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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

JERRY LASKIN.

Plaintiff.

Sequence No.: 001
Index No.: 014406/07

- against -

BANK OF AMERICA, N.A., COUNTRYWIDE HOME LOANS, INC. d/b/a AMERICA'S WHOLESALE LENDER, LEXINGTON CAPITAL, CORP, MICHAEL MIGNONE, GREGORY PERROTTA and JOSEPH & TERRACCIANO, LLP.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

Plaintiff moves for a preliminary injunction enjoining defendants Bank of America, N.A. and Countrywide Home Loans, Inc. from 1) foreclosing any mortgage on plaintiff's property which is located at 30 Monroe Street, Port Washington, New York; 2) filing, refiling, amending or correcting any instruments which encumber plaintiff's property; 3) contacting or communicating with plaintiff directly concerning said property and directing that all such communications be directed to plaintiff's attorneys herein; and 4) directing defendants Bank of America, Countrywide, Michael Mignone, Gregory Perrotta and Joseph & Terracciano, LLP from destroying, concealing, altering, transferring or otherwise disposing of any documents or electronic correspondence relative to plaintiff.

Plaintiff herein is the owner of real property located at 30 Monroe Street, Port Washington, New York. In his supporting affidavit plaintiff alleges that in June, 2004 he obtained a line of credit loan from non-party Fleet Bank which loan was later obtained by defendant Bank of America. In June, 2006 plaintiff refinanced with defendant Countrywide and

took out a loan secured by a mortgage in the amount of $728,000 and a line of credit in the amount of $91,000. Plaintiff further alleges that after closing on the Countrywide loans that he was told by the Countrywide representative defendant Joseph & Terracciano that the proceeds from said loan would be used to pay off one of the Bank of America lines of credit in the amount of $80,000 but that plaintiff would have to deliver the funds to satisfy the "second" line of credit with Bank of America in the sum of $100,000 himself. Parenthetically, plaintiff, in his affidavit initially mentions only one line of credit in the sum of $100,000. No mention is made of a second line of credit from Bank of America. Mr. Laskin then asserts that he was told by a Bank of America branch manager at its Port Washington, New York branch to give the pay-off check to a teller to satisfy the existing line of credit "and that everything would be taken care of." Plaintiff avers that he gave the check to the teller and was under the impression that the line of credit was satisfied and closed.

Mr. Laskin next asserts that he took out a "new" line of credit which he believed was "personal" and "unsecured". Plaintiff believed that same was not secured by his property and further believed that the loan was unsecured because the statements from defendant Bank of America referenced the loan as personal.

At the end of 2006 when plaintiff was unable to pay the two Countrywide loans and the Bank of America line of credit, plaintiff elected to sell his real property. In early 2007, claims plaintiff, he entered into a contract of sale for the subject property, the proceeds of which he intended to use to pay off the Countrywide loans in full and to partially pay off the Bank of America line of credit and thereafter continue to make monthly payments.

When he attempted to get a pay-off letter from Bank of America for the line of credit, plaintiff learned that the original line of credit was never closed and that this defendant considered said loan to be secured by the property. Plaintiff alleges that defendant Bank of America ignored his request that the original line of credit be closed out and merely continued the original line of credit which was secured by a mortgage.

The result, claims plaintiff, was that there were three secured loans encumbering his property and that his indebtedness exceeded the contract price. According to plaintiff his attempts to negotiate with the two banks were thwarted by both bank's claims to being the holder of the first lien position against the property.

Plaintiff also avers that his research revealed that the first Bank of America line of credit which was recorded by Fleet Bank was defectively recorded because it contained the wrong lot number.

With regard to defendant Countrywide, the institution which provided plaintiff with the mortgaged loan in the sum of $728,000 and a line of credit in the sum of $91,000, plaintiff alleges that he was not given any documentation as part of the application process other than the agreement between plaintiff and the mortgage broker. He was not given a copy of his application

"or a good faith estimate". After the closing, plaintiff was given a folder which did not include a copy of his application, estimate, or settlement statement. Plaintiff asserts that "Countrywide failed to provide the most crucial documentation which would have allowed me to properly review and weigh the decision of signing up for these loans."

Plaintiff commenced the instant action alleging causes of action for 1) fraudulent misrepresentation against defendants Bank of America and Countrywide; 2) breach of the implied covenant of good faith and fair dealing as against defendants Perrotta and Mignone; 3) breach of fiduciary duty against defendants Perrotta and Mignone; 4) unjust enrichment against Perrotta and Mignone; 5) violations of General Business Law §349 against Perrotta and Mignone; 6) negligent misrepresentation against Bank of America; 7) negligence against Bank of America; 8) violations of General Business Law §349 against Bank of America; 9) a declaratory judgment against defendant Bank of America that no valid mortgage exists securing its $100,000 line of credit to plaintiff; 10) equitable estoppel against Bank of America; 11) a cancellation of the allegedly improperly filed mortgage by Bank of America; 12) negligence against Countrywide; 13) aiding and abetting fraud and breach of fiduciary duty against defendant Countrywide; 14) violation of General Business Law §349 against Countrywide; 15) violations of the Federal Truth in Lending Act 15 U.S.C. §1604 and 1639 and the Real Estate Settlement Procedures Act against Countrywide; and 16) negligence against Joseph & Terracciano.

Plaintiff now moves for a preliminary injunction as set forth above. In moving for a preliminary injunction plaintiff must demonstrate 1) a likelihood of success on the merits; 2) irreparable injury in the absence of such relief; and 3) a balancing of the equities favors granting the preliminary injunction. Aetna Insurance Company v. Capasso, 75 N.Y.2d 860 (1990); J.A. Preston Corporation v. Fabrication Enterprises, Inc., 68 N.Y.2d 397 (1986); W.T. Grant v. Sgroi, 52 N.Y.2d 499 (1980).

The court finds that plaintiff has not, and indeed cannot demonstrate irreparable injury in the absence of a preliminary injunction. The relief sought in this action is all based upon the fact that defendants Bank of America and Countrywide have mortgages which encumber plaintiff's property and that same could be foreclosed upon. It has long been established that a party may not restrain the commencement of an action simply because plaintiff may have a defense thereto. See, Wolfe v. Burke, 56 N.Y.115 (1874). See, also, Spellman Food Services, Inc. v. Patrick, 90 A.D.2d 791 (2nd Dep't 1982). In the event the banks commenced the foreclosure actions, plaintiff could assert his defenses therein where the court will decide the parties' rights and conduct the proceedings "fairly, impartially and correctly." Wolfe v. Burke, p.119. See, also, Juran v. Title Guarantee & Trust Co., 151 Misc. 631 (Sup.Ct., N.Y.Co. 1934). It has also been held, and this court agrees, that where, as here, plaintiff would be prevented from conducting a short sale, the greatest harm plaintiff could suffer is damages at law. See, Medgar Evers Homes Associates, L.P. v. Corro, 2001 WL 1456190 (EDNY 2001).

Plaintiff's reliance on Gates v. Easy Living Homes, Inc., 29 A.D.3d 733 (2nd Dep't 2006) is misplaced. Plaintiff in that matter had commenced a foreclosure action against defendant and

defendant therein obtained a preliminary injunction enjoining foreclosure upon the ground that it had proven, *inter alia*, a likelihood of success on its defenses. The distinction between that matter and Wolfe v. Burke is that therein the action was already commenced and not under threat of commencement, as is the case here.

Based upon the foregoing, the motion is denied in its entirety.

So Ordered.

A.J.S.C.

Dated: February 27, 2008