

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES

IA PART \_\_\_\_\_

\_\_\_\_\_  
A&A WORLD REALTY INC., NOOSHIN  
SADIGH and KOUROSH SADIGH

Index No. 15095/12  
Motion Date: 11/7/12  
Motion Cal. No. 1  
Motion Seq. No. 1

Plaintiffs,

- against -

EMIGRANT FUNDING CORPORATION

Defendant.

\_\_\_\_\_  
X

The following papers numbered 1 to 7 read on this motion by defendant Emigrant Funding Corporation for an order dismissing the complaint on the grounds of documentary evidence, statute of frauds, statute of limitations, release, and failure to state a cause of action, pursuant to CPLR 3211(a)(1) (5) and (7), and 3016(b).

Papers  
Numbered

Notice of Motion -Affirmation-Exhibits-Affidavit of Service.....	1-4
Opposing Affirmation-Exhibits-Affidavit of Service.....	5-7
Memorandum of Law.....	
Opposing Memorandum of Law.....	
Reply Memorandum of Law.....	

Upon the foregoing papers this motion is determined as follows:

Plaintiffs A & A World Realty, Inc., a corporation, and its principals Nooshin Sadigh and Kourosch Sadigh entered into a mortgage loan agreement with defendant Emigrant Funding Corporation (Emigrant) on August 13, 2003, whereby they borrowed from Emigrant \$1,600,000.00 for a term of five years, with interest at the rate of 6% per annum. The loan had a maturity date of August 12, 2008, at which time the borrowers were obligated to pay the full balance due and owing under an amended and restated note. Said loan was secured

by a mortgage on mixed use commercial property located in Kew Gardens, New York, and residential property located in Great Neck, New York. The note provided for an option for extension, which allowed for 4 extension periods; required the borrowers to provide the lender with written notice of their election to exercise the extension not more than 90 days or less than 60 days prior to the maturity date of the note; and set forth terms of interest and monthly payments during the extension period.

On August 6, 2008, Nooshin Sadigh sent Emigrant a letter by facsimile requesting a final payoff, so that the borrowers could finalize a new loan with another lender; requested a two month extension of the loan at the same rate, without any additional charges; and stated that he wanted to have the loan with Emigrant but that “you do not provide a 15 year principal and interest type of loan.”

Emigrant in a letter dated August 6, 2008, that was sent by facsimile on said date, informed Mr. Sadigh that the loan would mature on August 12, 2008, and if it was not paid in full on that date, Emigrant would assess the maximum default interest permitted bylaw, pursuant to term of the parties’ agreements. Emigrant further stated that the loan could only be extended pursuant to the terms of the note, and could not be extended for another two months under the existing interest rate and terms, as Mr. Sadigh requested.

Plaintiffs did not pay the balance of the loan on the maturity date of August 12, 2008, and as the loan was in default Emigrant applied the default interest rate of 24%. Emigrant sent letters to the borrowers dated September 17, 2008, October 17, 2008, and November 17, 2008, advising that the loan was in default and that the default rate of interest of 24% was imposed. On January 9, 2009, plaintiffs paid the balance of the loan, together with the default rate of interest in the sum of \$1, 519, 638.61. Plaintiffs executed a general release in exchange for Emigrant waiving an assignment fee of \$10,000.00 for the assignment of the loan encumbering real property known as 80-46 Kew Gardens Road, Kew Gardens, New York. The General Release provides that in exchange for the waiver of the assignment fee, A & A World Realty Inc., Nooshin Sadigh and Kourosh Sadigh released Emigrant “from any and all claims, damages, loses, liabilities, costs and expenses, including without limitation, legal fees and disbursements, suffered or incurred by the Borrower or Guarantor in connection with Emigrant Funding Loan #440565-0.” The General Release was executed by A & A World Realty Inc., Nooshin Sadigh, and Kourosh Sadigh, who wrote the words “signed under protest” beneath their signatures.

Plaintiffs commenced the within action on July 20, 2012, and allege that prior to the maturity of the note, they “initiated negotiations with defendant for a new loan to satisfy their existing loan,” and that “[d]uring said negotiations, the Defendants[sic] intentionally mislead Plaintiffs; misrepresented facts; and employed stall/delay tactics, in order to bring Plaintiffs’

loan to maturity and impose the default interest rate of 24%.” Plaintiffs’ first cause of action for unjust enrichment seeks to recover the sum of \$135,397.81 they paid as default interest at the time they satisfied the loan on January 9, 2009. Plaintiffs allege that “Defendant intentionally misled the Plaintiffs in order to impose the Default Interest” and that the default interest rate was usurious. The second cause of action for conversion seeks to recover the sum of \$135,397.81 paid by plaintiffs as default interest at the time they satisfied the loan on January 9, 2009. Defendant’s and the third and fourth causes of action allege fraud and fraudulent inducement with respect to the imposition of the default interest. The fifth cause of action asserts a claim is for punitive damages.

