCC 9-611(f) and that plaintiff does not have a private right of action under the Home Affordable Modification Program (“HAMP”). Plaintiff opposes the motion.

The complaint alleges the following facts.

Plaintiff Stephen Field is the holder of the proprietary lease and co-op shares appurtenant to apartment 10B at 350 East 57<sup>th</sup> Street in Manhattan. Plaintiff obtained a mortgage from defendant Citimortgage, Inc., in December 1999, secured by the proprietary lease and shares (Complaint, p. 2, para. 6).

When plaintiff fell behind in making payments, he tried to negotiate a mortgage modification with defendant beginning in August 2011 (Complaint, p. 2, para. 9). The complaint alleges that, while defendant’s agents represented to

plaintiff that defendant would not commence any foreclosure proceeding during the pendency of his request for a mortgage modification, defendant gave plaintiff a notice of foreclosure sale on February 10, 2012, and scheduled a public auction for April 23, 2012 (Complaint, p. 3, paras. 14-15).

The complaint alleges that defendant did not fully consider plaintiff's request for mortgage modification in good faith, and that defendant's actions were "aimed at unscrupulously lulling plaintiff into a false sense of security while it sought to illegally foreclose" on the co-op. Plaintiff contends that defendant should be enjoined from proceeding with any foreclosure sale "by virtue of defendant's unconscionable conduct" and because it violated the CitiMortgage National Settlement Agreement and rules set forth in HAMP's Make Home Affordable handbook.

The complaint asserts eight causes of action. The first cause of action seeks an injunction against the foreclosure sale. The second cause of action seeks a judgment declaring that the mortgage and note are null, void and unenforceable. The third cause of action alleges breach of contract. The fourth cause of action sounding in misrepresentation alleges that defendant knew, or should have known, that the statements made to plaintiff regarding its forbearance from filing a foreclosure action during its consideration of the request for mortgage modification

were false. The fifth and sixth causes of action allege promissory and equitable estoppel. The seventh cause of action alleges breach of the duty of good faith and fair dealing. The eighth cause of action alleges that defendant does not have a valid interest in the shares of plaintiff's co-op pursuant to section 201 of the Lien Law.

#### Discussion

“On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory” (VisionChina Media Inc. v. Shareholder Representative Services, LLC, 109 A.D.3d 49, 55 [1<sup>st</sup> Dept., 2013]) (internal citation omitted). “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 (VisionChina, 109 A.D.3d at 56 (internal citation and quotation marks omitted)).

The first cause of action for injunctive relief alleges that defendant failed to serve notice required by UCC 9-611. Specifically, plaintiff contends that the notice provided to plaintiff did not comply with UCC 9-611's requirements in terms of timing; type size, font and boldface; the information provided; and the required paper color.

The Supreme Court has the authority to stay the sale of a co-op apartment based on a default in paying a home equity loan secured by co-op shares where the mortgagee's notice of foreclosure sale is defective (See, for example, Stern-Obstfeld v. Bank of America, 30 Misc.3d 901 [Sup. Ct., N.Y. Cty., 2011]). Likewise, the Supreme Court has the authority to stay a scheduled foreclosure sale while the mortgagor's loan modification application is pending (79 N.Y.Jur.2d Mortgages section 705, citing Aames Funding Corporation v. Houston, 85 A.D.3d 1070 [2d Dept., 2011]). Nevertheless, HAMP does not provide a private right of action to a homeowner (Stern-Obstfeld, *supra.*).

Defendant exhibits the sworn affidavit of Jennifer Sherman, who states that she is a business operations manager employed by defendant. A copy of a UCC 9-611(f) 90-day notice is attached to the affidavit as exhibit J. Ms. Sherman asserts that defendant sent the notice to plaintiff by certified mail on November 11, 2011. According to Ms. Sherman, the original 90-day notice was sent on yellow paper. She contends that defendant's computer system cannot make color copies.

"Under the general provisions of the N.Y.U.C.C., the requirement of giving notice and sending notice is satisfied even though the notice was not actually received, as long as reasonable steps were taken to notify the other party" (107 N.Y.Jur.2d Uniform Commercial Code section 37 (internal citations omitted)).

Here, based on this documentary evidence as corroborated by the affidavit, the Court finds that plaintiff's first cause of action seeking injunctive relief must be dismissed.

Even if the Court were to assume for the sake of argument that the notice was somehow defective, the first cause of action must be dismissed nonetheless. As noted above, HAMP does not provide a private right of action. Nor is there any evidence or legal authority demonstrating that the CitiMortgage National Settlement Agreement was intended to create a private right of action.

The second cause of action seeks a judgment declaring that the mortgage and note are null, void and unenforceable. The complaint asserts that defendant has not demonstrated that it is in possession of any promissory note; that defendant never demonstrated that it has the legal right to foreclose on the purported promissory note; that an unnamed third-party investor holds the note; and that plaintiff is "a victim of the defendant's blatant disregard of procedures designed to protect the plaintiff's rights" (Complaint, pp. 8-9, paras. 43-46).

