SUPREME COURT OF THE STATE OF NEW YORK **Index No.:131609/10**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:002**

WELLS FARGO BANK, N.A., also known as WACHOVIA MORTGAGE a Division of WACHOVIA BANK, N.A., formerly known as WACHOVIA MORTGAGE, FSB, formerly known as WORLD SAVINGS BANK, FSB,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

BONNIE TADROUS,
SAAD LABIB TADROUS,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
RAB PERFORMANCE RECOVERIES, LLC,
CITIBANK, ASSET ACCEPTANCE, LLC,
"JOHN DOE 1 to JOHN DOE 25," said names being fictitious, the persons or parties intended to being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgage premises described in the complaint,

Defendants

The following items were considered in the review of the following motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Answering Affidavits and Memorandum in Opposition	3
Replying Affidavits	4
Memorandum of Law in Reply	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves for summary judgment on its complaint against the defendants Bonnie Tadrous and Saad Labib Tadrous, and to dismiss their counterclaims. In addition the plaintiff seeks the amendment of the caption to substitute Semso Pelinkovic, Conrad Tadrous, Ian Tadrous and Miriam Tadrous in place of "John Doe 1 to John Doe 25." The plaintiff moves for a judgment of default against defendants: New York City Environmental Control Board, RAB

Performance Recoveries, LLC, Citibank, Asset Acceptance, LLC, Semso Pelinkovic, Conrad Tadrous and Miriam Tadrous. Moreover, the plaintiff moves pursuant to RPAPL § 1321for the appointment of a referee to compute the amounts due and owing the plaintiff. The plaintiff's motion is granted.

Facts

This is an action to foreclose a mortgage secured by property located at 316 Elverton Avenue, Staten Island, New York. On or about February 14, 2008 Bonnie Tadrous executed an delivered to Wachovia Mortgage, FSB ("Wachovia") an adjustable rate mortgage in the principal amount of $325,000 with an interest rate of 8.14%. Ms. Tadrous participated in Wachovia's "Quick Qualifying Loan Program." This program required the borrower to make certain factual statements that Wachovia was entitled to rely on to quickly approve Ms. Tadrous' loan. The "Quick Qualifying Loan Program" utilized the following language:

> I have qualified for this loan by making statements of fact which were relied upon by Lender to approve the loan rapidly. This loan is called a "Quick Qualifying Loan." I have stated and confirm that (A) I do not have any other Quick Qualifying Loans with Lender; (B) I have agreed to not further encumber the Property and do not intend to further encumber the Property for at least six months after the date of the Note and this Security Instrument; and (C) If I am purchasing the Property, all of the terms of the purchase agreement submitted to Lender are true and the entire down payment is cash from my own funds.
>
> If any of the statements that I have made are materially false or misleading, I will be in default under the Note and this Security Instrument. If I am in such default, Lender may, at its option, increase the interest rate and margin subject to the Lifetime Rate Cap stated in the Note.

Ms. Tadrous signed this statement and executed an adjustable rate mortgage "Pick-a-Payment Loan." However, she maintains that she did not contact Wachovia directly to obtain

this mortgage. Instead, Ms. Tadrous states that she utilized the services of a mortgage broker, Tom Cacciola, to procure her a mortgage. Tom Cacciola was employed by NSP First Financial Mortgage, 235 East Jericho Turnpike, Huntington Station, New York. Ms. Tadrous states that she informed Cacciola that her monthly income at the time was approximately $1,800 per month. However, a review of the Wachovia loan application indicated that Ms. Tadrous' income was $8,733 per month. Ms. Tadrous admits that she signed this application, but maintains that the loan closing took place so quickly that she did not have time to read the application when she signed it.

On or about April 29, 2009, Tadrous executed a mortgage modification agreement. The relevant terms of this agreement between the parties were as follows: Wachovia would: (I) waive all outstanding late charge and return check fees on the loan; (ii) add amounts owed for "Escrow Amounts Advanced," "Foreclosure Fees," "Attorney's Fees," and "Property Inspection Fees" to the loan balance; (iii) forgive accrued, outstanding and not capitalized interest through May 14, 2009; (iv) modify the outstanding balance owed on the loan to $327,139.47; (v) extend the maturity date of the loan from March 15, 2038 to May 15, 2049; (vi) provide for interest only payments on the loan at a lower interest rate than originally provided for in the Note from June 15, 2009 through May 15, 2015; and (vii) provide for principal and interest payments from June 15, 2015 through the remaining term of the loan at a lower interest rate of 6.5% that was lower than originally provided for in the original Note. This modification agreement modified the original mortgage payment of principal and interest of $1,414.43 for the first 12 months to a payment of $1,022.31 at an interest rate of 3.75%. The modification provides for increased payments until the year 2015 wherein the mortgage payment of principal and interest would be capped at $1,991.82 at an interest rate of 6.5%. This final payment differs considerably from the mortgage payment of principal and interest in Ms. Tadrous' original adjustable note that would have increased the monthly payment to $3,210.67.

