

**Mastan v Wells Fargo Home Inc.**

2020 NY Slip Op 32456(U)

July 24, 2020

Supreme Court, New York County

Docket Number: 155674/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

*Justice*

-----X

ALINA MASTAN,

Plaintiff,

- against -

WELLS FARGO HOME INC., and  
WELLS FARGO BANK, N.A.,

Defendant.

-----X

|                                   |             |
|-----------------------------------|-------------|
| INDEX NO.                         | 155674/2019 |
| MOTION DATE                       | 2/10/2020   |
| MOTION SEQ. NO.                   | 002         |
| <b>DECISION + ORDER ON MOTION</b> |             |

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16 were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover mortgage payments that were allegedly overpaid to the defendant Wells Fargo Home Inc. (“Wells Fargo”), plaintiff Alina Mastan (“Plaintiff”) moves pursuant to CPLR 3215 and 5229, directing the entry of a default judgment. Wells Fargo submits no opposition. The motion is granted as to liability on the breach of contract claim, and denied as to the remainder.

**BACKGROUND**

On June 6, 2019, Plaintiff commenced this action by filing a summons and notice against Wells Fargo and defendant Wells Fargo Bank, N.A., notifying them of an action grounded in “Fraud, Mistake, GBL 349 Deceptive Practices Act, Conversion, Breach of Contract and Unjust Enrichment” (NYSCEF Doc. No. 1 at 1). The summons and notice further stated that Plaintiff is seeking money damages, with an exact amount to be determined at trial. Wells Fargo was served on June 12, 2019, through the Secretary of State of the State of New York, in accordance with Business Corporation Law § 306 (b).

By notice of motion dated July 30, 2019 (motion sequence 001), Plaintiff moved for an entry of default judgment against Wells Fargo, on the basis that Wells Fargo did not file an answer or move with respect to the summons. Plaintiff's counsel also mailed Wells Fargo the notice of motion and supporting affirmation with exhibits, in accordance with CPLR 3215 (g). This court denied the motion, by order dated December 9, 2019, because Plaintiff failed to demonstrate proof of the facts constituting the claims by submitting an affidavit of a person with knowledge of a verified complaint in support of its motion (NYSCEF Doc. No. 11 at 1).

By this motion, Plaintiff again moves for a default judgment against Wells Fargo. In support of the motion, Plaintiff provides the initially submitted documents along with an affidavit of merit. According to the affidavit, in 2009, Plaintiff refinanced her apartment by virtue of a mortgage loan in the amount of \$300,000. Plaintiff alleges, *inter alia*, the following:

“Over the course of years of timely payments on the loan, I consistently paid additional principal toward the loan over my monthly obligation. Upon information and belief, defendant carried the improper additional principal amount on the loan, causing me to pay on a false principal amount over these many years. As I discovered, defendant misrepresented the loan amount since the payoff to defendant at the time of this refinancing was accurately \$283,797.22 instead of the approved \$302,000. Recently, I tracked down the person at defendant who handled the transaction, a Noreen Donovan. Ms. Donovan acknowledged to plaintiff the improper accounting of my payments and stated that the loan amount could not be adjusted downwards.”

(NYSCEF Doc. No. 14, Mastan aff, ¶¶ 4, 5).

Plaintiff asserts that the loan should have been paid off at the beginning of 2019, rather than in June 2019. While disputing the validity of her loan payments, Plaintiff nonetheless continued to make payments on the loan in order to protect her credit history. According to Plaintiff, she attempted to contact Wells Fargo on numerous occasions to resolve the “improper inflation of [the] mortgage loan,” but representatives refused to assist Plaintiff in person or over the phone (*id.* ¶ 6). Plaintiff further attests that she “experienced a policy of intimidation and

outright bullying during numerous [] communications with defendant’s representatives,” and that “[f]inally, when I reached a Resolution Specialist, Debbie Bender, in March 2019, I was told there was no resolution of this acknowledged error” (*id.* ¶ 7-8). Plaintiff alleges that she was forced to resort to litigation after Wells Fargo would not respond. Plaintiff summarizes that, “defendants are in default of pleading and no extension to answer has been sought or granted. As such, I must request an Inquest to explain my damages” (*id.* ¶ 11).

## DISCUSSION

### **I. Default Judgment**

A plaintiff that seeks entry of a default judgment for a defendant’s failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant’s default (CPLR 3215[a], [f]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]). Plaintiff has satisfied these requirements.

As set forth in the affidavit of merit, Plaintiff asserts claims for breach of contract and fraud for “the improper withholding of funds after a home refinancing” (Mastan aff, ¶ 2). The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance

of the contract by the injured party; (3) breach by the other party; and (4) resulting damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). On this motion, Plaintiff met her burden to establish Wells Fargo's liability for breaching the loan agreement by providing proof that Wells Fargo was properly served, proof of the default, and an affidavit of facts constituting the claim. That facts set forth in Plaintiff's affidavit adequately allege the requisite elements of a breach of contract claim and attest that Wells Fargo employees conceded that Plaintiff had overpaid and acknowledged the improper accounting of her payments. Nevertheless, Wells Fargo has not refunded any overpayments.

Although it is well settled that, while a defaulting defendant admits "the basic allegation of liability, [it] does not admit the plaintiff's conclusion as to damages" (*Rokina Opt. Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]). Thus, plaintiff's request for a damages inquest will be referred to a Special Referee, where plaintiff will be "required to prove the actual damages sustained" (*Paulson v Kotsilimbas*, 124 AD2d 513, 514 [1st Dept 1986]). "Where there has been a default in appearing or answering, or summary judgment has been granted on the issue of liability and an inquest directed, it is still necessary to present proof of damages." *Id.*

Plaintiff also asserts a claim for fraud, based on the allegation that Wells Fargo misrepresented the loan amount, causing her to pay on a false principal amount over many years. However, as the fraud claim is duplicative of the breach contract claim, plaintiff has not met her burden on this motion to establish a default judgment against Wells Fargo (*see e.g. Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 64 [1st Dept 2017] [Fraud claim is duplicative of claim for breach of contract where the only fraud alleged is defendant's unkept promise to perform certain of its preexisting obligations under the parties' contract and plaintiff seeks the same damages as are sought under the rubric of the claim for breach of contract]).

Accordingly, it is

ORDERED that plaintiff Alina Mastan’s motion for a default judgment against defendant Wells Fargo Home Inc. is granted as to liability on the breach of contract claim, and is otherwise denied; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court, or, if all appearing parties consent, to hear and determine, on the issue of the damages, including attorneys’ fees, caused to plaintiff by the breach of contract by defendant Wells Fargo Home Inc. which are hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on

the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on all parties within ten days.

*Louis L. Nock*

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|--------------------------|-------------------------------------|----------------------------|--------------------------|--------------------------|------------------------------|
| <u>7/24/2020</u><br>DATE |                                     |                            |                          |                          | <u>LOUIS L. NOCK, J.S.C.</u> |
| CHECK ONE:               | <input checked="" type="checkbox"/> | CASE DISPOSED              |                          | <input type="checkbox"/> | NON-FINAL DISPOSITION        |
|                          | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/> | <input type="checkbox"/> | GRANTED IN PART              |
| APPLICATION:             | <input type="checkbox"/>            | SETTLE ORDER               |                          | <input type="checkbox"/> | OTHER                        |
| CHECK IF APPROPRIATE:    | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN |                          | <input type="checkbox"/> | REFERENCE                    |