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

PRESENT: WALTER B. TOLUB Justice

PART 15

Index Number : 113466/2005

SANDER, MARIE

VS

JP MORGAN CHASE

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IN ACCORDANCE WITH [illegible]

FILED

JUL 25 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/24/07

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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MARIE SANDER,

Plaintiff,

Index No.: 113466/05
DECISION/ORDER

-against-

J.P. MORGAN CHASE HOME MORTGAGE,

Defendant.

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HON. WALTER B. TOLUB, J.S.C.:

In this action for a declaratory judgment on a contract, defendant moves for summary judgment to dismiss the amended complaint (motion sequence number 004). For the following reasons, this motion is granted and the action is dismissed.

BACKGROUND

The Parties

On November 20, 2002, plaintiff Marie Sander (Sander) obtained a mortgage in the amount of $262,500.00 (the first mortgage) from non-party Greenpoint Mortgage Funding, Inc. (Greenpoint). See Notice of Motion, Bonchonsky Affirmation, ¶ 9; Exhibit C. The first mortgage was secured by Sander's house, which is located at 56 Toussaint Ave. in the City of Yonkers, County of Westchester, State of New York. Id. Greenpoint designated its nominee, non-party Mortgage Electronic Registration Systems, Inc., as the mortgagee of record on the first mortgage. Id. The first mortgage contained an "Adjustable Rate Rider" that provided that the interest payments due thereon would be 6.125% for the first five years (i.e., until December of 2007), but would thereafter be adjusted to a rate set forth on an Index contained therein. Id.

On September 27, 2004, Sander obtained an additional mortgage on her house in the

amount of $83,536.00 (the second mortgage) from non-party Great American Mortgage Corp. (Great American). Id., ¶ 11; Exhibit D. The second mortgage also contained an "Adjustable Rate Rider" that provided that the interest payments due thereon would be 6.750% for the first three years (i.e., until November of 2007), but would thereafter be adjusted to a rate set forth on an Index contained therein. Id.

Also on September 27, 2004, Sander and Great American executed a Consolidation Extension and Modification Agreement (the CEMA) to consolidate the first and second mortgages (the consolidated mortgages).[1] Id.; Exhibit E. The CEMA also contains an "Adjustable Rate Rider" that provides that the interest payments due thereon shall be 6.750% for the first three years (i.e., until November of 2007), and shall thereafter be adjusted to a rate set forth on an Index contained therein. Id., ¶ 12; Exhibit E

Sander claims that, prior to executing the second mortgage and the CEMA, she was misled as to their terms by one Samer Allen (Allen), whom she alleges was acting as an agent for Great American. Id.; Exhibit B (amended complaint), ¶¶ 3-15. Sander also alleges that Allen misled her by, inter alia: 1) using the lure of receiving a large sum of cash to induce her to execute the second mortgage; 2) failing to disclose that he was not a licensed mortgage broker; 3) misrepresenting that Great American would own and service the combined mortgages over the life of the loans; 4) failing to disclose that the terms of the second mortgage and the combined mortgages - particularly the interest payment terms - were substantially less favorable than those of the first mortgage; 5) failing to disclose that, by entering into the second mortgage and

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[1] At this point, Great American acquired the first mortgage from Greenpoint and became the lender/mortgagee of record thereon.

combined mortgages, Sander would be liquidating all of the equity in her house; and 6) improperly inducing her to pay a 2% loan origination fee in connection with the second mortgage and combined mortgages, in addition to the usual application, processing and legal fees. Id.