"Although the test to be applied to the sufficiency of pleadings is whether, upon examination of the four corners of the pleading, the factual allegations contained therein indicate the existence of a cause of action, a complaint which is based solely on conclusory statements unsupported by factual allegations is

insufficient” (84 N.Y.Jur.2d Pleading section 20). “Allegations which set forth legal conclusions without supporting factual allegations will be disregarded in determining the sufficiency of a cause of action or defense even though upon a motion to dismiss for insufficiency, the facts stated in the pleading attacked are deemed admitted” (Id.).

Here, the second cause of action overflows with conclusory statements. For example, the pleading states that “[t]he defendant’s wayward conduct and abuses undertaken by it in the foreclosure arena have well [sic.] publicized, including those reported by the Office of Inspector General, U.S. Department of Housing and Urban Development, in its report entitled CitiMortgage, Inc. Foreclosure and Claims Process Review O’Fallon, MO dated March 12, 2012... (Complaint, p. 9, para. 26).

In light of such conclusory allegations, the Court finds that the second cause of action is clearly insufficient.

The third cause of action for breach of contract alleges that the parties entered into a “mortgage agreement” and that defendant breached its obligations under “such agreement” by imposing unauthorized expenses and charges (Complaint, pp. 9-10, paras. 48-49).

The third cause of action is nothing but a bare legal conclusion. The complaint gives no detail whatsoever as to the nature, type, or amount of the alleged



unauthorized expenses and charges. As such, the third cause of action is insufficient.

The fourth cause of action alleges misrepresentation.

The essential elements of a cause of action for fraud and deceit based on misrepresentation are a representation of a material fact, falsity, scienter, reliance, and injury or damage (60A N.Y.Jur.2d Fraud and Deceit section 14). “If any of these elements is lacking, there is no actionable fraud” (Id.). A cause of action for fraudulent misrepresentation must be pled with specificity (767 Third Ave. LLC v. Greble & Finger, LLP, 8 A.D.3d 75 [1<sup>st</sup> Dept., 2004]).

The complaint in the instant action alleges that statements made regarding the mortgage modification under HAMP, defendant’s forbearance from foreclosing, and the availability of an appeal process under HAMP were false. However, the complaint fails to describe any specific statements or communications that reflect an intent on defendant’s part to knowingly mislead the plaintiff. The mere fact that defendant invited plaintiff to apply for a mortgage modification is not, without more, an actionable factual representation. Accordingly, the Court finds that the complaint fails to sufficiently plead the element of scienter.

The fifth and sixth causes of action allege promissory and equitable estoppel.

“The elements of a claim for promissory estoppel are: (1) a promise that is

sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused” (MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 841 [1<sup>st</sup> Dept., 2011]). “[E]quitable estoppel involves a misrepresentation of an existing fact while promissory estoppel concerns a statement of intention regarding future conduct” (57 N.Y.Jur.2d Estoppel, Etc. section 51).

Here, the complaint alleges that plaintiff relied on defendant’s promises to his detriment by accepting defendant’s invitation to file a request for a mortgage modification under HAMP “which the defendant had no intention of honoring, despite the plaintiff’s eligibility for the same or other mortgage relief” (Complaint, p. 11, para. 57).

The Court notes that plaintiff continued to occupy the co-op while the defendant reviewed plaintiff’s modification application. In this important respect, plaintiff actually benefitted from defendant’s promises, for the negotiations allowed him to remain in the premises despite the undisputed fact that he was in default. Accordingly, plaintiff’s complaint fails to allege an injury, which is an indispensable element of the causes of action.

The seventh cause of action alleges that defendant breached the duty of good faith and fair dealing. Specifically, the complaint alleges that defendant’s actions

“had no legitimate purpose, are unreasonable, and are aimed solely at depriving the plaintiff of his lawful entitlements” (Complaint, p. 12, para. 67).

As we noted above, plaintiff’s allegations of bad faith are not supported by any specific factual statements or communications. Such allegations are completely conclusory. Accordingly, we find that the complaint fails to state a cause of action for breach of the duty of good faith and fair dealing.

The complaint’s final cause of action alleges that the defendant does not have a valid interest in the co-op shares under Lien Law 201.

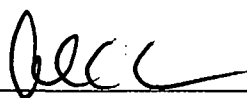
It is well settled that shares in a cooperative apartment are personal property, rather than real property, and UCC Article 9 controls security interest in the shares (see, for example, Fundex Capital Corp. v. Reichard, 172 A.D.2d 420 [1<sup>st</sup> Dept., 1991]). “Notice that is in conformity with Article 9 is sufficient; notice need not comply with the requirements of the Lien Law” (96 N.Y.Jur.2d Secured Transactions section 341).

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted in its entirety.

The foregoing constitutes the decision and order of the court.

Date: 10/11/13  
New York, New York

  
Anil C. Singh  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**