On September 15, 2009, less than five months after executing the modification agreement, Ms. Tadrous defaulted on her monthly loan payment of $1,022.31.

Over a year after the defendants' default on the modified note, Ms. Tadrous' attorney, Stephen A. Katz, Esq. Sent a letter to attorney Stuart L. Druckman of the Druckman Law Group PLLC rescinding her loan and mortgage under the Truth-in-Lending Act ("TILA"). Mr. Katz asserted in this letter, and in opposition to the plaintiff's motion for summary judgment, that Wachovia understated the February 14, 2008 prepaid finance charges by more than $35; and that Ms. Tadrous did not receive a copy of her loan's HUD-1.

In support of its motion for summary judgment the plaintiff annexes a HUD-1 signed by Ms. Tadrous on February 14, 2008. That HUD-1 states a total of $8,894.80 in Prepaid Finance Charges broken down as follows: Line 801 Mortgage Broker Fee $6,850; Line 808 Commitment Fee $50; Line 811 Funding Fee $50; Line 812 Ongoing Flood Zone/Determination Fee $9; Line 814 Tax Service Fee $61; Line 901 Interim Interest $724.80; Line 1101 Settlement/Closing/Legal Fee $850; Line 1102 Courier Fee $50; and Line 1107 Mortgage/Title Closer Pick-up Fee $250. The total Prepaid Finance Charges of $8,894.80 is $1,222.72 lower than the good faith estimate of $10,117.52.

Most telling about the Ms. Tadrous' claims of TILA violations on the part of the plaintiff is the fact that she was a member of the Pick-a-Payment Class Action. This terms of the class action settlement, which Ms. Tadrous did not opt out of, included a release that precludes her from asserting any claims against Wachovia that it violated TILA and allegedly misled her with respect to Prepaid Finance Charges.

Attorney Katz states in opposition to the plaintiff's motion for summary judgment that Ms. Tadrous' default was due to the fact that she contracted Parkinson's Disease. Moreover, Attorney Katz states in his affirmation that "Counsel for the plaintiff Wells Fargo Bank, N.A. has stated that Bonnie Tadrous may not apply for a loan modification to resolve this foreclosure suite, because she already received a loan modification in May 2009. But that is unfair: Tadrous defaulted on her first loan modification because she contracted Parkinson's Disease and was unable to work, so she should not be penalized for the default." In reply to Attorney Katz's

statement the counsel for the plaintiff affirms that on or about July 30, 2012 Ms. Tadrous applied for another loan modification. To support this claim the plaintiff's attorney submits an e-mail wherein he requests that Attorney Katz forward additional documents in order for the plaintiff to consider a modification. Moreover, attorney for the plaintiff affirms that by telephone conversation on September 28, 2012 he informed Attorney Katz that Ms. Tadrous' request for a second loan modification was dneied as she did not meet the plaintiff's underwriting requirements , and that she had previously defaulted on a modification.

In addition, in order to clarify the record concerning Attorney Katz's statements about plaintiff's attorney, the plaintiff in reply submits the Home Affordable Modification Program Hardship Affidavit application submitted by Bonnie Tadrous on January 20, 2010. That document contains no statement that her default was due to Parkinson's Disease. Instead, that document states that default occurred due to a reduction in Ms. Tadrous' working hours from 40 hours a week to 30.5 hours, and the loss of her tenant.

The plaintiff now moves for summary judgment on its complaint against Bonnie Tadrous and Saad Labib Tadrous; the amendment of the caption to substitute Semso Pelinkovic, Conrad Tadrous, Ian Tadrous and Miriam Tadrous in place of "John Doe 1 to John Doe 25"; a judgment of default against defendants: New York City Environmental Control Board, RAB Performance Recoveries, LLC, Citibank, Asset Acceptance, LLC, Semso Pelinkovic, Conrad Tadrous and Miriam Tadrous; and the appointment of a referee pursuant to RPAPL § 1321 to compute the amounts due and owing the plaintiff.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable

to the party opposing the motion".[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

At the outset this court will dismiss the Tadrous defendants' first counterclaim for the violation of TILA due to the Pick-a-Payment Class Action settlement that released the plaintiff from any claims concerning alleged TILA violations.