At some point thereafter, Fannie Mae acquired the consolidated mortgages from Great American. Id.; Reardon Affirmation, ¶ 4. In May of 2005, defendant J.P. Morgan Chase Home Mortgage (Morgan/Chase) became the loan servicer for the consolidated mortgages. Id., ¶ 3. Sander claims that, in July of 2005, Allen and two other men appeared at her house and demanded that she execute further documents and accompany them to a cash machine to withdraw money to pay them. Id.; Exhibit B (amended complaint), ¶¶ 16-18. Sander states that she refused to do so and called the police. Id. Morgan/Chase denies any knowledge of such activity, and states that Allen is not and never has been employed by it or by Fannie Mae. See Bonchonsky Reply Affirmation, ¶¶ 10-11. Morgan/Chase also states that Sander ceased making payments on the combined mortgages in September of 2005, and is now in default. See Notice of Motion, Reardon Affirmation, ¶¶ 6-7.

Prior Proceedings

Sander commenced this action on September 26, 2005 by serving and filing a pro se complaint.[2] Id.; Exhibit A. Morgan/Chase filed an answer to that complaint on October 25, 2005. Id. Sander subsequently retained counsel and filed an amended complaint on September 14, 2006. Id.; Exhibit B. The amended complaint sets forth causes of action for: 1) fraud; 2) negligence; 3) unconscionability; 4) duress; and 5) declaratory judgment. Id., ¶¶ 19-57.

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[2] Morgan/Chase correctly points out that the allegations in the original complaint are unclear and do not set forth any specific, legally recognizable causes of action.

Morgan/Chase filed an answer to the amended complaint on November 30, 2006. Id. Discovery having been completed, Morgan/Chase now moves for summary judgment to dismiss the amended complaint.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. See e.g. Andre v Pomeroy, 35 NY2d 361 (1974); Pirrelli v Long Island R.R., 226 AD2d 166 (1st Dept 1996). However, the court's reluctance to employ summary judgment "'only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'." Blechman v I.J. Peicer's and Sons, 186 AD2d 50, 51 (1st Dept 1992), quoting Andre v Pomeroy, 35 NY2d at 364. Here, Morgan/Chase argues that Sander's allegations and the available evidence do not sustain any of her causes of action. After reviewing each claim in turn, the court agrees, and finds that summary judgment dismissing the amended complaint is the appropriate remedy.

Sander's first cause of action alleges fraud in the inducement as regards the second

mortgage and the combined mortgages. See Notice of Cross Motion, Exhibit B (amended complaint), ¶¶ 19-29. The proponent of a fraud claim must demonstrate "(1) misrepresentation of a material fact; (2) scienter; (3) justifiable reliance; and (4) injury or damages." P. Chimento Co. v Banco Popular de Puerto Rico, 208 AD2d 385, 385 (1st Dept 1994), citing Gouldsbury v Dan's Supreme Supermarket, 154 AD2d 509, 510-511 (2d Dept 1989), lv denied 75 NY2d 701 (1989). Here, Morgan/Chase claims that no material facts were misrepresented. Morgan/Chase specifically notes that the amended complaint alleges that "upon information and belief, [Sander]'s prior mortgage with [Greenpoint] was at a fixed lower rate of 6.125%," and later that "[Allen] intentionally failed to divulge to the Plaintiff that the terms of the Adjustable Rate Mortgage [i.e., the combined mortgages] were substantially less favorable than her previous mortgage"; specifically, "a rate higher than her previous mortgage." See Notice of Cross Motion, Exhibit B (amended complaint), ¶¶ 9, 24, 26. Morgan/Chase then argues that no one misrepresented the type of interest terms set forth in the second or combined mortgages to Sander vis-á-vis those set forth in the first mortgage, since that instrument also had an adjustable rate and not a fixed rate as claimed in the complaint. See Notice of Motion, Bonchonsky Affirmation, ¶ 10. The documentary evidence bears out this statement, and Sander makes no claim to the contrary.[3] Id.; Exhibit C. Morgan/Chase concedes that the second and combined mortgages both provided for higher initial percentage interest payments than the first mortgage,

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[3] At this juncture, the court notes that, despite having retained counsel in this action, Sander evidently prepared the opposition papers to this motion by herself, and to very poor effect. The resulting document includes unseemly references to defendant and its counsel as "crooks," many obscure references to "conspiracies," "money laundering" and "terrorism," but no coherent legal argument whatsoever. The court admonishes plaintiff's counsel for permitting this to occur.

