STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR BCAP TRUST LLC 2007-AA4,
Plaintiff,

-against-

THOMAS LEE HARRIS A/K/A THOMAS L. HARRIS A/K/A THOMAS HARRIS, NEW YORK STATE AFFORDABLE HOUSING CORPORATION, ALBANY COMMUNITY DEVELOPMENT AGENCY, PEOPLE OF THE STATE OF NEW YORK, VANESSA HARRIS and JOHN DOE,
Defendants.

DECISION AND ORDER

(Supreme Court, Albany County, Motion Term, October 28, 2016)
Index No. 900159/2016
(RJI No. 01-16-120517)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Woods Aviate Gilman, LLP
Attorneys for Plaintiff
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The Legal Project
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MELKONIAN, J.:

Defendant Thomas Lee Harris ("defendant") moves pursuant to CPLR §§ 3025 and 3120, for leave to serve an Amended Answer and Counterclaims in the form annexed as Exhibit A to his motion. Plaintiff opposes.

Plaintiff commenced this action on February 1, 2016 to foreclose a mortgage encumbering the real property known as 72 First Street, Albany, New York 12210 given by defendant to Chevy Chase Bank, F.S.B. (plaintiff's "predecessor"), as security for the payment of a note executed and delivered by defendant, evidencing an obligation in the principal amount of $144,000.00 plus interest. In the complaint, plaintiff alleges it is the owner and holder of the note and mortgage by assignment dated December 31, 2014, defendant defaulted under the note and mortgage by nonpayment of monthly installment of principal and interest on July 1, 2015, and it elected to accelerate the entire mortgage debt.

Issue was joined by service of defendant's answer dated March 11, 2016. By his answer, defendant generally denied all of the allegations in the complaint, and asserted thirteen (13) affirmative defenses /seven (7) counterclaims.[1] In response, plaintiff served a

[1]In defendant's answer, he asserted affirmative defenses based on (1) lack of standing; (2) plaintiff failed to comply with NY RPAPL; (3) plaintiff failed to comply with conditions precedent; (4) plaintiff failed to mitigate damages; (5) unclean hands; (6) plaintiff violated the Real Estate Settlement procedures Act Early Intervention and Pre-Foreclosure Review Requirements; (7) plaintiff failed to state a cause of action; (8) certificate of merit requirements; (9) unjust enrichment; (10) breach of contract; (11) plaintiff breached the implied covenant of good faith and fair dealing; (12) conversion and failure to properly credit payments; and (13) plaintiff violated the Federal Fair Debt Collections Practices Act. Defendant also asserted seven (7) counterclaims, the first

reply answer on or about March 23, 2016.

Defendant states that his motion for leave to amend his answer to include certain other defenses not previously interposed, e.g., (1) unconscionability; (2) unilateral mistake; (3) violation of New York General Business Law § 349; (4) plaintiff failed to comply with the provisions of the Truth in Lending Act, 15 USC § 1601 et seq. ("TILA"); (5) fraud; (6) negligent misrepresentation on the part of plaintiff; and (7) promissory estoppel. Defendants also seek to interpose six (6) additional counterclaims based on an alleged violation of the New York General Business Law § 349, an alleged violation of TILA, fraud, negligent misrepresentation, promissory estoppel, and equitable modification. Defendant argues that his motion should be granted because his defenses and counterclaims are "meritorious." In the proposed amended answer, defendant alleges, among other things, that when he received his loan, plaintiff's predecessor misled him into believing he was receiving a fixed rate loan, rather than an adjustable rate loan.

In opposition to the instant motion, plaintiff contends that defendant's motion should be denied because his proposed additional affirmative defenses and/or counterclaims are not meritorious and also because he has not provided a reasonable excuse for his delay in failing to file and amended answer as of right within the allotted time period under the CPLR.

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based on unjust enrichment, the second based on breach of contract, the third based on breach of the implied covenant of good faith and fair dealing, the fourth based on conversion and failure to properly credit payments, the fifth based on violation of the Federal Fair Debt Collections Practices Act, the sixth based on declaratory judgment, and the seventh based on attorney fees under Real Property Law § 282.