The Tadrous defendants second counter claim for a violation of New York's Deceptive Practices Act, GBL § 349 - 350-e, is equally unavailing. A private right of action based on a violation of GBL § 349(a) is permitted by GBL § 349(h). In order to maintain a private right of action claim under GBL § 349(a) a plaintiff must plead that: 1) the challenged conduct was consumer-oriented, 2) the conduct was materially misleading, and 3) the individual sustained damages.[6] The Appellate Division, Second Department has held that there can be no GBL § 349(a) violation in the context of the issuance of a mortgage where it is demonstrated an

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[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[2] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[3] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

[4] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[5] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

[6] *Emigrant Mtge. Co., Inc. v. Fitzpatrick*, 95 AD3d 1169 [2d Dep't. 2012].

individual was presented with ". . . clearly written documents describing the terms of the subject loan and alerting [the individual] to the fact that the plaintiff would not independently verify [the individual's] income."[7] Here, the very terms of the Quick Qualifying Loan Program stated clearly that plaintiff would accept the statements made by Ms. Tadrous as true. In opposition, the defendants failed to distinguish any of the cases set forth by the plaintiff in its moving papers. Consequently, the counterclaim pursuant to a violation of New York's Deceptive Practices Act is dismissed.

The defendants' third counterclaim for fraud in the inducement is also dismissed. To articulate a prima facie case for fraud a party must demonstrated: 1) that an individual made material representations that were false; 2) that a party knew the representations were false when they were made and made the statements with the intent to deceive; 3) that a party justifiably relied on those representations; and 4) that the party asserting the claim was injured as a result of the misrepresentations.[8]

The Tadrous defendants argue that there were two misrepresentations made. First, the defendants claim that Wachovia falsely claimed that it evaluated Ms. Tadrous' ". . . finances using standard underwriting procedures, while taking into account anticipated housing prices and inflation, and had conclude that she could afford Wachovia's $325,000 loan."[9] The defendants' allege that the second misrepresentation was the inflation of Ms. Tadrous' income by Tom Cacciola, a mortgage broker employed by NSP First Financial Mortgage.

The Appellate Division, Second Department in *Deutsche Bank Natl. Trusst Co. v. Sinclair* held that a similar set of facts did not set forth a claim of fraud.[10] There the court found

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[7] Id.

[8] *See, Giurdanella v. Giurdanella,* 226 AD2d 343 [2d Dep't 1996].

[9] Affirmation of Katz in Opposition.

[10] *Deutsche Bank Natl. Trust Co. v. Sinclair*, 68 AD3d 914 [2d Dep't 2009].

that a mortgage broker's procurement of loans on behalf of the defendants by misrepresenting the defendants income, ". . . does not state a viable cause of action alleging fraud because such misrepresentation were not made to the [defendants] for the purposes of inducing their reliance." Here, the same statements were made in order to have the plaintiff issue a loan to Ms. Tadrous, and not to induce Ms. Tadrous to request a loan from the plaintiff. Consequently, there can be no counterclaim for fraud.

The Tadrous defendants fourth counterclaim is for an alleged violation by the plaintiff of the Credit Repair Organization Act.[11] This counterclaim is also without merit. The plaintiff at all times relevant operated as a Federal Savings Bank and not as a credit repair organization which is regulated under the Credit Repair Organization Act. While not controlling on this court, the plaintiff cites the decision from the federal district court for the Eastern District of New York in *Hayrioglu v. Granite Capital Funding, LLC*.[12] Wherein the court rejected a borrower's allegation of a CROA violation and found ". . . that the strained reading of the statute that the plaintiff advocates-where a false statement made to one's self can be contrary to law-is inconsistent with the description of the statute's purpose." Here, the misstatement of monthly income cannot support such an allegation. Consequently, the counterclaim is dismissed.

The court now turns itself to the merits of the plaintiff's motion for summary judgment awarding a judgment of foreclosure and sale in its favor. Here the plaintiff has come forward with adequate proof that Ms. Tadrous executed the mortgage, note and modification agreement. Ms. Tadrous cannot dispute this fact. Consequently, the plaintiff's motion for summary judgment is granted. While this court is sympathetic to Ms. Tadrous' situation it cannot order Wells Fargo to modify a loan.

There being no opposition to the other branches of the plaintiff's motion, they too are

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[11] 15 USC §§ 1679-79j

[12] 794 F.Supp2d 405 [EDNY 2011].

granted.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion is granted in its entirety; and it is further

ORDERED, that the plaintiff shall settle order on notice in accordance with this decision and order.

ENTER,

DATED: March 27, 2013

Joseph J. Maltese
Justice of the Supreme Court