but argues that Sander cannot claim to have reasonably relied on any purported misrepresentation of this fact because the interest rates are plainly set forth in all of the documents that she signed. See Defendant's Memorandum of Law, at 3-4. Morgan/Chase is correct. It is well settled that a party to a contract is "under the obligation to exercise ordinary diligence to ascertain the terms of the document he signed." PNC Capital Recovery v Mechanical Parking Systems, 283 AD2d 268, 272 (1st Dept 2001), citing Marine Midland Bank, N.A. v Idar Gem Distributors, 133 AD2d 525 (4th Dept 1987). Here, the interest rate provisions of the second and combined mortgages are plainly set forth, and Sander may not reasonably claim to have believed that they were other than as stated. Therefore, the court finds that Morgan/Chase has demonstrated that there is no triable issue of fact as to either the misrepresentation or the reliance elements of Sander's fraud claim. Accordingly, the court also finds that Morgan/Chase is entitled to a summary judgment dismissing that claim.

Sander's second cause of action alleges negligence. See Notice of Cross Motion, Exhibit B (amended complaint), ¶¶ 30-37. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." Hyatt v Metro-North Commuter R.R., 16 AD3d 218 (1st Dept 2005). The amended complaint alleges that "prior to acquiring the [combined mortgages], Morgan/Chase had a duty to Ms. Sander to investigate the legitimacy of this mortgage." See Notice of Cross Motion, Exhibit B (amended complaint), ¶ 31. However, it is clear that Morgan/ Chase never "acquired" the combined mortgages, since Fannie Mae is the entity that currently owns them, while Morgan/Chase is merely the loan servicer. Id.; Reardon Affidavit, ¶¶ 4, 6. Thus, the relationship between Sander and Morgan/Chase is purely contractual. Under these circumstances, the law does not impose

any additional duties or fiduciary responsibilities on Morgan/Chase. The terms of the combined mortgages certainly do not obligate Morgan/Chase to investigate allegations of fraud; although, if they did, Morgan/Chase's failure to do so would then constitute a breach of contract, but not an act of negligence. In any event, the court finds that Morgan/Chase has demonstrated that there is no triable issue of fact as to the duty element of Sander's negligence claim. Accordingly, the court also finds that Morgan/Chase is entitled to a summary judgment dismissing that claim.

Sander's third cause of action alleges unconscionability. See Notice of Cross Motion, Exhibit B (amended complaint), ¶¶ 38-45. The amended complaint specifically alleges that the combined mortgages are unconscionable because: 1) "Sander liquidated the remaining equity in [her house] when executing [the combined mortgages] and refinanced [her house] at a significantly higher rate than her previously held mortgage"; 2) Sander "paid Great American a large origination fee of 2% in addition to application and processing fees in the amount of approximately $8,000.00"; and 3) "there was a significant inequality of bargaining power and an imbalance in the understanding and acumen of [Sander] and [Allen]." Id., ¶¶ 40-42. As the Appellate Division, First Department, has observed, "under New York law, unconscionability requires a showing that a contract is 'both procedurally and substantively unconscionable when made'." Brower v Gateway 2000, 246 AD2d 246, 253 (1st Dept 1998), quoting Gillman v Chase Manhattan Bank, 73 NY2d 1, 10 (1988). Under this analysis,

> As to the procedural element, a court will look to the contract formation process to determine if in fact one party lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high-pressured tactics' and any disparity in the parties' bargaining power" while evaluating "the substantive element, ... entails an examination of the substance of the agreement in order to

determine whether the terms unreasonably favor one party.