It is well settled that leave to amend pleadings shall be freely given in the absence of prejudice to the opponent, unless the proposed amendment is palpably insufficient as a matter of law, or is totally devoid of merit (see, CPLR § 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]; McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 [1983]). The Court also should consider how long the amending party was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered (Murray-Gardner Management Inc. v Iroquois Gas Transmission System L.P., 251 AD2d 954 [3rd Dept. 1998]).

Defendant's motion must be denied inasmuch as the affirmative defenses set forth in the defendant's proposed amended answer and the counterclaims asserted therein are unmeritorious (see, generally, Blueberry Investors Co. v Ilana Realty Inc., 184 AD2d 906 [3rd Dept. 1992]).

As a proposed ninth affirmative defense, defendant claims that the subject mortgage loan was unconscionable inasmuch as there was a great disparity in bargaining power between him and plaintiff's predecessor. First, this claim is untimely based on the six-year limitations period under CPLR § 213 (Heritage v Mance, 265 AD2d 657, 659 [3rd Dept. 1999]). Second, unconscionability is generally not a defense (Emigrant Mtge. Co, Inc. v Fitzpatrick, 95 AD3d 169, 945 NYS2d 697 [2d Dept 2012]). Here, defendant has failed to show an absence of meaningful choice on his part (see, Matter of State of New York v Avco Fin. Serv. of N.Y., 50 NY2d 383, 389 [1980]; Baron Associates, LLC v Garcia Group

Enterprises, Inc., 96 AD3d 793 [2nd Dept. 2012]). Defendant also has failed to demonstrate the terms of the mortgage and note were unconscionable, or that plaintiff's predecessor acted unconscionably in the transaction (see, Zuckerman v City of New York, 49 NY2d 557, 562; Argent Mtge. Co., LLC v Mentesana, 79 AD3d 1079, 1081 [2nd Dept. 2010]; Quest Commercial, LLC v Rovner, 35 AD3d 576, 577 [2nd Dept. 2006]). Accordingly, defendant's motion to amend his answer to assert an affirmative defense based upon unconscionability is denied.

In his proposed ninth (sic) affirmative defense, defendant asserts a claim for "unilateral mistake" in that there was no mutual understanding of the terms of the loan contract, and, as a result, plaintiff should not be allowed to enforce it.

As a general rule, the signer of a written agreement is deemed to be conclusively bound by its terms, in the absence of a showing of fraud, duress or some other wrongful act by a party to the contract (see, Pimpinello v Swift & Co., 253 NY 159 [1930]; Columbus Trust Co. v Campolo, 110 AD2d 616 [1985]). Here, defendant admittedly signed documents for an adjustable rate mortgage. To the extent defendant signed the mortgage application at the closing, without reading it, and thus was unaware the application was for an adjustable rate mortgage rather than a fixed rate mortgage, he risked that plaintiff would be induced to give him a loan with terms he could not afford. Defendant makes no claim that he requested and was refused an opportunity to read the papers, consult with an attorney or someone else, have the documents explained to him, or adjourn the closing. Defendant is therefore bound

by the terms of the instrument he signed (see, Pimpinello v Swift & Co., 253 NY 159 [1930]).

That branch of defendant's motion which is to amend his answer to interpose an affirmative defense alleging that plaintiff's predecessor engaged in deceptive business practices in violation of General Business Law § 349 is denied inasmuch as a claimed violation of General Business Law § 349 and claimed deceptive business practices do not constitute affirmative defenses to a foreclosure action (see, La Salle Bank Nat. Assn. v Kosarovich, 31 AD3d 904 [3rd Dept. 2006]). Furthermore, claimed violations of General Business Law § 349 does not generally give rise to claims against a lender (Baron Assoc., LLC v Garcia Group Enters., 96 AD3d 793 [2nd Dept. 2012]). To assert a viable claim under General Business Law § 349(a), a party must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages (Emigrant Mortg. Co., Inc. v Fitzpatrick, 95 AD3d 1169 [2nd Dept. 2012]). Insofar as defendant asserts he was fraudulently induced to enter into the mortgage transaction by plaintiff's predecessor, this conduct does not "amount to conduct affecting the consuming public at large" and "is outside the ambit of [the] statute" (Brooks v Key Trust Co. Nat. Assn., 26 AD3d 628 [3rd Dept. 2006]).