Defendant Emigrant now seeks to dismiss the complaint on the grounds of documentary evidence, statute of frauds, release, statute of limitation, and failure to state a cause of action, pursuant to CPLR 3211(a)(1), (4), (7) and CPLR 3016.

It is well established that “on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction (see CPLR 3026), ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994 ] ; see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007 ] ). In opposing a motion pursuant to CPLR 3211(a)(7), a plaintiff may submit affidavits for “a limited purpose only, . . . to remedy defects in the complaint” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976 ] ; see *Sokol v Leader*, 74 AD3d 1180, 1181 [2010]). Where a defendant has submitted evidentiary material in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) and the motion has not been converted to one for summary judgment (cf. CPLR 3211[c]), “the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ; see *Woss, LLC v. 218 Eckford, LLC*, — AD3d —, 2013 Slip Op 327, 2013 N.Y. App. Div. LEXIS 304 [2d Dept 2013]).

“A motion to dismiss pursuant to CPLR 3211 (a)(1) may be granted only where ‘the documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claims’” (*HSBC Bank USA, N.A. v Decaudin*, 49 AD3d 694, 695 [2008], quoting *Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2006]; see *Leon v Martinez*, 84 NY2d at 88; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, *supra*; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646 [2008]; *Sullivan v State of New York*, 34 AD3d 443, 445 [2006]). *Museum Trading Co. v Bantry*, 281 AD2d 524, 525 [2001]; *Nevin*

*v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

Plaintiffs' first cause of action for unjust enrichment which seeks to recover the amount paid in default interest alleges that the default rate of interest of 24% per annum is usurious and unconscionable, fails to state a cause of action. Under New York law, contractual provisions, such as the one provided here, providing for an increased interest rate on default or maturity are enforceable and do not, as plaintiffs contend, constitute usury or unconscionable conduct (*Hicki v Choice Capital Corp.*, 264 AD2d 710, 711 [2d Dept 1999]; *Miller Planning Corp. v Wells*, 253 AD2d 859 [2d Dept 1998]; *Capital One, N.A. v 174 St., LLC*, 2011 NY Slip Op 33084(U), Misc 2011 N.Y. Misc. LEXIS 5630 [Sup Ct, New York County, Nov. 28, 2011]; *Nextbridge Arc Fund, LLC v Vadodra Prop., LLC*, 31 Misc 3d 1202[A], 929 NYS2d 201, 2011 NY Slip Op 50466[U] [Sup Ct, Queens County 2011]; *Eastern Sav. Bank, FSB v Aguirre*, 30 Misc 3d 1230[A], 924 NYS2d 308, 2011 NY Slip Op 50285[U] [Sup Ct, Queens County 2011]; *Emigrant Funding Corp. v 7021 LLC*, 25 Misc 3d 1220[A], 901 NYS2d 906, 2009 NY Slip Op 52199[U] [Sup Ct, Queens County 2009]; *In re Vargas Realty Enters., Inc.*, 440 BR 224, 234 [SD NY 2010]; *In re Gas Reclamation, Inc. Sec. Litig.*, 741 F Supp 1094, 1098 [SD NY 1990]).

Furthermore, a cause of action alleging unjust enrichment is a quasi-contract claim, and therefore, is not viable where, as here, it is undisputed that the parties entered into an express loan agreement (see *Woss, LLC v 218 Eckford, LLC*, — AD3d —, 2013 Slip Op 327, 2013 N.Y. App. Div. LEXIS 304 [2d Dept 2013]); *Vescon Constr., Inc. v Gerelli Ins. Agency, Inc.*, 97 AD3d 658 [2d Dept 2012]; *Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1120 [2d Dept 2008]). Therefore, that branch of the defendant's motion which seeks to dismiss the first cause of action for unjust enrichment is granted.

Plaintiffs' second cause of action asserts a claim for conversion. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Vigilant Ins. Co. of Am. v Hous. Auth.*, 87 NY2d 36, 44-45 [1995] quoting *Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]). For Statute of Limitations purposes, an action for conversion is subject to a three-year limitation period (see CPLR 214[3]), and accrual runs from the date the conversion takes place (see *State of New York v Seventh Regiment Fund Inc.*, 98 NY2d 249 [2002]; *Sporn v MCA Records*, 58 NY2d 482, 488 [1983]) and not from discovery or the exercise of diligence to discover (see *Vigilant Ins. Co. of Am. v Hous. Auth.*, 87 NY2d at 44-45; *Varga v Credit-Suisse*, 5 AD2d 289 [1958], affirmed 5 NY2d 865[1958]; *Matter of Chung Li*, 95 AD3d 881 [2d Dept 2012]). Here, the conversion, allegedly occurred on January 9, 2009, when the plaintiffs paid the default interest. Plaintiffs' claim for conversion, thus, is barred by the

statute of limitations, as this action was commenced on July 20, 2012, more than three years after the date of the alleged conversion.