Id. at 253, quoting Gillman v Chase Manhattan Bank, 73 NY2d at 11, 12. Here, with respect to the claim of procedural unconscionability, Sander claims that there was in inequality of bargaining power and acumen as between herself and Allen; however, she offers no evidence to support this allegation, and does not explain why she simply did not choose to walk away from the second and combined mortgages if she felt uncomfortable. Conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment. See e.g. Mason v Dupont Direct Financial Holdings, 302 AD2d 260 (1st Dept 2003). With respect to the claim of substantive unconscionability, it is true that the second and combined mortgages included slightly higher interest rates than the first mortgage did; however, the interest rates on both sets of mortgages were adjustable, and it cannot be said that the benefit Sander received in the form of $83,536.00 in available cash was unduly outweighed by the burden of making initial interest payments of 6.750%. The fact that Sander grew disenchanted with the terms of her mortgages after the fact is immaterial. As previously observed, a party to a contract is "under the obligation to exercise ordinary diligence to ascertain the terms of the document he signed." PNC Capital Recovery v Mechanical Parking Systems, 283 AD2d at 272. Further, in any event,

> On a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.

Maysek & Moran v S.G. Warburg & Co., 284 AD2d 203, 204 (1st Dept 2001), quoting Lake Constr. & Development Corp. v City of New York, 211 AD2d 514, 515 (1st Dept 1995). Here, the court finds that the available evidence does not support either prong of the unconscionability

test described in Gillman v Chase Manhattan Bank, and that Morgan/Chase has therefore demonstrated that there is no triable issue of fact as to Sander's unconscionability claim. Accordingly, the court also finds that Morgan/Chase is entitled to a summary judgment dismissing that claim.

Sander's fourth cause of action alleges duress. See Notice of Cross Motion, Exhibit B (amended complaint), ¶¶ 46-54. It specifically alleges that "[Allen] showed up at Ms. Sander's house around midnight in July of 2005, and informed Ms. Sander that if she didn't sign additional documents, she would lose her house." Id., ¶ 49. However, the amended complaint also states that Sander executed the second mortgage and the CEMA in September of 2004 (i.e., nearly a year earlier), and that she did not sign the "additional documents" that Allen purportedly brought to her house in July of 2005. Id., ¶¶ 7, 8, 17. The Appellate Division, First Department, holds that "'[a] contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will'." 767 Third Ave. LLC v Orix Capital Markets, LLC, 26 AD3d 216, 218 (1st Dept 2006), quoting Stewart M. Muller Constr. Co. v New York Tel. Co., 40 NY2d 955, 956 (1976). This definition clearly does not admit of the possibility of duress after the fact. Thus, Sander's claim that Allen somehow subjected her to duress is completely unsupported by any evidence. "'[A]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment.'" Banco Popular North America v Victory Taxi Management, 1 NY3d 381, 383 (2004), quoting Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285, 290 (1973). Therefore, the court finds that Morgan/Chase has demonstrated that there is no triable issue of fact as to Sander's duress claim. Accordingly, the court also finds that Morgan/Chase is

entitled to a summary judgment dismissing that claim.

Sander's final cause of action seeks a declaratory judgment that the combined mortgages are "null and void" and that "any party seeking to enforce the [combined mortgages] should be estopped from doing as such on the basis that the Plaintiff was induced into entering the [combined mortgages] by fraud, misrepresentations and/or deception." See Notice of Cross Motion, Exhibit B (amended complaint), ¶¶ 55-57. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal, 264 AD2d 681 (1st Dept 1999). Here, the court has already determined that Sander's allegations of fraud fail to make out a claim. Therefore, it would be most improper to grant Sander the declaratory relief that she seeks. Consequently, the court finds that Morgan/Chase is entitled to a summary judgment dismissing that claim. Accordingly, for the foregoing reasons, the court finds that Morgan/Chase's motion should be granted in full, and that the amended complaint should be dismissed. Accordingly it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant J.P. Morgan Chase Home Mortgage for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
July 24, 2007

ENTER:

Hon. Walter B. Tolub, J.S.C.