Notwithstanding, the loan instruments submitted by the plaintiff in opposition to defendant's motion demonstrate that the terms of the same were fully set forth in the loan documents.

Accordingly, that branch of defendant's motion to amend his answer to assert a counterclaim alleging violations of General Business Law § 349 is also denied.

In his sixteenth affirmative defense and seventh counterclaim asserting violations of the Truth-in-Lending Act, plaintiff submitted proof that defendant executed a TILA statement on March 2, 2007, the closing date for the loan, and, in any event, the counterclaim alleging such a violation is time-barred (15 USC § 1640 [e]).

To the degree the proposed eighth counterclaim is based upon fraud, it is untimely (see, CPLR § 213[8]). Notwithstanding, the loan instruments submitted by plaintiff in opposition to defendant's motion, which included, among other things, the adjustable rate note, mortgage, and adjustable rate rider demonstrate that the terms of the same were fully set forth in the loan documents. To the extent the seventeenth affirmative defense and eighth counterclaim is based upon fraudulent inducement, defendant makes no allegation that plaintiff's predecessor made any misrepresentations regarding the loan terms even at the closing – just that the representative remained silent when defendant to his wife remarked how glad he was that he had received a fixed rate loan. The loan documents sufficiently disclosed the terms of the loan, and defendant, who admittedly failed to read the documents prior to signing them, makes no claim that plaintiff falsified the loan application, or the loan documents.

To the degree defendant moves to assert an affirmative defense or proposed counterclaim based upon negligent misrepresentation, the affirmative defense or proposed

counterclaim is defective. The relationship between plaintiff and defendant is a contractual one, and a claim upon a negligently performed contract does not state a claim in the absence of a breach of a fiduciary duty. Defendant has failed to allege or demonstrate any special or fiduciary relationship existed between he and plaintiff to support a claim based upon negligent misrepresentation (see, Fresh Direct, LLC v Blue Martini Software, Inc., 7 AD3d 487 [2004]). Thus, that branch of defendant's motion for leave to amend his answer to assert an affirmative defense or counterclaim based upon negligent misrepresentation is denied.

The eighteenth affirmative defense and tenth counterclaim asserted by defendant are based upon promissory estoppel. The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise (Fleet Bank v Pine Knoll Corp., 290 AD2d 792 [3rd Dept. 2002]). Here, defendant alleges that he "received a promise that he had been 'approved' when he requested a fixed rate loan." Inasmuch as the loan documents establish that defendant applied for and received an adjustable rate mortgage, this proposed affirmative defense/counterclaim fails (Naugatuck Sav. Bank v Gross, 214 AD2d 549 [2nd Dept. 1995] [unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense]). Accordingly, that branch of defendant's motion to amend his answer to assert an affirmative defense and counterclaim based upon promissory estoppel is denied.

As to the eleventh counterclaim for equitable modification, defendant has pointed to

no provision in the loan documents that require plaintiff to modify his loan. Moreover, the documents submitted by plaintiff in opposition to defendant's motion demonstrate that plaintiff did review defendant for a modification option during the settlement conferences part, which ultimately resulted in a denial due to unaffordability.

Accordingly, defendant's motion for leave to amend his answer is denied.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the plaintiff. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
January 23, 2017

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

2-14-17

Papers Considered:

(1) Notice of Motion dated August 30, 2016;
(2) Affirmation of Michelle F. Lee, Esq., dated August 30, 2013, with exhibits annexed;
(3) Affidavit of Thomas Harris dated August 26, 2016;
(4) Memorandum of Law dated August 30, 2016;
(5) Affirmation of Tammy L. Garcia-Klipfel, Esq., dated October 21, 2016, with exhibits annexed.