A cause of action to recover damages for fraud requires allegations of (1) a false representation of fact, (2) knowledge of the falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Stein v Doukas*, 98 AD3d 1024, 1025-1026 [2d Dept 2012]; *Pace v Raisman & Assocs., Esqs., LLP*, 95 AD3d 1185 [2d Dept 2012]). CPLR 3016 (b) requires that “the circumstances of the fraud must be stated in detail, including specific dates and items” (*Scott v Fields*, 92 AD3d 666, 668 [2012]; *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2d Dept 2010]; *Orchid Constr. Corp. v Gonzalez*, 89 AD3d 705, 707-708 [2d Dept 2011]). Here plaintiffs failed to identify the person who allegedly made the misrepresentations, failed to set forth the time or place of the alleged misrepresentation (*see Orchid Constr. Corp. v Gonzalez*, 89 AD3d at 707-708; *Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691, 692 [2d Dept 2010]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1st Dept 1994]), and failed to properly plead the elements of misrepresentation of a material fact and justifiable reliance with specificity (*see Orchid Constr. Corp. v Gonzalez*, 89 AD3d at 707-708; *Brualdi v IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960-961 [2d Dept 2010]; *Couri v Westchester Country Club*, 186 AD2d 712, 714 [2d Dept 1992]).

Plaintiffs’ may not plead the element of justifiable reliance based upon an alleged oral modification of the default or extension provisions of the note and mortgage, as such claims are barred by the Statute of Frauds (General Obligations Law §§5-701, 5-703, and 15-301). To the extent that defendant’s alleged misrepresentations were made after the parties entered into the note and mortgage, such allegations may not form the basis for the plaintiffs’ claims of fraud since the element of reliance is necessarily absent (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 957-959 [2d Dept 2011]).

Furthermore, it is well established that a cause of action alleging fraud may not be based on disappointment that a promised future benefit did not materialize (*see Satler v Merlis*, 252 AD2d 551, 552 [2d Dept 1998]; *Tutak v Tutak*, 123 AD2d 758, 760 [2d Dept 1986]). The documentary evidence submitted by plaintiffs are insufficient to supplement the complaint and do not set forth the basis for maintaining the fraud claims against Emigrant. Mr. Sadigh, in letter dated January 6, 2008, stated that the lender, sometime prior to September 2005, stated that it would work with him to obtain a new loan, at a slightly higher interest rate. Such a statement is, at most, a promise of future intent, rather than misrepresentations of existing fact made to induce action or inaction on the part of the plaintiffs.

Mr. Sadigh's letters of August 2008, written prior to and after the loan matured, as well as his letters of November 2008, are equally insufficient to state a claim for fraud or fraudulent misrepresentation. Emigrant, consistently informed the plaintiffs that the loan had matured and that they were obligated to repay the loan, together with default interest. Emigrant, in its letter of December 9, 2008, stated that the monthly payments had been made even though the loan had matured, and reminded Mr. Sadigh that he had explored an extension/refinance options with Emigrant, but that he did not enter into such an agreement as he sought to obtain more favorable terms than those offered by Emigrant. Plaintiffs' disappointment in this regard, however, does not constitute a misrepresentation of an existing fact made to induce action or inaction on the part of the plaintiffs.

The court further finds that plaintiffs' claims are barred by the General Release they executed on January 9, 2009 (see CPLR 3211[a][5]; *Hydrodyne Industries, Inc. v Marine Midland Bank, N. A.*, 118 AD2d 626 [2d Dept 1986]). To the extent that plaintiff signed the General Release, with the notation "under protest", this, at most, made the release voidable (see *Short v Keyspan Corporate Servs., LLC*, 11 Misc3d 1076A [Sup Ct, Kings County 2006]). Notably plaintiffs' in their complaint do not allege that the General Release was procured by fraud, nor do they seek to set aside the General Release. Therefore, plaintiffs' counsel's assertion that the General Release is invalid, is rejected.

Accordingly, those branches of defendant's motion which seek to dismiss the third and fourth causes of action for fraud and fraudulent inducement, are granted.

Finally, that branch of defendant's motion which seeks to dismiss the fifth cause of action for punitive damages, is granted, as New York does not recognize an independent cause of action to recover punitive damages (see *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]; *Stein v Doukas*, 98 AD3d at 1025-1026; *Ehrlich v Incorporated Vil. of Sea Cliff*, 95 AD3d 1068, 1070 [2012]).

In view of the foregoing, defendant's motion to dismiss the complaint in its entirety is granted.

Dated: March 7, 2013

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ORIN R. KITZES, J.S.C.

